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Senate Bill 434 (as introduced 7-1-15) Sponsor: Senator Tom Casperson

Committee: Judiciary

Date Completed: 10-6-15

CONTENT

The bill would amend the Michigan Vehicle Code to do the following:

- -- Authorize a peace officer who was certified as a drug recognition expert to require a person suspected of driving while under the influence of alcohol or a controlled substance to submit to a preliminary oral fluid analysis, in addition to a preliminary chemical breath analysis, in order to detect the presence of a controlled substance.
- -- Extend to a preliminary oral fluid analysis provisions regarding results of a preliminary chemical breath analysis as the basis for an arrest, admissibility of the results in a criminal prosecution or administrative hearing, penalties for refusing to submit to a preliminary analysis, and issuance of an out-of-service order to a commercial motor vehicle (CMV) driver.
- -- Allow the Michigan Department of State Police (MSP) to establish a one-year roadside drug testing pilot program in three counties.
- -- Require the MSP to report to the Legislature after the program concluded.

The bill would take effect 90 days after it was enacted.

Preliminary Oral Fluid Analysis

Under the Code, a peace officer may require a person to submit to a preliminary chemical breath analysis if the officer has reasonable cause to believe that a person was operating a vehicle under any of the following circumstances:

- -- The individual's ability to operate the vehicle may have been affected by the consumption of alcoholic liquor or a controlled or intoxicating substance.
- -- The individual was operating a CMV while his or her blood, breath, or urine contained any measurable amount of alcohol or a controlled or intoxicating substance.
- -- The individual is younger than 21 and has any bodily alcohol content.

Under any of these conditions, the bill also would allow a peace officer who was certified as a drug recognition expert to require the person to submit to a preliminary oral fluid analysis in addition to a preliminary chemical breath analysis. "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 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.

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The Code permits a peace officer to arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results are admissible in a criminal prosecution for certain crimes involving the operation of a motor vehicle or in an administrative hearing for any of the following purposes:

- -- To assist the court or hearing officer in determining a challenge to the validity of an arrest.
- -- As evidence of the defendant's breath alcohol content, if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that the defendant's breath alcohol content was higher at the time of the charged offense than when a chemical test other than a preliminary test was administered.
- -- As evidence of the defendant's breath alcohol content, if offered by the prosecution to rebut testimony elicited on cross-examination of a prosecution witness that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test other than a preliminary test was administered.

Under the bill, these provisions also would apply with respect to a preliminary oral fluid analysis performed by a drug recognition expert. The results could be used as evidence of the presence or nonpresence of a controlled substance in the defendant's oral fluid, if offered to rebut testimony that the defendant's preliminary oral fluid analysis showed the presence of a controlled substance that was not found to be present when a chemical test was administered, or vice versa.

The Code provides that a person who submits to a preliminary chemical breath analysis remains subject to the Code's requirements related to a chemical test other than a preliminary test. A person who refuses to submit to a preliminary chemical breath analysis upon a lawful request by a peace officer is responsible for a civil infraction. Under the bill, these provisions also would apply with respect to an oral fluid analysis.

The Code requires a peace officer to use the results of a preliminary chemical breath analysis to determine whether to order a CMV operator out-of-service, and to order out-of-service a CMV operator who refuses to submit to an analysis. A CMV operator who is requested to submit to a preliminary chemical breath analysis must be advised that refusing the request is a misdemeanor punishable by imprisonment for up to 93 days and/or a maximum fine of \$100, and will result in the issuance of a 24-hour out-of-service order. Under the bill, all of these provisions also would apply with respect to a preliminary oral fluid analysis.

The Code prescribes a number of provisions that apply with respect to chemical tests and analysis of a person's blood, urine, or breath, other than a preliminary chemical breath analysis. Under the bill, these provisions would apply with respect to chemical tests and analysis other than a preliminary chemical breath or oral fluid analysis.

Pilot Program

The bill would authorize the Michigan Department of State Police to establish a one-year pilot program in three counties in Michigan for roadside drug testing to determine whether an individual was operating a vehicle while under the influence of a controlled substance. The funding of the pilot program would be subject to appropriation.

The MSP would have to select three counties in which to implement the pilot program. A county would be eligible to participate if it had a law enforcement agency within its boundary, including an MSP post, a sheriff's department, or a municipal police department, that employed at least one law enforcement officer who was a certified drug recognition expert.

The MSP would have to develop a written policy for the implementation of the pilot program and the administration of roadside drug testing. The MSP could promulgate rules to implement the pilot program.

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Within 90 days after conclusion of the pilot program, the MSP would have to submit a report to the legislative committees of the Senate and House of Representatives with primary responsibility for judicial and criminal justice issues. The report would have to cover all of the following:

- -- How pilot program participant counties were selected.
- -- The different types of law enforcement agencies in the participant counties that engaged in roadside drug testing.
- -- Relevant statistical data, including 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 by a certified drug recognition expert.
- -- The number and type of convictions resulting from an arrest made based on the result of a roadside drug test by a certified drug recognition expert.

MCL 257.625a et al. Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill would allow, but not mandate, a one-year roadside pilot drug testing program in three counties, which, if implemented, could cost local and State law enforcement agencies combined a total of between \$30,000 and \$50,000. Under the pilot program as it is currently being proposed, law enforcement officers could call certain law enforcement personnel who are specially trained as drug recognition experts (of whom there are 84 located statewide working for various law enforcement jurisdictions) to a roadside stop situation where a driver was suspected of being under the influence of a controlled substance -- just as they do now -- but, under the pilot program, according to the MSP, the drug recognition expert would be armed with a swab-based drug detection kit designed to identify the presence of six different controlled substances within saliva and a breath-based detection kit designed to detect the presence of tetrahydrocannabinol (THC).

A major cost of the pilot project would be the purchase of the breath-based and swab-based drug detection kits, which can range individually in cost from \$250 to \$700. Neither the kit manufacturers nor the three counties that would be part of the proposed pilot program have been identified, but if the counties chosen had a total of 30 drug recognition experts, a supply of kits costing \$30,000 or more would be required. The MSP would bear additional costs to provide a report to the Legislature on the pilot program's results and to create policies and rules. No funds have yet been identified for funding the bill's provisions.

It is not clear whether the proposed program would result in increased convictions. An increase in misdemeanor and felony arrests could place incremental resource demands on local court systems, law enforcement, and jails. For any new felony convictions that resulted in the offender being sent to prison, in the short term, the marginal cost to State government would be approximately \$4,100 per additional prisoner per year. In the long term, the marginal cost to State government would be approximately \$31,100 per additional prisoner per year. Any associated increase in fine revenue would be dedicated to public libraries.

Fiscal Analyst: Bruce Baker

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.