

Legislative Analysis



MAINTAIN BODILY ALCOHOL CONTENT OF 0.08 GRAMS AS PER SE STANDARD FOR OPERATING WHILE INTOXICATED

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4308 as introduced
Sponsor: Rep. Abdullah Hammoud

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4309 as introduced
Sponsor: Rep. Graham Filler

Committee: Judiciary
Complete to 3-1-21

SUMMARY:

House Bill 4308 would amend the Michigan Vehicle Code to establish a bodily alcohol content (BAC) of 0.08 grams as the *per se* level for drunk driving, and House Bill 4309 would make complementary changes to the Code of Criminal Procedure. (The *per se* level means that actual impairment does not have to be demonstrated. BAC measures the amount of alcohol in a person's blood, breath, or urine.) The bills would remove the sunset (expiration date) of October 1, 2021, that under current law will increase the *per se* standard to 0.10 grams on that date, and would thus maintain a BAC of 0.08 grams as the *per se* level for drunk driving.

House Bill 4308 would amend the Michigan Vehicle Code. Under the state's *per se* statute (or presumptive level for determining if a person is guilty of drunk driving), a person with a BAC of 0.08 grams is considered to be operating while intoxicated (OWI) and is guilty of that offense even if the person did not demonstrate signs of impairment. Currently, the code requires the *per se* level to revert to a BAC of 0.10 grams on October 1, 2021. The bill would eliminate the sunset provision and thus maintain a BAC of 0.08 grams as the *per se* level for operating a vehicle while intoxicated.

The bill would also remove the sunsets for the lower BAC level of 0.08 grams currently contained in a provision pertaining to chemical testing, the definition of "any bodily alcohol level" for drivers less than 21 years of age, the definition of "unlawful alcohol content" in a provision pertaining to refusing a chemical test, and a provision pertaining to unlawful BAC levels for drivers of commercial motor vehicles.

MCL 257.625, 257.625a, 257.625g, and 257.625m

House Bill 4309 would amend the Code of Criminal Procedure to make complementary changes to offense variables in the sentencing guidelines.

Michigan uses an indeterminate sentencing scheme for most criminal offenses. The maximum sentence that can be imposed for a particular crime is established in statute. While the sentencing guidelines are no longer mandatory, they are used to provide guidance in determining a sentence appropriate to the facts of the crime. A judge has discretion to go above or below the sentencing range but cannot exceed the statutory maximum term of imprisonment for the offense. In determining an appropriate sentence range, the judge looks at and scores a

number of factors, such as whether the offender has a record of prior convictions and certain elements of the crime known as “offense variables”—for example, whether a gun was used or a victim was injured or killed.

For Offense Variable 3 (physical injury to a victim), 50 points are scored if death results from the commission of a crime and the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive and the offender had a BAC of 0.08 grams or higher. The bill would eliminate the sunset provision so that on October 1, 2021, the *per se* BAC standard would not increase to 0.10 grams but would remain at 0.08 grams.

Under Offense Variable 18 (operator ability affected by alcohol or drugs), 10 points are scored if the offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive with a BAC of at least 0.08 grams but less than 0.15 grams. Currently, the lower level will be raised to a BAC of 0.10 grams on October 1, 2021, which would lower the points that could be scored for a BAC of 0.08 grams to five. The bill would maintain the lower limit at a BAC of 0.08 grams.

[In the above provisions, maintaining the BAC at the lower level by eliminating the sunset would maintain the status quo. By contrast, if the BAC were raised to 0.10 grams, the impact on a person convicted of driving with a BAC of at least 0.08 grams but less than 0.10 grams could, in some cases, affect whether the person would be eligible for community-based sanctions, such as jail or probation, or be sent to prison.]

MCL 777.33 and 777.48

Each bill would take effect 90 days after its enactment. The bills are tie-barred to one another, which means that neither could not take effect unless both were enacted.

BACKGROUND:

2003 PA 61 amended the Michigan Vehicle Code to, among other things, lower the *per se* BAC level for operating while intoxicated from 0.10 to 0.08 grams or higher. A person who is determined to be at or above the *per se* level does not have to demonstrate actual impairment to be found guilty of drunk driving. 2003 PA 61 included a 10-year sunset (expiration) on the lower BAC level. 2013 PA 23 extended that sunset to October 1, 2018. 2017 PA 153 subsequently extended the sunset to October 1, 2021. If the current sunset is not lifted or extended, the previous 0.10 BAC level would be reinstated, effective October 1, 2021, as the *per se* level for driving while intoxicated. These bills would remove the sunset and permanently make the 0.08 BAC level the *per se* standard for driving while intoxicated.

From a historical perspective, one objective of the original 10-year sunset was to allow time to see if data supported lowering the *per se* level. At the time the 2003 legislation was being considered, several new anti-drunk-driving measures had been recently implemented; for example, there was an expansion in the use of ignition interlock devices. Because there were initial signs that those measures were having a positive impact on drunk driving, some wanted more time to see if the measures were sufficient without having to change the *per se* standard. It was feared that lowering the standard would inadvertently capture social drinkers—e.g., those having a couple of glasses of wine with dinner—rather than deter hardcore alcohol abusers. Some wanted an opportunity for a future legislature to review the impact of 2003 PA

61, so a sunset (expiration) date was placed in it. A similar rationale applied to extensions of the sunset in 2013 and 2017. Now, as the October 1, 2021, sunset date nears, the legislature must again decide whether to remove or extend the sunset or allow the BAC to reset to the higher 0.10 level.

FISCAL IMPACT:

By eliminating the scheduled sunset of Michigan's 0.08 BAC standard for driving while intoxicated (as described above), the bills would have two impacts. First, the state would avoid a potential loss of federal-aid highway funds. Second, the state would forgo any savings to state and local correctional systems that might result from reverting to the .10 BAC standard. Each of these issues is discussed in more detail below.

Impact on State Transportation Funding

The federal government has long provided funds to states for highway programs. These federal funds help states achieve both state and national highway performance goals. Over the last five years, federal funds have provided approximately \$1.1 billion per year for Michigan highway programs—approximately one-third of annual state transportation budgets.

To achieve national highway operational or safety objectives, federal law has established various requirements of the states as a condition of receiving federal funds. Federal requirements include enforcement of vehicle size/weight limitations, control of junk yards and outdoor advertising, and safety-related requirements, including mandatory safety belt laws, establishment of a national (21-year-old) minimum drinking age, zero tolerance blood alcohol for underage drivers, restrictions on open containers of alcohol in vehicles, adoption of federal commercial driver's license standards, and adoption of a .08 BAC *per se* standard for driving while intoxicated.¹ Federal requirements encouraging states to adopt .08 *per se* laws are established in 23 USC 163 and implemented through 23 CFR 1225.

Federal law establishes penalties or sanctions through the withholding of federal-aid highway funds to states that do not comply with these requirements.

Note that sanctions are different for the various federal aid requirements. Some sanctions only apply to specific federal-aid categorical program. Some sanctions are immediate, others take effect on delayed schedules. Some funding losses are permanent, others can be reversed.

Federal-aid penalties apply to *apportionments*, which are effectively the maximum amounts individual states can receive from formula-distributed categorical programs.

A state's failure to comply with 23 USC 163 requirements regarding Operation of Motor Vehicles by Intoxicated Persons (0.08% BAC) could result in the withholding of 6% of National Highway Performance Program (NHPP) and Surface Transportation Program (STP) apportionments.

¹ The federal-aid highway program is described in detail in the FHWA publication *Financing Federal Aid Highways*. The 2017 edition is found here: <https://www.fhwa.dot.gov/policy/olsp/fundingfederalaid/>. Specific penalties applicable to the federal-aid highway program are included as Appendix D of the publication.

If Michigan does not lift the sunset on the .08 BAC *per se* operating while intoxicated standard, the state would fall out of compliance with the 23 USC 163 federal-aid highway program requirement. The state could be sanctioned with the loss of certain federal funds. The Michigan Department of Transportation estimates that this sanction would equate to approximately \$53.0 million in federal aid withheld each year.

There are several factors that would determine whether the sanction would result in a permanent loss of withheld federal funds or if withheld funds could be restored.

Impact on Correctional Costs

The bills are also likely to have an impact on future state and local correctional costs. If the state were to revert to the .10 BAC standard on October 1, 2021, it is likely that the number of felony and misdemeanor drunk driver convictions would be reduced to some degree and that some of those convicted would be sentenced under lesser offenses. This would reduce state and local correctional costs by an indeterminate amount, as well as revenues generated from fines.

Based on 2020 figures, the average cost of prison incarceration in a state facility is roughly \$42,200 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision average about \$4,300 per supervised offender per year. Those costs are financed with state general fund/general purpose revenue. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. Any decrease in penal fine revenues would reduce funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.