

LC Abstract

Implied Consent and Administrative Suspension of Driver's License in Drunk Driving Cases



*Wisconsin
Legislative
Council*

One East Main Street
Suite 401
Madison, WI 53703-3382

P.O. Box 2536
Madison, WI 53701-2536

Phone: (608) 266-1304
Fax: (608) 266-3830
www.legis.state.wi.us/lc

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This **LC Abstract** describes a particular aspect of Wisconsin law in effect as of the date printed on the document cover. The abstract is a general discussion and should not be used as legal advice for fact-specific situations. This LC Abstract was written by Don Salm, Senior Staff Attorney. The document is available on-line at www.legis.state.wi.us/lc/reports_by_topic.htm. Additional paper copies are available by contacting the Legislative Council office and requesting document LCA 02-3.

Implied Consent and Administrative Suspension of Driver's License in Drunk Driving Cases

This document provides a general overview of current Wisconsin laws relating to: (1) the Implied Consent Law applicable to operators of motor vehicles used to determine whether a specific operator is driving while under the influence of an intoxicant or drug; and (2) the administrative suspension of a person's driver's license as a result of having a high-level chemical test under the Implied Consent Law. Attached to this abstract are the license sanctions and other penalties applicable to a person who unlawfully refuses to take a chemical test under the Implied Consent Law or who is subject to administrative suspension of his or her license. Other aspects of Wisconsin's drunk driving law are dealt with in a companion document: *Penalties and License Sanctions for Operating a Motor Vehicle While Intoxicated*. (LC Abstract 02-4.)

IMPLIED CONSENT

Implied Consent Law in General

Cite: s. 343.305 (2), Stats.

Under current law, any person who drives or operates a motor vehicle upon the public highways of this state is deemed to have given consent to one or more tests of his or her breath, blood, or urine, for the purpose of determining the presence or quantity in his or her blood or breath of alcohol, controlled substances, controlled substance analogs or other drugs or any combination of alcohol, controlled substances, controlled substance analogs, and other drugs, when requested to do so by a law enforcement officer or when required to do so. The law specifies that: (1) any such tests must be administered upon the request of a law enforcement officer; and (2) the law enforcement agency by which the officer is employed must be prepared to administer, either at its agency or any other agency or facility, two of the three tests (breath, blood, or urine) and may designate which of the tests shall be administered first.

Preliminary Breath Screening Test

Cite: s. 343.303, Stats.

Generally Not Admissible Under current law, if a law enforcement officer has probable cause to believe that the person is violating or has violated an operating a motor vehicle while intoxicated (OWI) or OWI-related offense, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test (PBT) using a device approved by the Department of Transportation (DOT) for this purpose. The result of the PBT may be used by the officer for the purpose of deciding: (1) whether or not the person should be arrested for an OWI violation; and (2) whether or not to require or request chemical tests as authorized under the Implied Consent Law. The result of the PBT is not admissible in any action or proceeding **except:** (1) to show probable cause for an arrest, if the arrest is challenged; or (2) to prove that a chemical test was properly required or requested of a person. Following the screening test,

additional tests may be required or requested of the driver under the Implied Consent Law. There is **no penalty** applicable to refusal to take a PBT.

Law and Procedures Relating to Invoking the Implied Consent Law

Cite: s. 343.305 (3) to (6), Stats.

When Test Requested or Required Current law specifies that upon arrest of a person for an OWI or OWI-related violation, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood, or urine for the purpose specified in the Implied Consent Law. Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent, and if an officer has probable cause to believe that the person has committed a violation, one or more tests may be administered to the person.

Use of Other Means to Obtain Evidence Current law specifies that these provisions do not limit the right of a law enforcement officer to obtain evidence by any other lawful means (e.g., by a search incident to lawful arrest or pursuant to a search warrant; by an emergency search supported by probable cause for arrest).

Information Provided At the time that a chemical test specimen is requested, the law enforcement officer is required to read a statutorily prescribed statement to the person from whom the test specimen is requested.

Chemical Test Procedures and Requirements

Alternative Test A person who submits to the test is permitted, upon his or her request: (1) the alternative test provided by the agency; or (2) at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test.

Persons Permitted to Withdraw Blood Blood may be withdrawn from the person arrested for an OWI or OWI-related offense only by a physician, registered nurse, medical technologist, physician assistant, or person acting under the direction of a physician. A person so acting, the employer of any such person, and any hospital where blood is withdrawn by any such person have **immunity** from civil or criminal liability under s. 895.53, Stats.

Admissibility of Tests at Trial At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have committed an OWI violation, the results of a properly administered chemical test are admissible on: (1) the issue of whether the person was under the influence of an intoxicant or drugs, or both; or (2) any issue relating to the person's alcohol concentration. The test results are admissible (i.e., no other proof is required for admissibility) on the issue of intoxication or prohibited alcohol concentration if the test sample is taken **within three hours** after the event to be proved. If the sample is not taken within the three-hour limit, expert testimony is required to establish the probative value of the analysis. Test results must be given the effect required under s. 885.235, Stats.

Requirements Applicable to Analysis To be considered valid, chemical analyses of blood or urine must have been performed substantially according to methods approved by the State Laboratory of Hygiene and by

an individual possessing a valid permit to perform the analyses issued by the Department of Health and Family Services (DHFS).

The DOT is required to approve techniques or methods of performing chemical analysis of the breath and must:

- Approve training manuals and courses throughout the state for the training of officers in the chemical analysis of a person's breath;
- Certify the qualifications and competence of individuals to conduct the analysis;
- Have trained technicians, approved by the DOT Secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath before regular use of the equipment and periodically thereafter at intervals of not more than 120 days; and
- Issue permits to individuals according to their qualifications.

Separate Breath Sample Requirement

Current law specifies that if a breath test is administered using an infrared breath-testing instrument:

- The test must consist of analyses in the following sequence: one adequate breath sample analysis, one calibration standard analysis, and a second, adequate breath sample analysis.
- A sample is adequate if the instrument analyzes the sample and does not indicate the sample is deficient.
- Failure of a person to provide two separate adequate breath samples in the proper sequence constitutes a refusal.

Effects of Submitting to the Test

See the discussion of administrative suspension of license in the second part of this abstract and the penalties for having a prohibited alcohol concentration set forth in the attachment to LC Abstract 02-4, cited above.

Refusal to Submit to Chemical Test

Cite: s. 343.305 (9) and (10), Stats.

Procedures Prior to Hearing

Current law specifies that if a person refuses to take a chemical test, the officer must immediately take possession of the person's license and prepare a **notice of intent to revoke** the person's operating privilege. The officer must issue a copy of the notice to the person and submit or mail a copy with the person's license to the circuit court for the county in which the arrest was made, the district attorney for that county, and the DOT. The notice of the person's operating privilege must contain substantially the following information:

- That prior to a request for a chemical test, the officer had placed the person under arrest and issued a citation, if appropriate, for an OWI or OWI-related violation.
- That the officer complied with the oral information requirements under s. 343.305 (4), Stats.

- That the person refused a request for a chemical test.
- That the person may request a hearing on the revocation **within 10 days** by mailing or delivering a written request to the court whose address is specified in the notice. If no request for a hearing is received within the 10-day period, the revocation period commences **30 days after** the notice is issued.
- That the issues of the hearing are limited to:
 1. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle: (a) while under the influence of alcohol, a controlled substance, or both; (b) while under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders him or her incapable of safely driving; or (c) while having a prohibited alcohol concentration.
 2. Whether the officer complied with the oral information requirements set forth above.
 3. Whether the person refused to permit the test. The person must be deemed not to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a **physical disability or disease unrelated to the use of alcohol, controlled substances, or other drugs**.
- That, if it is determined that the person refused the test, there will be an order for the person to comply with assessment and a driver safety plan.

The use of this notice by an officer is adequate process to give the appropriate court jurisdiction over the person.

Hearing on Refusal

If a law enforcement officer informs the circuit court that a person has refused to submit to a test, the court must be prepared to hold any requested hearing to determine if the refusal was proper. The scope of the hearing is limited to the issues outlined above.

At the close of the hearing, or **within five days** thereafter, the court must determine the issues before it. If all issues are determined **adversely** to the person, the court must proceed as specified below, relating to revocation and assessment. If one or more of the issues is determined **favorably** to the person, the court must order that no action be taken on the operating privilege on account of the person's refusal to take the test in question. However, this does not preclude the prosecution of the person for an OWI or OWI-related violation.

Court-Ordered Revocation

If the court determines that a person improperly refused to take a test **or** if the person does not request a hearing **within 10 days** after the person has been served with the notice of intent to revoke the person's operating privilege, the court is required to proceed as follows:

- If no hearing was requested, the revocation period must begin 30 days after the date of the refusal.
- If a hearing was requested, the revocation period must commence 30 days after the date of refusal or immediately upon a final determination that the refusal was improper, whichever is later.

License Sanctions; Immobilization, Ignition Interlock, or Seizure of Vehicle

The periods of revocation, which depend on the number of prior refusals or OWI or OWI-related violations in a five- or 10-year period, and the waiting period to obtain an occupational license, are set forth in the attachment to this abstract. The attachment also indicates other possible sanctions including immobilization of the vehicle, installation of an ignition interlock device in the vehicle, and seizure of the vehicle. An example of how this counting of prior refusals and OWI or OWI-related violations operates follows:

In 2002, Driver Z improperly refuses to take a chemical test under the implied consent law. He has, within the past 10 years, been convicted, in separate incidents, of OWI (in 1994) and causing injury by OWI (in 1999). Driver Z is subject to the license revocation periods and related provisions applicable to a third improper refusal within a 10-year period.

Assessment and Treatment

If a person unlawfully refuses to take a chemical test, he or she is subject to assessment and treatment provisions similar to those applicable to persons convicted of OWI or OWI-related offenses (see LC Abstract 02-4, cited above).

ADMINISTRATIVE SUSPENSION FOR HIGH-LEVEL CHEMICAL TEST

Administrative Suspension by DOT

Cite: s. 343.305 (7) and (8), Stats.

Action by Officer if High Test; Suspension

If a person submits to chemical testing administered in accordance with the Implied Consent Law and any test results indicate a prohibited alcohol concentration, the officer must: (1) report the results to the DOT; and (2) take possession of the person's license and forward it to the DOT. The person's operating privilege is then administratively suspended for **six months**.

Request for Administrative Review

Within 10 days after the notification or, if the notification is by mail, **within 13 days**, excluding Saturdays, Sundays, and holidays, after the date of the mailing, the person may request, in writing, that the DOT review the administrative suspension. The review procedure is not subject to ch. 227, Stats. (the Administrative Procedures Act). The officer must provide the person with a separate form for the person to use to request the administrative review. The form must clearly indicate how to request an administrative review and must clearly notify the person that this form must be submitted within 10 days from the notice date indicated on the form.

Administrative Hearing

The DOT must hold the hearing on the matter if the offense allegedly occurred in any other county. Hearings by the DOT must be held in the county in which the offense allegedly occurred or at the nearest office of the DOT if the offense allegedly occurred in a county in which the DOT does not maintain an office.

The DOT must hold a hearing regarding the administrative suspension **within 30 days** after the date of notification. The person may present evidence and may be represented by counsel. The arresting officer need not appear at the administrative hearing unless subpoenaed under s. 805.07, Stats., but he or she must submit a copy of his or her report and the results of the chemical test to the hearing examiner. The hearing is limited to the following issues: (1) the correct identity of the person; (2)

whether the person was informed of the options regarding tests; (3) whether the person had a prohibited alcohol concentration at the time the offense allegedly occurred; (4) whether one or more tests were administered in accordance with the Implied Consent Law; (5) if one or more tests were administered, whether each of the test results for those tests indicates the person had a prohibited alcohol concentration; and (6) whether probable cause existed for the arrest.

The hearing examiner must conduct the administrative hearing in an informal manner. No testimony given by any witness may be used in any subsequent action or proceeding. The hearing examiner may permit testimony by telephone if the site of the administrative hearing is equipped with telephone facilities to allow multiple-party conversations.

Findings of Hearing Examiner

If the hearing examiner finds that the criteria for administrative suspension **have not been satisfied** or that the person did not have a prohibited alcohol concentration at the time the offense allegedly occurred, the examiner must order that the administrative suspension of the person's operating privilege be rescinded. If the hearing examiner finds that the criteria for administrative suspension **have been satisfied** and that the person had a prohibited alcohol concentration at the time the offense allegedly occurred, the administrative suspension must continue.

Notice of Decision, Judicial Review and Stay

The hearing examiner must notify the person in writing of the hearing decision, of the right to judicial review, and of the court's authority to issue a stay of the suspension as described. The administrative suspension is vacated and the person's operating privilege must be automatically reinstated if the hearing examiner fails to mail this notice to the person **within 30 days** after the date of the notification.

Judicial Review

Cite: s. 343.305 (8) (c), Stats.

Request for Review; No Stay of Suspension

An individual aggrieved by the determination of the hearing examiner may have the determination reviewed by the court hearing the action relating to the OWI or OWI-related violation applicable to the individual. If the individual seeks judicial review, he or she must file the request for judicial review with the court **within 20 days** of the issuance of the hearing examiner's decision. The court must send a copy of that request to the DOT.

A request for judicial review does not stay any administrative suspension order (i.e., the suspension continues during the review period).

Judicial Review

The judicial review must be conducted at the time of the trial of the underlying offense. The prosecutor of the underlying offense is required to represent the interests of the DOT.

Court Order

The court must order that the administrative suspension be either rescinded or sustained and forward its order to the DOT. The DOT must vacate the administrative suspension unless, **within 60 days of the date of the request for judicial review** of the administrative hearing decision, the DOT has been notified of the result of the judicial review or of an order of the court entering a stay of the hearing examiner's order continuing the suspension.

Appeal of Lower Court Order

Any party aggrieved by the order of a circuit court may appeal to the court of appeals. Any party aggrieved by the order of a municipal court may appeal to the circuit court for the county where the offense allegedly occurred.

Eligibility for Occupational License

Cite: s. 343.305 (8) (d), Stats.

A person who has his or her operating privilege administratively suspended is eligible for an occupational license under s. 343.10, Stats., ***at any time.***

Attachment

ATTACHMENT

**OWI Chemical Test Refusal and Administrative Suspension Sanctions
in Effect on January 1, 2002**

OFFENSE	REVOCATION OF LICENSE	OCCUPATIONAL LICENSE (WAITING PERIOD)	ASSESSMENT FOR ALCOHOL OR DRUG PROBLEMS	POINTS ON DRIVER'S RECORD
Chemical Test Refusal (First) [s. 343.305 (10) (b) 2.]	1-year revocation ¹ [s. 343.305 (10) (b) 2.]	After 30 days [s. 343.305 (10) (b) 2.]	Yes	0
Chemical Test Refusal (Second) ² [s. 343.305 (10) (b) 3.]	2-year revocation ^{1,2,3} [s. 343.305 (10) (b) 3.]	After 90 days ^{4,5} , <i>except</i> if total number of offenses within any 5-year period equals 2 or more, after 1 year of the revocation period has elapsed	Yes	0
Chemical Test Refusal (Third) ² [s. 343.305 (10) (b) 4.]	3-year revocation ^{1,2,3} [s. 343.305 (10) (b) 4.]	After 120 days ^{4,5} , <i>except</i> if total number of offenses within any 5-year period equals 2 or more, after 1 year of the revocation period has elapsed	Yes	0
Administrative Suspension (PAC) [s. 343.305 (7)]	6-month suspension [s. 343.305 (7) (a)]	Immediately [s. 343.305 (8) (d)]	No	0

¹ Revocation periods are doubled for a person guilty of a refusal when a person under 16 years of age was in the vehicle at the time of the offense. [s. 343.305 (10) (b) 4m.]

² Generally, second offenses are counted within a 10-year period. Most other offenses (third and subsequent) are counted within an individual's lifetime dating back to 1/1/89. [s. 343.305 (10) (b) 3. and 4.] The 10-year and lifetime periods are measured from the date of refusal. [s. 346.65 (2c).]

³ The vehicle owned by the offender and used in the offense may be immobilized or equipped with IID. [s. 343.301 (1) (a) and (2) (a).] For second or subsequent offenses within 5 years, all vehicles titled or registered in the offender's name must be immobilized or equipped with IID. [ss. 343.301 (1) (a) and (2) (a) and 343.305 (10m).] For third or subsequent offenses, the vehicle may be seized. [s. 346.65 (6) (a) 1.]

⁴ Absolute sobriety is mandatory for an occupational license for persons with 2 or more suspensions, revocations, or convictions. [ss. 343.307 (1) and 343.10 (5) (a) 2.]

⁵ Persons with 2 or more suspensions, revocations, or convictions counted under s. 343.307 (1), must complete assessment and be in compliance with a driver safety plan to be eligible for an occupational license. [ss. 343.30 (1q) (b) 3. and 343.10 (2) (c).]