

BLOOD AND BREATH ALCOHOL TESTING

2002 GENERAL SESSION

STATE OF UTAH

Sponsor: Paul Ray

This act modifies provisions of the Motor Vehicle Code and the Criminal Code relating to testing of blood or breath alcohol levels in driving under the influence cases, automobile homicide cases, flying under the influence cases, and boating under the influence cases.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

41-6-44, as last amended by Chapters 64, 289, 309 and 355, Laws of Utah 2001

41-6-44.5, as last amended by Chapter 161, Laws of Utah 1993

41-6-44.12, as enacted by Chapter 157, Laws of Utah 1999

53-3-418, as last amended by Chapter 85, Laws of Utah 2001

72-10-501, as renumbered and amended by Chapter 270, Laws of Utah 1998

72-10-504, as renumbered and amended by Chapter 270, Laws of Utah 1998

73-18-12.2, as last amended by Chapter 94, Laws of Utah 1998

73-18-12.4, as enacted by Chapter 118, Laws of Utah 1987

76-5-207, as last amended by Chapter 161, Laws of Utah 1993

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **41-6-44** is amended to read:

41-6-44. Driving under the influence of alcohol, drugs, or with specified or unsafe blood alcohol concentration -- Measurement of blood or breath alcohol -- Criminal punishment -- Arrest without warrant -- Penalties -- Suspension or revocation of license.

(1) As used in this section:

(a) "educational series" means an educational series obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(b) "prior conviction" means any conviction for a violation of:

(i) this section;

(ii) alcohol-related reckless driving under Subsections (9) and (10);

(iii) local ordinances similar to this section or alcohol-related reckless driving adopted in compliance with Section 41-6-43;

(iv) automobile homicide under Section 76-5-207; or

(v) statutes or ordinances in effect in any other state, the United States, or any district, possession, or territory of the United States which would constitute a violation of this section or alcohol-related reckless driving if committed in this state, including punishments administered under 10 U.S.C. Sec. 815;

(c) "screening and assessment" means a substance abuse addiction and dependency screening and assessment obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(d) "serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death;

(e) "substance abuse treatment" means treatment obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(f) "substance abuse treatment program" means a state licensed substance abuse program;

(g) a violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6-43; and

(h) the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(2) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has sufficient alcohol in his body that a subsequent chemical test [~~given within two hours of the alleged operation or physical control~~] shows that the person has a blood or breath alcohol concentration of .08 grams or greater[~~;~~~~or~~] at the time of the test;

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle[~~;~~]; or

(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(c) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) A person convicted the first or second time of a violation of Subsection (2) is guilty of a:

- (i) class B misdemeanor; or
- (ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner;

(B) had a passenger under 16 years of age in the vehicle at the time of the offense; or

(C) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense.

(b) A person convicted of a violation of Subsection (2) is guilty of a third degree felony if the person has also inflicted serious bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(4) (a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 24 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening and assessment;

(ii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (4)(d); and

(iii) impose a fine of not less than \$700.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e)(i) Except as provided in Subsection (4)(e)(ii), the court may order probation for the person in accordance with Subsection (14).

(ii) If there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order probation for the person in accordance with Subsection (14).

(5) (a) If a person is convicted under Subsection (2) within ten years of a prior conviction under this section, the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 240 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening and assessment;

(ii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (5)(d); and

(iii) impose a fine of not less than \$800.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e) The court shall order probation for the person in accordance with Subsection (14).

(6) (a) A conviction for a violation of Subsection (2) is a third degree felony if it is committed:

(i) within ten years of two or more prior convictions under this section; or

(ii) at any time after a conviction of:

(A) automobile homicide under Section 76-5-207 that is committed after July 1, 2001; or

(B) a felony violation under this section that is committed after July 1, 2001.

(b) Under Subsection (3)(b) or (6)(a), if the court suspends the execution of a prison sentence and places the defendant on probation the court shall impose:

(i) a fine of not less than \$1,500; and

(ii) a mandatory jail sentence of not less than 1,500 hours.

(c) For Subsection (6)(a) or (b), the court shall impose an order requiring the person to obtain a screening and assessment and substance abuse treatment at a substance abuse treatment program providing intensive care or inpatient treatment and long-term closely supervised follow-through after treatment for not less than 240 hours.

(d) In addition to the penalties required under Subsection (6)(b), the court may require the person to participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(7) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(8) (a) (i) The provisions in Subsections (4), (5), and (6) that require a sentencing court to order a convicted person to: participate in a screening and assessment; and an educational series; obtain, in the discretion of the court, substance abuse treatment; obtain, mandatorily, substance abuse treatment; or do a combination of those things, apply to a conviction for a violation of Section 41-6-44.6 or 41-6-45 under Subsection (9).

(ii) The court shall render the same order regarding screening and assessment, an educational series, or substance abuse treatment in connection with a first, second, or subsequent conviction under Section 41-6-44.6 or 41-6-45 under Subsection (9), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), and (6).

(b) If a person fails to complete all court ordered screening and assessment, educational series, and substance abuse treatment, or fails to pay all fines and fees, including fees for restitution and treatment costs, the court shall notify the Driver License Division of a failure to comply. Upon receiving the notification, the division shall suspend the person's driving privilege in accordance with Subsections 53-3-221(2) and (3).

(9) (a) (i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45, of an ordinance enacted under Section 41-6-43, or of Section 41-6-44.6 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) The court shall advise the defendant before accepting the plea offered under this Subsection (9)(b) of the consequences of a violation of Section 41-6-44.6 or of Section 41-6-45.

(c) The court shall notify the Driver License Division of each conviction of Section 41-6-44.6 or 41-6-45 entered under this Subsection (9).

(10) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

(11) (a) The Driver License Division shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (2);

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (2) if the violation is committed within a period of ten years from the date of the prior violation; and

(iii) suspend or revoke the license of a person as ordered by the court under Subsection (12).

(b) The Driver License Division shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223 or 53-3-231, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

(12) (a) In addition to any other penalties provided in this section, a court may order the operator's license of a person who is convicted of a violation of Subsection (2) to be suspended or revoked for an additional period of 90 days, 180 days, one year, or two years to remove from the highways those persons who have shown they are safety hazards.

(b) If the court suspends or revokes the person's license under this Subsection (12)(b), the court shall prepare and send to the Driver License Division an order to suspend or revoke that person's driving privileges for a specified period of time.

(13) (a) If the court orders a person to participate in home confinement through the use of electronic monitoring, the electronic monitoring shall alert the appropriate corrections, probation monitoring agency, law enforcement units, or contract provider of the defendant's whereabouts.

(b) The electronic monitoring device shall be used under conditions which require:

- (i) the person to wear an electronic monitoring device at all times;
- (ii) that a device be placed in the home or other specified location of the person, so that the person's compliance with the court's order may be monitored; and
- (iii) the person to pay the costs of the electronic monitoring.

(c) The court shall order the appropriate entity described in Subsection (13)(e) to place an electronic monitoring device on the person and install electronic monitoring equipment in the residence of the person or other specified location.

(d) The court may:

- (i) require the person's electronic home monitoring device to include a substance abuse testing instrument;
- (ii) restrict the amount of alcohol the person may consume during the time the person is subject to home confinement;
- (iii) set specific time and location conditions that allow the person to attend school

educational classes, or employment and to travel directly between those activities and the person's home; and

(iv) waive all or part of the costs associated with home confinement if the person is determined to be indigent by the court.

(e) The electronic monitoring described in this section may either be administered directly by the appropriate corrections agency, probation monitoring agency, or by contract with a private provider.

(f) The electronic monitoring provider shall cover the costs of waivers by the court under Subsection (13)(c)(iv).

(14) (a) If supervised probation is ordered under Section 41-6-44.6 or Subsection (4)(e) or (5)(e):

- (i) the court shall specify the period of the probation;
- (ii) the person shall pay all of the costs of the probation; and
- (iii) the court may order any other conditions of the probation.

(b) The court shall provide the probation described in this section by contract with a probation monitoring agency or a private probation provider.

(c) The probation provider described in Subsection (14)(b) shall monitor the person's compliance with all conditions of the person's sentence, conditions of probation, and court orders received under this article and shall notify the court of any failure to comply with or complete that sentence or those conditions or orders.

(d) (i) The court may waive all or part of the costs associated with probation if the person is determined to be indigent by the court.

(ii) The probation provider described in Subsection (14)(b) shall cover the costs of waivers by the court under Subsection (14)(d)(i).

(15) If a person is convicted of a violation of Subsection (2) and there is admissible evidence that the person had a blood alcohol level of .16 or higher, then if the court does not order:

(a) treatment as described under Subsection (4)(d), (5)(d), or (6)(b)(iii), then the court shall enter the reasons on the record; and

(b) the following penalties, the court shall enter the reasons on the record:

(i) the installation of an ignition interlock system as a condition of probation for the person in accordance with Section 41-6-44.7; or

(ii) the imposition of home confinement through the use of electronic monitoring in accordance with Subsection (13).

Section 2. Section **41-6-44.5** is amended to read:

41-6-44.5. Admissibility of chemical test results in actions for driving under the influence -- Weight of evidence.

(1) (a) In any civil or criminal action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or drugs or with a blood or breath alcohol content statutorily prohibited, the results of a chemical test or tests as authorized in Section 41-6-44.10 are admissible as evidence.

(b) In a criminal proceeding, noncompliance with Section 41-6-44.10 does not render the results of a chemical test inadmissible. Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

~~[(2) If the chemical test was taken more than two hours after the alleged driving or actual physical control, the test result is admissible as evidence of the person's blood or breath alcohol level at the time of the alleged operating or actual physical control, but the trier of fact shall determine what weight is given to the result of the test.]~~

~~[(3)]~~ (2) This section does not prevent a court from receiving otherwise admissible evidence as to a defendant's blood or breath alcohol level or drug level at the time ~~[of the alleged operating or actual physical control]~~ relevant to the alleged offense.

Section 3. Section **41-6-44.12** is amended to read:

41-6-44.12. Reporting test results -- Immunity from liability.

(1) As used in this section, "health care provider" means a person licensed under Title 58, Chapter 31b, Nurse Practice Act, Title 58, Chapter 67, Utah Medical Practice Act, or Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(2) A health care provider who is providing medical care to any person involved in a motor

vehicle crash may notify, as soon as reasonably possible, the nearest peace officer or law enforcement agency if the health care provider has reason to believe, as a result of any test performed in the course of medical treatment, that the:

(a) person's blood alcohol concentration meets or exceeds the limit under Subsection 41-6-44(2)(a)(i) or (iii);

(b) person is younger than 21 years of age and has any measurable blood, breath, or urine alcohol concentration in the person's body; or

(c) person has any measurable controlled substance or metabolite of a controlled substance in the person's body which could be a violation of Subsection 41-6-44(2)(a)(ii) or Section 41-6-44.6.

(3) The report under Subsection (2) shall consist of the:

(a) name of the person being treated;

(b) date and time of the administration of the test; and

(c) results disclosed by the test.

(4) A health care provider participating in good faith in making a report or assisting an investigator from a law enforcement agency pursuant to this section is immune from any liability, civil or criminal, that otherwise might result by reason of those actions.

(5) A report under Subsection (2) may not be used to support a finding of probable cause that a person who is not a driver of a vehicle has committed an offense.

Section 4. Section **53-3-418** is amended to read:

53-3-418. Prohibited alcohol level for drivers -- Procedures, including hearing.

(1) A person who holds or is required to hold a CDL may not drive a commercial motor vehicle in this state if the person:

(a) has [~~a blood, breath, or urine alcohol concentration of .04 grams or greater as shown by a chemical test given within two hours~~] sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .04 grams or greater at the time of the test after the alleged driving of the commercial motor vehicle; or

(b) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to [~~any~~] degree that renders the person incapable of safely driving a commercial motor

vehicle[-]; or

(c) has a blood or breath alcohol concentration of .04 grams or greater at the time of driving the commercial motor vehicle.

(2) A person who holds or is required to hold a CDL and who drives a commercial motor vehicle in this state is considered to have given his consent to a test or tests of his blood, breath, or urine to determine the concentration of alcohol or the presence of other drugs in his physical system.

(3) If a peace officer or port-of-entry agent has reasonable cause to believe that a person may be violating this section, the peace officer or port-of-entry agent may request the person to submit to a chemical test to be administered in compliance with Section 41-6-44.3.

(4) When a peace officer or port-of-entry agent requests a person to submit to a test under this section, he shall advise the person that test results indicating .04 grams or greater alcohol concentration or refusal to submit to any test requested will result in the person's disqualification under Section 53-3-414 from driving a commercial motor vehicle.

(5) If test results under this section indicate .04 grams or greater of alcohol concentration or the person refuses to submit to any test requested under this section, the peace officer or port-of-entry agent shall on behalf of the division serve the person with immediate notice of the division's intention to disqualify the person's privilege to drive a commercial motor vehicle.

(6) When the peace officer or port-of-entry agent serves notice under Subsection (5) he shall:

- (a) take any Utah license certificate or permit held by the driver;
- (b) issue to the driver a temporary license certificate effective for 29 days;
- (c) provide the driver, in a manner specified by the division, basic information regarding how to obtain a prompt hearing before the division; and
- (d) issue a 24-hour out-of-service order.

(7) A notice of disqualification issued under Subsection (6) may serve also as the temporary license certificate under that subsection, if the form is approved by the division.

(8) As a matter of procedure, the peace officer or port-of-entry agent serving the notice of disqualification shall, within ten calendar days after the date of service, send to the division the person's license certificate, a copy of the served notice, and a report signed by the peace officer or

port-of-entry agent that indicates the results of any chemical test administered or that the person refused a test.

(9) (a) The person has the right to a hearing regarding the disqualification.

(b) The request for the hearing shall be submitted to the division in a manner specified by the division and shall be made within ten calendar days of the date the notice was issued. If requested, the hearing shall be conducted within 29 days after the notice was issued.

(10) (a) A hearing held under this section shall be held before the division and in the county where the notice was issued, unless the division agrees to hold the hearing in another county.

(b) The hearing shall be documented and shall determine:

(i) whether the peace officer or port-of-entry agent had reasonable grounds to believe the person had been driving a motor vehicle in violation of this section;

(ii) whether the person refused to submit to any requested test; and

(iii) any test results obtained.

(c) In connection with a hearing the division or its authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and documents.

(d) One or more members of the division may conduct the hearing.

(e) A decision made after a hearing before any number of members of the division is as valid as if the hearing were held before the full membership of the division.

(f) After a hearing under this section the division shall indicate by order if the person's CDL is disqualified.

(g) If the person for whom the hearing is held fails to appear before the division as required in the notice, the division shall indicate by order if the person's CDL is disqualified.

(11) If the division disqualifies a person under this section, the person may petition for a hearing under Section 53-3-224. The petition shall be filed within 30 days after the division issues the disqualification.

(12) (a) A person who violates this section shall be punished in accordance with Section 53-3-414.

(b) In accordance with Section 53-3-414, the first disqualification under this section shall be for one year, and a second disqualification shall be for life.

(13) (a) In addition to the fees imposed under Section 53-3-205 for reinstatement of a CDL, a fee under Section 53-3-105 to cover administrative costs shall be paid before the driving privilege is reinstated.

(b) The fees under Sections 53-3-105 and 53-3-205 shall be canceled if an unappealed hearing at the division or court level determines the disqualification was not proper.

Section 5. Section **72-10-501** is amended to read:

72-10-501. Flying under the influence of alcohol, drugs, or with specified or unsafe blood alcohol concentration -- Calculations of blood or breath alcohol -- Criminal punishment -- Arrest without warrant.

(1) (a) A person may not operate or be in actual physical control of an aircraft within this state if the person:

(i) ~~[has a blood or breath alcohol concentration of .04 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control; or]~~ has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .04 grams or greater at the time of the test;

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating an aircraft[-]; or

(iii) has a blood or breath alcohol concentration of .04 grams or greater at the time of operation or actual physical control.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(2) ~~[Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.]~~ Calculations of blood or breath alcohol concentration under this section shall be made in accordance with Subsection 41-6-44(2).

(3) (a) A person convicted of a violation of Subsection (1) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person has also inflicted bodily injury upon another as a proximate result of having operated the aircraft in a negligent manner.

(b) In this section, the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(4) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe:

(a) the violation has occurred, although not in the officer's presence; and

(b) the violation was committed by that person.

Section 6. Section **72-10-504** is amended to read:

72-10-504. Admissibility of chemical test results in actions for flying under the influence -- Weight of evidence.

(1) (a) In any civil or criminal action or proceeding in which it is material to prove that a person was operating or in actual physical control of an aircraft while under the influence of alcohol, drugs, or with a blood or breath alcohol content statutorily prohibited, the results of a chemical test or tests as authorized in Section 72-10-502 are admissible as evidence.

(b) (i) In a criminal proceeding, noncompliance with Section 72-10-502 does not render the results of the chemical test inadmissible.

(ii) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

~~[(2) If the chemical test was taken more than two hours after the alleged flying or actual physical control, the test result is admissible as evidence of the person's blood or breath alcohol level at the time of the alleged operating or actual physical control, but the trier of fact shall determine what weight is given to the result of the test.]~~

~~[(3)]~~ (2) This section does not prevent a court from receiving otherwise admissible evidence as to a defendant's blood or breath alcohol level or drug level at the time ~~[of the alleged operating or actual physical control]~~ relevant to the alleged offense.

Section 7. Section **73-18-12.2** is amended to read:

73-18-12.2. Boating under the influence of alcohol or drugs or with high blood or breath alcohol content -- Criminal punishment -- Arrest without a warrant.

(1) (a) ~~[It is unlawful and punishable as provided in this section for any]~~ A person ~~[to]~~ may not operate a vessel on the waters of this state if the person:

(i) ~~[the person has a blood or breath alcohol concentration of .08 grams or greater, as shown by any chemical test given within two hours after the alleged operation; or]~~ has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(ii) ~~[the person]~~ is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely operating a vessel~~[-];~~
or

(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(2) ~~[Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.]~~ Calculations of blood or breath alcohol concentration under this section shall be made in accordance with Subsection 41-6-44(2).

(3) For the purposes of this section, the standard of negligence is that of simple negligence, the failure to exercise that degree of care which an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(4) (a) Every person who is convicted of a violation of Subsection (1) is guilty of a class B misdemeanor, however, if the person has inflicted a bodily injury upon another as a proximate result of having operated the vessel in a negligent manner, he is guilty of a class A misdemeanor.

(b) No portion of any sentence imposed under Subsection (4)(a) may be suspended.

(5) In addition to the penalties provided for in Subsection (4), the court shall, upon a first

conviction of a violation of this section:

(a) impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 240 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a compensatory-service work program for not less than 24 nor more than 50 hours; and

(b) order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility.

(6) Upon a second conviction within five years after a first conviction under this section or under a local ordinance similar to this section adopted in compliance with Section 73-18-12.1, the court shall, in addition to the penalties provided for in Subsection (4):

(a) impose a mandatory jail sentence of not less than 240 consecutive hours nor more than 720 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a compensatory-service work program for not less than 80 nor more than 240 hours; and

(b) order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility. The court may, in its discretion, order the person to obtain treatment at an alcohol rehabilitation facility.

(7) Upon a subsequent conviction within five years after a second conviction under this section or under a local ordinance similar to this section adopted in compliance with Section 73-18-12.1, the court shall, in addition to the penalties provided for in Subsection (4):

(a) impose a mandatory jail sentence of not less than 720 consecutive hours nor more than 2,160 hours with emphasis on serving in the drunk tank of the jail, or require the person to work in a compensatory-service work program for not less than 240 nor more than 720 hours; and

(b) order the person to obtain treatment at an alcohol rehabilitation facility.

(8) A person convicted of a violation of this section is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation of this section or a local ordinance similar to this section adopted in compliance with Section 73-18-12.1 may not be terminated until all fines and fees, including fees for restitution and rehabilitation costs, assessed against the convicted person, have been paid.

(9) (a) The provisions in Subsections (5), (6), and (7) requiring a sentencing court to order

a convicted person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility or to obtain treatment at an alcohol rehabilitation facility apply to a conviction for a violation of Section 73-18-12 that qualifies as a prior offense under Subsection (10). A court shall render the same order regarding education or treatment at an alcohol rehabilitation facility for a first, second, or subsequent conviction under Section 73-18-12 that qualifies as a prior offense under Subsection (10), as the court would render for a first, second, or subsequent conviction of a violation of Subsection (1).

(b) For purposes of determining whether a conviction under Section 73-18-12 which qualified as a prior conviction under Subsection (10) is a first, second, or subsequent conviction under this Subsection (9), a previous conviction under either Section 73-18-12 or 73-18-12.2 is considered a prior conviction. Any alcohol rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Human Services.

(10) (a) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 73-18-12 or of a local ordinance similar to that section adopted in compliance with Section 73-18-12.1, the prosecution shall state for the record a factual basis for the plea, including whether there had been consumption of alcohol or drugs by the defendant in connection with the offense. The statement shall be an offer of proof of the facts which shows whether there was consumption of alcohol or drugs in connection with the offense.

(b) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of Section 73-18-12 as follows. If the court accepts the defendant's plea of guilty or no contest to a charge of violating Section 73-18-12, and the prosecutor states for the record that there was consumption of alcohol or drugs by the defendant in connection with the offense, the resulting conviction is a prior offense for the purposes of Subsection (9).

(11) A peace officer may, without a warrant, arrest a person for a violation of this section when the peace officer has probable cause to believe the violation has occurred, although not in his presence, and if the peace officer has probable cause to believe that the violation was committed by

the person.

Section 8. Section **73-18-12.4** is amended to read:

73-18-12.4. Operating under the influence -- Admissibility of chemical test -- Other evidence.

(1) In any action or proceeding in which it is material to prove that a person was operating a vessel while under the influence of alcohol or with a blood or breath alcohol content statutorily prohibited, the results of any chemical test as authorized in Section 73-18-12.6 are admissible as evidence.

~~[(2) If the chemical test was taken more than two hours after the alleged operation, the test result is admissible as evidence of the person's blood or breath alcohol level at the time of the alleged operation, but the trier of fact shall determine what weight shall be given to the test results.]~~

~~[(3)]~~ (2) The provisions of this section do not prevent a court from receiving any other admissible evidence as to a defendant's blood or breath alcohol level at the time ~~[of the alleged operation]~~ relevant to the alleged offense.

Section 9. Section **76-5-207** is amended to read:

76-5-207. Automobile homicide.

(1) (a) Criminal homicide is automobile homicide, a third degree felony, if the ~~[actor]~~ person operates a motor vehicle ~~[while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the vehicle]~~ in a negligent manner~~[-]~~ causing the death of another and:

(i) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation.

(b) For the purpose of this subsection, "negligent" means simple negligence, the failure to

exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances.

(2) (a) Criminal homicide is automobile homicide, a second degree felony, if the [actor] person operates a motor vehicle [~~while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the motor vehicle~~] in a criminally negligent manner[-] causing the death of another and:

(i) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation.

(b) For the purpose of this [~~subsection~~] section, "criminally negligent" means criminal negligence as defined by Subsection 76-2-103(4).

(3) The standards for chemical breath analysis as provided by Section 41-6-44.3 and the provisions for the admissibility of chemical test results as provided by Section 41-6-44.5 apply to determination and proof of blood alcohol content under this section.

(4) [~~Percent by weight of alcohol in the blood is based upon grams of alcohol per one hundred cubic centimeters of blood.~~] Calculations of blood or breath alcohol concentration under this section shall be made in accordance with Subsection 41-6-44(2).

(5) The fact that a person charged with violating this section is [~~on~~] or has been legally entitled to use alcohol or a drug is not a defense to any charge of violating this section.

(6) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

(7) For purposes of this section, "motor vehicle" means any self-propelled vehicle and includes any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.

