



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-
MAKING REVIEW COMMITTEE**

AGENCY: Health TITLE-SERIES: 64-10
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No
RULE NAME: 64-10 Methods and Standards for Chemical Tests for Intoxication

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: 16-1-4 and 17C-5-8

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

The secretary may propose rules in accordance with the provisions of 29A-3-1 et seq. of this code that are necessary and proper to effectuate the purposes of this chapter. The Bureau for Public Health shall prescribe, by legislative rules promulgated pursuant to article three, chapter twenty-nine-a of this code, methods and standards for the chemical analysis of a person's blood or breath.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/29/2021

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/29/2021

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

n/a

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

This legislative rule establishes the methods and standards relating to implied consent for chemical test for intoxication pursuant to appropriate articles of Chapter 17C of the West Virginia Code.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

At the request of the West Virginia State Police, the testing methodology has been updated. Technical amendments will increase administrative efficiency by consolidating certification records under WVSP control.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

n/a

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

n/a

C. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

n/a

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2021 Increase/Decrease (use "-")	2022 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			0
Personal Services			0
Current Expenses			0
Repairs and Alterations			0
Assets			0
Other			0
2. Estimated Total Revenues			0

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

n/a

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

April L Robertson -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 64
LEGISLATIVE RULE
BUREAU FOR PUBLIC HEALTH

SERIES 10
METHODS AND STANDARDS FOR CHEMICAL
TESTS FOR INTOXICATION

§64-10-1. General.

1.1. Scope. -- This legislative rule establishes the methods and standards relating to implied consent for chemical test for intoxication pursuant to appropriate articles of Chapter 17C of the West Virginia Code.

1.2. Authority. -- W. Va. Code §16-1-4 and ~~§§17C-5-4, 17C-5-5, 17C-5-6 and §17C-5-8.~~

1.3. Filing Date. -- ~~April 22, 2005.~~

1.4. Effective Date. -- ~~April 22, 2005.~~

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect upon August 1, 2027.

§64-10-2. Application and Enforcement.

2.1. Application. The provisions of this rule are applicable to all law enforcement agencies and personnel engaging in breath, blood, urine, alcohol and/or drug analysis in this state; and to those persons suspected of driving under the influence of alcohol ~~and/or~~ or drugs, or both.

§64-10-3. Definitions.

3.1. Agency means a law enforcement agency in the state engaging in breath, blood, and/or urine alcohol testing.

3.2. Alcohol means ethyl alcohol and may include methyl alcohol and isopropyl alcohol.

3.3. Alcohol breath analysis means chemical testing of a sample of a person's expired breath, using a breath test instrument designed for that purpose, in order to determine the concentration of alcohol in the person's blood.

3.4. Bureau means the West Virginia Bureau for Public Health.

3.5. Calibrating unit means a device designed to produce a predictable alcohol concentration reading on a breath alcohol test instrument.

3.6. Certified instrument operator means a person who has successfully completed a specialized training program and has been certified by the Bureau to perform breath alcohol testing using instruments approved for that purpose.

3.7. Chemical Test or Testing means an analysis performed on a biological material, including, but not limited to breath, blood, or urine, to determine the identity or concentration, or both, of particular constituents such as alcohol or controlled substances. Test procedures may rely on one or more physical or chemical properties of the constituents and use instrumental or chemical analysis techniques to accomplish the determination.

3.8. Commissioner means the commissioner of the West Virginia Bureau for Public Health or his or her lawful designee.

3.9. Dry gas standard means a sealed pressurized sample of gas that contains a predictable alcohol concentration that can be used to verify the accuracy of breath test instruments.

3.10. Evidential test sequence means ~~one adequate reference standard analysis, one adequate breath sample analysis, and a second adequate reference standard analysis~~ one adequate blank analysis, one adequate reference standard analysis, one adequate blank analysis, one adequate breath sample analysis, one adequate blank analysis, a second adequate reference standard analysis, and one adequate blank analysis.

3.11. Instrument means an item or combination of items of equipment designed to make a measurement of alcohol concentration.

3.12. Instrument blank analysis means a test of an ambient air sample to ensure that the instrument produces a zero result.

3.13. Lot means an entire quantity batch of a reference standard.

3.14. Qualitative breath alcohol analysis means a test of a person's breath, the results of which indicate the presence or absence of alcohol.

3.15. Quantitative breath alcohol analysis means a chemical test of a person's breath that yields a specific result in grams of alcohol per 210 liters of breath.

3.16. Reference standard means an aqueous ethanol solution compounded for use in a calibrating unit which, when equilibrated with air yields a predictable alcohol concentration or a sealed pressurized sample of gas that contains a predictable alcohol concentration that can be used to inspect or verify the accuracy of breath test instruments.

3.17. Simulator Solution means an aqueous standard ethanol solution which, when equilibrated with air in a breath simulator instrument produces an air-alcohol mixture ~~of 0.10 grams W/V~~ of a predictable concentration that can be used to inspect or verify the accuracy of breath test instruments.

3.18. Simulator Test means the testing of a sample of simulator solution vapor, using a breath test instrument in order to verify the accuracy of the breath test instrument.

3.19. W/V means weight divided by volume.

§64-10-4. Preliminary Breath Analysis; Designation of Testing Instrument; Compliance with Methods and Standards Required.

4.1. Each law enforcement agency using a preliminary breath testing instrument shall designate the testing instrument for the purpose of administering a preliminary breath analysis pursuant to W. Va. Code §17C-5-5. The designation of the testing instrument shall be filed with the Bureau on a form provided by the Bureau.

4.2. Each law enforcement agency shall comply with the methods and the standards established by this rule.

4.3. The Bureau shall maintain a registry of approved testing instruments.

4.4. All instruments used for the purpose of preliminary alcohol breath analysis shall be approved in writing by the Commissioner.

4.5. Approvals and designations of preliminary breath testing instruments in effect at the time this rule becomes effective continue in effect.

§64-10-5. Breath Analysis; Preliminary Breath Test; Standards and Methods.

5.1. The use of the approved instrument shall adhere to the manufacturer's specifications for operation and shall include any maintenance specified by the manufacturer.

5.2. The following general methods apply in extracting breath for preliminary breath analysis:

~~(a)~~ 5.2.a. The preliminary alcohol breath analysis shall be administered after the law enforcement officer has a reasonable belief that the person has been driving while under the influence of alcohol. The law enforcement officer shall prohibit the person from drinking alcohol or smoking for at least fifteen minutes before conducting the test.

~~(b)~~ 5.2.b. If the testing instrument requires contact with the mouth of the tested, person the law enforcement officer conducting the preliminary alcohol breath analysis shall use an individual disposable mouthpiece for each person tested.

~~(c)~~ 5.2.c. The preliminary alcohol breath analysis may be administered by a law enforcement officer who is a certified instrument officer and who has additional training, theory and practical exercise recommended by the manufacturer.

5.3. The results of a preliminary alcohol breath analysis shall be used ~~solely~~ for the purpose of guiding the officer in deciding whether an arrest should be made and to determine if alcohol is the cause for impairment.

§64-10-6. Designation of Secondary Test; Compliance with Methods and Standards Required; Certification of Law Enforcement Officers Required.

6.1. Each law enforcement agency shall designate a type of test, either breath, blood or urine for the purpose of administering a secondary alcohol breath analysis incidental to lawful arrest for the offense of driving a motor vehicle in this state while under the influence of alcohol. The designation of the alcohol breath analysis shall be filed with the Bureau on a form provided by the Bureau.

6.2. Each law enforcement agency shall comply with the methods and the standards established by this rule.

6.3. The Bureau shall maintain a registry of approved alcohol breath analysis instruments inclusive of methods and standards for the proper conduct of the alcohol breath analysis.

6.4. Secondary alcohol breath analysis designations in effect at the time this rule becomes effective shall continue in effect.

6.5. Each law enforcement officer administering a secondary alcohol breath analysis shall be a certified instrument operator.

6.6. The Bureau shall certify each operator properly trained in the procedures of operation and shall issue a certificate to each trained individual.

6.7. As a minimum training requirement each law enforcement officer shall complete the Basic

Training Program for Breath Examiner Specialist Course as prescribed by the United States Department of Transportation or an equivalent course prior to certification. This course shall consist of classroom and laboratory training including review sessions and examinations.

6.8. Each law enforcement officer desiring to be a certified instrument operator shall apply to the Bureau on a form provided by the Bureau.

6.9. Certifications of law enforcement officers in effect at the time this rule becomes effective continue in effect.

§64-10-7. Breath Analysis; Secondary Breath Test; Standards; Accuracy Inspection Tests; Methods.

7.1. Instrument Standards - Instruments for breath alcohol analysis shall meet the following standards:

~~(a)~~ 7.1.a. The designated instrument and any related accessories shall be capable of the collection and the analysis of breath specimens which approach alveolar composition;

~~(b)~~ 7.1.b. The designated instrument shall be capable of analyzing a blank sample and of analyzing a suitable reference standard;

~~(c)~~ 7.1.c. The designated instrument shall be capable of the analysis of a reference standard within accuracy and precision limits of plus or minus 0.01 grams percent W/V or higher;

~~(d)~~ 7.1.d. The designated instrument shall be capable, in a controlled experiment, of alcohol breath analysis which results in a determination of a person's blood alcohol concentration which has a correlation with his or her actual blood alcohol concentration as measured on a blood sample taken at approximately the same time as the breath sample;

~~(e)~~ 7.1.e. The instrument shall be capable of alcohol breath analysis which results in a concentration less than 0.01 grams of alcohol per 210 liters of breath when alcohol-free persons are tested; and

~~(f)~~ 7.1.f. Any model of instrument used for the purpose of secondary breath analysis shall be approved in writing by the Bureau. The instrument shall meet or exceed the standards contained in this subsection.

7.2. Methods - The following general methods apply in extracting breath for secondary breath analysis:

~~(a)~~ 7.2.a. The law enforcement officer shall keep the person being tested under constant observation for a period of twenty minutes before the test is administered to ensure that the person has nothing in his or her mouth at the time of the test and that he or she has had no food or drink or foreign matter in his or her mouth during the observation period.

~~(b)~~ 7.2.b. The certified instrument officer conducting the alcohol breath analysis shall perform the evidential test sequence to ensure that the instrument is in proper working condition at the time the person's alcohol breath analysis test is being conducted.

~~(c)~~ 7.2.c. The alcohol breath analysis shall be administered by a certified instrument operator and in accordance with this rule.

~~(d)~~ 7.2.d. The certified instrument operator conducting the secondary alcohol breath analysis shall use an individual disposable mouthpiece for each person tested.

§64-10-8. Blood Analysis; Standards and Methods.

8.1. Methods of analyzing blood specimens for ethyl alcohol shall meet the following standards:

~~(a)~~ 8.1.a. The method used shall be capable of separating and quantifying ethyl alcohol from the blood specimen;

~~(b)~~ 8.1.b. The method used shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 0.01 grams per cent W/V of the true value. These limits shall be applied to alcohol concentrations which are 0.01 grams per cent W/V or higher;

~~(c)~~ 8.1.c. The method used shall be capable of blood alcohol analysis which results in a concentration less than 0.01 grams of alcohol per one hundred milliliters of blood when alcohol free persons are tested; and

~~(d)~~ 8.1.d. The gas-chromatographic method meets the standards in this subsection for testing.

8.2. Blood for alcohol analysis shall be collected as follows:

~~(a)~~ 8.2.a. The blood shall be drawn only by a licensed doctor of medicine or osteopathy, registered professional nurse, trained medical technician or any medical professional trained in phlebotomy;

~~(b)~~ 8.2.b. Sterile hypodermic needles and syringes shall be used. Sterile disposable units are recommended;

~~(c)~~ 8.2.c. The skin shall not be disinfected with ethyl alcohol. The use of non-alcoholic antiseptics, those which do not contain ethyl alcohol, including 1-1000 aqueous solution of mercuric chloride, aqueous benzalkonium chloride (zephiran), aqueous merthiolate, or other suitable aqueous disinfectants is acceptable;

~~(d)~~ 8.2.d. The quantity of alcohol found in serum shall be divided by a factor of 1.16 to determine the quantity of alcohol in the blood; and

~~(e)~~ 8.2.e. The container (tube or vial) shall be clean and dry, and have an inert, airtight stopper.