

6.5: ADMINISTERING THE BREATHALYZER TEST

The breathalyzer test must be given within two hours of the arrest of the suspect. Prior to administering the test, the suspect must be closely monitored for a period of at least twenty minutes. During this time, the suspect will not be allowed to chew gum, take mouthwash, or place any other object in their mouth. This is to guard against a false reading caused by introducing a chemical substance into the suspect's mouth.

The suspect will then be asked to blow for a sustained period of time into a small glass ampule. This ampule will then be analyzed by the breathalyzer machine which in turn will print out a copy of the machine's analysis of the suspect's blood alcohol content. Breathalyzers don't actually measure blood alcohol concentration (BAC) directly, they estimate BAC based on breath alcohol.

It is estimated that a breathalyzer machines are accurate to within .01. That degree of accuracy may sound great, but consider the fact that if the test is off by .01, the range when a person blows into the machine can be from .07 to .09. Since the law in NYS is that it is a crime to drive with a BAC of .08, but a violation to drive with a BAC of .07, that degree of accuracy of .01 may not be so great after all.

FACTORS TO BE CONSIDERED IN DECIDING TO TAKE THE TEST: If possible, a suspect should consult with an attorney before making the decision to take a breathalyzer test. The following are some of the more typical matters to consider in making this decision:

- Was an accident involved?
- Does the driver have a prior alcohol related driving conviction? If so, when did this occur?
- Does the driver have a prior DWI conviction? If so, when did this occur?
- Will the driver need their license for purposes of employment or other reasons?

NEW YORK FIELD SOBRIETY TESTS: When a police officer suspects a driver of being intoxicated, they will ask the driver to perform a series of physical acts to determine whether the physical coordination or lack thereof is indicative of intoxication or the influence of drugs. These are called field sobriety tests and vary across the state.

Generally, the field sobriety tests consist of the point finger-to-nose, walk-and-turn in a straight line, stand on one leg, the Horizontal Gaze Nystagmus (HGN), and recite the alphabet. The officers also use their personal observations to make a determination of intoxication. Depending on how a suspect performs in these various tests, the officer may request the suspect to breath into a small portable device known as an Alco-Sensor. This is not to be confused with the breathalyzer machine. The Alco-Sensor is used as a screening tool to determine the presence of alcohol in your breath. It is not evidence of intoxication itself. A suspect can refuse to submit to the field sobriety tests in the same manner as refusing to take a breathalyzer test.

Regardless of whether a driver submits to the field sobriety tests or agrees to the breathalyzer test, an officer is making observations about the suspect's condition. These include whether the officer smells alcohol on the suspects breath, the suspect has blood shot eyes, sways while standing, has slurred speech, or has a flushed face. All of these observations can be submitted as evidence of intoxication through testimony of the officer at trial.

FINANCIAL COSTS OF A DWI ARREST/CONVICTION: Whether a person is guilty or not of driving while intoxicated, just being charged can be expensive. Attorney fees, loss of time from work, drastically increased rates of insurance are all to be expected. The following can be found on the New York State Department of Motor Vehicles website (dmv.ny.gov) regarding the penalties for an alcohol or drug-related violation include the loss of driving privileges, fines, and a possible jail term. (<https://dmv.ny.gov/org/tickets/penalties-alcohol-or-drug-related-violations> July 23, 2018)

Violation	Fine	Jail	License Action
Aggravated Driving While Intoxicated (A-DWI)	\$1,000 – \$2,500	1 year	Revoked for at least one year
Second A-DWI in 10 years (E felony)	\$1,000 – \$5,000	4 years	Revoked for at least 18 months

Third A-DWI in 10 years (D felony)	\$2,000 – \$10,000	7 years	Revoked for at least 18 months
Driving While Intoxicated (DWI) or Driving While Impaired by a Drug (DWAI-Drug)	\$500 – \$1,000	1 year	DWI-Revoked for at least six months. DWAI-Drugs – Suspended for at least six months
Second DWI/DWAI-Drug violation in 10 years (E felony)	\$1,000 – \$5,000	4 years	Revoked for at least one year
Third DWI/DWAI-Drug violation in 10 years (D felony)	\$2,000 – \$10,000	7 years	Revoked for at least one year
Driving While Ability Impaired by a Combination of Alcohol/Drugs (DWAI-Combination)	\$500 – \$1,000	1 year	Revoked for at least six months
Second DWAI/Combination in 10 years (E felony)	\$1,000 – \$5,000	4 years	Revoked for at least one year
Third DWAI/Combination in 10 years (D felony)	\$2,000 – \$10,000	7 years	Revoked for at least one year
Driving While Ability Impaired by Alcohol (DWAI)	\$300 – \$500	15 days	Suspended for 90 days
Second DWAI violation in 5 years	\$500 – \$750	30 days	Revoked for at least six months
Third or subsequent DWAI within 10 years (Misdemeanor)	\$750 – \$1,500	180 days	Revoked for at least six months
Zero Tolerance Law	\$125 civil penalty and \$100 fee to terminate suspension	None	Suspended for six months
Second Zero Tolerance Law	\$125 civil penalty and \$100 re-application fee	None	Revoked for one year or until age 21
Chemical Test Refusal	\$500 civil penalty (\$550 for commercial drivers)	None	Revoked for at least one year, 18 months for commercial drivers

Chemical Test Refusal within five years of a previous DWI-related charge/Chemical Test Refusal	\$750 civil penalty	None	Revoked for at least 18 months, one-year or until age 21 for drivers under age 21, permanent CDL revocation for commercial drivers
Chemical Test Refusal – Zero Tolerance Law	\$300 civil penalty and \$100 re-application fee	None	Revoked for at least one year
Chemical Test Refusal – Second or subsequent Zero Tolerance Law	\$750 civil penalty and \$100 re-application fee	None	Revoked for at least one year
Driving Under the Influence (Out-of-State)	N/A	N/A	Revoked for at least 90 days. If less than 21 years of age, revoked at least one year
Driving Under the Influence (Out-of State) with any previous alcohol-drug violation	N/A	N/A	Revoked for at least 90 days (longer term with certain prior offenses). If less than 21 years of age, revoked at least one year or until age 21 (longest term)

ZERO TOLERANCE LAW: This law makes it illegal for a driver under age 21 to have consumed any alcohol. A police officer may temporarily detain a driver to request or administer a chemical test to determine the driver's Blood Alcohol Content (BAC). If the driver's BAC is .02 to .07 percent, the driver will be notified to appear at a DMV hearing. If the judge's finding supports the charge, the penalty is a 6-month license suspension, a \$125 civil penalty, and a \$100 suspension termination fee. Each additional offense will result in the driver's license being revoked for at least one year or until age 21, whichever is longer, plus a \$125 civil penalty, and a \$100 license re-application fee. If the driver's BAC is .05 percent or greater, the police may charge driver with driving while ability impaired (DWAI) or driving while intoxicated (DWI) and may prosecute the driver in criminal court. (Source: dmv.ny.gov)

IGNITION INTERLOCK: Any driver convicted of misdemeanor or felony drunk driving charges – even first-time offenders – are required to install and maintain ignition interlock devices at their own expense on any vehicles they own or operate. For an Aggravated DWI offense or any repeat alcohol or drug offense within five years, a judge is required to order the system installed on each vehicle owned or operated by the motorist during both the revocation period and any probation period that follows. The judge also must order an alcohol assessment for the repeat offender.

The device, purchased and installed at the expense of the motorist, is connected to a motor vehicle ignition system and measures the alcohol content of the operator's breath. As a result, the vehicle cannot be started until the driver provides an acceptable sample breath. The motorist may be qualified to hold a conditional license during the time an interlock device is in use. This conditional driver license will be revoked if the motorist does not comply with the court terms or for conviction of any traffic offense except parking, stopping or standing. (Source: dmv.ny.gov)

LEANDRAS LAW: This legislation makes operating a motor vehicle while intoxicated or under the influence of drugs with a passenger under the age of 16 a Class E felony punishable by up to four years in state prison. Courts must order all drivers, including youthful offenders, convicted of driving while intoxicated or aggravated driving while intoxicated to install and maintain an ignition interlock on any vehicle owned or operated by such driver for at least 12 months. The law also makes it a felony to drive drunk with a conditional license. Drivers who drive while intoxicated or impaired by drug and cause the death of a child under 16 in the vehicle may be charged with a Class B felony punishable by up to 25 years in prison. Drivers who drive while

intoxicated or impaired by drugs and cause serious physical injury to a child under 16 in the vehicle may be charged with a Class C felony punishable by up to 15 years in prison. (Source: dmv.ny.gov)

LOSS OF LICENSE FOR A DWI CONVICTION: After a conviction of an alcohol-related offense, the defendant's license is usually revoked. One exception is for first Driving While Ability Impaired convictions which results in a suspension for 90 days, not a revocation. Even if not convicted, a defendant's license can be still be revoked by the DMV for refusing to take a breathalyzer test.

In some instances, by paying a fee and attending and completing a state-approved Alcohol and Drug Rehabilitation program, sometimes called a Drinking Driver Program, and by attending Victim Impact Panels, you can apply to have your license restored and, additionally, the court can allow you a "conditional license," which enables you to drive to work, school, and medical appointments.

LEGALITY OF SOBRIETY CHECKPOINTS AND ROADBLOCKS: In the *People v. Scott*, 63 NY2d 518 (1984) case the New York Court of Appeals upheld the constitutionality of such roadblocks, as long as they are conducted according to certain guidelines and not applied in a discriminatory manner.

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