

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 972

(Senator Kagan)

Judicial Proceedings

Drugged Driving - Oral Fluid Tests - Pilot Program

This bill establishes a two-year pilot program to examine the testing of oral fluid samples by police officers who are drug recognition experts for the purpose of determining if an individual is operating a motor vehicle while impaired by a controlled dangerous substance (CDS). Local jurisdictions may apply to participate in the pilot program. The State coordinator for the Drug Recognition Expert Program must select participating jurisdictions based on specified criteria. The State coordinator must also, in consultation with the Montgomery County Police Department and the Center for Forensic Science Research and Education, submit a report to the General Assembly regarding the data collected from the pilot program by December 1, 2019.

The bill terminates September 30, 2019.

Fiscal Summary

State Effect: The bill's requirements regarding program participant selection and reporting can be handled with existing resources. Revenues are not affected.

Local Effect: Minimal increase in local government expenditures for those jurisdictions that participate in the pilot program. Revenues are not affected.

Small Business Effect: Potential minimal.

Analysis

Bill Summary: "Oral fluid test" means the testing of the oral fluid of a driver who is the subject of a traffic stop for the purpose of detecting the presence of a CDS.

The State coordinator for the Drug Recognition Expert Program must select local jurisdictions to participate in the program based on (1) the number of blood tests administered in the jurisdiction that show the presence of a CDS; (2) the availability in the jurisdiction of police officers who are certified as drug recognition experts; and (3) the availability of oral fluid testing devices.

A police officer in a participating jurisdiction who has reasonable grounds to believe that an individual is or has been driving or attempting to drive a motor vehicle while impaired by a CDS may request the individual to submit an oral fluid sample for testing by an officer who is a certified drug recognition expert. A requesting officer is required to advise the individual being tested that neither a refusal to submit nor submitting the sample prevents or requires a subsequent blood test under State law.

The results of the oral fluid test may not be used as a guide for a police officer in deciding whether charges should be filed or as evidence in any court action. Similarly, submitting to or a refusal to submit an oral fluid sample is not admissible as evidence in any court action, including a civil action. A refusal to submit to a test of oral fluid is not a violation of the State implied consent law. Submitting an oral fluid sample, however, does not relieve an individual from the obligation under State law to submit to a blood test if required under the State implied consent law.

Current Law: A person who drives or attempts to drive a motor vehicle is deemed to have consented to take a test of breath or blood, or both, if the person is detained by a police officer on suspicion of committing an alcohol- and/or drug-related driving offense. A person must submit to a test of blood or breath, or both, as directed by a police officer if the person is involved in a motor vehicle accident that results in death or life-threatening injury to another person and the police officer detains the person due to a reasonable belief that the person was driving or attempting to drive while:

- under the influence of alcohol or under the influence of alcohol *per se*;
- impaired by alcohol;
- impaired by drugs and/or drugs and alcohol; or
- impaired by a CDS.

If a police officer directs that a person be tested, then the test must be administered by qualified personnel who comply with the testing procedures specified in statute. Medical personnel who perform the required tests are not liable for civil damages from administering the tests, unless gross negligence is proved.

However, a person may not be compelled to submit to a test to determine the alcohol or drug concentration of a person's blood or breath unless there is a motor vehicle accident that results in death or a life-threatening injury to another person. Further, in a 2016 case, the U.S. Supreme Court held that a blood test cannot be administered without the consent of a person suspected of a drunk and/or drugged driving offense, unless a search warrant is obtained, absent exigent circumstances.

A police officer who stops a driver with reasonable grounds to believe that a violation of alcohol- and/or drug-related driving provisions has taken place must detain the person and request the person to take a test. The police officer must advise the person of the administrative sanctions that must be imposed for refusal to take a test and notice and hearing procedures. For a test refusal, an offender's license or driving privilege must be suspended by the Motor Vehicle Administration for 270 days for a first offense and two years for a second or subsequent offense. A person operating a commercial vehicle who refuses to take a test for alcohol or drug concentration is subject to more stringent administrative sanctions. No modification of the license suspension is permitted for a refusal unless the driver participates in the Ignition Interlock System Program for at least one year.

A police officer is required to advise a person detained on suspicion of an alcohol- and/or drug-related driving offense of the additional criminal penalties that may be imposed if the person is convicted of an alcohol- and/or drug-related driving offense and knowingly refused to take a test requested at the time of the suspected violation. If a person is convicted of an alcohol- and/or drug-related driving offense and the trier of fact finds beyond a reasonable doubt that the person knowingly refused to take the requested test, the person is subject to a penalty in addition to any other penalty that may be imposed for the alcohol- and/or drug-related driving conviction. A person who knowingly refuses to take a test of blood or breath under these circumstances is subject to maximum penalties of imprisonment for two months and/or a fine of \$500. The court may not impose the additional penalty unless the State's Attorney serves notice of the alleged test refusal on the defendant or the defendant's counsel before acceptance of a plea of *nolo contendere* or guilty, or at least 15 days before a circuit court trial or 5 days before a District Court trial, whichever is earlier.

If the person stopped by the police officer is unconscious or otherwise incapable of refusing to take a test, the officer must (1) obtain prompt medical attention; (2) arrange for removal of the person to a medical facility, if necessary; (3) obtain a search warrant, unless exigent circumstances exist; and (4) direct a qualified medical person to withdraw blood for a test, if it does not jeopardize the person's health. An initial refusal to take a test that is withdrawn as specified by statute is deemed not to be a refusal. The burden of proof rests with the person who has withdrawn the refusal to show, by a preponderance of the evidence, that the requirements for withdrawal of a refusal were met.

A test for drugs or CDS is admissible as evidence. However, there are no evidentiary presumptions for impairment based on specific levels of drug or CDS content.

Background: According to the National Conference of State Legislatures, 17 states have *per se* “driving under the influence of drugs” laws. Colorado, Illinois, Montana, and Washington have set the threshold for tetrahydrocannabinol blood concentration at five nanograms or more for driving under the influence of marijuana; Nevada and Ohio have set the threshold at two nanograms of illegal substances per milliliter of blood for driving under the influence of drugs; and Pennsylvania has set the threshold at five nanograms of illegal substances per milliliter of blood. Other states with *per se* laws for driving under the influence of drugs have not set a specific threshold for marijuana.

Local Expenditures: Montgomery County advises that most of the costs for the pilot program are covered by the manufacturers of the testing equipment, including training, instrumentation, laboratory analysis, and expert witness support. The county is responsible for the costs of the individual test kits and laboratory confirmation of individual tests. These costs depend on the number of tests performed in each participating county, but Montgomery County estimates them to be \$10,000 per year.

Prince George’s County advises that test kits cost less than \$11 each and additionally anticipates using 500 kits (\$5,395) in the first year of implementation and 1,000 kits (\$10,790) in the second year of implementation of the pilot program, if the county is selected for participation. In addition, Prince George’s County estimates that testing may cost about \$30 per test, for a cost of \$15,000 in the first year of the pilot program and \$30,000 for the second year, assuming that the county participates.

On the other hand, Baltimore City advises that there is no significant fiscal impact from the bill, and Caroline County advises that, if the county applies and is selected for participation, the resulting costs are unclear.

Additional Comments: The Department of Legislative Services advises that, although the bill requires the pilot program report to be submitted by December 1, 2019, the estimate assumes that the required report is submitted on or before September 30, 2019, in accordance with the bill’s termination date.

Additional Information

Prior Introductions: HB 1367 of 2016, a similar bill, received an unfavorable report from the House Judiciary Committee. Its cross file, SB 970, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken.

Cross File: HB 1068 (Delegate Valentino-Smith) - Judiciary.

Information Source(s): Baltimore City; Caroline, Montgomery, and Prince George's counties; Department of Health and Mental Hygiene; Maryland Department of Transportation; Department of State Police; Judiciary (Administrative Office of the Courts); National Conference of State Legislatures; Department of Legislative Services

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