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SENATE BILL NO. 13

INTRODUCED BY K. REGIER

BY REQUEST OF THE LAW AND JUSTICE INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING ADDITIONAL TYPES OF BODILY FLUIDS TO TEST FOR THE PRESENCE OF DRUGS IN DRIVING WHILE UNDER THE INFLUENCE CASES; AMENDING SECTIONS 23-2-535, 61-8-1010, 61-8-1016, 61-8-1018, 61-8-1019, 61-8-1032, AND 67-1-211, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 23-2-535, MCA, is amended to read:

"23-2-535. Alcohol concentration standards -- evidence admissible -- administration of tests.

(1) The inferences contained in 61-8-1002 apply to any criminal action or proceeding arising out of acts alleged to have been committed in violation of 23-2-523(2).

(2) Evidence of any measured amount or detected presence of alcohol or drugs in a person at the time of the act alleged, as shown by analysis of the person's blood, breath, oral fluid, or urine, and any other competent evidence bearing on the question of whether the person was under the influence of alcohol, drugs, or a combination of the two at the time of the act alleged is admissible in any criminal action or proceeding arising out of acts alleged to have been committed in violation of 23-2-523(2).

(3) If a person charged with violation of 23-2-523(2) refuses to submit to a test of the person's blood, breath, or urine for the purpose of determining any measured amount or detected presence of alcohol, none will be given, but proof of refusal is admissible in any criminal action or proceeding arising out of acts alleged to have been committed in violation of 23-2-523(2).

(4) The provisions relating to administration of tests provided in 61-8-1019 and the definition of alcohol concentration provided in 61-8-1001 apply to any testing done to a person charged with violation of 23-2-523(2).

(5) As used in 23-2-523(2), the term "under the influence" has the meaning provided in 61-8-

1 1001."

2

3 **Section 2.** Section 61-8-1010, MCA, is amended to read:

4 **"61-8-1010. Driving under influence -- ignition interlock device -- 24/7 sobriety and drug**

5 **monitoring program.** (1) For a person convicted of a first offense of driving under the influence, including 61-
6 8-1002, an offense that meets the definition of aggravated driving under the influence in 61-8-1001, or a similar
7 offense under the laws of another state, in addition to the punishments listed in 61-8-1007, the court may,
8 regardless of disposition and if a probationary license is recommended by the court, require the person to
9 comply with the conditions listed in subsection (2)(a) or (2)(b).

10 (2) On a second or subsequent conviction for a violation of driving under the influence, including
11 61-8-1002, an offense that meets the definition of aggravated driving under the influence in 61-8-1001, or a
12 similar offense under the laws of another state, or a second or subsequent conviction under 61-5-212 when the
13 reason for the suspension or revocation was that the person was convicted of a violation of driving under the
14 influence, including 61-8-1002, an offense that meets the definition of aggravated driving under the influence in
15 61-8-1001, or a similar offense under previous laws of this state or the laws of another state, or the suspension
16 was under 61-8-1016 or a similar law of another state for refusal to take a test for alcohol or drugs requested by
17 a peace officer who believed that the person might be driving under the influence, in addition to the
18 punishments listed in 61-8-1002 and 61-8-1007, the court shall ~~require the person:~~

19 (a) require the person to participate in the 24/7 sobriety and drug monitoring program provided for
20 in 44-4-1203 or require the person to participate in a court-approved alcohol or drug detection testing program
21 and to pay the fees associated with the program;

22 (b) if recommending that a probationary license be issued to the person, restrict the person to
23 driving only a motor vehicle equipped with a functioning ignition interlock device during the probationary period
24 and require the person to pay the reasonable cost of leasing, installing, and maintaining the device; or

25 (c) order that each motor vehicle owned by the person at the time of the offense be seized and
26 subjected to the forfeiture procedure provided under 61-8-1033. A vehicle used by a person as a common
27 carrier in the transaction of business as a common carrier is not subject to forfeiture unless it appears that the
28 owner or other person in charge of the vehicle consented to or was privy to the violation. A vehicle may not be

1 forfeited under this section for any act or omission established by the owner to have been committed or omitted
2 by a person other than the owner while the vehicle was unlawfully in the possession of a person other than the
3 owner in violation of the criminal laws of this state or the United States. Forfeiture of a vehicle encumbered by a
4 security interest is subject to the secured person's interest if the person did not know and could not have
5 reasonably known of the unlawful possession, use, or other act on which the forfeiture is sought.

6 (3) All court-approved alcohol or drug detection testing programs allowed under this section are
7 required to use the state's data management system pursuant to 44-4-1203."

8

9 **Section 3.** Section 61-8-1016, MCA, is amended to read:

10 **"61-8-1016. Implied consent -- blood or breath tests for alcohol, blood or oral fluid for drugs, or**
11 **testing for both -- alcohol and drugs using recognized methods for each -- refusal to submit to test --**
12 **administrative license suspension.** (1) (a) A person who operates or is in actual physical control of a vehicle
13 or commercial motor vehicle upon the ways of this state open to the public is considered to have given consent
14 to a test or tests of the person's blood or breath for the purpose of determining any measured amount or
15 detected presence of alcohol or blood or oral fluid for the purpose of determining any measured amount or
16 detected presence of drugs in the person's body.

17 (b) The tests in subsection (1)(a) include but are not limited to a preliminary alcohol screening test
18 of the person's breath for the purpose of estimating the person's alcohol concentration.

19 (c) A preliminary alcohol screening test may not be conducted or requested under this section
20 unless both the peace officer and the instrument used to conduct the test have been certified by the department
21 pursuant to rules adopted under the authority of 61-8-1019(5).

22 (d) The person's obligation to submit to a test in subsection (1)(a) is not satisfied by the person
23 submitting to a preliminary alcohol screening test pursuant to this section.

24 (2) (a) The test or tests must be administered at the direction of a peace officer when:

25 (i) the peace officer has particularized suspicion to believe that the person has been driving or has
26 been in actual physical control of a vehicle upon ways of this state open to the public while under the influence
27 of alcohol, drugs, or a combination of the two and the person has been detained for a violation of driving under
28 the influence as provided in 61-8-1002 or an offense that meets the definition of aggravated driving under the

1 influence in 61-8-1001;

2 (ii) the person is under the age of 21 and the peace officer has particularized suspicion to believe
3 that the person has been driving or in actual physical control of a vehicle in violation of 61-8-1002(1)(e); or

4 (iii) the peace officer has probable cause to believe that the person was driving or in actual
5 physical control of a vehicle or commercial motor vehicle:

6 (A) in violation of driving under the influence, as provided in 61-8-1002, and the person has been
7 placed under arrest;

8 (B) in violation of driving under the influence as provided in 61-8-1002, and the person has been
9 involved in a motor vehicle crash or collision resulting in property damage;

10 (C) and the person has been involved in a motor vehicle accident or collision resulting in serious
11 bodily injury, as defined in 45-2-101, or death; or

12 (D) in violation of driving under the influence as provided in 61-8-1002 and meets the definition of
13 aggravated driving under the influence in 61-8-1001.

14 (b) A peace officer may designate which test or tests are administered.

15 (c) The peace officer shall inform the person of the right to refuse the test and that the refusal to
16 submit to the test will result in the suspension for up to 1 year of that person's driver's license.

17 (d) A hearing as provided for in 61-8-1017 must be available. The issues in the hearing must be
18 limited to determining whether a peace officer had a particularized suspicion that the person was in violation of
19 61-8-1002 or an offense meeting the definition of aggravated driving under the influence in 61-8-1001, and
20 whether the person refused to submit to the test.

21 (e) If a person refuses a preliminary alcohol screening test and another test during the same
22 incident, the department may not consider each a separate refusal for purposes of suspension of the person's
23 driver's license.

24 (3) A person who is unconscious or who is otherwise in a condition rendering the person incapable
25 of refusal is considered not to have withdrawn the consent requested in subsection (1).

26 (4) (a) If an arrested person refuses to submit to one or more tests requested and designated by
27 the peace officer, the refused test or tests may not be given unless the person has refused to provide a breath,
28 blood, urine, or other bodily substance in a prior investigation in this state or under a substantially similar statute

1 in another jurisdiction or the arrested person has a prior conviction or pending offense for a violation of 45-5-
2 104, 45-5-106, 45-5-205, or driving under the influence, including 61-8-1002, an offense that meets the
3 definition of aggravated driving under the influence in 61-8-1001, or a similar offense under previous laws of
4 this state or a similar statute in another jurisdiction.

5 (b) ~~Upon~~On the person's refusal to provide the breath, blood, urine, oral fluid, or other bodily
6 substance requested by the peace officer pursuant to subsection (1) and this subsection (4) may apply for a
7 search warrant to be issued pursuant to 46-5-224 to collect a sample of the person's blood or oral fluid for
8 testing.

9 (c) (i) ~~Upon~~On the person's refusal to provide a breath, blood, urine, oral fluid, or other bodily
10 substance, the peace officer shall, on behalf of the department, immediately seize the person's driver's license.
11 The peace officer shall immediately forward the license to the department, along with a report certified under
12 penalty of law stating which of the conditions set forth in subsection (2)(a) provides the basis for the testing
13 request and confirming that the person refused to submit to one or more tests requested and designated by the
14 peace officer. Upon receipt of the report, the department shall suspend the license for the period provided in
15 61-8-1032.

16 (ii) Upon seizure of a driver's license, the peace officer shall issue, on behalf of the department, a
17 temporary driving permit, which is effective 12 hours after issuance and is valid for 5 days following the date of
18 issuance, and shall provide the driver with written notice of the license suspension and the right to a hearing as
19 provided in 61-8-1017.

20 (iii) A nonresident driver's license seized under this section must be sent by the department to the
21 licensing authority of the nonresident's home state with a report of the nonresident's refusal to submit to one or
22 more tests.

23 (5) This section does not apply to tests, samples, and analyses of blood ~~or~~, breath, or urine used
24 for purposes of medical treatment or care of an injured motorist, related to a lawful seizure for a suspected
25 violation of an offense not in this part, or performed pursuant to a search warrant.

26 (6) This section does not prohibit the release of information obtained from tests, samples, and
27 analyses of blood ~~or~~, breath, or urine for law enforcement purposes as provided in 46-4-301 and 61-8-1019(6)."
28

1 **Section 4.** Section 61-8-1018, MCA, is amended to read:

2 **"61-8-1018. Evidence admissible -- conditions of admissibility.** (1) Upon the trial of a criminal
3 action or other proceeding arising out of acts alleged to have been committed by a person in violation of driving
4 under the influence, including 61-8-1002, an offense that meets the definition of aggravated driving under the
5 influence in 61-8-1001, a similar offense under previous laws of this state or the laws of another state, or 61-8-
6 805:

7 (a) evidence of any measured amount or detected presence of alcohol, drugs, or a combination of
8 alcohol and drugs in the person at the time of a test, as shown by an analysis of the person's blood ~~or~~, breath,
9 or oral fluid is admissible. A positive test result does not, in itself, prove that the person was under the influence
10 of a drug or drugs at the time the person was in control of a vehicle. A person may not be convicted of a
11 violation of 61-8-1002(1)(a) based on the presence of a drug or drugs in the person unless some other
12 competent evidence exists that tends to establish that the person was under the influence of a drug or drugs
13 while driving or in actual physical control of a motor vehicle within this state.

14 (b) a report of the facts and results of one or more tests of a person's blood ~~or~~, breath, or oral fluid
15 is admissible in evidence if:

16 (i) a breath test, oral fluid screening test, or preliminary alcohol screening test was performed by a
17 person certified by the forensic sciences division of the department to administer the test; or

18 (ii) a blood sample was analyzed in a laboratory operated or certified by the department or in a
19 laboratory exempt from certification under the rules of the department and the blood was withdrawn from the
20 person by a person competent to do so under 61-8-1019(1); and

21 (c) a report of the facts and results of a physical, psychomotor, or physiological assessment of a
22 person is admissible in evidence if it was made by a person trained by the department or by a person who has
23 received training recognized by the department.

24 (2) If the person under arrest refused to submit to one or more tests under 61-8-1016, whether or
25 not a sample was subsequently collected for any purpose, proof of refusal is admissible in any criminal action
26 or proceeding arising out of acts alleged to have been committed while the person was driving or in actual
27 physical control of a vehicle upon the ways of this state open to the public while under the influence of alcohol,
28 drugs, or a combination of alcohol and drugs. The trier of fact may infer from the refusal that the person was

1 under the influence. The inference is rebuttable.

2 (3) The provisions of this part do not limit the introduction of any other competent evidence bearing
3 on the question of whether the person was under the influence of alcohol, drugs, or a combination of alcohol
4 and drugs."

5

6 **Section 5.** Section 61-8-1019, MCA, is amended to read:

7 **"61-8-1019. Administration of tests.** (1) Only a licensed physician, registered nurse, or other
8 qualified person acting under the supervision and direction of a physician or registered nurse may, at the
9 request of a peace officer, withdraw blood for the purpose of determining any measured amount or detected
10 presence of alcohol, drugs, or any combination of alcohol and drugs in the person. This limitation does not
11 apply to the sampling of breath.

12 (2) In addition to any test administered at the direction of a peace officer, a person may request
13 that an independent blood sample be drawn by a physician or registered nurse for the purpose of determining
14 any measured amount or detected presence of alcohol, drugs, or any combination of alcohol and drugs in the
15 person. The peace officer may not unreasonably impede the person's right to obtain an independent blood test.
16 The peace officer may but has no duty to transport the person to a medical facility or otherwise assist the
17 person in obtaining the test. The cost of an independent blood test is the sole responsibility of the person
18 requesting the test. The failure or inability to obtain an independent test by a person does not preclude the
19 admissibility in evidence of any test given at the direction of a peace officer.

20 (3) Upon the request of the person tested, full information concerning any test given at the
21 direction of the peace officer must be made available to the person or the person's attorney.

22 (4) A physician, registered nurse, or other qualified person acting under the supervision and
23 direction of a physician or registered nurse does not incur any civil or criminal liability as a result of the proper
24 administering of a blood test when requested in writing by a peace officer to administer a test.

25 (5) The department in cooperation with any appropriate agency shall adopt uniform rules for the
26 giving of tests and may require certification of training to administer the tests as considered necessary.

27 (6) If a peace officer has probable cause to believe that a person has violated 61-8-1002, meets
28 the definition of aggravated driving under the influence as defined in 61-8-1001, or has violated 61-8-805 and a

1 sample of blood, breath, oral fluid, urine, or other bodily substance is taken from that person for any reason, a
2 portion of that sample sufficient for analysis must be provided to a peace officer if requested for law
3 enforcement purposes and upon issuance of a subpoena as provided in 46-4-301."
4

5 **Section 6.** Section 61-8-1032, MCA, is amended to read:

6 **"61-8-1032. Mandatory suspension of license following certain implied consent action.** (1) The
7 department shall suspend an individual's driver license if the department receives a report for an implied
8 consent violation from law enforcement or another reporting jurisdiction that, pursuant to 61-8-1016, an
9 individual has refused a test or tests of the person's blood, breath, oral fluid, urine, or other bodily substance for
10 determining any measured amount or detected presence of alcohol or drugs in the person's body.

11 (2) (a) Except as permitted by law, a person whose license or privilege to drive a motor vehicle on
12 the public highways has been suspended may not have the license or privilege renewed or restored until the
13 revocation or suspension duration has been completed.

14 (b) The department shall apply the appropriate sanction to the driver based on the reported
15 conviction and prior offenses.

16 (c) The driver shall pay all reinstatement and administrative fees owed to the department before a
17 driver's license or privilege to drive is restored.

18 (d) The duration of the suspension commences from the date of violation.

19 (e) If a person refuses tests for the same incident, the department may not consider each a
20 separate refusal for purposes of suspension.

21 (f) The department may not issue a probationary license during the suspension issued under this
22 part.

23 (3) (a) A person who has an implied consent violation shall pay the department an administrative
24 fee of \$300, which must be deposited in the state special revenue account established pursuant to subsection
25 (3)(b).

26 (b) There is a blood-draw search warrant processing account in the state special revenue fund
27 established pursuant to 17-2-102(1)(b). Money provided to the department of justice pursuant to this subsection

28 (3) must be deposited in the account and may be used only for providing forensic analysis of a driver's blood or

1 breath to determine the presence of alcohol or drugs.

2 (4) (a) Upon receiving a report of an implied consent violation, the department shall:

3 (i) for a first violation, suspend the driver's license or driving privilege for 6 months with no
4 provision for a restricted probationary license; or

5 (ii) for a second or subsequent violation within 5 years of a previous refusal, as determined from
6 the records of the department, suspend the driver's license or driving privilege for 1 year with no provision for a
7 restricted probationary license.

8 (b) If a person who refuses to submit to one or more tests under this section is the holder of a
9 commercial driver's license, in addition to any action taken against the driver's noncommercial driving
10 privileges, the department shall:

11 (i) upon a first refusal, suspend the person's commercial driver's license for 1 year; and

12 (ii) upon a second or subsequent refusal, suspend the person's commercial driver's license for life,
13 subject to department rules adopted to implement federal rules allowing for license reinstatement, if the person
14 is otherwise eligible, upon completion of a minimum suspension period of 10 years. If the person has a prior
15 conviction of a major offense listed in 61-8-802(2) arising from a separate incident, the conviction has the same
16 effect as a previous testing refusal.

17 (5) A nonresident driver's license seized under this section must be sent by the department to the
18 licensing authority of the nonresident's home state with a report of the nonresident's refusal to submit to one or
19 more tests.

20 (6) The department may recognize the seizure of a license of a tribal member by a peace officer
21 acting under the authority of a tribal government or an order issued by a tribal court suspending, revoking, or
22 reinstating a license or adjudicating a license seizure if the actions are conducted pursuant to tribal law or
23 regulation requiring alcohol or drug testing of motor vehicle operators and the conduct giving rise to the actions
24 occurred within the exterior boundaries of a federally recognized Indian reservation in this state. Action by the
25 department under this subsection is not reviewable under 61-8-1017."

26

27 **Section 7.** Section 67-1-211, MCA, is amended to read:

28 **"67-1-211. Alcohol concentration standards -- evidence admissible -- administration of tests.**

1 (1) If a person acting or attempting to act as a crewmember of an aircraft has an alcohol concentration, as
2 defined in 61-8-1001, of 0.04% by weight or more, it may be inferred that the person is under the influence of
3 alcohol and is in violation of 67-1-204.

4 (2) Evidence of any measured amount or detected presence of alcohol in the person at the time of
5 the act alleged under subsection (1) and any other competent evidence bearing on the question of whether the
6 person was under the influence of alcohol, drugs, or a combination of the two at the time of the act alleged is
7 admissible in any criminal action or proceeding arising out of acts alleged to have been committed in violation
8 of 67-1-204.

9 (3) In any criminal action or proceeding arising out of acts alleged to have been committed in
10 violation of 67-1-204, the court or jury may consider federal regulations governing aeronautics.

11 (4) A person who operates an aircraft over the lands and waters of this state is considered to have
12 given consent to a test of the person's blood, breath, oral fluid, or urine for the purpose of determining any
13 measured amount or detected presence of alcohol or drugs in the person's body if arrested by a peace officer
14 for operating, attempting to operate, or being in actual physical control of an aircraft while under the influence of
15 alcohol, drugs, or a combination of the two. The test must be administered at the direction of a peace officer
16 who has reasonable grounds to believe the person was operating, attempting to operate, or in actual physical
17 control of an aircraft while under the influence of alcohol, drugs, or a combination of the two. The arresting
18 officer may designate which of the tests must be administered. A person who is unconscious or who is
19 otherwise in a condition rendering the person incapable of refusal is considered not to have withdrawn the
20 consent provided by this subsection.

21 (5) If a person charged with a violation of 67-1-204 refuses to submit to a test of the person's
22 blood, breath, oral fluid, or urine for the purpose of determining any measured amount or detected presence of
23 alcohol in the person's body, a test will not be given, but proof of refusal is admissible in any criminal action or
24 proceeding arising out of acts alleged to have been committed in violation of 67-1-204.

25 (6) The provisions relating to administration of tests provided in 61-8-1019 and the definition of
26 alcohol concentration provided in 61-8-1001 apply to any testing done to determine any measured amount or
27 detected presence of alcohol in a person and the alcohol concentration of a person charged with violation of 67-
28 1-204."

