

SENATE PROPOSAL OF AMENDMENT

H. 264

An act relating to driving while intoxicated and to forfeiture and registration of motor vehicles

The Senate proposes to the House to amend the bill by striking out all after the enacting clause and inserting in lieu thereof the following:

Sec. 1. PURPOSE

This act is intended to help prevent the harm caused to Vermonters and their families and friends by chronic DUI offenders who repeatedly operate motor vehicles while under the influence of alcohol or other drugs.

* * * Permitting Unlicensed or Impaired Person to Operate * * *

Sec. 2. 23 V.S.A. § 1130 is amended to read:

§ 1130. PERMITTING UNLICENSED OR IMPAIRED PERSON TO OPERATE

(a) No person shall knowingly employ, ~~as operator of a motor vehicle,~~ another person as an operator of a motor vehicle knowing that the other person is not licensed as provided in this title.

(b) No person shall knowingly permit a motor vehicle owned by him or her or under his or her control to be operated by a another person who if the person who owns or controls the vehicle knows that the other person has no legal right to do so, or in violation of a provision of this title operate the vehicle.

(c)(1) No person who owns or is in control of a vehicle shall intentionally enable another person to operate the vehicle if the person who owns or controls the vehicle has actual knowledge that the operator is:

(A) under the influence of intoxicating liquor; or

(B) under the influence of any other drug or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of driving safely.

(2) In a prosecution under this section, the state shall have the burden of proving beyond a reasonable doubt that the defendant was not placed under duress or subjected to coercion by the other person at the time the defendant enabled the other person to operate the motor vehicle.

(3) As used in this section, "intentionally enable another person to operate the motor vehicle" means to intentionally create a direct and immediate opportunity for another person to operate the motor vehicle.

(d)(1) A person who violates subsection (c) of this section shall be fined not more than \$1,000.00 or imprisoned for not more than six months, or both.

(2) If the death or if serious bodily injury as defined in 13 V.S.A. § 1021(2) results to any person other than the operator from a violation of subsection (c) of this section, the person convicted of the violation shall be fined not more than \$5,000.00 or imprisoned not more than two years, or both. The provisions of this subdivision do not limit or restrict prosecutions for manslaughter.

* * * DUI penalties, alternative sanctions, and innovative responses * * *

Sec. 3. 23 V.S.A. § 1201 is amended to read:

§ 1201. OPERATING VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR OTHER SUBSTANCE; CRIMINAL REFUSAL

(a) A person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway:

(1) when the person's alcohol concentration is 0.08 or more, or 0.02 or more if the person is operating a school bus as defined in subdivision 4(34) of this title; or

(2) when the person is under the influence of intoxicating liquor; or

(3) when the person is under the influence of any other drug or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of driving safely; or

(4) when the person's alcohol concentration is 0.04 or more if the person is operating a commercial motor vehicle as defined in subdivision 4103(4) of this title; or

(5) when the person's alcohol concentration is 0.02 or more if the person has previously been convicted of a second or subsequent violation of this section within the preceding three years and the person's alcohol concentration for the second or subsequent violation was 0.16 or greater.

* * *

Sec. 4. 23 V.S.A. § 1210 is amended to read:

§ 1210. PENALTIES

* * *

(d) ~~Third or subsequent~~ offense. A person convicted of violating section 1201 of this title who has ~~twice~~ previously been convicted two times of a violation of that section shall be fined not more than \$2,500.00 or imprisoned not more than five years, or both. ~~At least 400 hours of community service shall be performed, or 100~~ 96 consecutive hours of the sentence of imprisonment shall be served and may not be suspended or deferred or served as a supervised sentence, except that credit for a sentence of imprisonment may

be received for time served in a residential alcohol facility pursuant to sentence if the program is successfully completed. The court may impose a sentence that does not include a term of imprisonment or that does not require that the 96 hours of imprisonment be served consecutively only if the court makes written findings on the record that such a sentence will serve the interests of justice and public safety.

(e) Fourth or subsequent offense. A person convicted of violating section 1201 of this title who has previously been convicted three times of a violation of that section shall be fined not more than \$5,000.00 or imprisoned not more than ten years, or both. At least 192 consecutive hours of the sentence of imprisonment shall be served and may not be suspended or deferred or served as a supervised sentence, except that credit for a sentence of imprisonment may be received for time served in a residential alcohol facility pursuant to sentence if the program is successfully completed. The court shall not impose a sentence that does not include a term of imprisonment unless the court makes written findings on the record that there are compelling reasons why such a sentence will serve the interests of justice and public safety.

(e)(1)(f)(1) Death resulting. If the death of any person results from a violation of section 1201 of this title, the person convicted of the violation shall be fined not more than \$10,000.00 or imprisoned not less than one year nor more than 15 years, or both. The provisions of this subsection do not limit or restrict prosecutions for manslaughter.

(2) If the death of more than one person results from a violation of section 1201 of this title, the operator may be convicted of a separate violation of this subdivision for each decedent.

(3)(A) Death resulting; third or subsequent offense. If the death of any person results from a violation of section 1201 of this title and the person convicted of the violation previously has been convicted two or more times of a violation of that section, a sentence ordered pursuant to this subsection shall, except as provided in subdivision (B) of this subdivision (3), include at least a five-year term of imprisonment. The five-year minimum term of imprisonment required by this subdivision shall be served and may not be suspended, deferred, or served as a supervised sentence. The defendant shall not be eligible for probation, parole, furlough, or any other type of early release until the expiration of the five-year term of imprisonment.

(B) Notwithstanding subdivision (A) of this subdivision (3), if the death of any person results from a violation of section 1201 of this title and the person convicted of the violation previously has been convicted two or more times of a violation of that section, the court may impose a sentence that does not include a term of imprisonment or which includes a term of imprisonment of less than five years if the court makes written findings on the record that such a sentence will serve the interests of justice and public safety.

~~(f)(1)~~(g)(1) Injury resulting. If serious bodily injury, as defined in 13 V.S.A. § 1021(2), results to any person other than the operator from a violation of section 1201 of this title, the person convicted of the violation shall be fined not more than \$5,000.00, or imprisoned not more than 15 years, or both.

(2) If serious bodily injury as defined in 13 V.S.A. § 1021(2) results to more than one person other than the operator from a violation of section 1201 of this title, the operator may be convicted of a separate violation of this subdivision for each person injured.

(3)(A) Injury resulting; third or subsequent offense. If serious bodily injury as defined in 13 V.S.A. § 1021(2) results to any person other than the operator from a violation of section 1201 of this title and the person convicted of the violation previously has been convicted two or more times of a violation of section 1201, a sentence ordered pursuant to this subsection shall, except as provided in subdivision (B) of this subdivision (3), include at least a five-year term of imprisonment. The five-year minimum term of imprisonment required by this subdivision shall be served and may not be suspended, deferred, or served as a supervised sentence. The defendant shall not be eligible for probation, parole, furlough, or any other type of early release until the expiration of the five-year term of imprisonment.

(B) Notwithstanding subdivision (A) of this subdivision (3), if serious bodily injury as defined in 13 V.S.A. § 1021(2) results to any person other than the operator from a violation of section 1201 of this title and the person convicted of the violation previously has been convicted two or more times of a violation of section 1201, the court may impose a sentence that does not include a term of imprisonment or which includes a term of imprisonment of less than five years if the court makes written findings on the record that such a sentence will serve the interests of justice and public safety.

~~(g)~~(h) Determination of fines. In determining appropriate fines under this section the court may take into account the total cost to a defendant of alcohol screening, participation in the alcohol and driving education program and therapy and the income of the defendant.

~~(h)~~(i) A person convicted of violating section 1201 of this title shall be assessed a surcharge of \$60.00, which shall be added to any fine imposed by the court. The court shall collect and transfer such surcharge to the department of ~~health~~ public safety for deposit in the health department's laboratory services special fund.

~~(i)~~(j) A person convicted of violating section 1201 of this title shall be assessed a surcharge of \$50.00, which shall be added to any fine or surcharge imposed by the court. The court shall collect and transfer the surcharge assessed under this subsection to the office of defender general for deposit in

the public defender special fund specifying the source of the monies being deposited. The collection procedures described in 13 V.S.A. § 5240 shall be utilized in the collection of this surcharge.

~~(j)~~(k) A person convicted of violating section 1201 of this title shall be assessed a surcharge of \$50.00, which shall be added to any fine or surcharge imposed by the court. The court shall collect and transfer the surcharge assessed under this subsection to be credited to the DUI enforcement fund. The collection procedures described in 13 V.S.A. § 5240 shall be utilized in the collection of this surcharge.

Sec. 5. REPEAL

23 V.S.A. § 1213(a),(b), and (c) within Sec. 9 of No. 126 of the Acts of 2009 Adj. Sess. (2010) are repealed.

Sec. 6. 23 V.S.A. § 1213(a), (b), and (c) are added to read:

(a) First offense. A person whose license or privilege to operate is suspended for a first offense under this subchapter shall be permitted to operate a motor vehicle, other than a commercial motor vehicle as defined in section 4103 of this title, if issued a valid ignition interlock RDL. The commissioner shall issue an ignition interlock RDL to a person eligible under section 1205(a)(2), 1206(a), or 1216(a)(1) of this title upon receipt of a \$125.00 application fee, and upon receipt of satisfactory proof of installation of an approved ignition interlock RDL in any motor vehicle to be operated, financial responsibility as provided in section 801 of this title, and enrollment in an alcohol and driving education program. The RDL shall be valid after expiration of the applicable shortened period specified in section 1205(a)(2), 1206(a), or 1216(a)(1) of this title. An ignition interlock RDL shall expire upon reinstatement of a person's regular license or privilege to operate or shall expire unless renewed yearly. The commissioner shall send by first class mail an application for renewal of the RDL at least 30 days prior to the day renewal is required and shall impose the same conditions for renewal as are required for initial issuance of an ignition interlock RDL. The renewal fee shall be \$125.00.

(b) Second offense. A person whose license or privilege to operate is suspended for a second offense under this subchapter shall be permitted to operate a motor vehicle, other than a commercial motor vehicle as defined in section 4103 of this title, if issued a valid ignition interlock RDL. The commissioner shall issue an ignition interlock RDL to a person eligible under section 1205(m), 1208(a), or 1216(a)(2) of this title upon receipt of a \$125.00 application fee, and upon receipt of satisfactory proof of installation of an approved ignition interlock RDL in any motor vehicle to be operated, financial responsibility as provided in section 801 of this title, and enrollment in an alcohol and driving rehabilitation program. The RDL shall be valid after

expiration of the applicable shortened period specified in section 1205(m), 1208(a), or 1216(a)(2) of this title. An ignition interlock RDL shall expire upon reinstatement of a person's regular license or privilege to operate or shall expire unless renewed yearly. The commissioner shall send by first class mail an application for renewal of the RDL at least 30 days prior to the day renewal is required and shall impose the same conditions for renewal as are required for initial issuance of an ignition interlock RDL. The renewal fee shall be \$125.00.

(c) Third or subsequent offense. A person whose license or privilege to operate is suspended or revoked for a third or subsequent offense under this subchapter shall be permitted to operate a motor vehicle, other than a commercial motor vehicle as defined in section 4103 of this title, if issued a valid ignition interlock RDL. The commissioner shall issue an ignition interlock RDL to a person eligible under section 1205(m), 1208(b), or 1216(a)(2) of this title upon receipt of a \$125.00 application fee, and upon receipt of satisfactory proof of installation of an approved ignition interlock RDL in any motor vehicle to be operated, financial responsibility as provided in section 801 of this title, and enrollment in an alcohol and driving rehabilitation program. The RDL shall be valid after expiration of the applicable shortened period specified in section 1205(m), 1208(b), or 1216(a)(2) of this title. An ignition interlock RDL shall expire upon reinstatement of a person's regular license or privilege to operate or shall expire unless renewed yearly. The commissioner shall send by first class mail an application for renewal of the RDL at least 30 days prior to the day renewal is required and shall impose the same conditions for renewal as are required for initial issuance of an ignition interlock RDL. The renewal fee shall be \$125.00.

Sec. 7. 23 V.S.A. § 1220a is amended to read:

§ 1220a. DUI ENFORCEMENT SPECIAL FUND

(a) There is created a DUI enforcement special fund which shall be a special fund established and managed pursuant to 32 V.S.A. chapter 7 subchapter 5. The DUI enforcement special fund shall be a continuation of and successor to the DUI enforcement special fund established under subsection 1205(r) of this title.

(b) The DUI enforcement special fund shall consist of:

(1) receipts from the surcharges assessed under section 206 and subsections 674(i), 1091(d), 1094(f), 1128(d), 1133(d), 1205(r), and 1210(j) of this title;

(2) beginning in fiscal year 2000 and thereafter, the first \$150,000.00 of revenues collected from fines imposed under subchapter 13 of chapter 13 of this title pertaining to DUI related offenses;

(3) beginning in fiscal year 2000 and thereafter, two percent of the revenues raised by the motor fuel tax on gasoline imposed by chapter 28 of this title; and

(4) any additional funds transferred or appropriated by the general assembly.

(c) The DUI enforcement special fund shall be used for the implementation and enforcement of this subchapter for purposes specified and in amounts appropriated by the general assembly. At least 40 percent of the money collected by the fund each year shall be awarded as grants to municipalities or law enforcement agencies for innovative programs designed to reduce DUI offenses. Priority shall be given to grants requested jointly by more than one law enforcement agency or municipality.

Sec. 8. DEDICATED BEDS FOR CHRONIC REPEAT DUI OFFENDERS

The department of corrections shall report to the joint committee on corrections oversight on or before November 15, 2011 on the feasibility of dedicating 25 beds at the southeast state correctional facility exclusively for chronic repeat DUI offenders. As used in this section, "chronic repeat DUI offender" means a person convicted three or more times of a violation of 23 V.S.A. § 1201.

Sec. 9. COMPREHENSIVE SYSTEM TO REDUCE REPEAT DUI OFFENSES

On or before January 15, 2012, the director of the governor's highway safety program, in consultation with the defender general and the departments of motor vehicles, of public safety, of health and of corrections shall report to the house and senate committees on judiciary a plan for implementation of a comprehensive system of penalties, alternative sanctions, and treatment to reduce the number of persons with repeat offenses of operating motor vehicles while under the influence of alcohol or other drugs. The system may include, among other measures, the following:

(1) a mandatory sobriety program for repeat DUI offenders similar to South Dakota's "24/7 Sobriety Program";

(2) increased penalties for operating a vehicle with an alcohol concentration substantially greater than the legal limit;

(3) methods of responding to DUI offenders who fail to complete the alcohol and driving education program (CRASH) required by 23 V.S.A. § 1209a(a)(1);

(4) enhanced use of ignition interlock devices, with respect to which the ignition interlock effectiveness study required by Sec. 14 of No. 126 of the Acts of 2009 shall be considered;

(5) mandatory alcohol and drug counseling and treatment for persons convicted of operating a motor vehicle while under the influence of alcohol or other drugs;

(6) establishment of a secure facility for housing and treatment of persons convicted of operating a motor vehicle while under the influence of alcohol or drugs;

(7) the circumstances under which the operator of a motor vehicle may be required to submit to a blood test to determine whether he or she has been operating the vehicle while under the influence of a drug other than alcohol;

(8) revisions that may be appropriate to the DUI statutes when the circumstances involve operating a motor vehicle under the influence of a drug that has been legally prescribed to the operator; and

(9) a proposal to permit conditional operator's licenses, which may be issued to a person who has been convicted of DUI for travel to limited places such as work, drug or alcohol treatment, school, or a doctor's office.

* * * Detention of operator * * *

Sec. 10. 23 V.S.A. § 1212 is amended to read:

§ 1212. CONDITIONS OF RELEASE AND PAROLE; ARREST UPON VIOLATION

* * *

(d) A law enforcement officer who observes a person violating a condition of parole requiring that the person not operate a motor vehicle may promptly arrest the person for violating the condition and may detain the person pursuant to 28 V.S.A. § 551. The officer shall immediately notify the parole board of the suspected violation. If the parole board determines pursuant to 28 V.S.A. § 552 that a parole violation has occurred, the board shall notify the state's attorney in the county where the violation occurred.

* * * Miscellaneous * * *

Sec. 11. REPORTS; STUDIES

(a) The court administrator shall report to the senate and house committees on judiciary on or before January 15, 2012 on the number of persons convicted of violating 23 V.S.A. § 1130(c) (permitting impaired person to operate motor vehicle) since the passage of this act.

(b) Notwithstanding any other provision of law, the court administrator shall conduct a weighted caseload study and analysis or equivalent study within the probate division of the superior court for use by the senate and house committees on appropriations during development of the fiscal year 2013 budget. The results of the study shall be reported to the senate and house

committees on judiciary and on appropriations on or before January 15, 2012. The study may be used to review and consider adjustments to the compensation of probate judges.

(c)(1) A committee is established to study modifying the number of interested parties who must be served with notice when a probate proceeding is commenced involving a decedent's estate and reducing the amount of time notice by publication is required to be published in newspapers. The committee shall consider whether reducing the number of interested parties would reduce costs to the estate without unduly prejudicing the rights of potential beneficiaries, and whether constitutional issues would be raised if such changes were made. The committee shall report its findings, together with any recommendations for legislative action, to the senate and house committees on judiciary no later than December 15, 2011.

(2) The committee established by this subsection shall consist of the following members:

(A) one member appointed by the Vermont Probate Judges Association;

(B) one member with experience in probate practice appointed by the Vermont Bar Association; and

(C) one member appointed by the Committee on Vermont Elders.

(3) Members of the committee who are not employees of the state of Vermont shall be entitled to reimbursement at the per diem rate set in 32 V.S.A. § 1010.

Sec. 12. Sec. 22(a) of No. 157 of the Acts of the 2009 Adj. Sess. (2010), as amended by Sec. 1 of No. 5 of the Acts of 2011, is amended to read:

(a) Sec. 18 of this act shall take effect on ~~July 1, 2011~~ July 1, 2012.

Sec. 13. [DELETED]

Sec. 14. 23 V.S.A. § 1203 is amended to read:

§ 1203. ADMINISTRATION OF TESTS; RETENTION OF TEST AND VIDEOTAPE

* * *

(c) When a breath test which is intended to be introduced in evidence is taken with a crimper device or when blood is withdrawn at an officer's request, a sufficient amount of breath or blood, as the case may be, shall be taken to enable the person to have made an independent analysis of the sample, and shall be held for at least 45 days from the date the sample was taken. At any time during that period the person may direct that the sample be sent to an independent laboratory of the person's choosing for an independent analysis.

The department of ~~health~~ public safety shall adopt rules providing for the security of the sample. At no time shall the defendant or any agent of the defendant have access to the sample. A preserved sample of breath shall not be required when an infrared breath-testing instrument is used. A person tested with an infrared breath-testing instrument shall have the option of having a second infrared test administered immediately after receiving the results of the first test.

(d) In the case of a breath test administered using an infrared breath testing instrument, the test shall be analyzed in compliance with rules adopted by the department of ~~health~~ public safety. The analyses shall be retained by the state. A sample is adequate if the infrared breath testing instrument analyzes the sample and does not indicate the sample is deficient. Analysis of the person's breath or blood which is available to that person for independent analysis shall be considered valid when performed according to methods approved by the department of ~~health~~ public safety. The analysis performed by the state shall be considered valid when performed according to a method or methods selected by the department of ~~health~~ public safety. The department of ~~health~~ public safety shall use rule making procedures to select its method or methods. Failure of a person to provide an adequate breath sample constitutes a refusal.

(e) [Repealed.]

(f) When a law enforcement officer has reason to believe that a person may be violating or has violated section 1201 of this title, the officer may request the person to provide a sample of breath for a preliminary screening test using a device approved by the commissioner of ~~health~~ public safety for this purpose. The person shall not have the right to consult an attorney prior to submitting to this preliminary breath alcohol screening test. The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to request an evidentiary test and shall not be used in any court proceeding except on those issues. Following the screening test additional tests may be required of the operator pursuant to the provisions of section 1202 of this title.

* * *

(i) The commissioner of ~~health~~ public safety shall adopt emergency rules relating to the operation, maintenance and use of preliminary alcohol screening devices for use by law enforcement officers in enforcing the provisions of this title. The commissioner shall consider relevant standards of the National Highway Traffic Safety Administration in adopting such rules. Any preliminary alcohol screening device authorized for use under this title shall be on the qualified products list of the National Highway Traffic Safety Administration.

* * *

Sec. 15. 23 V.S.A. § 1203a is amended to read:

§ 1203a. INDEPENDENT CHEMICAL TEST; BLOOD TESTS

* * *

(d) The physician, licensed nurse, medical technician, physician's assistant, medical technologist, or laboratory assistant drawing a sample of blood shall use a sample collection kit provided by the department of ~~health~~ public safety or another type of collection kit. The sample shall be identified as to donor, date, and time, sealed and mailed to the department of ~~health~~ public safety where it shall be held for a period of at least 45 days from the date the sample was taken. At any time during that period the person may direct that the sample be sent to an independent laboratory of the person's choosing for an independent analysis. The department of ~~health~~ public safety may recover its costs of supplies, handling and storage.

* * *

Sec. 16. 23 V.S.A. § 1205(h)(1)(D) is amended to read:

(D) whether the test was taken and the test results indicated that the person's alcohol concentration was 0.08 or more at the time of operating, attempting to operate or being in actual physical control of a vehicle in violation of section 1201 of this title, whether the testing methods used were valid and reliable and whether the test results were accurate and accurately evaluated. Evidence that the test was taken and evaluated in compliance with rules adopted by the department of ~~health~~ public safety shall be prima facie evidence that the testing methods used were valid and reliable and that the test results are accurate and were accurately evaluated;

Sec. 17. 23 V.S.A. § 1216 is amended to read:

§ 1216. PERSONS UNDER 21; ALCOHOL CONCENTRATION OF 0.02 OR MORE

* * *

(d) If a law enforcement officer has reasonable grounds to believe that a person is violating this section, the officer may request the person to submit to a breath test using a preliminary screening device approved by the commissioner of ~~health~~ public safety. A refusal to submit to the breath test shall be considered a violation of this section. Notwithstanding any provisions to the contrary in sections 1202 and 1203 of this title:

* * *

Sec. 18. BLOOD AND BREATH ALCOHOL TESTING AND ALCOHOL SCREENING DEVICES; AUTHORITY OF DEPARTMENT OF PUBLIC SAFETY; RULEMAKING

(a) The department of public safety shall adopt rules, which may include emergency rules, to govern the operation, maintenance, and use of blood and breath alcohol testing and alcohol screening devices, and to describe the methods used to exercise the authority granted by this act. Prior to the effective date of the rules required to be adopted by this subsection, the department of public safety may take such steps as are necessary to prepare to assume authority and supervision over operation, maintenance, and use of blood and breath alcohol testing and alcohol screening devices. The rules of the agency of human services pertaining to the blood and breath alcohol testing and alcohol screening program shall remain in effect and govern the program until revised or repealed by rules adopted by the department of public safety, including emergency rules adopted pursuant to this subsection.

(b) The administration shall, in consultation with the Vermont state employees association, ensure that no reduction in positions occurs as a result of the transfer required by this section. The administration shall transfer positions to the department of public safety so that the department may implement the authority granted to it by this act.

(c) On or before January 15, 2012, and on or before January 15 of each of the following two years, the department of public safety shall report to the senate and house committees on judiciary on progress toward identifying and implementing an accreditation process for the blood alcohol testing and alcohol screening program transferred to the department by this section.

(d) Notwithstanding any other provision of law, on March 1, 2012, or on the effective date of the rules required to be adopted by subsection (a) of this section, whichever is earlier, the department of public safety shall assume the authority transferred to it by this act over the blood and breath alcohol testing and alcohol screening program.

Sec. 19. EFFECTIVE DATES

This act shall take effect on passage, except as follows:

- (1) Sec. 5 shall take effect on June 30, 2011.
- (2) Sec. 6 shall take effect on July 1, 2011.
- (3) Secs. 14, 15, 16, and 17 shall take effect on March 1, 2012.