



2014 SEP 16 AM 10:06

OFFICE OF THE
SECRETARY

VINCENT C. GRAY
MAYOR

SEP 16 2014

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Ave., N.W., Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

Enclosed for consideration and enactment by the Council is the "Breath Alcohol Testing Program Rulemaking Approval Resolution of 2014." If enacted, the proposed resolution will add Chapter 37 to Title 28 (Corrections, Courts, and Criminal Justice) of the District of Columbia Municipal Regulations (DCMR). This rulemaking establishes the requirements for the certification, calibration and maintenance of the breath alcohol testing equipment, and to provide forensic science services and training pertaining to forensic testing of breath for ethanol content through the Breath Alcohol Testing Program administered by the Office of the Chief Medical Examiner. The proposed rules were published at 61 DCR 6443 on June 27, 2014, and no comments were received during the thirty (30) day notice period.

The rulemaking is authorized by section 16 of the Department of Forensic Sciences Establishment Act of 2011, effective August 17, 2011 (D.C. Law 19-18; D.C. Official Code § 5-1501.01 *et seq.*). This rulemaking requires a forty-five (45) day period for review by the Council, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, by resolution, within the forty-five (45) day review period, the rulemaking shall be deemed approved.

I urge the Council to take prompt and favorable action on the "Breath Alcohol Testing Program Rulemaking Approval Resolution of 2014."

Sincerely,

A handwritten signature in black ink that reads "Vincent C. Gray".
Vincent C. Gray


Chairman Phil Mendelson
at the request of the Mayor

A PROPOSED RESOLUTION

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Phil Mendelson, at the request of the Mayor, introduced the following resolution, which was referred to the Committee on _____.

To approve the proposed rules to establish requirements for the certification, calibration and maintenance of the breath alcohol testing equipment, and to provide forensic science services and training pertaining to forensic testing of breath for ethanol content through the Breath Alcohol Testing Program administered by the Office of the Chief Medical Examiner.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, that this resolution may be cited as the “Breath Alcohol Testing Program Rulemaking Approval Resolution of 2014.”

Sec. 2. Pursuant to the section 16 of the Department of Forensic Sciences Establishment Act of 2011, effective August 17, 2011 (D.C. Law 19-18; D.C. Official Code § 5-1501.01 *et seq.*), the Council approves the proposed rulemaking to add a new chapter 37 to Title 28 of the District of Columbia Municipal Regulations that was adopted by the Director of the Department of Forensic Sciences to establish requirements for the certification, calibration and maintenance of the breath alcohol testing equipment, and to provide forensic science services and training pertaining to forensic testing of breath for ethanol content through the Breath Alcohol Testing Program administered by the Office of the Chief Medical Examiner.

Sec. 3. The Council of the District of Columbia shall transmit a copy of this resolution, upon its adoption, to the Director of the Department of Forensic Sciences.

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Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec.5 Effective date.

This resolution shall take effect immediately.

D.C. DEPARTMENT OF FORENSIC SCIENCES

NOTICE OF FINAL RULE MAKING

The Director of the Department of Forensic Sciences, pursuant to the authority set forth in Department of Forensic Sciences Establishment Act of 2011, effective August 17, 2011 (D.C. Law 19-18; D.C. Official Code § 5-1501.01 *et seq.*), hereby gives notice of its intent to adopt the final rules that add a new Chapter 30 and section 3700 of Title 28 of the DCMR in support of the District of Columbia Breath Alcohol Testing Program.

The Department published notice of the proposed rulemaking at 61 DCR 6443 on June 27, 2014, and received no comments during the thirty (30) day notice period. Pursuant to D.C. Official Code § 5-1501.15 these rules are also being transmitted to the Council of the District of Columbia, and the final rules may not become effective until the expiration of the forty-five (45) day period of Council review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, by resolution, within the forty-five (45) day review period, the proposed rules shall be deemed approved.

Title 28 DCMR is amended by adding a new chapter 30 and section 3700 to read as follows:

3700 BREATH ALCOHOL PROGRAM MANAGER RESPONSIBILITIES

3700.1 The primary function of the Breath Alcohol Program Manager is as follows:

- (a) Provide the technical and administrative support for the District's breath alcohol testing program; and
- (b) Maintain all records that pertain to the calibration, certification, accuracy, validity, and data generated from evidentiary instruments and licensure of operators and technicians.

3700.2 Supervision of the program shall include:

- (a) Maintaining evidentiary instrument(s), and affiliated equipment;
- (b) Supervising data collection for initial certification and/or approval of individual evidentiary instruments, including the following:
 - 1. Developing techniques for testing and for certification of evidentiary instruments; and
 - 2. Selecting site location(s) for evidential breath alcohol testing.
- (c) Providing testimony as an expert witness, either by affidavit or in person, or in any other manner approved by the court, regarding breath alcohol testing;
- (d) Maintaining records of all operators' and technicians' licensure records;

- (e) Modifying the Quality Management Manual Breath Alcohol Program and Basic Training Program for Breath Alcohol Operator's Manual (Operator's Manual) when needed; and
- (f) Maintaining all versions of the Operator's Manual and the Quality Management Manual Breath Alcohol Program (Quality Manual) to include revision dates.

3700.3 The Breath Alcohol Program Manager shall maintain all records that pertain to the calibration, accuracy, and validity of, and data generated from, evidentiary instruments used by the Breath Alcohol Program, for a minimum of five (5) years.

3700.4 The Breath Alcohol Program Manager shall provide copies of records listed in sections 3700.3 for inspection upon request from the following:

- (a) The Mayor; or authorized representative;
- (b) The Office of the United States Attorney for the District of Columbia;
- (c) The Office of the Attorney General for the District of Columbia;
- (d) The Metropolitan Police Department (MPD);
- (e) The Office of the District of Columbia Auditor;
- (f) The Office of the Inspector General; and
- (g) Any other law enforcement agency.

3701 APPROVAL OF DEVICES

3701.1 The Breath Alcohol Program Manager shall approve all evidentiary instruments used by licensed operators.

3701.2 Devices are approved and certified in accordance with the admissibility criteria defined in D.C. Official Code § 50-2206.52a.

3701.3 The standard operating procedures in the Quality Manual are the procedures for establishing the accuracy of the District's evidentiary instruments.

3702 OPERATOR LICENSURE

3702.1 The Breath Alcohol Program Manager shall approve and maintain a Basic Training Program in accordance with the Operator's Manual and shall issue operator licenses under the standards in the Operator's Manual.

3702.2 An applicant shall successfully complete a course of instruction which meets the criteria set forth in the Operator's Manual in order to obtain licensure as an operator. that includes:

- (a) Basic breath instrument operation;
- (b) Basic troubleshooting for the evidential instrument; and

(c) Subject testing procedures.

- 3702.3 An applicant must also establish successful participation in and completion of a Standardized Field Sobriety Testing course in accordance with the curriculum established by the National Highway Traffic Safety Administration.
- 3702.4 Prior to initial licensure an applicant must satisfactorily complete examinations, prepared and given by the Breath Alcohol Program Manager in accordance with the Operator's Manual to include:
- (a) A written examination; and
 - (b) A practical examination.
- 3702.5 An operator card and associated personal identification number (PIN) will be issued to a successful applicant as proof of licensure by the Breath Alcohol Program Manager.
- 3702.6 An operator license is valid for two years unless deactivated or suspended by the Breath Alcohol Program Manager.

3703 RENEWAL OF CURRENT OPERATOR LICENSURE

- 3703.1 Renewal of an operator licensure requires satisfactory completion of a course of instruction approved by the Breath Alcohol Program Manager and as defined in the Operator's Manual, including:
- (a) An overview of any changes to the manuals or procedures for testing; and
 - (b) A practical examination.
- 3703.2 Upon license renewal a new breath operator card and associated PIN will be issued that is valid for a period of two (2) years unless deactivated or suspended by the Breath Alcohol Program Manager.
- 3703.3 If an operator fails to renew the license in accordance with the Operator's Manual the previously issued operator card and associated PIN will be deactivated.

3704 OPERATOR LICENSURE DEACTIVATION AND SUSPENSION

- 3704.1 Deactivation shall be initiated by the licensed operator in the event of voluntary surrender of licensure in accordance with Operator's Manual.
- 3704.2 An operator's license shall be deactivated by the Breath Alcohol Program Manager in the following situations:
- (a) Failure to renew;
 - (b) Change in employment under which the licensure was acquired;
 - (c) Failure to comply with protocols in the Operator's Manual; or
 - (d) Upon receipt of notification by the Breath Alcohol Program Manager that an operator's arrest powers have been suspended by MPD.

3704.3 The Breath Alcohol Program Manager shall suspend an operator's license if an operator:

- (a) Intentionally disregard or violates these regulations;
- (b) Falsely or deceitfully obtains licensure;
- (c) Engages in malfeasance or noncompliance with any provision of these regulations; or
- (d) Performs his duties in an unreliable or incompetent manner.

3704.4 An operator with a suspended or deactivated license will not be permitted to operate an evidentiary breath testing instrument.

3705 REQUIREMENTS TO BE A LICENSED TECHNICIAN

3705.1 The minimum qualifications for certification as a licensed technician are:

- (a) A baccalaureate degree from an accredited college or university with a major in chemistry, a major in another scientific field with sufficient semester hours in chemistry or other qualifications as determined by the Breath Alcohol Program Manager;
- (b) Employment with the OCME; and
- (c) Satisfactory completion of a course of instruction as set forth in the Quality Manual.

3706 TECHNICIAN LICENSURE ACTIVATION AND SUSPENSION

3706.1 Technician licensure shall be deactivated at the discretion of the Breath Alcohol Program Manager if the technician is no longer actively engaged in the breath alcohol testing program.

3706.2 Technician licensure shall be suspended by the Breath Alcohol Program Manager for malfeasance, falsely or deceitfully obtaining certification or purposeful failure to carry out the responsibilities set forth in this title.

3706.3 A technician whose license has been suspended may file an appeal in accordance with the procedures established in the District Personnel Manual.

3707 ACCEPTABLE RANGES FOR EVIDENTIARY BREATH TESTS

3707.1 The reference standard used to conduct an accuracy check of an evidentiary instrument must agree within ± 0.005 grams of alcohol per 210 liters of air of the predicted value.

3707.2 If the instrument's accuracy check falls outside of the acceptable range as defined in section 3707.1, the evidentiary instrument shall be disabled and licensed operators will not be able to administer evidential breath tests with that instrument.

3707.3 Duplicate breath specimens shall be collected and the analytical results for the consecutive breath specimens shall correlate within ± 0.02 grams of alcohol per 210 liters of breath/ of each other.

3708 DEFINITIONS

3708.1 For the purposes of this section, the following terms shall have the meanings ascribed below:

“Accuracy Check” – The evaluation made by the breath test instrument of a reference standard with a predicted value which occurs during the evidentiary breath test sequence.

“Breath Alcohol Program Manager” - The OCME employee designated by the Chief Medical Examiner for the District of Columbia to oversee licensure of operators and technicians and certification of instruments used by licensed operators to test the alcohol content of breath.

“Certification”- The process by which reference standards are evaluated and a series of tests performed at least every one-hundred and eighty days (180) to verify accuracy of the breath testing instrument.

“Evidentiary Instrument” - An analytical breath alcohol measuring device which has been issued a “Certificate of Instrument Accuracy” as defined by the Quality Manual and has been placed into field service used to collect evidence.

“Licensed Operator” - An operator who is licensed by the Breath Alcohol Program Manager to perform evidentiary breath tests.

“Licensed Technician”- A person designated by the Breath Alcohol Program Manager to be responsible for the certification, calibration and maintenance of breath testing instrument.

“Operator License”- A certificate issued by the Breath Alcohol Program Manager.

“Operator’s Manual” – The “Basic Training Program for Breath Alcohol Operators”, training manual maintained by the Breath Alcohol Program Manager.

“Predicted Value” – A value produced by the evidentiary instrument for each evidentiary breath test based upon the barometric pressure compensation and the reference standard value.

“Quality Manual” – The “Quality Management Manual Breath Alcohol Program”, training manual maintained by the Breath Alcohol Program Manager.

“Reference Standard” – A commercial dry gas standard consisting of ethanol and balanced nitrogen traceable to the National Institute of Standards and

Technology with a verified known value. The verified known value for evidentiary breath tests is 0.082g of alcohol per 210L of air.

“Subject Test” – The evidentiary breath alcohol test which meets the criteria defined in the Operator’s Manual.

Comments on these rules should be submitted in writing to Max M. Houck, PhD., Director, Department of Forensic Sciences, Government of the District of Columbia, 401 E Street, SW, 4th Floor, Washington DC 20024, via telephone on (202) 727-8267, via email at contactDFS@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days of the date of publication of this notice in the D.C. Register. Additional copies of these rules are available from the above address.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



Legal Counsel Division

MEMORANDUM

TO: Lolita S. Alston
Director
Office of Legislative Support

FROM: Janet M. Robins
Deputy Attorney General
Legal Counsel Division

DATE: August 20, 2014

SUBJECT: Legal Sufficiency Review of the "Breath Alcohol Testing Program Rulemaking Approval Resolution of 2014"
(AE-14-237E)

This is to Certify that this Office has reviewed the above-referenced Resolution and that we have found it to be legally sufficient. If you have any questions in this regard, please do not hesitate to call me at 724-5524.

A handwritten signature in cursive script that reads "Janet M. Robins".

Janet M. Robins