

Legislative Analysis



ELIMINATE SUNSET ON 0.08 BAC AS *PER SE* DRUNK DRIVING LIMIT

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**House Bill 5664 (reported with committee amendments)
Sponsor: Rep. Pat Somerville**

**House Bill 5665 as introduced
Sponsor: Rep. Andrea LaFontaine**

**Committee: Judiciary
First Analysis (10-25-12)**

BRIEF SUMMARY: The bills would amend two separate acts to maintain the current *per se* BAC (blood alcohol content) level for operating a vehicle while intoxicated at 0.08.

FISCAL IMPACT: The bills would have fiscal implications as detailed later in the analysis.

THE APPARENT PROBLEM:

In 2003, Public Act 61 amended the Michigan Vehicle Code to, among other things, lower the *per se* blood alcohol content (BAC) level for operating while intoxicated to 0.08 or higher. Prior to PA 61, the *per se* BAC level (meaning that actual impairment does not have to be demonstrated) was 0.10. The change was driven by 2000 federal legislation that required all states to establish, by October 1, 2003, a 0.08 BAC legal limit for a *per se* drunk driving offense or lose a percentage of certain highway construction funds.

However, in a response to what some saw as a strong-arm tactic by the federal government to force states to adopt the lower *per se* level rather than allow states to determine what worked best for their residents, the Michigan legislature included a 10-year sunset on the lower BAC level. Thus, as of October 1, 2013, the 0.10 BAC level will be reinstated as the *per se* level for driving while intoxicated.

A July 2009 survey by the National Highway Traffic Safety Administration (NHTSA) reported a dramatic decline in the number of drunk drivers having a BAC of 0.08 or higher on weekend nights compared to surveys conducted in the decades preceding the shift to the lower *per se* level. For instance, in 1973, 7.5 percent of drivers had BACs of 0.08 or greater. In 2007, the numbers declined to 2.2 percent - a decline of 71 percent.

In addition, the federal sanctions for noncompliance with the 0.08 BAC are still in force. In fact, federal legislation enacted this summer amended the penalty provisions related to a variety of federal compliance standards, including the penalties related to the 0.08 BAC provisions. (See the **Fiscal Information** section below for a more detailed discussion of the federal penalties.)

In light of the positive impact on lowering drunk driving rates and the continuing federal sanctions for noncompliance, it has been suggested that Michigan repeal the sunset keep the level for drunk driving to 0.08 BAC.

THE CONTENT OF THE BILL:

The bills would amend different acts to maintain 0.08 BAC as the *per se* level for drunk driving.

House Bill 5665 would amend the Michigan Vehicle Code (257.625 et al.). Under the state's *per se* statute (or presumptive level for determining if a person was guilty of drunk driving), a person with a blood alcohol content (BAC) of 0.08 percent is considered to be operating while intoxicated and is guilty of drunk driving. However, on October 1, 2013, the 0.08 BAC *per se* level will revert to 0.10 BAC. The bill would eliminate the sunset provision and maintain 0.08 BAC as the *per se* BAC level for drunk driving.

The bill would also eliminate references to the higher BAC level as of October 1, 2013, that are currently contained in the definition of "any bodily alcohol level" for drivers less than 21 years of age and a provision pertaining to unlawful BAC levels for commercial truck drivers.

House Bill 5664 would make complementary changes to the sentencing guidelines within the Code of Criminal Procedure (MCL 777.33 and 777.48). Under Offense Variable 18 (operator ability affected by alcohol or drugs), 10 points are scored if the offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive with a BAC of at least 0.08 but less than 0.15, with the lower level being raised to 0.10 BAC as of October 1, 2013, (thus lowering the points that could be scored for a BAC of 0.08 to five points). The bill would maintain the lower limit at 0.08 BAC.

For Offense Variable 3 (physical injury to a victim), 50 points are scored if death results from the commission of a crime and the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive and the offender had an alcohol content of 0.08 BAC or higher. The bill would remove the sunset provision that would increase the BAC to 0.10 as of October 1, 2013.

BACKGROUND INFORMATION:

For more information regarding the 2003 legislation that, among other things, lowered the *per se* drunk driving threshold to 0.08 BAC, see the House Fiscal Agency's analysis of House Bills 4247 and 4248 dated 8-21-03, as found on the Michigan Legislature website: www.legislature.mi.gov

FISCAL INFORMATION:

By eliminating the scheduled sunset of Michigan's .08 blood alcohol content (BAC) standard for driving while intoxicated, the bills would prevent Michigan from returning

to the .10 BAC standard which had previously existed. This would have two impacts. First, the State would avoid a potential loss of federal highway funds. Second, the State would forego any savings to state and local correctional systems that might result from reverting to the .10 BAC standard. Each of these issues is discussed in more detail below.

Department of Transportation

The federal government has long provided funds to states for highway programs. Over the last 15 years, federal funds for Michigan highway programs have averaged approximately \$1.0 billion per year—approximately one-third of the state's annual transportation budgets. In order to achieve national highway operational or safety objectives, federal law has established various requirements of the states as a condition of receiving federal funds. Federal requirements include enforcement of vehicle size/weight limitations and control of junk yards and outdoor advertising. Safety-related requirements include mandatory safety belt laws, establishment of national (21-year-old) minimum drinking age, zero tolerance blood alcohol for underage drivers, adoption of a .08 blood alcohol content (BAC) standard for driving while intoxicated, restrictions on open containers of alcohol in vehicles, and adoption of federal commercial driver's license standards.

On July 6, 2012, President Obama signed into law P.L. 112-141, the Moving Ahead for Progress in the 21st Century Act (MAP-21), which reauthorized federal-aid transportation programs through September 2014. Subtitle D of MAP-21 amended several sections of federal law dealing with highway safety; Sec. 1402 of MAP-21 amended the *Open container requirements* of federal law; Sec. 1403 of MAP-21 amended provisions related to *Minimum penalties for repeat offenders for driving while intoxicated or driving under the influence*.

Sec. 1404 of MAP-21 amended the penalty provisions related to federal compliance standards, including penalty provisions related to the .08 BAC requirement. The new provisions direct that beginning with the 2012 fiscal year, the FHWA shall withhold 6% of federal funding for certain apportioned programs from states which had not enacted or were not enforcing laws meeting the federal operating while intoxicated requirements.

Michigan had amended its *driving while intoxicated* and *driving under the influence* laws in 2003 to conform to the federal requirements which pertained at that time. Public Act 61 of 2003 amended Section 625 of the Michigan Vehicle Code to define "operating while intoxicated" to mean having a BAC of .08 or greater. Prior this 2003 amendment the Michigan Vehicle Code had used a .10 BAC to define operating while intoxicated. Public Act 61 also established standards for BAC for minors operating motor vehicles and for operators of commercial motor vehicles. The 2003 legislation is described in this 2003 House Fiscal Agency memo, <http://www.house.mi.gov/hfa/PDFs/HB4247.pdf>

At the time PA 61 was enacted, the Legislature provided for a sunset of the .08 BAC standard; the .08 BAC standard would sunset, and the .10 BAC would again be the legal standard for operating while intoxicated, effective October 1, 2013.

The Michigan Department of Transportation indicates that Michigan is now out of compliance with federal *operating while intoxicated* requirements. The department indicates that failure to demonstrate compliance will cause the FHWA to withhold 6% of MAP-21 apportioned National Highway Performance Program and Surface Transportation Program funds; the potential withheld amount is estimated to be \$50.0 million per year.

Impact of Correctional Costs

The bills are also likely to have an impact on future state and local correctional costs. If the state were to revert to the .10 BAC standard, it is likely that the number of felony and misdemeanor drunk driver convictions would be reduced to some degree and that some of those convicted would be sentenced under lesser offenses. This would reduce state and local correctional costs by an indeterminate amount as well revenue generated from civil fines.

The average cost of prison incarceration in a state facility is roughly \$34,000 per prisoner per year, a figure that includes various fixed administrative and operational costs. The cost of local incarceration in a county jail and local misdemeanor probation supervision varies by jurisdiction. State costs of parole and felony probation supervision, exclusive of the cost of electronic tether, average about \$2,300 per supervised offender per year. Any decrease in penal fine revenues would reduce funding for local libraries, which are the constitutionally-designated recipients of those revenues.

ARGUMENTS:

For:

If the bills are not enacted, the state would be in noncompliance with federal drunk driving standards and the state would lose needed road construction dollars. The increase in the *per se* BAC level would also affect the scoring variables used to determine an offender's range for an appropriate sentence and thus impact whether some offenders go straight to prison or are eligible for probation and/or county jail.

Further, prior to the 2003 legislation that created the 0.08 *per se* BAC level, drivers under 21 years of age were prohibited from driving with any bodily alcohol content, defined to mean a BAC level of 0.02 or greater. Operators of commercial vehicles were prohibited from driving with a BAC of 0.04 but less than 0.07. Even though it could be argued that neither of these provisions was related to the issue of establishing 0.08 BAC as the *per se* level for drunk driving, these provisions nonetheless were amended. "Any bodily alcohol content" for underage drivers was therefore defined as a BAC of 0.02 to less than 0.08 and commercial drivers were prohibited from driving with a BAC of 0.04 to less than

0.08. Both provisions contain the same sunset which will increase the upper limit to 0.10 - levels that do not represent the historical limits for these drivers.

Data continue to show that the lower *per se* level is an effective deterrent to drunk driving, especially when combined with other policies such as training for servers in recognizing intoxicated patrons, license suspension or revocation, enrollment in sobriety courts, and use of ignition interlock devices. With less than a year before the sunset provision raises the upper limit for drunk driving penalties, the bills are a timely remedy to keep a good public policy in force.

POSITIONS:

The Michigan Department of State Police indicated support for the bill. (9-27-12)

The Office of Attorney General indicated support for the bill. (9-27-12)

The Michigan Department of Transportation indicated support for the bill. (9-27-12)

The Prosecuting Attorneys Association of Michigan (PAAM) indicated support for the bill. (9-27-12)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.