

# Legislative Analysis

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## ELIMINATE SUNSET FOR 0.08 BAC LIMIT

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<http://www.house.mi.gov/hfa>

**House Bill 5742 (reported from committee w/o amendment)**  
**Sponsor: Rep. Sarah Roberts**

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

**House Bill 5743 (reported from committee w/o amendment)**  
**Sponsor: Rep. Al Pscholka**

**Committee: Criminal Justice**  
**Complete to 11-2-16**

**BRIEF SUMMARY:** The bills would amend two separate acts to permanently maintain the provisions establishing 0.08 BAC (blood alcohol content) as the *per se* level for drunk driving.

**FISCAL IMPACT:** The bills will have fiscal implications for transportation funding and state and local correctional systems. See *Fiscal Information* for details

### **THE APPARENT PROBLEM:**

In 2003, Public Act 61 amended the Michigan Vehicle Code to, among other things, lower the *per se* blood alcohol content (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. However, PA 61 included a 10-year sunset on the lower BAC level. In 2013, Public Act 23 extended the sunset another five years. Thus, as of October 1, 2018, if nothing is done, the 0.10 BAC level will be reinstated as the *per se* level for driving while intoxicated. These bills would prevent that.

Researchers say that studies show that even though small amounts of alcohol can affect a person's ability to drive, effects on muscle coordination, judgment, reasoning, and ability to detect danger begin to be exhibited at a BAC of 0.08. According to the National Highway Traffic Safety Administration (NHTSA), the relative risk of a driver 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. This is due to the effects of alcohol on the ability to perform critical driving tasks such as changing lanes, steering, and braking that are apparent at a BAC of 0.08.

Alcohol-involved crashes result in fatalities about 3.2 times more often than crashes that do not involve an operator who had been drinking, and incapacitating injuries to drivers, occupants, and others (pedestrians, cyclists, etc.) are about 5.4 times more likely in crashes in which the operator had been drinking, according to 2015 data compiled by the Michigan Office of Highway Safety Planning. The Brain Injury Association of Michigan reports that motor vehicle crashes are the leading cause of traumatic brain injury death in the state and the second leading cause of traumatic brain injuries. Besides the human toll, alcohol-

involved crashes have a significant societal cost in terms of monetary costs, medical care, lost productivity, etc.

Moreover, the federal sanctions for noncompliance with the 0.08 BAC are still in force. In fact, federal legislation enacted in the summer of 2012 amended the penalty provisions related to a variety of federal compliance standards, including the penalties related to the 0.08 BAC provisions. (See the ***Fiscal Information*** section below for a more detailed discussion of the federal penalties.)

In the years since Michigan adopted the lower drunk driving standard, annual data collected by the Michigan State Police continue to show a downward trend in alcohol-involved crashes.

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

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

The bills would amend different acts to eliminate the sunset and thus maintain indefinitely 0.08 BAC as the *per se* level for drunk driving.

House Bill 5742 would amend the Michigan Vehicle Code (257.625 et al.). Under the state's *per se* statute (or presumptive level for determining if a person is guilty of drunk driving), a person with a blood alcohol content (BAC) of 0.08 grams is considered to be operating while intoxicated and is guilty of drunk driving. On October 1, 2018, the 0.08 BAC *per se* level will revert to 0.10 BAC. The bill will eliminate the sunset provision and maintain 0.08 BAC as the *per se* BAC level for drunk driving.

The bill will also eliminate references to the higher BAC level as of October 1, 2018, that are currently contained in provisions pertaining to chemical testing, the definition of "any bodily alcohol level" for drivers less than 21 years of age, and to unlawful BAC levels for commercial truck drivers.

House Bill 5743 will make complementary changes to the sentencing guidelines within the Code of Criminal Procedure (MCL 777.33 and 777.48).

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. 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. (The sentence range is no longer mandatory, but 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.)

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 an alcohol content of 0.08 BAC or higher. The bill will remove the sunset provision so that the BAC will not increase to 0.10 as of October 1, 2018.

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 but less than 0.15, with the lower level being raised to 0.10 BAC as of October 1, 2018, (thus lowering the points that could be scored for a BAC of 0.08 to five points). The bill will maintain the lower limit at 0.08 BAC.

House Bill 4753 is tie-barred to House Bill 4752, meaning that the former cannot take effect unless the latter is also enacted into law.

### ***FISCAL INFORMATION:***

House Bill 5742 would amend the Michigan Vehicle Code to eliminate the scheduled September 30, 2018, sunset on the current .08 BAC standard. House Bill 5743 would make a related change to the Code of Criminal Procedure. In eliminating the sunset, the bills would retain the current .08 BAC standard and prevent Michigan from returning to the .10 BAC standard which had been in effect prior to 2003. Eliminating the sunset would have two impacts: First, the state would avoid a potential loss of federal-aid highway funds. Second, the state would forego 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. Over the last 15 years, federal funds for Michigan highway programs averaged approximately \$1.0 billion per year – approximately one-third of annual state transportation budgets. In order 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 and control of junk yards and outdoor advertising. Safety-related requirements include mandatory safety belt laws, establishment of 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 blood alcohol content (BAC) *per se* standard for driving while intoxicated.

Federal requirements encouraging states to adopt .08 *per se* laws are established in 23 USC 163 and implemented through 23 CFR 1225. Those provisions were last amended in 2012 with the enactment of P.L. 112-141, the Moving Ahead for Progress in the 21st Century Act (MAP-21). Subtitle D of MAP-21 amended several sections of federal law dealing with highway safety; Sec. 1403 of MAP-21 amended provisions related to ***Minimum***

***penalties for repeat offenders for driving while intoxicated or driving under the influence.***

Sec. 1404 of MAP-21 amended the penalty provisions related to federal compliance standards, including penalty provisions related to the .08 BAC requirement. These provisions directed that beginning with the 2012 fiscal year, the Federal Highway Administration (FHWA) withhold 6% of federal funding for certain apportioned programs from states which had not enacted or were not enforcing laws meeting the federal operating while intoxicated requirements.

As noted above, Michigan had amended its operating *driving while intoxicated* and *driving under the influence* laws in 2003 to conform to the federal requirements which obtained at that time. The 2003 legislation is described in this 2003 House Fiscal Agency memo, <http://www.house.mi.gov/hfa/PDFs/HB4247.pdf>

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 federal-aid highway program requirements. The state would be sanctioned with the loss of certain federal funds. We have not yet established when federal penalties would go into effect and we do not yet have an estimate of the amount of potential sanctions—the amount would depend on the amount of federal-aid allocated to Michigan in the applicable program categories. In 2013 the Michigan Department of Transportation estimated that failure to demonstrate compliance with the federal .08 BAC standard would cause the FHWA to withhold 6% of certain federal-aid highway funds with a potential loss of \$50.0 million per year.

***Impact of 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, 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.

The average cost of prison incarceration in a state facility is roughly \$34,900 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision average about \$3,400 per supervised offender per year. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. Any decrease in penal fine revenues would reduce funding for local libraries, which are the constitutionally-designated recipients of those revenues.

***ARGUMENTS:***

***For:***

With 2015 data revealing that almost a third of all traffic crashes involve at least one operator of a vehicle or pedestrian that had been drinking, and that fatalities and

incapacitating injuries increase when alcohol is involved, observers say that it simply does not make sense to raise the *per se* level for drunk driving to the pre-2003 level. Data continue to show 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 (MADD reports that there has been a 21 percent reduction in drunk driving deaths since .08 was implemented).

Moreover, if the bills are not enacted, the state will be out of compliance with federal drunk driving standards in 2018, 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 impact whether some offenders go to prison or are eligible for probation and/or county jail.

Further, as mentioned earlier, the economic costs to society such as lost productivity and health care costs are likely to increase if the BAC reverted to 0.10 due to the number of accidents with fatalities or serious injuries increasing. Considering the above facts, it is easy to see why it is imperative to maintain the 0.08 BAC standard. With the upper limit for 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.

***For:***

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 recently been implemented; for example, 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. Lowering the standard, it was feared, would inadvertently capture social drinkers – e.g., those having a couple glasses of wine with dinner – rather than deter the hard core alcohol abusers. Thus, some wanted an opportunity for a future legislature to review the impact of Public Act 61 of 2003 and placed a sunset date in it.

However, as already discussed, the data overwhelmingly supports the effectiveness of reducing the number and severity of drunk driving accidents by lowering the drunk driving BAC standard. In addition, research into the effects on driving skills by blood alcohol level continue to show significant impacts on coordination, judgment, and reasoning at a BAC of 0.08 that not present at lower amounts, though people will exhibit various levels of impairment at lower levels. Regarding capturing social drinkers, some research shows that it often takes more than just a drink or two over the course of an evening to get someone to a 0.08 BAC level (Note: metabolism of alcohol is affected by many variables such as age, sex, body build, weight, food and nonalcoholic beverage consumption, and even at lower BAC limits a driver's ability to safely operate a vehicle may be impaired). Yes, other measures such as educating the public about the effects of alcohol on driving ability, sobriety courts, and the use of ignition interlock systems are also part of the solution. But

some believe the lower standard saves lives and prevents many incapacitating injuries and so should be made permanent.

***For:***

Prior to the 2003 legislation that created the 0.08 *per se* BAC level and the sunset clause, drivers under 21 years of age were prohibited from driving with any bodily alcohol content, defined to mean a BAC level of 0.02 or greater. Operators of commercial vehicles were prohibited from driving with a BAC of 0.04 but less than 0.07. These provisions were revised in 2003 to define "any bodily alcohol content" for underage drivers as a BAC of 0.02 to less than 0.08 and to prohibit commercial drivers from driving with a BAC of 0.04 to less than 0.08.

Even though it could be argued that neither of these provisions was related to the issue of establishing 0.08 BAC as the *per se* level for drunk driving, these provisions nonetheless were amended to contain the same sunset which will increase the upper limit to 0.10 in 2018 – levels that do not represent the historical limits for these drivers.

***POSITIONS:***

The following entities indicated support for the bills on 9-13-16:

Brain Injury Association of Michigan (oral and written testimony)  
MADD (written testimony)  
Department of State Police  
Prosecuting Attorneys Association of Michigan  
Michigan Sheriff's Association  
Michigan Association of Treatment Court Professionals  
Ascension Michigan  
Michigan Health & Hospital Association  
Michigan Brain Injury Provider Council  
Michigan Nurses Association

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