

EXTEND SUNSET OF 0.08 BLOOD ALCOHOL CONTENT AS *PER SE* DRUNK DRIVING LEVEL

Phone: (517) 373-8080
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House Bill 4547 as enacted
Public Act 152 of 2017
Sponsor: Rep. Klint Kesto

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4548 as enacted
Public Act 153 of 2017
Sponsor: Rep. Patrick Green

House Committee: Law and Justice
Senate Committee: Judiciary
Complete to 7-25-18

BRIEF SUMMARY: House Bill 4548 extends, for three more years—until October 1, 2021—the provision within the Michigan Vehicle Code establishing 0.08 blood alcohol content (BAC) as the *per se* level for drunk driving, and House Bill 4547 makes complementary revisions to another section of law. (The *per se* level means that actual impairment does not have to be demonstrated.)

FISCAL IMPACT: The bills would prevent the loss of federal funds for Michigan highway programs and impact state and local correctional costs. (See *Fiscal Information*, below.)

THE APPARENT PROBLEM:

In 2003, Public Act 61 amended the Michigan Vehicle Code to, among other things, lower the *per se* BAC level for operating while intoxicated from 0.10 to 0.08 grams or higher. A person who is determined to be at or above the *per se* level does not have to demonstrate actual impairment to be found guilty of drunk driving.

However, Public Act 61 of 2003 included a 10-year sunset (expiration) on the lower BAC level. In 2013, Public Act 23 extended the sunset another five years. Thus, as of October 1, 2018, if nothing is done, the 0.10 BAC level will be reinstated as the *per se* level for driving while intoxicated. These bills prevent that for an additional three years, extending the sunset to October 1, 2021.

Researchers cite studies showing 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's 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. A driver with a BAC at the *per se* level of 0.08 is approximately four times more likely to be involved in a vehicle accident than a driver with a BAC of zero, according to the Michigan State Police (MSP). 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.

The Brain Injury Association of Michigan reports that motor vehicle crashes are the second leading cause of traumatic brain *injuries*, and are the leading cause of traumatic brain injury *death*, in the state. Besides the human toll, alcohol-involved crashes have a significant societal cost in terms of monetary costs, medical care, and lost productivity. According to a 2011 study by the University of Michigan Transportation Research Institute, the total monetary and non-monetary quality-of-life costs in 2009 specific to Michigan from alcohol-involved crashes was about \$1.9 billion—over one-fifth of costs associated with all traffic crashes and almost half of the costs associated with index crimes (such as murder and arson). [An updated report by UMTRI is expected later this year.]

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 penalty provisions related to a variety of federal compliance standards, including the penalties related to the 0.08 BAC provisions. (See *Fiscal Information*, below, for a more detailed discussion of the federal penalties.)

In the years since Michigan adopted the lower drunk driving standard, annual data collected by the MSP continue to show a downward trend in alcohol-involved crashes. For instance, even though Michigan traffic deaths increased 10% between 2015 and 2016, alcohol-involved traffic deaths fell by 11%, according to the MSP.

In light of the positive impact on lowering drunk driving rates and the continuing federal sanctions for noncompliance, legislation has been offered once again to extend the sunset and keep the level for drunk driving at 0.08 BAC for a few more years.

THE CONTENT OF THE BILLS:

The bills amend different acts to extend the 2018 sunset and thus maintain 0.08 BAC as the *per se* level for drunk driving for another three years, until October 1, 2021.

House Bill 4548 amends the Michigan Vehicle Code. Under the state's *per se* statute (or presumptive level for determining if a person is guilty of drunk driving), a person with a BAC of 0.08 percent is considered to be operating while intoxicated and is guilty of drunk driving. On October 1, 2018, the 0.08 BAC *per se* level will revert to 0.10 BAC. As noted earlier, the bill extends the sunset provision and maintains 0.08 BAC as the *per se* BAC level for drunk driving for another three years, until October 1, 2021. All statutory references to a BAC of 0.08 grams will at that time be changed to apply to a BAC of 0.10 grams.

The bill also extends the sunsets for the lower BAC level 0.08 currently contained in a provision pertaining to chemical testing, the definition of “any bodily alcohol level” for drivers less than 21 years of age, the definition of “unlawful alcohol content” in a provision

pertaining to refusing a chemical test, and a provision pertaining to unlawful BAC levels for drivers of commercial motor vehicles.

MCL 257.625 et al.

House Bill 4547 makes complementary changes to the sentencing guidelines within the Code of Criminal Procedure.

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 extends the sunset provision so that the BAC will not increase to 0.10 until October 1, 2021.

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, 2018. (This would lower the points that could be scored for a BAC of 0.08 to five).

The bill maintains the lower limit at 0.08 BAC until October 1, 2021.

[Michigan uses an indeterminate sentencing scheme for most criminal offenses. The maximum sentence that can be imposed for a particular crime is established in statute. In determining an appropriate sentence range, the judge looks at and scores a number of factors such as whether the offender has a record of prior convictions and certain elements of the crime, known as “offense variables,” for example, whether a gun was used or a victim was injured or killed. Maintaining the BAC at the lower level by extending the sunset maintains the status quo for another five years. By contrast, if the BAC were raised to 0.10, the impact on a person convicted of driving with a BAC of at least 0.08 but less than 0.10 BAC may, in some cases, affect whether the person would be eligible for community-based sanctions, such as jail and/or probation, or sent to prison. While the sentence range is no longer mandatory, it is used to provide guidance in determining a sentence appropriate to the facts of the crime; a judge has discretion to go above or below the sentencing range.]

MCL 777.33 and 777.48

FISCAL INFORMATION:

By extending the scheduled sunset of Michigan’s 0.08 BAC standard for driving while intoxicated (as described above), the bills would have two impacts. First, the state would avoid a potential loss of federal-aid highway funds. Second, the state would forgo 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.

Impact on State Transportation Funding

The federal government has long provided funds to states for highway programs. Over the last 15 years, federal funds for Michigan highway programs averaged approximately \$1.0 billion per year—approximately one-third of annual state 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, restrictions on open containers of alcohol in vehicles, adoption of federal commercial driver's license standards, and adoption of a .08 BAC *per se* standard for driving while intoxicated.

Federal requirements encouraging states to adopt .08 *per se* laws are established in 23 USC 163 and implemented through 23 CFR 1225. Those provisions were last amended in 2012 with the enactment of P.L. 112-141, the Moving Ahead for Progress in the 21st Century Act (MAP-21). Subtitle D of MAP-21 amended several sections of federal law dealing with highway safety; Section 1403 of MAP-21 amended provisions related to Minimum penalties for repeat offenders for driving while intoxicated or driving under the influence.

Section 1404 of MAP-21 amended the penalty provisions related to federal compliance standards, including penalty provisions related to the .08 BAC requirement. These provisions directed that beginning with the 2012 fiscal year, the Federal Highway Administration (FHWA) 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.

As noted above, Michigan had amended its operating driving while intoxicated and driving under the influence laws in 2003 to conform to the federal requirements that obtained at that time.¹

If Michigan does not lift the sunset on the .08 BAC *per se* operating while intoxicated standard, the state would fall out of compliance with the federal-aid highway program requirements. The state would be sanctioned with the loss of certain federal funds. We have not yet established when federal penalties would go into effect, and we do not yet have an estimate of the amount of potential sanctions—the amount would depend on the amount of federal-aid allocated to Michigan in the applicable program categories. In 2013 the Michigan Department of Transportation estimated that failure to demonstrate compliance with the federal .08 BAC standard would cause the FHWA to withhold 6% of certain federal-aid highway funds, with a potential loss of \$50.0 million per year.

¹ The 2003 legislation is described in this 2003 HFA memo: <http://www.house.mi.gov/hfa/PDFs/HB4247.pdf>

Impact on 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 on October 1, 2018, 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 as revenues generated from fines.

Based on 2017 figures, the average cost of prison incarceration in a state facility is roughly \$37,000 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision average about \$3,600 per supervised offender per year. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. Any decrease in penal fine revenues would reduce funding for local libraries, which are the constitutionally designated recipients of those revenues.

ARGUMENTS:

For:

With 2015 data revealing that almost a third of all traffic crashes involve at least one operator of a vehicle or pedestrian who had been drinking, and that fatalities and incapacitating injuries increase when alcohol is involved, observers say that it simply does not make sense to raise the *per se* level for drunk driving to the pre-2003 level. 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. (MADD reports that there has been a 21% reduction in drunk driving deaths since .08 BAC was implemented).

Moreover, if the bills are not enacted, the state will be out of compliance with federal drunk driving standards in 2018, and the state will lose needed road construction dollars. The increase in the *per se* BAC level will also affect the scoring variables used to determine an offender's range for an appropriate sentence and thus influence whether some offenders go to prison or are eligible for probation and/or county jail.

Further, as mentioned earlier, the economic costs to society such as lost productivity and health care costs are likely to increase if the BAC reverts to 0.10 because of the likely increase in the number of accidents with fatalities or serious injuries. Considering the above, it is easy to see why proponents of the bills say that it is imperative to maintain the 0.08 BAC standard. With the upper limit for drunk driving penalties about to rise soon when the sunset expires, the bills are a timely remedy to keep a good public policy in force.

For:

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, there was 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 of glasses of wine with dinner—rather than deter the hardcore alcohol abusers. Thus, some wanted an opportunity for a future legislature to review the impact of Public Act 61 of 2003 and so placed a sunset (expiration) date in it. The legislature in 2013 opted to continue the lower BAC level for an additional five years. Now, as that date nears in 2018, the legislature must again decide whether to extend the sunset or allow the BAC to reset to the higher 0.10 level.

However, as already discussed, the data overwhelmingly support 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 negative impact on coordination, judgment, and reasoning at a BAC of 0.08 that is not present at lower amounts (although people will exhibit various levels of impairment at lower levels). Regarding capturing social drinkers, research shows that it often takes more than just a drink or two over the course of an evening to get someone to a 0.08 BAC level. (Note: metabolism of alcohol is affected by many variables such as age, sex, body build, weight, food and nonalcoholic beverage consumption, and even at a BAC lower than 0.08, a driver's ability to safely operate a vehicle may be impaired.)

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 evidence supports arguments that the lower standard saves lives and prevents many incapacitating injuries. Extending the sunset allows data collection to continue and allows the opportunity for future legislators to examine the data and debate the issue when deciding what is in the public's best interest. As some say, ending the sunset also ends the discussion.

Response:

To some, the data are incontrovertible. A *per se* BAC of 0.08 instead of 0.10 saves lives, reduces serious injuries, and saves society a lot of money. Most advocates prefer *permanently* lowering the BAC to 0.08 over extending the sunset. They say that the evidence is so overwhelming that Canada makes driving with a BAC of 0.08 a crime, as do the United Kingdom (except for Scotland at 0.05) and Malta. Australia, Russia, and most European countries set 0.05 BAC for criminal drunk driving, with some (Sweden and Poland, among others) as low as 0.02 BAC, and the Czech Republic has a zero tolerance for driving when drinking (0.0 BAC).

Movement to adopt lower BAC levels is active in the United States, as well. As of December 30, 2018, Utah will lower its *per se* drunk driving level to 0.05 BAC. The National Highway Safety Transportation Board has also recommended that all states reduce the BAC to 0.05 as a way to reduce alcohol-impaired deaths and injuries. Moreover, research shows that alcohol increases the intoxicating effect of marijuana on people who mix the two. Thus, as medical marijuana use increases, and support grows for legalizing

recreational marijuana, many say it is time for the BAC for *per se* drunk driving to be permanently established at 0.08, if not lower, as Utah and much of the world have done.

For:

Prior to the 2003 legislation that created the 0.08 *per se* BAC level and the sunset clause, 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. These provisions were revised in 2003 to define “any bodily alcohol content” for underage drivers as a BAC of 0.02 to less than 0.08 and to prohibit commercial drivers from driving with a BAC of 0.04 to less than 0.08.

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 to contain the same sunset which is currently due to increase the upper limit to 0.10 in 2018—levels that do not represent the historical limits for these drivers. Thus, at a minimum, the sunset should be extended or these provisions should be restored to their original meanings.

Legislative Analyst: Susan Stutzky
Fiscal Analysts: William E. Hamilton
Robin Risko

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