

Legislative Analysis



ELIMINATE SUNSET FOR 0.08 BAC LIMIT

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

House Bill 5742 as introduced
Sponsor: Rep. Sarah Roberts

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

House Bill 5743 as introduced
Sponsor: Rep. Al Pscholka
Committee: Criminal Justice
Complete to 9-12-16

SUMMARY:

The bills would amend two separate acts to permanently maintain the provisions establishing 0.08 BAC as the *per se* level for drunk driving.

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 to 0.08 or higher. Prior to PA 61, the *per se* BAC level (meaning that actual impairment does not have to be demonstrated) was 0.10. However, the Michigan legislature included a 10-year sunset on the lower BAC level. Public Act 23 of 2013 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.

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

Specifically, 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 percent 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 a provision pertaining to chemical testing, the definition of "any bodily alcohol level" for drivers less than 21 years of age, and a provision pertaining 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.

FISCAL IMPACT:

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.

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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.