

# Legislative Analysis

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## **EXTEND SUNSET KEEPING 0.08 BAC AS "PER SE" LEVEL FOR INTOXICATION OR IMPAIRMENT**

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**House Bill 4093 as enrolled**  
**Public Act 23 of 2013**  
**Sponsor: Rep. Andrea LaFontaine**

**House Bill 4131 as enrolled**  
**Public Act 24 of 2013**  
**Sponsor: Rep. Klint Kesto**

**House Committee: Criminal Justice**  
**Senate Committee: Judiciary**

### **Second Analysis (7-10-13)**

**BRIEF SUMMARY:** The bills would amend two different acts to extend, for five more years, the provision establishing 0.08 BAC as the *per se* level for drunk driving.

**FISCAL IMPACT:** The bills would prevent the loss of federal funds for Michigan highway programs and impact state and local correctional costs, as discussed in more detail later.

### **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, if nothing is done, the 0.10 BAC level will be reinstated as the *per se* level for driving while intoxicated.

Some have wondered why the *per se* level for intoxication was established at 0.08 BAC. Research studies show that even though small amounts of alcohol can affect a person's ability to drive, effects on muscle coordination, judgment, reasoning, and ability to detect danger begin to be exhibited at a BAC of 0.08. According to the National Highway Traffic Safety Administration (NHTSA), the relative risk of a driver being involved in a single-vehicle crash is at least 11 times greater with a BAC between .08 and .10 than with a BAC of zero. This is due to the effects of alcohol on the ability to perform critical

driving tasks such as changing lanes, steering, and braking that are apparent at a BAC of 0.08.

In the years since Michigan adopted the lower drunk driving standard, data submitted to the House Criminal Justice Committee testimony show a downward trend in all classifications involving alcohol – total crashes, fatal crashes, and fatalities. In 2002, the last full year of the 0.10 BAC standard, there were 15,872 total crashes involving alcohol, 384 were fatal crashes, and 422 people died. In 2011, the total crashes had decreased to 9,855 with 261 being fatal crashes, and 282 deaths.

Besides the human toll, alcohol-involved crashes have a significant societal cost in terms of monetary costs, medical care, lost productivity, etc. In 2009, the total monetary and nonmonetary quality-of-life costs specific to Michigan for traffic crashes were \$9.1 billion, over one-fifth of which were from alcohol-involved crashes (\$1.9 billion in total costs). Compare that to the \$4.7 billion total cost for index crimes (such as violent crimes and arson) and the economic toll on individuals and the state as a whole due to alcohol-involved crashes is apparent. [*Societal Costs of Traffic Crashes and Crime in Michigan: 2011 Update*, University of Michigan Transportation Research Institute (UMTRI)]

Moreover, the federal sanctions for noncompliance with the 0.08 BAC are still in force. In fact, federal legislation enacted in the summer of 2012 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 extend the sunset and keep the level for drunk driving to 0.08 BAC for a few years longer.

### ***THE CONTENT OF THE BILLS:***

The bills, which are tie-barred to each other, took effect May 9, 2013.

House Bill 4093 would amend the Michigan Vehicle Code (257.625 et al.). Under the state's *per se* statute (meaning that actual impairment does not have to be demonstrated), 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 extend the sunset provision and maintain 0.08 BAC as the *per se* BAC level for drunk driving for another five years (until October 1, 2018).

The bill would also extend the sunset provisions contained in several other sections of the vehicle code that pertain to drivers of commercial vehicles, drivers less than 21 years of age, and admissibility of chemical testing as evidence, and in the definitions of "any bodily alcohol content" and "unlawful alcohol content."

[For drivers under 21 years of age, "unlawful alcohol content" begins at a BAC of 0.02. For commercial drivers, it is 0.04. These provisions remain unchanged.]

House Bill 4131 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 operates 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 another five years, until October 1, 2018.

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 extend the sunset provision and so would increase the BAC to 0.10 as of October 1, 2018, instead of October 1, 2013.

#### ***BACKGROUND INFORMATION:***

The bills are similar to House Bills 5665 and 5664, respectively, of last session. However, those bills would have eliminated the sunset and made the .08 BAC *per se* standard permanent. They were reported from the House Judiciary Committee but saw no further action.

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](http://www.legislature.mi.gov). The UMTRI report *Societal Costs of Traffic Crashes and Crime in Michigan: 2011 Update* can be found on the Department of State Police website ([www.michigan.gov/msp](http://www.michigan.gov/msp)) by typing "societal costs of traffic crashes" into the search box.

#### ***FISCAL INFORMATION:***

By extending the scheduled sunset of Michigan's .08 blood alcohol content (BAC) standard for driving while intoxicated, the bills would prevent Michigan, until October 1, 2018, 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 at this time. 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 obtained 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 \$35,500 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 average about \$3,000 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 out of compliance 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.

Moreover, 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. In fact, according to testimony submitted by the Michigan Association of Chiefs of Police, alcohol-involved crashes, as well as the number of fatal crashes and fatalities, have declined in each year since the 0.08 BAC standard was adopted. Overall, since 2004 (the first full year 0.08 BAC was the law) to 2011, alcohol-involved crashes declined by 32 percent, fatal crashes by 23 percent, and fatalities by 22 percent.

Lastly, as mentioned earlier in the UMTRI report, the economic costs to society such as lost productivity and health care costs are likely to increase if the BAC reverted to 0.10 and the number of accidents with fatalities or serious injuries also increased. Considering the above facts, it is easy to see why it is imperative to maintain the 0.08 BAC standard. With the upper limit for drunk driving penalties about to rise in a few months when the sunset expires, the bills are a timely remedy to keep a good public policy in force for a few years longer.

#### **Response:**

The enacted versions of the bills merely extend the sunset on the lower BAC standard of .08, whereas the bills as reported from the Criminal Justice Committee would have put the 0.08 standard in statute indefinitely. From a historical perspective, one objective of the original 10-year sunset was to allow time to see if data supported lowering the *per se* level. At the time the 2003 legislation was being considered, several new anti-drunk driving measures had recently been implemented, for example, an expansion in the use of ignition interlock devices. Because there were initial signs that those measures were having a positive impact on drunk driving, some wanted more time to see if the measures were sufficient without having to change the *per se* standard. Lowering the standard, it was feared, would inadvertently capture social drinkers – e.g., those having a couple

glasses of wine with dinner – rather than deter the hard core alcohol abusers. Thus, some wanted an opportunity for a future legislature to review the impact of Public Act 61 of 2003 and placed a sunset date in it.

However, as already discussed, the data since 2004 overwhelmingly supports the effectiveness of reducing the number and severity of drunk driving accidents by lowering the drunk driving BAC standard. In addition, research into the effects on driving skills by blood alcohol level continue to show significant impacts on coordination, judgment, and reasoning at a BAC of 0.08 that just aren't there at lower amounts, though people will exhibit various levels of impairment at lower levels. Research also shows that it takes many more drinks than just two to get someone to a 0.08 BAC level. Yes, other measures such as educating the public about the effects of alcohol on driving ability, sobriety courts, and the use of ignition interlock systems are also part of the solution. But some believe the lower standard saves lives and so should be made permanent.

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