

## ROADSIDE DRUG TESTING PILOT PROJECT

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**Senate Bill 207 (reported from House committee as H-1)**  
**Sponsor: Sen. Rick Jones**

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

**Senate Bill 434 (reported from House committee as H-1)**  
**Sponsor: Sen. Tom Casperson**

**House Committee: Judiciary**  
**Senate Committee: Judiciary**  
**Complete to 4-7-16**

### SUMMARY:

Senate Bill 434 allows the Michigan State Police to establish a one-year pilot program in five counties under which a saliva test could be given (in a similar manner as a breathalyzer test for alcohol) to detect if a driver was under the influence of a controlled substance.

Senate Bill 207 would allow peace officers who had completed specialized training to require, with reasonable cause, a driver suspected of driving drugged to take a saliva test, make a warrantless arrest based on the test's outcome, make it a civil infraction for a driver to refuse a saliva test, order a commercial driver out of service for driving drugged or for refusing to submit to the saliva test, and make it a misdemeanor for a commercial driver to refuse a saliva test.

The bills are tie-barred to each other, meaning that one bill cannot take effect unless the bill it is tie-barred to is also enacted. The bills would take effect 90 days after enactment.

Senate Bill 434 adds two new sections to the Michigan Vehicle Code (MCL 43b and 625t). The bill allows the Department of State Police (MSP) to establish a one-year, five-county pilot program for roadside drug testing to determine whether an individual is operating a vehicle while under the influence of a controlled substance in violation of the drunk/drugged driving laws. The bill specifies that:

- ❖ The sections added by the bill would be known and could be cited as the Barbara J. and Thomas J. Swift Law.
- ❖ A pilot program would be for one year. Funding would be subject to appropriation.
- ❖ MSP must select five counties in which to implement the pilot program.
- ❖ A county would be eligible to participate in the program if it has a law enforcement agency within its boundary that employs at least one law enforcement officer who is a certified drug recognition expert. This would include, but not be limited to, a state police post, sheriff's department, or municipal police department.
- ❖ MSP must develop a written policy for the program's implementation and the administration of roadside drug testing.
- ❖ MSP could promulgate rules to implement a pilot program.

- ❖ Not more than 90 days after the conclusion of a pilot program, MSP must submit a report to the committees of the Legislature with primary responsibility for judicial and criminal justice issues. The report must cover all of following:
  - How pilot program participant counties were selected.
  - The different types of law enforcement agencies in the pilot program participant counties that engaged in roadside drug testing.
  - Relevant statistical data, including, but not limited to, the number of traffic stops resulting in an arrest for operating under the influence of a controlled substance as a result of roadside drug testing and the number and type of convictions resulting from an arrest made based on a roadside drug testing result.
- ❖ Upon the conclusion of a pilot program, MSP may, subject to appropriation, establish additional pilot programs in eligible counties not part of the original five counties. The duration of a pilot program established under this provision would be one year.

#### Definitions

"Preliminary oral fluid analysis" would mean the on-site taking of a preliminary oral fluid test, performed by a certified drug recognition expert, from the oral fluid of a person for the purpose of detecting the presence of a Schedule 1-5 controlled substance.

"Certified drug recognition expert" would mean a law enforcement officer trained to recognize impairment in a driver under the influence of a controlled substance rather than, or in addition to, alcohol.

"Controlled substance" means a drug, substance, or immediate precursor included in Schedules 1-5.

**Senate Bill 207** adds several sections to the Michigan Vehicle Code (MCL 257.62a, 257.625r, and 257.625s). Briefly, the bill establishes a roadside procedure for suspected drugged drivers similar to that currently in place for drunk drivers who are given a roadside breathalyzer test. The provisions below apply only to a peace officer certified as a drug recognition expert in a county that is participating in the roadside drug testing pilot program created under Senate Bill 434. The bill would do the following:

- ❖ Allow a peace officer to require a person to submit to a preliminary oral fluid analysis (saliva test). An officer must have reasonable cause to believe the driver's ability to operate the vehicle is affected by the consumption of a controlled substance or that the person has any bodily amount of a Schedule 1 controlled substance or cocaine. This applies to vehicles operated upon a highway, other places open to the public or generally accessible to motor vehicles, and parking lots.
- ❖ Allow a certified officer to arrest a person in whole or in part upon the results of the roadside saliva test.

### Admissibility in court

- ❖ Allow the results of the roadside saliva test to be admissible in a criminal prosecution or administrative hearing only for one of more of the following purposes (these are similar to what is in place for results of a preliminary chemical breath analysis, the roadside breathalyzer test given to detect a driver's bodily alcohol content):
  - To assist the court or hearing officer in determining a challenge to the validity of an arrest.
  - As evidence of the presence or nonpresence of a controlled substance in the defendant's saliva if offered by the defendant (or prosecution) to rebut testimony elicited on cross-examination of a defense witness (or prosecution witness) that a preliminary saliva test analysis of the defendant's saliva showed the presence (or no presence) of a controlled substance that was not found (or had been found) to be present when a chemical test of the defendant's blood or urine was administered under Section 625a of the code.

### Penalties for refusing a roadside saliva test

- ❖ Specify that a person who submits to a roadside saliva test remains subject to other requirements of drunk driving laws for purposes of chemical tests described in those provisions. (This is similar to persons subjected to a roadside breathalyzer test.)
- ❖ Subject the person to a civil infraction for refusing to submit to a roadside saliva test (this does not apply to commercial drivers).

### Commercial drivers

- ❖ Allow the results of the roadside saliva test to be used by the certified officer in determining whether to order a commercial driver out of service for 24 hours under Section 319d. If the commercial driver refused to submit to the roadside saliva test, the officer would have to order the person out of service. The officer could also use other competent evidence in determining whether to order the driver out of service.
- ❖ Make refusing to submit to a roadside saliva test by a commercial driver a misdemeanor punishable by imprisonment for not more than 93 days and/or a fine of not more than \$100.
- ❖ Require that a commercial driver asked to submit to a roadside saliva test be advised that refusing the test is a misdemeanor punishable by imprisonment for not more than 93 days and/or a fine of not more than \$100, and will result in the 24-hour out-of-service order.

### Expert witness testimony

- ❖ Allow a person qualified by knowledge, skill, experience, training, or education in the administration of standardized field sobriety tests, including the horizontal gaze nystagmus (HGN) test, to testify subject to showing of a proper foundation of qualifications. In addition, this provision would not preclude the admissibility of a

nonstandardized field sobriety test if it complies with the Michigan Rules of Evidence.

#### Definition

"Standardized field sobriety test" is defined to mean one of the standardized tests validated by the National Highway Traffic Safety Administration (NHTSA). A test is considered a standardized field sobriety test if it is administered in substantial compliance with the standards prescribed by NHTSA. (Standardized field sobriety tests validated by NHTSA include the one-leg stand, walk and turn, and the horizontal gaze nystagmus tests.)

### **BRIEF DISCUSSION OF THE ISSUES:**

Michigan prohibits not just driving while drunk, but also driving when drugged. Operating a motor vehicle while under the influence of a controlled substance or with a combination of alcohol and a controlled substance, or with any amount of a Schedule 1 controlled substance (which includes heroin, cocaine, marihuana, and LSD, among other drugs) may subject a person to incarceration, criminal fines, and driver license sanctions. Driving while drugged also increases the chance of causing an accident that may result in serious injuries or death to the driver and/or to others.

Yet, despite efforts to educate the public on the dangers of driving while under the influence of controlled substances, including prescription medications, drugged driving is increasing. Some believe that to curb drugged driving, and to identify and take dangerous drivers off the road, law enforcement should be allowed to use recently developed technology that tests saliva for the presence of certain drugs known to cause impairment. The bills would address the issue by allowing the Department of State Police to implement a pilot program to research the feasibility and reliability of using such devices during a traffic stop to identify drivers operating a vehicle while under the influence of certain controlled substances.

#### Arguments in support

Proponents of the proposed legislation say that it is a needed tool for law enforcement in the effort to identify and remove dangerous drivers from the road before others are harmed. The oral swabs work similarly to preliminary breath tests (PBTs) that have long been used to detect alcohol levels at traffic stops and used by police officers as probable cause to make an arrest for drunk driving.

Currently, there are about three models of the swab test. Each takes a sample of saliva from a person's tongue or cheek and is capable of testing for cannabis, cocaine, methamphetamines, and opiates. The saliva is wholly contained in the single use device. According to information available online, the tests are able to detect recent use of a drug, often hours before it is detectable in a urine sample. Under the bills, only officers who had completed specialized training and received certification as a drug recognition expert would be authorized to conduct the saliva tests, and only in the five counties selected for the initial pilot program.

It is important to note that the saliva tests give only a preliminary result; verification of the results is required. However, a positive test, coupled with an officer's observation of unsafe driving or results of a standardized field sobriety test (such as walking a straight line), can give an officer important information when determining whether to place a person under arrest for drugged driving or, in the case of a commercial driver, issue a 24-hour-out-of-service order. The roadside saliva test may also save some drivers from unnecessary arrest for suspected drugged driving. For example, someone observed weaving between lanes may not be drunk or drugged, but may be driving distracted, texting, or falling asleep. The driver may still deserve a ticket for unsafe driving practices, but could be spared being initially arrested for drugged driving and taken to a hospital for a more invasive blood test.

The manner in which preliminary saliva tests would be administered, and how results are used, mirror those currently in place for preliminary breath tests (PBTs). Refusal to submit to a roadside saliva test would be a civil infraction (misdemeanor for a commercial driver), and the results would have limited admissibility in court, and generally would not be admissible as evidence, the same as for PBT results.

Manufacturers of the saliva tests say that a chemical test to check the driver's blood, breath, or urine should be done to verify the presence of substances and the levels of those substances in the driver's body. If arrested for a positive result of the roadside saliva test, a more comprehensive chemical test can be taken at the station or at a hospital. If the driver does not voluntarily submit to the more comprehensive chemical test, the officer could use the results of the roadside saliva test to obtain a warrant compelling the driver to submit to the chemical test. This would be similar to current practice for positive PBTs.

The bills should not be unduly burdensome to medical marijuana patients who, under a recent state Supreme Court ruling, are not in violation of the Vehicle Code's prohibition on driving with any detectable amount of marijuana as long as they do not show signs of impaired driving and are otherwise in compliance with the Michigan Medical Marijuana Act.

Regarding the use of prescription opioid pain killers, or any prescription medication, a person currently can be convicted of drugged driving if there are signs of impairment. This is true whether the dose taken exceeded that prescribed or if the prescribed amount affected the person's ability to safely operate the vehicle. Thus, the bills should not have an unfair impact on persons taking prescription medications as they would have the same responsibility as now—that being, not to drive if a medication is affecting their ability to operate a vehicle safely. However, by detecting recent opiate and methamphetamine use, the roadside saliva tests may more easily identify drivers consuming those substances for which no bodily amount is legal.

Roadside saliva tests are increasingly used in other states and countries such as Great Britain and Australia. According to data from some of the jurisdictions where the roadside saliva tests are in use, arrests and convictions for drugged driving have increased. Senate Bill 434 is named after Barbara J. and Thomas J. Swift, a couple killed in an accident caused by a driver operating a vehicle while under the influence of controlled substances.

Having a tool by which drugged drivers may be more readily identified and removed from the road has the potential to greatly increase public safety. To some, enactment of the bills is simply the right thing to do to help save lives.

#### Arguments in opposition

By some reports, cannabis use is detectable for up to 12 hours after ingestion or smoking, but other reports say a saliva swab may detect cannabis in a chronic user up to four days after ingestion. This is long past the time that a person's ability to safely operate a vehicle would be impaired, as the actual window of impairment may be closer to three to four hours after ingestion. Thus, some feel that the bills may unfairly target marijuana users, even those who are qualified registered patients.

In addition, besides being costly to administer (possibly \$30 for each device) and requiring extra training for law enforcement officers, the roadside saliva tests are time consuming to conduct. First, the officer must wait 10-15 minutes before administering the test in order to increase accuracy by making sure the person's mouth is empty, and then must wait another 8-10 minutes after taking the swab for the device to complete the analysis of the saliva. This is time an officer would not be available to respond to other calls. Some may wonder if the benefits to public safety justify the extra time and expense needed to administer the tests, and whether the time needed to administer the test exceeds protections against unreasonable detention.

Further, the bills are silent on what happens to the devices after they are no longer needed for any law enforcement purpose. Some would like an amendment to be added calling for the destruction of the devices when they are no longer of evidentiary value; this could be done by placing language to that effect in statute or require it to be included in a departmental policy directive.

### **FISCAL IMPACT:**

#### Judiciary/Corrections

The fiscal impact would depend on the number of and types of sentences for people who are held responsible for state civil infractions and found guilty of misdemeanors. Civil infraction penalties would increase revenues going to the state Justice System Fund, which supports various justice-related endeavors in the judicial branch, and the Departments of State Police, Corrections, and Health and Human Services. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. Increases in applicable fines would benefit local libraries, which are the constitutionally designated recipients of such revenues. Also, the bill would have an indeterminate fiscal impact on the judiciary and local court funding units. The fiscal impact would depend on how the provisions of the bill affected caseloads in the courts and related administrative costs.

### Department of State Police

These bills would engender an approximate cost of \$30,000 on the Department of State Police (MSP) for the purchase of five oral fluid drug detection apparatuses (approximately \$6,000 each), and would have an indeterminate fiscal impact on the MSP for the costs of purchasing the oral drug detection kits and the administration of the program.

The MSP reports that each oral drug detection kit would cost approximately \$25. However it is unclear how many kits would need to be purchased over the period of the pilot program. The number of kits required would be dependent upon the counties selected to participate in the program and the assets they have available.

The MSP would be responsible for any costs related to drafting the required reports to the legislature as well as the promulgation of rules and policies.

### **POSITIONS:**

A representative of the Department of State Police testified in support of the bills. (2-9-16)

The Prosecuting Attorneys Association of Michigan (PAAM) indicated support for the bills. (2-9-16)

The Michigan Sheriff's Association indicated support for the bills. (2-9 & 3-15-16)

The Michigan Association of Chiefs of Police indicated support for the bills. (3-15-16)

The Fraternal Order of Police indicated support for the bills. (3-22-16)

The Office of Attorney General indicated support for SB 434. (3-22-16)

The Criminal Defense Attorneys of Michigan (CDAM) indicated a neutral position on the bills. (2-9, 3-14, & 3-22-16)

The ACLU of Michigan indicated a neutral position on the bills. (3-22-16)

A representative of Criminalize Racketeering Against Patients (CRAP) offered testimony neutral to SB 207. (2-9-16)

A representative of the Michigan Medical Marihuana Association (M.M.M.A.) testified in opposition to the bills. (2-9-16)

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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.