

# Legislative Analysis



## **MAINTAIN BLOOD 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 (H-1) as reported from committee**  
**Sponsor: Rep. Abdullah Hammoud**

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

**House Bill 4309 as reported from committee**  
**Sponsor: Rep. Graham Filler**

**Committee: Judiciary**  
**Complete to 3-9-21**

**BRIEF SUMMARY:** House Bill 4308 would amend the Michigan Vehicle Code to establish a blood 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.

**FISCAL IMPACT:** The bills would maintain the current *per se* level for operating a vehicle while intoxicated. The fiscal impact of raising the threshold for drunk driving to 0.10 is discussed in more detail later in the analysis (see *Fiscal Implications* below).

### **THE APPARENT PROBLEM:**

Studies on the effect of alcohol consumption on drivers reveal that though even small amounts of alcohol can affect a person's ability to drive, the risk of being involved in a crash steadily increases as the level of blood-alcohol concentration increases. According to the National Highway Traffic Safety Administration (NHTSA), the relative risk of a driver's being involved in a single-vehicle crash is at least 11 times greater with a BAC between .08 and .10 than with a BAC of zero. Since the BAC limits were lowered across the U.S. almost two decades ago, drunk driving-related fatalities have decreased approximately 23%. Yet Michigan is the only state in the nation that has not established a *per se* level of 0.08 or lower as the permanent standard for drunk driving. On October 1 of this year, when the sunset lowering the BAC to 0.08 expires, the standard will increase to 0.10. If that should happen, deaths and injuries related to accidents involving impaired drivers is likely to increase. In addition, a BAC limit of 0.10 will trigger the imposition of federal penalties that will result in a loss of over \$50.0 million in annual federal transportation funding used for state roadway resurfacing and rehabilitation projects and local road projects.

In light of the positive impact on lowering drunk driving rates and the continuing federal sanctions for noncompliance, legislation has again been offered to remove the sunset and keep the level for drunk driving at 0.08 BAC.

## ***THE CONTENT OF THE BILLS:***

**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 BAC limit at 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, and House Bill 4308 is tie-barred to House Bill 4220. A bill cannot take effect unless each bill to which it is tie-barred is also enacted. House Bill 4220 is itself tie-barred to House Bill 4219. House Bills 4219 and 4220 would enable a person who had a single conviction of operating a vehicle while intoxicated (OWI) to expunge the conviction under certain circumstances.

### ***BACKGROUND INFORMATION:***

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 INFORMATION:***

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.<sup>1</sup> 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.

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

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<sup>1</sup> 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.

revenues would reduce funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

**ARGUMENTS:**

**For:**

Fatalities and incapacitating injuries increase when alcohol is involved, with the likelihood of an alcohol-related crash increasing as blood-alcohol concentrations increase. According to MADD, lowering the *per se* limit for drunk driving to 0.08 has resulted in a 23% reduction in drunk driving deaths. This supports the contention that the lower *per se* level is an effective deterrent to drunk driving, especially when combined with other policies, such as training for servers in recognizing intoxicated patrons, license suspension or revocation, enrollment in sobriety courts, and use of ignition interlock devices. Therefore, it simply does not make sense to raise the *per se* level for drunk driving to the pre-2003 level.

Moreover, if the bills are not enacted, the state will be out of compliance with federal drunk driving standards as of the next fiscal year, and the state will lose needed road construction dollars. The increase in the *per se* BAC level will also affect the scoring variables used to determine an offender's range for an appropriate sentence and thus influence whether some offenders go to prison or are eligible for community sanctions such as admission to a sobriety court. Sobriety courts are proving to be an effective tool in reducing recidivism among participants, thereby increasing public safety and lowering incarceration costs.

Often overlooked in the discussion are the economic costs to society, such as lost productivity and health care costs due to injuries and fatalities caused by impaired drivers. Such costs are likely to rise if, in raising the 0.08 limit to 0.10, the number of serious crashes are also increased. Considering the above, it is easy to see why proponents of the bills say that it is imperative to maintain the 0.08 BAC standard. With the upper limit for *per se* drunk driving penalties about to rise soon when the sunset expires, the bills are a timely remedy to keep a good public policy in force.

**Response:**

The House Judiciary committee reported an H-1 substitute for House Bill 4308 that tie-barred the bill to legislation that would allow a first offense violation of the drunk and drugged driving laws to be expunged if the offense did not result in injury or death to another person (HB 4220, which is tie-barred to HB 4219). It should be noted that similar legislation was passed by both chambers in the 2019-20 legislative session and was pocket vetoed by the governor. In addition, the positions on HBs 4308 and 4309 that are listed below were offered before the tie-bar was added to HB 4308; some supporters of this package previously expressed opposition to HBs 4219 and 4220 in their current form.

**For:**

A review of 16 years of data from the National Highway Traffic Administration's Fatality Analysis Reporting System revealed that, of the 223,471 deaths due to accidents involving at least one driver with a positive BAC test, 85% resulted from crashes that involved a driver with a BAC at or above the legal limit.<sup>2</sup> Such statistics appear to support a drunk driving limit of

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<sup>2</sup> Fatal crashes might decline with lower legal blood alcohol limits, Reuters Health, March 16, 2020. <https://www.reuters.com/article/us-health-alcohol-driving/fatal-crashes-might-decline-with-lower-legal-blood-alcohol-limits-idUSKBN2133H9>

0.08. Interestingly, the trend across the world has been to lower the threshold even further. Indeed, Utah has established a *per se* limit of 0.05, a level recommended by the National Highway Safety Transportation Board as a way to further reduce alcohol-impaired deaths and injuries. Moreover, research shows that alcohol increases the intoxicating effect of marijuana on people who mix the two. Thus, as medical marijuana use increases, and recreational marijuana has been legalized, many say it is time for the BAC for *per se* drunk driving to be permanently established at 0.08, if not lower, as Utah and much of the world have done.

***POSITIONS:***

Representatives of the following entities testified in support of the bills (3-2-21):

- Prosecuting Attorneys Association of Michigan (PAAM)
- Michigan Department of Transportation
- Michigan State Police

The following entities indicated support for the bills:

- Mothers Against Drunk Driving (MADD) (3-2-21)
- Foundation for Advancing Alcohol Responsibility (Responsibility.org) (3-9-21)
- Michigan Association of Chiefs of Police (3-9-21)
- Anheuser-Busch (3-2-21)
- Wine Institute (3-2-21)
- AAA Michigan (3-2-21)
- Michigan Sheriffs' Association (3-9-21)
- Safe and Just Michigan (3-2-21)
- Criminal Defense Attorneys of Michigan (CDAM) (3-9-21)

Legislative Analyst: Susan Stutzky  
Fiscal Analysts: William E. Hamilton  
Robin Risko

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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.