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SENATE . . . . . No. 1964

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act increasing protection against drivers under the influence of drugs.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. This bill may be known as the "Drug Test Consent Bill".

Section 2. Section 1 of Chapter 90 of the General Laws is hereby amended by inserting, after the definition of "Department", the following new paragraph:

"'Drugs', any substance except alcohol which, when ingested or otherwise introduced into the body, impairs the ability of a person to drive, and whose impairing effect is known or should be known to the ingesting person.

Section 3. Section 24(f) of Chapter 90 of the General Laws is hereby amended by striking the subsection in its entirety and replacing it with the following paragraph: "(f)

(1) Whoever operates a motor vehicle upon any way or in any place to which the public has right to access, or upon any way or in any place to which the public has access as invitees or licensees, shall be deemed to have consented to submit to chemical tests or analyses of his breath, urine or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor or drugs; provided, however, that no such person shall be

deemed to have consented to a blood test or tests unless such person has been brought for treatment to a medical facility licensed under the provisions of section 51 of chapter 111; and provided, further, that no person who is afflicted with hemophilia or any other condition requiring the use of anticoagulants shall be deemed to have consented to a withdrawal of blood. Such test or tests shall be administered at the direction of a police officer, as defined in section 1 of chapter 90C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon such way or place while under the influence of intoxicating liquor or drugs. If the person arrested refuses to submit to any tests or analyses, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of at least 180 days and up to a lifetime loss, for each refusal, no such test or analysis shall be made absent an order of a court, and he shall have his license or right to operate suspended in accordance with this paragraph for a period of 180 days for each refusal; provided, that each suspension for a refusal under this section shall run consecutively; provided, further, that any person who is under the age of 21 years or who has been previously convicted of or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program for a violation under this section, subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor or drugs in violation of subsection (b) of said section 24G, section 24L or subsection (a) of section 8 of chapter 90B, section 8A or 8B of said chapter 90B, section 11 of chapter 90F, or section 13 1/2 of chapter 265 or a like violation by a court of any other jurisdiction shall have his license or right to operate suspended forthwith for a period of 3 years for each refusal; provided, further, that any person previously convicted of or assigned to an alcohol or controlled substance education, treatment, or

rehabilitation program for 2 such violations shall have his license or right to operate suspended forthwith for a period of 5 years for each refusal; and provided, further, that a person previously convicted of or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program for 3 or more such violations shall have his license or right to operate suspended forthwith for life based upon each refusal. If a person refuses to submit to any such tests or analyses after having been convicted of or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program for a violation of section 24L, the registrar shall suspend his license or right to operate for 10 years for each refusal unless a longer suspension has been ordered pursuant to this section, in which case a suspension of 10 years shall run consecutively with the previous suspension. If a person refuses to submit to any such tests or analyses after having been convicted of or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program for a violation of subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of said section 24G, or section 13 1/2 of chapter 265, the registrar shall revoke his license or right to operate for life. If a person refuses to take any test under this paragraph, the police officer shall:

(i) immediately, on behalf of the registrar, take custody of such person's license if said license was issued by the commonwealth;

(ii) provide to each person who refuses a test, on behalf of the registrar, a written notification of suspension in a format approved by the registrar; and

(iii) impound the vehicle being driven by the operator and arrange for the vehicle to be impounded for a period of 12 hours after the operator's refusal, with the costs for the towing, storage and maintenance of the vehicle to be borne by the operator.

The police officer before whom any such refusal was made shall, within 24 hours, prepare a report of each refusal. Each report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer before whom such refusal was made. Each report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor or drugs and shall state that such person had refused to submit to one or more chemical tests or analyses when requested by the officer to do so, such refusal or refusals having been witnessed by another person other than the defendant. Each report shall identify the police officer who requested the chemical test or analysis and the other person witnessing the refusal. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend in a form, including electronic or otherwise, that the registrar deems appropriate. A license which has been confiscated pursuant to this subparagraph shall be disposed of in a manner prescribed by the registrar. The report shall constitute prima facie evidence of the facts set forth therein at any administrative hearing regarding the suspension specified in this section.

The suspension of a license or right to operate shall become effective immediately upon receipt of the notification of suspension from the police officer. A suspension for a refusal of either a chemical test or analysis of breath, urine or blood shall run consecutively and not concurrently, both as to any additional suspension periods arising from the same incident, and as to each other.

No license or right to operate shall be restored under any circumstances and no restricted or hardship permits shall be issued during the suspension period imposed by this paragraph; provided, however, that the defendant may immediately, upon the entry of a not guilty finding or dismissal of all charges under this section, section 24G, section 24L, or section 13 1/2 of chapter 265, and in the absence of any other alcohol or drug related charges pending against said defendant, apply for and be immediately granted a hearing before the court which took final action on the charges for the purpose of requesting the restoration of said license. At said hearing, there shall be a rebuttable presumption that said license be restored, unless the commonwealth shall establish, by a fair preponderance of the evidence, that restoration of said license would likely endanger the public safety. In all such instances, the court shall issue written findings of fact with its decision.

(2) If a person's blood alcohol percentage is not less than eight one-hundredths or the person is under twenty-one years of age and his blood alcohol percentage is not less than two one-hundredths, or if a person is under the influence of marijuana, narcotic drugs, depressants, or stimulant substances, such police officer shall do the following:

(i) immediately and on behalf of the registrar take custody of such person's drivers license or permit issued by the commonwealth;

(ii) provide to each person who refuses the test, on behalf of the registrar, a written notification of suspension, in a format approved by the registrar;

(iii) impound the vehicle being driven by the operator and arrange for the vehicle to be impounded for a period of 12 hours after the operator's test, with the costs for the towing, storage and maintenance of the vehicle to be borne by the operator; and

(iii) immediately report action taken under this paragraph to the registrar. Each report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer. Each report shall set forth the grounds for the officer's belief that the person arrested has been operating a motor vehicle on any way or place while under the influence of intoxicating liquor or drugs and that the person's blood alcohol percentage was not less than .08 or that the person was under the influence of drugs, or that the person was under 21 years of age at the time of the arrest and whose blood alcohol percentage was not less than .02. The report shall indicate that the person was administered one or more tests or analyses, that the operator administering the tests or analyses was trained and certified in the administration of the tests or analyses, that the test or tests were performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for the test or tests was regularly serviced and maintained and that the person administering the test or tests had every reason to believe the equipment was functioning properly at the time the test of tests were administered. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend, in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to operate confiscated under this clause shall be forwarded to the registrar forthwith.

The license suspension shall become effective immediately upon receipt by the offender of the notice of intent to suspend from a police officer. The license to operate a motor vehicle shall remain suspended until the disposition of the offense for which the person is being prosecuted, but in no event shall such suspension pursuant to this subparagraph exceed 30 days.

In any instance where a defendant is under the age of twenty-one years and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-

hundredths or greater and upon the failure of any police officer pursuant to this subparagraph, to suspend or take custody of the driver's license or permit issued by the commonwealth, and, in the absence of a complaint alleging a violation of paragraph (a) of subdivision (1) or a violation of section twenty-four G or twenty-four L, the registrar shall administratively suspend the defendant's license or right to operate a motor vehicle upon receipt of a report from the police officer who administered such chemical test or analysis of the defendant's blood pursuant to subparagraph (1). Each such report shall be made on a form approved by the registrar and shall be sworn to under the penalties of perjury by such police officer. Each such report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor and that such person was under twenty-one years of age at the time of the arrest and whose blood alcohol percentage was two one-hundredths or greater. Such report shall also state that the person was administered such a test or analysis, that the operator administering the test or analysis was trained and certified in the administration of such test, that the test was performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for such test was regularly serviced and maintained, and that the person administering the test had every reason to believe that the equipment was functioning properly at the time the test was administered. Each such report shall be endorsed by the police chief as defined in section one of chapter ninety C, or by the person authorized by him, and shall be sent to the registrar along with the confiscated license or permit not later than ten days from the date that such chemical test or analysis of the defendant's blood was administered. The license to operate a motor vehicle shall thereupon be suspended in accordance with section twenty-four P.

(g) Any person whose license, permit or right to operate has been suspended under subparagraph (1) of paragraph (f) shall, within fifteen days of suspension, be entitled to a hearing before the registrar which shall be limited to the following issues: (i) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor or drugs upon any way or in any place to which members of the public have a right of access or upon any way to which members of the public have a right of access as invitees or licensees, (ii) was such person placed under arrest, and (iii) did such person refuse to submit to such tests or analyses. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall forthwith reinstate such license, permit or right to operate. The registrar shall create and preserve a record at said hearing for judicial review. Within thirty days of the issuance of the final determination by the registrar following a hearing under this paragraph, a person aggrieved by the determination shall have the right to file a petition in the district court for the judicial district in which the offense occurred for judicial review. The filing of a petition for judicial review shall not stay the revocation or suspension. The filing of a petition for judicial review shall be had as soon as possible following the submission of said request, but not later than thirty days following the submission thereof. Review by the court shall be on the record established at the hearing before the registrar. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the registrar's determination.

Any person whose license or right to operate has been suspended pursuant to subparagraph (2) of paragraph (f) on the basis of chemical analysis of his breath, urine or blood

may within ten days of such suspension request a hearing and upon such request shall be entitled to a hearing before the court in which the underlying charges are pending or if the individual is under the age of twenty-one and there are no pending charges, in the district court having jurisdiction where the arrest occurred, which hearing shall be limited to the following issues: whether a blood test administered pursuant to paragraph (e) within a reasonable period of time after such chemical analysis of his breath, shows that the percentage, by weight, of alcohol in such person's blood was less than eight one-hundredths or, relative to such person under the age of twenty-one was less than two one-hundredths; whether reasonable grounds existed for the arrest; and the reliability or validity of the machines, personnel, and procedures used in the chemical analysis or analyses. If the court finds that such a blood test shows that such percentage was less than eight one-hundredths or, relative to such person under the age of twenty-one, that such percentage was less than two one-hundredths, or that there did not exist reasonable grounds for the arrest, or that the chemical analysis or analyses were not reliable or valid, the court shall restore such person's license, permit or right to operate and shall direct the prosecuting officer to forthwith notify the criminal history systems board and the registrar of such restoration.

Section 4. Section 24(e) of Chapter 90 of the General Laws is hereby amended by striking the subsection in its entirety and replacing it with the following paragraph:

(e) In any prosecution for a violation of paragraph (a), evidence of the percentage, by weight, of alcohol in the defendant’s blood at the time of the alleged offense, or evidence of the presence of drugs, as shown by chemical test or analysis of his blood, urine, or breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor or drugs; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the

consent of the defendant, the results thereof were made available to him upon his request and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him; and provided, further, that blood shall not be withdrawn from any party for the purpose of such test or analysis except by a physician, registered nurse or other qualified medical personnel. Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (f) or in any proceedings provided for in section twenty-four N. In the case of a test for the presence of alcohol, if such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith, but the officer who placed him under arrest shall not be liable for false arrest if such police officer had reasonable grounds to believe that the person arrested had been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor; provided, however, that in an instance where a defendant is under the age of twenty-one and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater, the officer who placed him under arrest shall, in accordance with subparagraph (2) of paragraph (f), suspend such defendant's license or permit and take all other actions directed therein, if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference. A certificate, signed and sworn to, by a chemist of the department of the state police or by a chemist of a laboratory certified by the department of public health, which contains the results of an analysis made by such chemist of the percentage

of alcohol in such blood or urine or of the presence drugs shall be prima facie evidence of the percentage of alcohol in such blood or of the presence of drugs.