

Michigan's Super Drunk Drivers Will Soon Face Greater Punishment

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Introduction:

Beginning on October 31 2010, Michigan drivers with a bodily alcohol content (BAC) of .17 or greater will face significantly enhanced penaltiesⁱ. These new and enhanced penalties are based on Public Acts 461 and 462ⁱⁱ, which Governor Granholm signed into law on January 9, 2009. Collectively known as Michigan's "super drunk" law, these Public Acts amend several sections of Michigan's vehicle code, and most notably add a new definition of drunk driving carrying enhanced punitive and license sanctions.

To Whom Does the Law Apply?

These newly enhanced sanctions are applicable only to first time high BAC offenders. Second and subsequent offense license and punitive sanctions remain unchanged regardless of the driver's BAC. Presumably this is because the overall punishment for repeat offenders is still greater than will be applicable to super drunks.

One Year Treatment Requirement:

One change that is applicable to repeat offenders as well as first time high BAC drivers is a new one-year treatment requirement. This one-year period is the longest treatment requirement yet mandated for those convicted of any drunk-driving offense. Previously, even those convicted of felony drunk driving were not required by law to undergo such extensive treatment. Now, the only time such treatment will not be mandatory is if the driver is convicted of a traditional "low BAC" first offense.

Enhanced Punitive Sanctions:

In addition to treatment, a high BAC driver will also be exposed to an array of enhanced punitive sanctions. These sanctions include an increase in fines from \$200.00 - \$700.00, and an increase in the potential jail time from 93 days to 180 days.ⁱⁱⁱ

Enhanced License Sanctions:

Upon notice of a conviction under the new law for a high BAC offense the Secretary of State will suspend driving privileges for one year. The first 45 days of this suspension is a “hard” suspension, meaning no driving is allowed. During the remaining 320 days the offender is entitled to restricted privileges, but only if they pay to have a breath alcohol ignition interlock device (BAIID) placed on their car during this period.^{iv}

The statute also provides that multiple offenders who have had their driver license revoked may only have a restricted license with a BAIID for one year,^v and the BAIID may only be removed by “departmental order.”^{vi}

New Offense – Operating without BAIID:

The new amendments also create a second new offense related to the monitoring of the BAIID. Accordingly, any violation of the driving restrictions imposed, or operating or attempting to operate a BAIID equipped vehicle with a BAC of 0.025 or greater results in a doubling of the license penalty. Thus, offenders who violate their license restrictions in this way will have a second set of identical driver license sanctions imposed, meaning a new 45 day period of no driving followed by 320 days of restricted driving with the BAIID.^{vii}

Details Regarding BAIID Law:

While the pre-amendment law provided for the use of a BAIID under other circumstances, including as a condition of bond or probation, several amendments have also been made relative to this device. For example, approved devices are now specifically defined as those that meet or exceed the specifications appearing on the 1992 Federal Register conforming products list. These devices use “alcohol-specific electrochemical fuel sensor technology,” and the statute requires that certain “anticircumvention” technology be employed.

Once installed, a typical BAIID requires a driver to blow into the device when they first start their car, and then retest within the first 5 to 15 minutes. The BAIID will not allow the car to be started if it detects a BAC of .025 or greater.^{viii} When driving for longer periods of time the driver must also test about twice every hour. The device records the date and time of each test and any violation is reported to the monitoring agency. If a BAC of greater than .025 is detected during operation a “warning signal” will be emitted,^{ix} and after coming to a complete stop the car cannot be re-started until the driver has a BAC of less than .025.^x A person required to have an ignition interlock cannot operate a vehicle not equipped with an ignition interlock.^{xi} As a rough approximation it may be considered that a BAC of .025 is equal to about one drink of alcohol for a person weighing approximately 160 pounds^{xii}.

Non-BAIID Equipped Vehicle Impoundment:

The amended law also provides for impoundment where a person required to have a BAIID is stopped in a car without one will have. If this “non-BAIID” vehicle is individually or jointly owned, the vehicle registration plate will be confiscated and destroyed. A new temporary plate will be issued and the Secretary of State will be

notified.^{xiii} This is considered to be an “offending vehicle” sanction, meaning the owner and not necessarily the driver of the car remains liable for all expenses incurred in the removal and storage of the vehicle.^{xiv}

Drunk Driving Now More Expensive Than Ever:

The new law also makes drunk driving far more expensive because it is the driver’s responsibility to pay the cost of installing the BAIID as well as the monthly fees required to maintain it. While the state does not regulate the cost of ignition interlock devices, the Legislature had previously limited the amount that can be charged to people on low-incomes to a maximum of \$1.00 per day. The new law increases this maximum to \$2.00 per day, and for certain low income drivers the installation fee is waived.^{xv} Drivers who do not meet the low income deferment requirements must pay the BAIID vendor’s usual rates. In Michigan installation fees are around \$50.00, and depending on the vendor, monthly fees can be as high as \$100.00.

Knowingly Allowing OWI Penalties also Enhanced:

In a rather peculiar change, a person convicted of knowingly allows an intoxicated person to drive must have their car immobilized for 90 to 180 days. Under these circumstances there is an option however to have a BAIID installed in which case the immobilization must be suspended.^{xvi} However, the court may reinstate vehicle immobilization if the ignition device is tampered with, circumvented, disabled, or the person’s restricted license is suspended or revoked.^{xvii}

Fewer “Local” Prosecutors:

Michigan law provides that a village^{xviii}, charter village^{xix}, township^{xx} and charter township^{xxi} may create and enforce ordinances with penalties up to 93 days, while

cities^{xxii} with populations under 10,000 may create and enforce ordinances with penalties of up to 180 days. However, these cities will be in the minority, because most cities have adopted a charter which would put them into the Home Rule City Act^{xxiii} which again limits prosecutions to crimes punishable by up to 93 days^{xxiv}.

Because a Michigan super drunk can now be incarcerated for up to 180 days, only a small number of city prosecutors will be able to prosecute this new crime. Otherwise, super drunk drivers can only be prosecuted at the state level, i.e., by county prosecutors. This means that far fewer high BAC first offense drunk driving cases will be handled at the “local” level, but instead will be handled by the elected prosecutor in the county in which the crime was committed.^{xxv} This change may also have an impact on the availability of plea bargaining for first offense super drunks.

Conclusion:

In passing this legislation, Michigan’s lawmakers stopped short of matching laws recently enacted in other states requiring a BAIID device be installed for all offenders. Once such law requires a BAIID as a condition of driving even before there has been a conviction.^{xxvi}

While certainly less encompassing than some states, as a matter practice it is also unclear if this new law will have any meaningful impact on driver safety. This is because under the pre-amendment law it was quite common for first offense drunk drivers to plead guilty to the lesser-included offense of impaired driving. Depending on how plea bargaining is handled for the new offense the new law will either have no impact, or will clog court dockets with unnecessary trials. This is because it seems entirely plausible that high BAC first offenders will be offered the option of pleading guilty to traditional

operating while intoxicated or operating while visibly impaired, thereby avoiding this BAID requirement and other enhanced sanctions altogether. It is also entirely plausible that more trials will result if such reductions are not offered.

About the Author:

Patrick T. Barone is the principal and founding member of the Barone Defense Firm whose practice is devoted primarily to the defense of drinking drivers and license restoration matters. He is the author of two books on the topic including the highly respected *Defending Drinking Drivers* (James Publishing) and an Adjunct Professor at Thomas M. Cooley Law School where he teaches “Drunk Driving Law and Practice.” He can be reached at (248) 594-4554 or on the web at www.WinBackYourLife.org

ⁱ MCL § 257.625(1)(c)

ⁱⁱ 2009 PA 461; 2009 PA 462

ⁱⁱⁱ MCL § 257.625(5).

^{iv} MCL § 257.319(g).

^v MCL § 257.322(9)

^{vi} MCL § 257.322a

^{vii} MCL § 257.319(i).

^{viii} MCL § 257.20d

^{ix} MCL § 257.625k(5)(B) (I) & (II)

^x MCL § 257.625k(5)(B)(II)

^{xi} MCL § 257.625l(2)

^{xii} See Jones, *Disposition and Fate of Ethanol in the Body*, Garriot’s Medicolegal Aspects of Alcohol, Lawyers and Judges Publishing, Fifth Edition (2008)

^{xiii} MCL § 257.625l(7)

^{xiv} MCL § 257.625l(10)

^{xv} MCL § 257.625k(5)(d)

^{xvi} MCL § 257.904d(1)(11)

^{xvii} MCL § 257.904d(1)(12)

^{xviii} MCL § 66.2

^{xix} MCL § 42.21

^{xx} MCL § 41.183

^{xxi} MCL § 78.24

^{xxii} MCL § 89.2 and MCL § 87.20

^{xxiii} MCL § 117.1 et seq.

^{xxiv} MCL § 117.3(k)

^{xxv} MCL § 87.20

^{xxvi} 625 ILCS 5/6-206.1