

FILED

2010 APR -2 PM 4:08

**WEST VIRGINIA LEGISLATURE**

**SEVENTY-NINTH LEGISLATURE**

**REGULAR SESSION, 2010**

**ENROLLED**

**COMMITTEE SUBSTITUTE**

**FOR**

**Senate Bill No. 186**

**(SENATOR KESSLER, *original sponsors*)**

[Passed March 13, 2010; in effect ninety days from passage.]

SB 186

OFFICE WEST VIRGINIA  
CLERK OF STATE

2010 APR -2 PM 4: 08

CLARENCE M. BROWN  
SECRETARY OF STATE

**ENROLLED**

COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 186**

(SENATOR KESSLER, *original sponsor*)

[Passed March 13, 2010; in effect ninety days from passage.]

AN ACT to amend and reenact §17C-5-2 and §17C-5-7 of the Code of West Virginia, 1931, as amended; to amend said code by adding thereto a new section, designated §17C-5-2b; to amend and reenact §17C-5A-1a, §17C-5A-2, §17C-5A-3 and §17C-5A-3a of said code; to amend said code by adding thereto a new article, designated §17C-5C-1, §17C-5C-2, §17C-5C-3, §17C-5C-4 and §17C-5C-5; and to amend and reenact §61-11-22 and §61-11-25 of said code, all relating to the motor vehicle and traffic laws of the state; procedures for conditional probation, deferral and dismissal of criminal charges and expungement of arrest record for certain persons charged for the first time with a non-aggravated offense of driving under the influence of alcohol conditioned upon successful completion of the motor vehicle alcohol test and lock program; exempting from eligibility for said conditional probation persons originally charged with any aggravated offense of driving under the influence of alcohol, any controlled substance, or

any other drug, persons holding commercial drivers' licenses or operating a commercial vehicle, and persons who have had their drivers' licenses previously revoked for driving under the influence of alcohol, any controlled substance or any other drug in any jurisdiction; providing procedures for termination of conditional probation upon violation of the terms thereof; exempting records maintained by the division of motor vehicles from expungement; preserving criminal and administrative consequences for any subsequent charge of driving under the influence of alcohol; amending the hearing procedures; clarifying the effect of a no contest plea on the administrative license suspension process; requiring the state establish lawful arrest in administrative license suspension proceedings where applicable; providing that any determination of indigence made by the Department of Health and Human Resources for purposes of subsidized participation in the safety and treatment program applies to subsidization of participation in the motor vehicle alcohol test and lock program; creation of a special revenue account, known as the Department of Health and Human Resources Safety and Treatment Fund; making a one-time transfer of monies into the fund; providing rule-making authority; control and use of the fund by the agency; creating the Office of Administrative Hearings within the Department of Transportation; appointment of Chief Hearing Examiner; providing for the organization and jurisdiction of the office; setting out hearing procedures; and providing for the transition of the hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings.

*Be it enacted by the Legislature of West Virginia:*

That §17C-5-2 and §17C-5-7 of the Code of West Virginia, 1931, as amended be amended and reenacted; that said code be amended by adding thereto a new section, designated §17C-5-2b; that §17C-5A-1a, §17C-5A-2, §17C-5A-3 and §17C-5A-3a of said code be amended and reenacted; that said code be

amended by adding thereto a new article, designated §17C-5C-1, §17C-5C-2, §17C-5C-3, §17C-5C-4 and §17C-5C-5; and that §61-11-22 and §61-11-25 of said code be amended and reenacted, all to read as follows:

**CHAPTER 17C. TRAFFIC REGULATIONS  
AND LAWS OF THE ROAD.**

**ARTICLE 5. SERIOUS TRAFFIC OFFENSES.**

**§17C-5-2. Driving under influence of alcohol, controlled substances or drugs; penalties.**

1 (a) Any person who:

2 (1) Drives a vehicle in this state while he or she:

3 (A) Is under the influence of alcohol;

4 (B) Is under the influence of any controlled substance;

5 (C) Is under the influence of any other drug;

6 (D) Is under the combined influence of alcohol and any  
7 controlled substance or any other drug; or

8 (E) Has an alcohol concentration in his or her blood of  
9 eight hundredths of one percent or more, by weight; and

10 (2) While driving does any act forbidden by law or fails  
11 to perform any duty imposed by law in the driving of the  
12 vehicle, which act or failure proximately causes the death  
13 of any person within one year next following the act or  
14 failure; and

15 (3) Commits the act or failure in reckless disregard of the  
16 safety of others and when the influence of alcohol, con-  
17 trolled substances or drugs is shown to be a contributing  
18 cause to the death, is guilty of a felony and, upon convic-  
19 tion thereof, shall be imprisoned in a state correctional  
20 facility for not less than two years nor more than ten years

21 and shall be fined not less than one thousand dollars nor  
22 more than three thousand dollars.

23 (b) Any person who:

24 (1) Drives a vehicle in this state while he or she:

25 (A) Is under the influence of alcohol;

26 (B) Is under the influence of any controlled substance;

27 (C) Is under the influence of any other drug;

28 (D) Is under the combined influence of alcohol and any  
29 controlled substance or any other drug;

30 (E) Has an alcohol concentration in his or her blood of  
31 eight hundredths of one percent or more, by weight; and

32 (2) While driving does any act forbidden by law or fails  
33 to perform any duty imposed by law in the driving of the  
34 vehicle, which act or failure proximately causes the death  
35 of any person within one year next following the act or  
36 failure, is guilty of a misdemeanor and, upon conviction  
37 thereof, shall be confined in jail for not less than ninety  
38 days nor more than one year and shall be fined not less  
39 than five hundred dollars nor more than one thousand  
40 dollars.

41 (c) Any person who:

42 (1) Drives a vehicle in this state while he or she:

43 (A) Is under the influence of alcohol;

44 (B) Is under the influence of any controlled substance;

45 (C) Is under the influence of any other drug;

46 (D) Is under the combined influence of alcohol and any  
47 controlled substance or any other drug; or

48 (E) Has an alcohol concentration in his or her blood of  
49 eight hundredths of one percent or more, by weight; and

50 (2) While driving does any act forbidden by law or fails  
51 to perform any duty imposed by law in the driving of the  
52 vehicle, which act or failure proximately causes bodily  
53 injury to any person other than himself or herself, is guilty  
54 of a misdemeanor and, upon conviction thereof, shall be  
55 confined in jail for not less than one day nor more than  
56 one year, which jail term is to include actual confinement  
57 of not less than twenty-four hours, and shall be fined not  
58 less than two hundred dollars nor more than one thousand  
59 dollars.

60 (d) Any person who:

61 (1) Drives a vehicle in this state while he or she:

62 (A) Is under the influence of alcohol;

63 (B) Is under the influence of any controlled substance;

64 (C) Is under the influence of any other drug;

65 (D) Is under the combined influence of alcohol and any  
66 controlled substance or any other drug; or

67 (E) Has an alcohol concentration in his or her blood of  
68 eight hundredths of one percent or more, by weight, but  
69 less than fifteen hundredths of one percent, by weight;

70 (2) Is guilty of a misdemeanor and, upon conviction  
71 thereof, except as provided in section two-b of this article,  
72 shall be confined in jail for up to six months and shall be  
73 fined not less than one hundred dollars nor more than five  
74 hundred dollars. A person sentenced pursuant to this  
75 subdivision shall receive credit for any period of actual  
76 confinement he or she served upon arrest for the subject  
77 offense.

78 (e) Any person who drives a vehicle in this state while he  
79 or she has an alcohol concentration in his or her blood of  
80 fifteen hundredths of one percent or more, by weight, is  
81 guilty of a misdemeanor and, upon conviction thereof,

82 shall be confined in jail for not less than two days nor  
83 more than six months, which jail term is to include actual  
84 confinement of not less than twenty-four hours, and shall  
85 be fined not less than two hundred dollars nor more than  
86 one thousand dollars. A person sentenced pursuant to this  
87 subdivision shall receive credit for any period of actual  
88 confinement he or she served upon arrest for the subject  
89 offense.

90 (f) Any person who, being an habitual user of narcotic  
91 drugs or amphetamine or any derivative thereof, drives a  
92 vehicle in this state is guilty of a misdemeanor and, upon  
93 conviction thereof, shall be confined in jail for not less  
94 than one day nor more than six months, which jail term is  
95 to include actual confinement of not less than twenty-four  
96 hours, and shall be fined not less than one hundred dollars  
97 nor more than five hundred dollars. A person sentenced  
98 pursuant to this subdivision shall receive credit for any  
99 period of actual confinement he or she served upon arrest  
100 for the subject offense.

101 (g) Any person who:

102 (1) Knowingly permits his or her vehicle to be driven in  
103 this state by any other person who:

104 (A) Is under the influence of alcohol;

105 (B) Is under the influence of any controlled substance;

106 (C) Is under the influence of any other drug;

107 (D) Is under the combined influence of alcohol and any  
108 controlled substance or any other drug;

109 (E) Has an alcohol concentration in his or her blood of  
110 eight hundredths of one percent or more, by weight;

111 (2) Is guilty of a misdemeanor and, upon conviction  
112 thereof, shall be confined in jail for not more than six

113 months and shall be fined not less than one hundred  
114 dollars nor more than five hundred dollars.

115 (h) Any person who knowingly permits his or her vehicle  
116 to be driven in this state by any other person who is an  
117 habitual user of narcotic drugs or amphetamine or any  
118 derivative thereof is guilty of a misdemeanor and, upon  
119 conviction thereof, shall be confined in jail for not more  
120 than six months and shall be fined not less than one  
121 hundred dollars nor more than five hundred dollars.

122 (i) Any person under the age of twenty-one years who  
123 drives a vehicle in this state while he or she has an alcohol  
124 concentration in his or her blood of two hundredths of one  
125 percent or more, by weight, but less than eight hundredths  
126 of one percent, by weight, for a first offense under this  
127 subsection is guilty of a misdemeanor and, upon conviction  
128 thereof, shall be fined not less than twenty-five  
129 dollars nor more than one hundred dollars. For a second  
130 or subsequent offense under this subsection, the person is  
131 guilty of a misdemeanor and, upon conviction thereof,  
132 shall be confined in jail for twenty-four hours and shall be  
133 fined not less than one hundred dollars nor more than five  
134 hundred dollars. A person who is charged with a first  
135 offense under the provisions of this subsection may move  
136 for a continuance of the proceedings, from time to time, to  
137 allow the person to participate in the Motor Vehicle  
138 Alcohol Test and Lock Program as provided in section  
139 three-a, article five-a of this chapter. Upon successful  
140 completion of the program, the court shall dismiss the  
141 charge against the person and expunge the person's record  
142 as it relates to the alleged offense. In the event the person  
143 fails to successfully complete the program, the court shall  
144 proceed to an adjudication of the alleged offense. A  
145 motion for a continuance under this subsection may not be  
146 construed as an admission or be used as evidence. A person  
147 arrested and charged with an offense under the provisions  
148 of this subsection or subsection (a), (b), (c), (d), (e), (f), (g)



149 or (h) of this section may not also be charged with an  
150 offense under this subsection arising out of the same  
151 transaction or occurrence.

152 (j) Any person who:

153 (1) Drives a vehicle in this state while he or she:

154 (A) Is under the influence of alcohol;

155 (B) Is under the influence of any controlled substance;

156 (C) Is under the influence of any other drug;

157 (D) Is under the combined influence of alcohol and any  
158 controlled substance or any other drug; or

159 (E) Has an alcohol concentration in his or her blood of  
160 eight hundredths of one percent or more, by weight; and

161 (2) The person while driving has on or within the motor  
162 vehicle one or more other persons who are unemancipated  
163 minors who have not reached their sixteenth birthday is  
164 guilty of a misdemeanor and, upon conviction thereof,  
165 shall be confined in jail for not less than two days nor  
166 more than twelve months, which jail term is to include  
167 actual confinement of not less than forty-eight hours and  
168 shall be fined not less than two hundred dollars nor more  
169 than one thousand dollars.

170 (k) A person violating any provision of subsection (b), (c),  
171 (d), (e), (f), (g) or (i) of this section, for the second offense  
172 under this section, is guilty of a misdemeanor and, upon  
173 conviction thereof, shall be confined in jail for not less  
174 than six months nor more than one year and the court  
175 may, in its discretion, impose a fine of not less than one  
176 thousand dollars nor more than three thousand dollars.

177 (l) A person violating any provision of subsection (b), (c),  
178 (d), (e), (f), (g) or (i) of this section, for the third or any  
179 subsequent offense under this section, is guilty of a felony

180 and, upon conviction thereof, shall be imprisoned in a  
181 state correctional facility for not less than one nor more  
182 than three years and the court may, in its discretion,  
183 impose a fine of not less than three thousand dollars nor  
184 more than five thousand dollars.

185 (m) For purposes of subsections (k) and (l) of this section  
186 relating to second, third and subsequent offenses, the  
187 following events shall be regarded as offenses under this  
188 section:

189 (1) Any conviction under the provisions of subsection (a),  
190 (b), (c), (d), (e), (f) or (g) of this section or under a prior  
191 enactment of this section for an offense which occurred  
192 within the ten-year period immediately preceding the date  
193 of arrest in the current proceeding;

194 (2) Any conviction under a municipal ordinance of this  
195 state or any other state or a statute of the United States or  
196 of any other state of an offense which has the same  
197 elements as an offense described in subsection (a), (b), (c),  
198 (d), (e), (f), (g) or (h) of this section, which offense occurred  
199 within the ten-year period immediately preceding the date  
200 of arrest in the current proceeding; and,

201 (3) Any period of conditional probation imposed pursu-  
202 ant section two-b of this article for violation of subsection  
203 (d) of this article, which violation occurred within the  
204 ten-year period immediately preceding the date of arrest  
205 in the current proceeding.

206 (n) A person may be charged in a warrant or indictment  
207 or information for a second or subsequent offense under  
208 this section if the person has been previously arrested for  
209 or charged with a violation of this section which is alleged  
210 to have occurred within the applicable time period for  
211 prior offenses, notwithstanding the fact that there has not  
212 been a final adjudication of the charges for the alleged  
213 previous offense. In that case, the warrant or indictment

214 or information must set forth the date, location and  
215 particulars of the previous offense or offenses. No person  
216 may be convicted of a second or subsequent offense under  
217 this section unless the conviction for the previous offense  
218 has become final, or the person has previously had a  
219 period of conditional probation imposed pursuant to  
220 section two-b of this article.

221 (o) The fact that any person charged with a violation of  
222 subsection (a), (b), (c), (d), (e) or (f) of this section, or any  
223 person permitted to drive as described under subsection (g)  
224 or (h) of this section, is or has been legally entitled to use  
225 alcohol, a controlled substance or a drug does not consti-  
226 tute a defense against any charge of violating subsection  
227 (a), (b), (c), (d), (e), (f), (g) or (h) of this section.

228 (p) For purposes of this section, the term “controlled  
229 substance” has the meaning ascribed to it in chapter  
230 sixty-a of this code.

231 (q) The sentences provided in this section upon convic-  
232 tion for a violation of this article are mandatory and are  
233 not subject to suspension or probation: Provided, That the  
234 court may apply the provisions of article eleven-a, chapter  
235 sixty-two of this code to a person sentenced or committed  
236 to a term of one year or less for a first offense under this  
237 section: *Provided further*, That the court may impose a  
238 term of conditional probation pursuant to section two-b of  
239 this article to persons adjudicated thereunder. An order  
240 for home detention by the court pursuant to the provisions  
241 of article eleven-b of said chapter may be used as an  
242 alternative sentence to any period of incarceration re-  
243 quired by this section for a first or subsequent offense:  
244 Provided, however, That for any period of home incarcera-  
245 tion ordered for a person convicted of second offense  
246 under this section, electronic monitoring shall be required  
247 for no fewer than five days of the total period of home  
248 confinement ordered and the offender may not leave home

249 for those five days notwithstanding the provisions of  
250 section five, article eleven-b, chapter sixty-two of this  
251 code: Provided further, That for any period of home  
252 incarceration ordered for a person convicted of a third or  
253 subsequent violation of this section, electronic monitoring  
254 shall be included for no fewer than ten days of the total  
255 period of home confinement ordered and the offender may  
256 not leave home for those ten days notwithstanding section  
257 five, article eleven-b, chapter sixty-two of this code.

**§17C-5-2b. Deferral of further proceedings for certain first offenses upon condition of participation in motor vehicle alcohol test and lock program; procedure on charge of violation of conditions.**

1 (a) Except as provided in subsections (g) of this section,  
2 whenever any person who has not previously been con-  
3 victed of any offense under this article or under any  
4 statute of the United States or of any state relating to  
5 driving under the influence alcohol, any controlled  
6 substance or any other drug:

7 (1) notifies the court within thirty days of his or her  
8 arrest of his or her intention to participate in a deferral  
9 pursuant to this section; and

10 (2) pleads guilty to or is found guilty of driving under the  
11 influence of alcohol under subsection (d), section two of  
12 this article,

13 the court, without entering a judgment of guilt and with  
14 the consent of the accused, shall defer further proceedings  
15 and, notwithstanding any provisions of this code to the  
16 contrary, place him or her on probation, which conditions  
17 shall include, that he or she successfully completes the  
18 Motor Vehicle Alcohol Test and Lock Program as provided  
19 in section three-a, article five-a of this chapter. Participa-  
20 tion therein shall be for a period of at least one hundred  
21 and sixty five days after he or she has served the fifteen

22 days of license suspension imposed pursuant to section  
23 two, article five-a of this chapter.

24 (b) A defendant's election to participate in deferral  
25 under this section shall constitute a waiver of his or her  
26 right to an administrative hearing as provided in section  
27 two, article five-a, of this chapter.

28 (c) (1) If the prosecuting attorney files a motion alleging  
29 that the defendant during the period of the Motor Vehicle  
30 Alcohol Test and Lock program has been removed there-  
31 from by the Division of Motor Vehicles, or has failed to  
32 successfully complete the program before making a motion  
33 for dismissal pursuant to subsection (d) of this section, the  
34 court may issue such process as is necessary to bring the  
35 defendant before the court.

36 (2) A motion alleging such violation filed pursuant to  
37 subdivision (1) must be filed during the period of the  
38 Motor Vehicle Alcohol Test and Lock Program or, if filed  
39 thereafter, must be filed within a reasonable time after the  
40 alleged violation was committed.

41 (3) When the defendant is brought before the court, the  
42 court shall afford the defendant an opportunity to be  
43 heard. If the court finds that the defendant has been  
44 rightfully removed from the Motor Vehicle Alcohol Test  
45 and Lock Program by the Division of Motor Vehicles, the  
46 court may order, when appropriate, that the deferral be  
47 terminated, and thereupon enter an adjudication of guilt  
48 and proceed as otherwise provided.

49 (4) Should the defendant fail to complete or be removed  
50 from the Motor Vehicle Alcohol Test and Lock Program,  
51 the defendant waives the appropriate statute of limita-  
52 tions and the defendant's right to a speedy trial under any  
53 applicable Federal or State constitutional provisions,  
54 statutes or rules of court during the period of enrollment  
55 in the program.

56 (d) When the defendant shall have completed satisfacto-  
57 rily the Motor Vehicle Alcohol Test and Lock Program and  
58 complied with its conditions, the defendant may move the  
59 court for an order dismissing the charges. This motion  
60 shall be supported by affidavit of the defendant and by  
61 certification of the Division of Motor Vehicles that the  
62 defendant has successfully completed the Motor Vehicle  
63 Alcohol Test and Lock Program. A copy of the motion  
64 shall be served on the prosecuting attorney who shall  
65 within 30 days after service advise the judge of any  
66 objections to the motion, serving a copy of such objections  
67 on the defendant or the defendant's attorney. If there are  
68 no objections filed within the 30-day period, the court  
69 shall thereafter dismiss the charges against the defendant.  
70 If there are objections filed with regard to the dismissal of  
71 charges, the court shall proceed as set forth in subsection  
72 (c) of this section.

73 (e) Except as provided herein, unless a defendant  
74 adjudicated pursuant to this subsection be convicted of a  
75 subsequent violation of this article, discharge and dis-  
76 missal under this section shall be without adjudication of  
77 guilt and is not a conviction for purposes of disqualifica-  
78 tions or disabilities imposed by law upon conviction of a  
79 crime except for those provided in article five-a of this  
80 chapter. Except as provided in subsection (k) (l) and (m),  
81 section two of this article regarding subsequent offenses,  
82 the effect of the dismissal and discharge shall be to restore  
83 the person in contemplation of law to the status he or she  
84 occupied prior to arrest and trial. No person as to whom  
85 a dismissal and discharge have been effected shall be  
86 thereafter held to be guilty of perjury, false swearing, or  
87 otherwise giving a false statement by reason of his or her  
88 failure to disclose or acknowledge his or her arrest or trial  
89 in response to any inquiry made of him or her for any  
90 purpose other than any inquiry made in connection with  
91 any subsequent offense as that term is defined in subsec-  
92 tion (m), section two of this article.

93 (f) There may be only one discharge and dismissal under  
94 this section with respect to any person.

95 (g) No person shall be eligible for dismissal and dis-  
96 charge under this section: (1) in any prosecution in which  
97 any violation of any other provision of this article has  
98 been charged; (2) if the person holds a commercial driver's  
99 license or operates commercial motor vehicle(s), or (3) the  
100 person has previously had his or her driver's license  
101 revoked under section two-a of this article or under any  
102 statute of the United States or of any state relating to  
103 driving under the influence alcohol, any controlled  
104 substance or any other drug.

105 (h) (1) After a period of not less than one year which  
106 shall begin to run immediately upon the expiration of a  
107 term of probation imposed upon any person under this  
108 section, the person may apply to the court for an order to  
109 expunge from all official records all recordations of his or  
110 her arrest, trial, and conviction, pursuant to this section  
111 except for those maintained by the Division of Motor  
112 Vehicles: *Provided*, That any person who has previously  
113 been convicted of a felony may not make a motion for  
114 expungement pursuant to this section.

115 (2) If the prosecuting attorney objects to the  
116 expungement, the objections shall be filed with the court  
117 within 30 days after service of a motion for expungement  
118 and copies of the objections shall be served on the defen-  
119 dant or the defendant's attorney.

120 (3) If the objections are filed, the court shall hold a  
121 hearing on the objections, affording all parties an opportu-  
122 nity to be heard. If the court determines after a hearing  
123 that the person during the period of his or her probation  
124 and during the period of time prior to his or her applica-  
125 tion to the court under this subsection has not been guilty  
126 of any serious or repeated violation of the conditions of his  
127 or her probation, it shall order the expungement.

128 (i) Notwithstanding any provision of this code to the  
129 contrary, any person prosecuted for a violation of subsec-  
130 tion (d), section two, article five of this chapter whose case  
131 is disposed of pursuant to the provisions of this section  
132 shall be liable for any court costs assessable against a  
133 person convicted of a violation of subsection (j), section  
134 two, article five of this chapter. Payment of such costs  
135 may be made a condition of probation. The costs assessed  
136 pursuant to this subsection, whether as a term of proba-  
137 tion or not, shall be distributed as other court costs in  
138 accordance with section two, article three, chapter fifty,  
139 section four, article two-a, chapter fourteen, section four,  
140 article twenty-nine, chapter thirty and sections two, seven  
141 and ten, article five, chapter sixty-two of this code.

**§17C-5-7. Refusal to submit to tests; revocation of license or  
privilege; consent not withdrawn if person ar-  
rested is incapable of refusal; hearing.**

1 (a) If any person under arrest as specified in section four  
2 of this article refuses to submit to any secondary chemical  
3 test, the tests shall not be given: *Provided*, That prior to  
4 the refusal, the person is given an oral warning and a  
5 written statement advising him or her that his or her  
6 refusal to submit to the secondary test finally designated  
7 will result in the revocation of his or her license to operate  
8 a motor vehicle in this state for a period of at least forty-  
9 five days and up to life; and that after fifteen minutes  
10 following the warnings the refusal is considered final. The  
11 arresting officer after that period of time expires has no  
12 further duty to provide the person with an opportunity to  
13 take the secondary test. The officer shall, within forty-  
14 eight hours of the refusal, sign and submit to the Commis-  
15 sioner of Motor Vehicles a written statement of the officer  
16 that: (1) He or she had reasonable grounds to believe the  
17 person had been driving a motor vehicle in this state while  
18 under the influence of alcohol, controlled substances or  
19 drugs; (2) the person was lawfully placed under arrest for



20 an offense relating to driving a motor vehicle in this state  
21 while under the influence of alcohol, controlled substances  
22 or drugs; (3) the person refused to submit to the secondary  
23 chemical test finally designated in the manner provided in  
24 section four of this article; and (4) the person was given a  
25 written statement advising him or her that his or her  
26 license to operate a motor vehicle in this state would be  
27 revoked for a period of at least forty-five days and up to  
28 life if he or she refused to submit to the secondary test  
29 finally designated in the manner provided in section four  
30 of this article. The signing of the statement required to be  
31 signed by this section constitutes an oath or affirmation by  
32 the person signing the statement that the statements  
33 contained in the statement are true and that any copy filed  
34 is a true copy. The statement shall contain upon its face a  
35 warning to the officer signing that to willfully sign a  
36 statement containing false information concerning any  
37 matter or thing, material or not material, is false swearing  
38 and is a misdemeanor. Upon receiving the statement the  
39 commissioner shall make and enter an order revoking the  
40 person's license to operate a motor vehicle in this state for  
41 the period prescribed by this section.

42 For the first refusal to submit to the designated second-  
43 ary chemical test, the commissioner shall make and enter  
44 an order revoking the person's license to operate a motor  
45 vehicle in this state for a period of one year or forty-five  
46 days, with an additional one year of participation in the  
47 Motor Vehicle Alcohol Test and Lock Program in accor-  
48 dance with the provisions of section three-a, article five-a  
49 of this chapter: *Provided*, That a person revoked for  
50 driving while under the influence of drugs is not eligible to  
51 participate in the Motor Vehicle Test and Lock Program.  
52 The application for participation in the Motor Vehicle  
53 Alcohol Test and Lock Program shall be considered to be  
54 a waiver of the hearing provided in section two of said  
55 article. If the person's license has previously been revoked  
56 under the provisions of this section, the commissioner

57 shall, for the refusal to submit to the designated secondary  
58 chemical test, make and enter an order revoking the  
59 person's license to operate a motor vehicle in this state for  
60 a period of ten years: *Provided, however,* That the license  
61 may be reissued in five years in accordance with the  
62 provisions of section three, article five-a of this chapter.  
63 If the person's license has previously been revoked more  
64 than once under the provisions of this section, the commis-  
65 sioner shall, for the refusal to submit to the designated  
66 secondary chemical test, make and enter an order revoking  
67 the person's license to operate a motor vehicle in this state  
68 for a period of life. A copy of each order shall be for-  
69 warded to the person by registered or certified mail, return  
70 receipt requested, and shall contain the reasons for the  
71 revocation and shall specify the revocation period imposed  
72 pursuant to this section. A revocation shall not become  
73 effective until ten days after receipt of the copy of the  
74 order. Any person who is unconscious or who is otherwise  
75 in a condition rendering him or her incapable of refusal  
76 shall be considered not to have withdrawn his or her  
77 consent for a test of his or her blood, breath or urine as  
78 provided in section four of this article and the test may be  
79 administered although the person is not informed that his  
80 or her failure to submit to the test will result in the  
81 revocation of his or her license to operate a motor vehicle  
82 in this state for the period provided for in this section. A  
83 revocation under this section shall run concurrently with  
84 the period of any suspension or revocation imposed in  
85 accordance with other provisions of this code and growing  
86 out of the same incident which gave rise to the arrest for  
87 driving a motor vehicle while under the influence of  
88 alcohol, controlled substances or drugs and the subsequent  
89 refusal to undergo the test finally designated in accor-  
90 dance with the provisions of section four of this article.

91 (b) For the purposes of this section, where reference is  
92 made to previous suspensions or revocations under this  
93 section, the following types of suspensions or revocations

94 shall also be regarded as suspensions or revocations under  
95 this section:

96 (1) Any suspension or revocation on the basis of a  
97 conviction under a municipal ordinance of another state or  
98 a statute of the United States or of any other state of an  
99 offense which has the same elements as an offense de-  
100 scribed in section two of this article for conduct which  
101 occurred on or after June 10, 1983; and

102 (2) Any revocation under the provisions of section one or  
103 two, article five-a of this chapter for conduct which  
104 occurred on or after June 10, 1983.

105 (c) A person whose license to operate a motor vehicle in  
106 this state has been revoked shall be afforded an opportu-  
107 nity to be heard, in accordance with the provisions of  
108 section two, article five-a of this chapter.

**ARTICLE 5A. ADMINISTRATIVE PROCEDURES FOR SUSPENSION AND  
REVOCATION OF LICENSES FOR DRIVING UNDER THE  
INFLUENCE OF ALCOHOL, CONTROLLED SUB-  
STANCES OR DRUGS.**

**§17C-5A-1a. Revocation upon conviction for driving under the  
influence of alcohol, controlled substances or  
drugs.**

1 (a) If a person has a term of conditional probation  
2 imposed pursuant to section two-b, article five of this  
3 chapter, or is convicted for an offense defined in section  
4 two, article five of this chapter or for an offense described  
5 in a municipal ordinance which has the same elements as  
6 an offense described in said section because the person did  
7 drive a motor vehicle while under the influence of alcohol,  
8 controlled substances or drugs, or the combined influence  
9 of alcohol or controlled substances or drugs, or did drive  
10 a motor vehicle while having an alcohol concentration in  
11 his or her blood of eight hundredths of one percent or

12 more, by weight, or did drive a motor vehicle while under  
13 the age of twenty-one years with an alcohol concentration  
14 in his or her blood of two hundredths of one percent or  
15 more, by weight, but less than eight hundredths of one  
16 percent, by weight, and if the person does not act to appeal  
17 the conviction within the time periods described in  
18 subsection (b) of this section, the person's license to  
19 operate a motor vehicle in this state shall be revoked or  
20 suspended in accordance with the provisions of this  
21 section.

22 (b) The clerk of the court in which a person has had a  
23 term of conditional probation imposed pursuant to section  
24 two-b, article five of this chapter, or is convicted for an  
25 offense described in section two, article five of this chapter  
26 or for an offense described in a municipal ordinance which  
27 has the same elements as an offense described in said  
28 section shall forward to the commissioner a transcript of  
29 the judgment of conviction. If the conviction is the  
30 judgment of a magistrate court, the magistrate court clerk  
31 shall forward the transcript when the person convicted has  
32 not requested an appeal within twenty days of the sen-  
33 tencing for such conviction. If the term of conditional  
34 probation is the act of a magistrate court, the magistrate  
35 court clerk shall forward the transcript when the order  
36 imposing the term of conditional probation is entered. If  
37 the conviction is the judgment of a mayor or police court  
38 judge or municipal court judge, the clerk or recorder shall  
39 forward the transcript when the person convicted has not  
40 perfected an appeal within ten days from and after the  
41 date upon which the sentence is imposed. If the conviction  
42 is the judgment of a circuit court, the circuit clerk shall  
43 forward the transcript when the person convicted has not  
44 filed a notice of intent to file a petition for appeal or writ  
45 of error within thirty days after the judgment was entered.

46 (c) If, upon examination of the transcript of the judg-  
47 ment of conviction, or imposition of a term of conditional

48 probation pursuant to section two-b, article five of this  
49 chapter, the commissioner determines that the person was  
50 convicted for an offense described in section two, article  
51 five of this chapter or had a period of conditional proba-  
52 tion imposed pursuant to section two-b, article five of this  
53 chapter, or for an offense described in a municipal ordi-  
54 nance which has the same elements as an offense described  
55 in said section because the person did drive a motor  
56 vehicle while under the influence of alcohol, controlled  
57 substances or drugs, or the combined influence of alcohol  
58 or controlled substances or drugs, or did drive a motor  
59 vehicle while having an alcohol concentration in his or her  
60 blood of eight hundredths of one percent or more, by  
61 weight, the commissioner shall make and enter an order  
62 revoking the person's license to operate a motor vehicle in  
63 this state. If the commissioner determines that the person  
64 was convicted of driving a motor vehicle while under the  
65 age of twenty-one years with an alcohol concentration in  
66 his or her blood of two hundredths of one percent or more,  
67 by weight, but less than eight hundredths of one percent,  
68 by weight, the commissioner shall make and enter an order  
69 suspending the person's license to operate a motor vehicle  
70 in this state. The order shall contain the reasons for the  
71 revocation or suspension and the revocation or suspension  
72 periods provided for in section two of this article. Further,  
73 the order shall give the procedures for requesting a  
74 hearing which is to be held in accordance with the provi-  
75 sions of said section. The person shall be advised in the  
76 order that because of the receipt of a transcript of the  
77 judgment of conviction by the commissioner a presump-  
78 tion exists that the person named in the transcript of the  
79 judgment of conviction is the person named in the commis-  
80 sioner's order and such constitutes sufficient evidence to  
81 support revocation or suspension and that the sole purpose  
82 for the hearing held under this section is for the person  
83 requesting the hearing to present evidence that he or she  
84 is not the person named in the transcript of the judgment

85 of conviction. A copy of the order shall be forwarded to  
86 the person by registered or certified mail, return receipt  
87 requested. No revocation or suspension shall become  
88 effective until ten days after receipt of a copy of the order.

89 (d) The provisions of this section shall not apply if an  
90 order reinstating the operator's license of the person has  
91 been entered by the commissioner prior to the receipt of  
92 the transcript of the judgment of conviction.

93 (e) For the purposes of this section, a person is convicted  
94 when the person enters a plea of guilty or is found guilty  
95 by a court or jury. A plea of no contest does not constitute  
96 a conviction for purposes of this section except where the  
97 person holds a commercial drivers' license or operates a  
98 commercial vehicle.

**§17C-5A-2. Hearing; revocation; review.**

1 (a) Written objections to an order of revocation or  
2 suspension under the provisions of section one of this  
3 article or section seven, article five of this chapter shall be  
4 filed with the Office of Administrative Hearings. Upon  
5 the receipt of an objection, the Office of Administrative  
6 Hearings shall notify the Commissioner of the Division of  
7 Motor Vehicles, who shall stay the imposition of the period  
8 of revocation or suspension and afford the person an  
9 opportunity to be heard by the Office of Administrative  
10 Hearings. The written objection must be filed with Office  
11 of Administrative Hearings in person or by registered or  
12 certified mail, return receipt requested, within thirty  
13 calendar days after receipt of a copy of the order of  
14 revocation or suspension or no hearing will be granted.  
15 The hearing shall be before a hearing examiner employed  
16 by the Office of Administrative Hearings who shall rule on  
17 evidentiary issues. Upon consideration of the designated  
18 record, the hearing examiner shall, based on the determi-  
19 nation of the facts of the case and applicable law, render  
20 a decision affirming, reversing or modifying the action

21 protested. The decision shall contain findings of fact and  
22 conclusions of law and shall be provided to all parties by  
23 registered or certified mail, return receipt requested.

24 (b) The hearing shall be held at an office of the Division  
25 of Motor Vehicles located in or near the county in which  
26 the arrest was made in this state or at some other suitable  
27 place in the county in which the arrest was made if an  
28 office of the division is not available. The Office of  
29 Administrative Hearings shall send a notice of hearing to  
30 the person whose license is at issue, the appropriate law-  
31 enforcement officers, and the prosecuting attorney.

32 (c) (1) Any hearing shall be held within one hundred  
33 eighty days after the date upon which the Office of  
34 Administrative Hearings received the timely written  
35 objection unless there is a postponement or continuance.

36 (2) The Office of Administrative Hearings may postpone  
37 or continue any hearing on its own motion or upon appli-  
38 cation by the party whose license is at issue in that hearing  
39 or by the commissioner for good cause shown.

40 (3) A notice of hearing to the appropriate  
41 law-enforcement officers by registered or certified mail,  
42 return receipt requested, constitutes a subpoena to appear  
43 at the hearing without the necessity of payment of fees by  
44 the Division of Motor Vehicles.

45 (d) Law-enforcement officers shall be compensated for  
46 the time expended in their travel and appearance before  
47 the Office of Administrative Hearings by the law-enforce-  
48 ment agency by whom they are employed at their regular  
49 rate if they are scheduled to be on duty during said time or  
50 at their regular overtime rate if they are scheduled to be  
51 off duty during said time.

52 (e) The principal question at the hearing shall be  
53 whether the person did drive a motor vehicle while under

54 the influence of alcohol, controlled substances or drugs, or  
55 did drive a motor vehicle while having an alcohol concen-  
56 tration in the person's blood of eight hundredths of one  
57 percent or more, by weight, or did refuse to submit to the  
58 designated secondary chemical test, or did drive a motor  
59 vehicle while under the age of twenty-one years with an  
60 alcohol concentration in his or her blood of two hun-  
61 dredths of one percent or more, by weight, but less than  
62 eight hundredths of one percent, by weight.

63 (f) In the case of a hearing in which a person is accused  
64 of driving a motor vehicle while under the influence of  
65 alcohol, controlled substances or drugs, or accused of  
66 driving a motor vehicle while having an alcohol concen-  
67 tration in the person's blood of eight hundredths of one  
68 percent or more, by weight, or accused of driving a motor  
69 vehicle while under the age of twenty-one years with an  
70 alcohol concentration in his or her blood of two hun-  
71 dredths of one percent or more, by weight, but less than  
72 eight hundredths of one percent, by weight, the Office of  
73 Administrative Hearings shall make specific findings as to:  
74 (1) Whether the investigating law-enforcement officer had  
75 reasonable grounds to believe the person to have been  
76 driving while under the influence of alcohol, controlled  
77 substances or drugs, or while having an alcohol concentra-  
78 tion in the person's blood of eight hundredths of one  
79 percent or more, by weight, or to have been driving a  
80 motor vehicle while under the age of twenty-one years  
81 with an alcohol concentration in his or her blood of two  
82 hundredths of one percent or more, by weight, but less  
83 than eight hundredths of one percent, by weight; (2)  
84 whether the person was lawfully placed under arrest for  
85 an offense involving driving under the influence of alco-  
86 hol, controlled substances or drugs, or was lawfully taken  
87 into custody for the purpose of administering a secondary  
88 test: *Provided*, That this element shall be waived in cases  
89 where no arrest occurred due to driver incapacitation; (3)



90 whether the person committed an offense involving  
91 driving under the influence of alcohol, controlled sub-  
92 stances or drugs, or was lawfully taken into custody for  
93 the purpose of administering a secondary test; and (4)  
94 whether the tests, if any, were administered in accordance  
95 with the provisions of this article and article five of this  
96 chapter.

97 (g) If, in addition to a finding that the person did drive  
98 a motor vehicle while under the influence of alcohol,  
99 controlled substances or drugs, or did drive a motor  
100 vehicle while having an alcohol concentration in the  
101 person's blood of eight hundredths of one percent or more,  
102 by weight, or did drive a motor vehicle while under the age  
103 of twenty-one years with an alcohol concentration in his  
104 or her blood of two hundredths of one percent or more, by  
105 weight, but less than eight hundredths of one percent, by  
106 weight, the Office of Administrative Hearings also finds by  
107 a preponderance of the evidence that the person when  
108 driving did an act forbidden by law or failed to perform a  
109 duty imposed by law, which act or failure proximately  
110 caused the death of a person and was committed in  
111 reckless disregard of the safety of others and if the Office  
112 of Administrative Hearings further finds that the influence  
113 of alcohol, controlled substances or drugs or the alcohol  
114 concentration in the blood was a contributing cause to the  
115 death, the commissioner shall revoke the person's license  
116 for a period of ten years: *Provided*, That if the person's  
117 license has previously been suspended or revoked under  
118 the provisions of this section or section one of this article  
119 within the ten years immediately preceding the date of  
120 arrest, the period of revocation shall be for the life of the  
121 person.

122 (h) If, in addition to a finding that the person did drive  
123 a motor vehicle while under the influence of alcohol,  
124 controlled substances or drugs, or did drive a motor  
125 vehicle while having an alcohol concentration in the

126 person's blood of eight hundredths of one percent or more,  
127 by weight, the Office of Administrative Hearings also finds  
128 by a preponderance of the evidence that the person when  
129 driving did an act forbidden by law or failed to perform a  
130 duty imposed by law, which act or failure proximately  
131 caused the death of a person, the commissioner shall  
132 revoke the person's license for a period of five years:  
133 *Provided*, That if the person's license has previously been  
134 suspended or revoked under the provisions of this section  
135 or section one of this article within the ten years immedi-  
136 ately preceding the date of arrest, the period of revocation  
137 shall be for the life of the person.

138 (i) If, in addition to a finding that the person did drive a  
139 motor vehicle while under the influence of alcohol,  
140 controlled substances or drugs, or did drive a motor  
141 vehicle while having an alcohol concentration in the  
142 person's blood of eight hundredths of one percent or more,  
143 by weight, the Office of Administrative Hearings also finds  
144 by a preponderance of the evidence that the person when  
145 driving did an act forbidden by law or failed to perform a  
146 duty imposed by law, which act or failure proximately  
147 caused bodily injury to a person other than himself or  
148 herself, the commissioner shall revoke the person's license  
149 for a period of two years: *Provided*, That if the license has  
150 previously been suspended or revoked under the provisions  
151 of this section or section one of this article within the ten  
152 years immediately preceding the date of arrest, the period  
153 of revocation shall be ten years: *Provided, however*, That  
154 if the person's license has previously been suspended or  
155 revoked more than once under the provisions of this  
156 section or section one of this article within the ten years  
157 immediately preceding the date of arrest, the period of  
158 revocation shall be for the life of the person.

159 (j) If the Office of Administrative Hearings finds by a  
160 preponderance of the evidence that the person did drive a  
161 motor vehicle while under the influence of alcohol,

162 controlled substances or drugs, or did drive a motor  
163 vehicle while having an alcohol concentration in the  
164 person's blood of eight hundredths of one percent or more,  
165 by weight, but less than fifteen hundredths of one percent  
166 or more, by weight, or finds that the person knowingly  
167 permitted the person's vehicle to be driven by another  
168 person who was under the influence of alcohol, controlled  
169 substances or drugs, or knowingly permitted the person's  
170 vehicle to be driven by another person who had an alcohol  
171 concentration in his or her blood of eight hundredths of  
172 one percent or more, by weight the commissioner shall  
173 revoke the person's license for a period of six months or a  
174 period of fifteen days with an additional one hundred and  
175 twenty days of participation in the Motor Vehicle Alcohol  
176 Test and Lock Program in accordance with the provisions  
177 of section three-a of this article: *Provided*, That any period  
178 of participation in the Motor Vehicle Alcohol Test and  
179 Lock Program that has been imposed by a court pursuant  
180 to section two-b, article five of this chapter shall be  
181 credited against any period of participation imposed by  
182 the commissioner: *Provided* further, That a person whose  
183 license is revoked for driving while under the influence of  
184 drugs is not eligible to participate in the Motor Vehicle  
185 Alcohol Test and Lock Program: *Provided, however*, That  
186 if the person's license has previously been suspended or  
187 revoked under the provisions of this section or section one  
188 of this article within the ten years immediately preceding  
189 the date of arrest, the period of revocation shall be ten  
190 years: *Provided further*, That if the person's license has  
191 previously been suspended or revoked more than once  
192 under the provisions of this section or section one of this  
193 article within the ten years immediately preceding the  
194 date of arrest, the period of revocation shall be for the life  
195 of the person.

196 (k) (1) If in addition to finding by a preponderance of the  
197 evidence that the person did drive a motor vehicle while

198 under the influence of alcohol, controlled substance or  
199 drugs, the Office of Administrative Hearings also finds by  
200 a preponderance of the evidence that the person did drive  
201 a motor vehicle while having an alcohol concentration in  
202 the person's blood of fifteen hundredths of one percent or  
203 more, by weight, the commissioner shall revoke the per-  
204 son's license for a period of forty-five days with an  
205 additional two hundred and seventy days of participation  
206 in the Motor Vehicle Alcohol Test and Lock Program in  
207 accordance with the provisions of article three-a, article  
208 five-a, chapter seventeen-c of this code: *Provided*, That if  
209 the person's license has previously been suspended or  
210 revoked under the provisions of this section or section one  
211 of this article within the ten years immediately preceding  
212 the date of arrest, the period of revocation shall be ten  
213 years: *Provided, however*, That if the person's license has  
214 previously been suspended or revoked the person's license  
215 more than once under the provisions of this section or  
216 section one of this article within the ten years immediately  
217 preceding the date of arrest, the period of revocation shall  
218 be for the life of the person.

219 (2) If a person whose license is revoked pursuant to  
220 subdivision (1) of this subsection proves by clear and  
221 convincing evidence that they do not own a motor vehicle  
222 upon which the alcohol test and lock device may be  
223 installed or is otherwise incapable of participating in the  
224 Motor Vehicle Alcohol Test and Lock Program, the period  
225 of revocation shall be one hundred eighty days: *Provided*,  
226 That if the person's license has previously been suspended  
227 or revoked under the provisions of this section or section  
228 one of this article within the ten years immediately  
229 preceding the date of arrest, the period of revocation shall  
230 be ten years: *Provided, however*, That if the person's  
231 license has previously been suspended or revoked more  
232 than once under the provisions of this section or section  
233 one of this article within the ten years immediately

234 preceding the date of arrest, the period of revocation shall  
235 be for the life of the person.

236 (l) If, in addition to a finding that the person did drive a  
237 motor vehicle while under the age of twenty-one years  
238 with an alcohol concentration in his or her blood of two  
239 hundredths of one percent or more, by weight, but less  
240 than eight hundredths of one percent, by weight, the  
241 Office of Administrative Hearings also finds by a prepon-  
242 derance of the evidence that the person when driving did  
243 an act forbidden by law or failed to perform a duty  
244 imposed by law, which act or failure proximately caused  
245 the death of a person, and if the Office of Administrative  
246 Hearings further finds that the alcohol concentration in  
247 the blood was a contributing cause to the death, the  
248 commissioner shall revoke the person's license for a period  
249 of five years: *Provided*, That if the person's license has  
250 previously been suspended or revoked under the provisions  
251 of this section or section one of this article within the ten  
252 years immediately preceding the date of arrest, the period  
253 of revocation shall be for the life of the person.

254 (m) If, in addition to a finding that the person did drive  
255 a motor vehicle while under the age of twenty-one years  
256 with an alcohol concentration in his or her blood of two  
257 hundredths of one percent or more, by weight, but less  
258 than eight hundredths of one percent, by weight, the  
259 Office of Administrative Hearings also finds by a prepon-  
260 derance of the evidence that the person when driving did  
261 an act forbidden by law or failed to perform a duty  
262 imposed by law, which act or failure proximately caused  
263 bodily injury to a person other than himself or herself, and  
264 if the Office of Administrative Hearings further finds that  
265 the alcohol concentration in the blood was a contributing  
266 cause to the bodily injury, the commissioner shall revoke  
267 the person's license for a period of two years: *Provided*,  
268 That if the person's license has previously been suspended  
269 or revoked under the provisions of this section or section

270 one of this article within the ten years immediately  
271 preceding the date of arrest, the period of revocation shall  
272 be ten years: *Provided, however,* That if the person's  
273 license has previously been suspended or revoked more  
274 than once under the provisions of this section or section  
275 one of this article within the ten years immediately  
276 preceding the date of arrest, the period of revocation shall  
277 be for the life of the person.

278 (n) If the Office of Administrative Hearings finds by a  
279 preponderance of the evidence that the person did drive a  
280 motor vehicle while under the age of twenty-one years  
281 with an alcohol concentration in his or her blood of two  
282 hundredths of one percent or more, by weight, but less  
283 than eight hundredths of one percent, by weight, the  
284 commissioner shall suspend the person's license for a  
285 period of sixty days: *Provided,* That if the person's license  
286 has previously been suspended or revoked under the  
287 provisions of this section or section one of this article, the  
288 period of revocation shall be for one year, or until the  
289 person's twenty-first birthday, whichever period is longer.

290 (o) If, in addition to a finding that the person did drive  
291 a motor vehicle while under the influence of alcohol,  
292 controlled substances or drugs, or did drive a motor  
293 vehicle while having an alcohol concentration in the  
294 person's blood of eight hundredths of one percent or more,  
295 by weight, the Office of Administrative Hearings also finds  
296 by a preponderance of the evidence that the person when  
297 driving did have on or within the motor vehicle another  
298 person who has not reached his or her sixteenth birthday,  
299 the commissioner shall revoke the person's license for a  
300 period of one year: *Provided,* That if the person's license  
301 has previously been suspended or revoked under the  
302 provisions of this section or section one of this article  
303 within the ten years immediately preceding the date of  
304 arrest, the period of revocation shall be ten years: *Pro-*  
305 *vided, however,* That if the person's license has previously

306 been suspended or revoked more than once under the  
307 provisions of this section or section one of this article  
308 within the ten years immediately preceding the date of  
309 arrest, the period of revocation shall be for the life of the  
310 person.

311 (p) For purposes of this section, where reference is made  
312 to previous suspensions or revocations under this section,  
313 the following types of criminal convictions or administra-  
314 tive suspensions or revocations shall also be regarded as  
315 suspensions or revocations under this section or section  
316 one of this article:

317 (1) Any administrative revocation under the provisions  
318 of the prior enactment of this section for conduct which  
319 occurred within the ten years immediately preceding the  
320 date of arrest;

321 (2) Any suspension or revocation on the basis of a  
322 conviction under a municipal ordinance of another state or  
323 a statute of the United States or of any other state of an  
324 offense which has the same elements as an offense de-  
325 scribed in section two, article five of this chapter for  
326 conduct which occurred within the ten years immediately  
327 preceding the date of arrest; or

328 (3) Any revocation under the provisions of section seven,  
329 article five of this chapter for conduct which occurred  
330 within the ten years immediately preceding the date of  
331 arrest.

332 (q) In the case of a hearing in which a person is accused  
333 of refusing to submit to a designated secondary test, the  
334 Office of Administrative Hearings shall make specific  
335 findings as to: (1) Whether the arresting law-enforcement  
336 officer had reasonable grounds to believe the person had  
337 been driving a motor vehicle in this state while under the  
338 influence of alcohol, controlled substances or drugs; (2)  
339 whether the person was lawfully placed under arrest for

340 an offense involving driving under the influence of alco-  
341 hol, controlled substances or drugs, or was lawfully taken  
342 into custody for the purpose of administering a secondary  
343 test: *Provided*, That this element shall be waived in cases  
344 where no arrest occurred due to driver incapacitation; (3)  
345 whether the person committed an offense relating to  
346 driving a motor vehicle in this state while under the  
347 influence of alcohol, controlled substances or drugs; (4)  
348 whether the person refused to submit to the secondary test  
349 finally designated in the manner provided in section four,  
350 article five of this chapter; and (5) whether the person had  
351 been given a written statement advising the person that  
352 the person's license to operate a motor vehicle in this state  
353 would be revoked for at least forty-five days and up to life  
354 if the person refused to submit to the test finally desig-  
355 nated in the manner provided in said section.

356 (r) If the Office of Administrative Hearings finds by a  
357 preponderance of the evidence that: (1) The investigating  
358 officer had reasonable grounds to believe the person had  
359 been driving a motor vehicle in this state while under the  
360 influence of alcohol, controlled substances or drugs; (2)  
361 whether the person was lawfully placed under arrest for  
362 an offense involving driving under the influence of alco-  
363 hol, controlled substances or drugs, or was lawfully taken  
364 into custody for the purpose of administering a secondary  
365 test: *Provided*, That this element shall be waived in cases  
366 where no arrest occurred due to driver incapacitation; (3)  
367 the person committed an offense relating to driving a  
368 motor vehicle in this state while under the influence of  
369 alcohol, controlled substances or drugs; (4) the person  
370 refused to submit to the secondary test finally designated  
371 in the manner provided in section four, article five of this  
372 chapter; and (5) the person had been given a written  
373 statement advising the person that the person's license to  
374 operate a motor vehicle in this state would be revoked for  
375 at least forty-five days and up to life if the person refused



376 to submit to the test finally designated, the commissioner  
377 shall revoke the person's license to operate a motor vehicle  
378 in this state for the periods specified in section seven,  
379 article five of this chapter. The revocation period pre-  
380 scribed in this subsection shall run concurrently with any  
381 other revocation period ordered under this section or  
382 section one of this article arising out of the same occur-  
383 rence. The revocation period prescribed in this subsection  
384 shall run concurrently with any other revocation period  
385 ordered under this section or section one of this article  
386 arising out of the same occurrence.

387 (s) If the Office of Administrative Hearings finds to the  
388 contrary with respect to the above issues the commissioner  
389 shall rescind his or her earlier order of revocation or shall  
390 reduce the order of revocation to the appropriate period of  
391 revocation under this section or section seven, article five  
392 of this chapter. A copy of the Office of Administrative  
393 Hearings' findings of fact and conclusions of law made  
394 and entered following the hearing shall be served upon the  
395 person whose license is at issue and the commissioner by  
396 registered or certified mail, return receipt requested.  
397 During the pendency of any hearing, the revocation of the  
398 person's license to operate a motor vehicle in this state  
399 shall be stayed.

400 A person whose license is at issue and the commissioner  
401 shall be entitled to judicial review as set forth in chapter  
402 twenty-nine-a of this code. Neither the Commissioner nor  
403 the Office of Administrative Hearings may stay enforce-  
404 ment of the order. The court may grant a stay or super-  
405 sede as of the order only upon motion and hearing, and a  
406 finding by the court upon the evidence presented, that  
407 there is a substantial probability that the appellant shall  
408 prevail upon the merits and the appellant will suffer  
409 irreparable harm if the order is not stayed: *Provided*, That  
410 in no event shall the stay or supersede as of the order  
411 exceed one hundred fifty days. Notwithstanding the

412 provisions of section four, article five of said chapter, the  
413 Office of Administrative Hearings may not be compelled  
414 to transmit a certified copy of the file or the transcript of  
415 the hearing to the circuit court in less than sixty days.

416 (t) In any revocation or suspension pursuant to this  
417 section, if the driver whose license is revoked or suspended  
418 had not reached the driver's eighteenth birthday at the  
419 time of the conduct for which the license is revoked or  
420 suspended, the driver's license shall be revoked or sus-  
421 pended until the driver's eighteenth birthday or the  
422 applicable statutory period of revocation or suspension  
423 prescribed by this section, whichever is longer.

424 (u) Funds for this section's hearing and appeal process  
425 may be provided from the Drunk Driving Prevention  
426 Fund, as created by section forty-one, article two, chapter  
427 fifteen of this code, upon application for the funds to the  
428 Commission on Drunk Driving Prevention.

**§17C-5A-3. Safety and treatment program; reissuance of  
license.**

1 (a) The Department of Health and Human Resources,  
2 Division of Alcoholism and Drug Abuse shall administer  
3 a comprehensive safety and treatment program for persons  
4 whose licenses have been revoked under the provisions of  
5 this article or section seven, article five of this chapter or  
6 subsection (6), section five, article three, chapter  
7 seventeen-b of this code and shall also establish the  
8 minimum qualifications for mental health facilities, day  
9 report centers, community correction centers or other  
10 public agencies or private entities conducting the safety  
11 and treatment program: *Provided*, That the Department of  
12 Health and Human Resources, Division of Alcoholism and  
13 Drug Abuse may establish standards whereby the division  
14 will accept or approve participation by violators in  
15 another treatment program which provides the same or

16 substantially similar benefits as the safety and treatment  
17 program established pursuant to this section.

18 (b) The program shall include, but not be limited to,  
19 treatment of alcoholism, alcohol and drug abuse, psycho-  
20 logical counseling, educational courses on the dangers of  
21 alcohol and drugs as they relate to driving, defensive  
22 driving or other safety driving instruction and other  
23 programs designed to properly educate, train and rehabili-  
24 tate the offender.

25 (c) The Department of Health and Human Resources,  
26 Division of Alcoholism and Drug Abuse shall provide for  
27 the preparation of an educational and treatment the  
28 program for each person whose license has been revoked  
29 under the provisions of this article or section seven, article  
30 five of this chapter or subsection (6), section five, article  
31 three, chapter seventeen-b of this code which shall contain  
32 the following: (1) A listing and evaluation of the offender's  
33 prior traffic record; (2) the characteristics and history of  
34 alcohol or drug use, if any; (3) his or her amenability to  
35 rehabilitation through the alcohol safety program; and (4)  
36 a recommendation as to treatment or rehabilitation and  
37 the terms and conditions of the treatment or rehabilita-  
38 tion. The program shall be prepared by persons knowl-  
39 edgeable in the diagnosis of alcohol or drug abuse and  
40 treatment.

41 (d) There is hereby created a special revenue account  
42 within the State Treasury known as the Department of  
43 Health and Human Resources Safety and Treatment Fund.  
44 The account shall be administered by the Secretary of the  
45 Department of Health and Human Resources for the  
46 purpose of administering the comprehensive safety and  
47 treatment program established by subsection (a) of this  
48 section. The account may be invested, and all earnings  
49 and interest accruing shall be retained in the account. The  
50 Auditor shall conduct an audit of the fund at least every  
51 three fiscal years.

52 Effective July 1, 2010, the State Treasurer shall make a  
53 one-time transfer of \$250,000 from the Motor Vehicle Fees  
54 Fund into the Department of Health and Human Re-  
55 sources Safety and Treatment Fund.

56 (e) (1) The program provider shall collect the established  
57 fee from each participant upon enrollment unless the  
58 department has determined that the participant is an  
59 indigent based upon criteria established pursuant to  
60 legislative rule authorized in this section.

61 (2) If the department determined that a participant is an  
62 indigent based upon criteria established pursuant to the  
63 legislative rule authorized by this section, the department  
64 shall provide the applicant with proof of its determination  
65 regarding indigency, which proof the applicant shall  
66 present to the interlock provider as part of the application  
67 process provided in section three-a of this article and/or  
68 the rules promulgated pursuant thereto.

69 (3) Program providers shall remit to the Department of  
70 Health and Human Resources a portion of the fee col-  
71 lected, which shall be deposited by the Secretary of the  
72 Department of Health and Human Resources into the  
73 Department of Health and Human Resources Safety and  
74 Treatment Fund. The Department of Health and Human  
75 Resources shall reimburse enrollment fees to program  
76 providers for each eligible indigent offender.

77 (f) On or before January 15 of each year, the Secretary of  
78 the Department of Health and Human Resources shall  
79 report to the Legislature on:

80 (1) The total number of offenders participating in the  
81 safety and treatment program during the prior year;

82 (2) The total number of indigent offenders participating  
83 in the safety and treatment program during the prior year;

84 (3) The total number of program providers during the  
85 prior year; and

86 (4) The total amount of reimbursements paid to program  
87 provider during the prior year.

88 (g) The Commissioner of the Division of Motor Vehicles,  
89 after giving due consideration to the program developed  
90 for the offender, shall prescribe the necessary terms and  
91 conditions for the reissuance of the license to operate a  
92 motor vehicle in this state revoked under this article or  
93 section seven, article five of this chapter or subsection (6),  
94 section five, article three, chapter seventeen-b of this code  
95 which shall include successful completion of the educa-  
96 tional, treatment or rehabilitation program, subject to the  
97 following:

98 (1) When the period of revocation is six months, the  
99 license to operate a motor vehicle in this State may not be  
100 reissued until: (A) At least ninety days have elapsed from  
101 the date of the initial revocation, during which time the  
102 revocation was actually in effect; (B) the offender has  
103 successfully completed the program; (C) all costs of the  
104 program and administration have been paid; and (D) all  
105 costs assessed as a result of a revocation hearing have been  
106 paid.

107 (2) When the period of revocation is for a period of one  
108 year or for more than a year, the license to operate a motor  
109 vehicle in this state may not be reissued until: (A) At least  
110 one-half of the time period has elapsed from the date of  
111 the initial revocation, during which time the revocation  
112 was actually in effect; (B) the offender has successfully  
113 completed the program; (C) all costs of the program and  
114 administration have been paid; and (D) all costs assessed  
115 as a result of a revocation hearing have been paid. Not-  
116 withstanding any provision in this code, a person whose  
117 license is revoked for refusing to take a chemical test as  
118 required by section seven, article five of this chapter for a

119 first offense is not eligible to reduce the revocation period  
120 by completing the safety and treatment program.

121 (3) When the period of revocation is for life, the license  
122 to operate a motor vehicle in this State may not be reis-  
123 sued until: (A) At least ten years have elapsed from the  
124 date of the initial revocation, during which time the  
125 revocation was actually in effect; (B) the offender has  
126 successfully completed the program; (C) all costs of the  
127 program and administration have been paid; and (D) all  
128 costs assessed as a result of a revocation hearing have been  
129 paid.

130 (4) Notwithstanding any provision of this code or any  
131 rule, any mental health facilities or other public agencies  
132 or private entities conducting the safety and treatment  
133 program when certifying that a person has successfully  
134 completed a safety and treatment program shall only have  
135 to certify that the person has successfully completed the  
136 program.

137 (h) (1) The Department of Health and Human Resources,  
138 Division of Alcoholism and Drug Abuse shall provide for  
139 the preparation of an educational program for each person  
140 whose license has been suspended for sixty days pursuant  
141 to the provisions of subsection (n), section two, article  
142 five-a of this chapter. The educational program shall  
143 consist of not less than twelve nor more than eighteen  
144 hours of actual classroom time.

145 (2) When a sixty-day period of suspension has been  
146 ordered, the license to operate a motor vehicle may not be  
147 reinstated until: (A) At least sixty days have elapsed from  
148 the date of the initial suspension, during which time the  
149 suspension was actually in effect; (B) the offender has  
150 successfully completed the educational program; (C) all  
151 costs of the program and administration have been paid;  
152 and (D) all costs assessed as a result of a suspension  
153 hearing have been paid.

154 (i) A required component of the treatment program  
155 provided in subsection (b) of this section and the education  
156 program provided for in subsection (c) of this section shall  
157 be participation by the violator with a victim impact panel  
158 program providing a forum for victims of alcohol and  
159 drug-related offenses and offenders to share first-hand  
160 experiences on the impact of alcohol and drug-related  
161 offenses in their lives. The Department of Health and  
162 Human Resources, Division of Alcoholism and Drug Abuse  
163 shall propose and implement a plan for victim impact  
164 panels where appropriate numbers of victims are available  
165 and willing to participate and shall establish guidelines  
166 for other innovative programs which may be substituted  
167 where the victims are not available to assist persons whose  
168 licenses have been suspended or revoked for alcohol and  
169 drug-related offenses to gain a full understanding of the  
170 severity of their offenses in terms of the impact of the  
171 offenses on victims and offenders. The plan shall require,  
172 at a minimum, discussion and consideration of the follow-  
173 ing:

174 (A) Economic losses suffered by victims or offenders;

175 (B) Death or physical injuries suffered by victims or  
176 offenders;

177 (C) Psychological injuries suffered by victims or offend-  
178 ers;

179 (D) Changes in the personal welfare or familial relation-  
180 ships of victims or offenders; and

181 (E) Other information relating to the impact of alcohol  
182 and drug-related offenses upon victims or offenders.

183 The Department of Health and Human Resources,  
184 Division of Alcoholism and Drug Abuse shall ensure that  
185 any meetings between victims and offenders shall be

186 nonconfrontational and ensure the physical safety of the  
187 persons involved.

188 (j)(1) The Secretary of the Department of Health and  
189 Human Resources shall promulgate a rule for legislative  
190 approval in accordance with article three, chapter twenty-  
191 nine-a of this code to administer the provisions of this  
192 section and establish a fee to be collected from each  
193 offender enrolled in the safety and treatment program.  
194 The rule shall include: (A) A reimbursement mechanism to  
195 program providers of required fees for the safety and  
196 treatment program for indigent offenders, criteria for  
197 determining eligibility of indigent offenders, and any  
198 necessary application forms; and (B) program standards  
199 that encompass provider criteria including minimum  
200 professional training requirements for providers, curricu-  
201 lum approval, minimum course length requirements and  
202 other items that may be necessary to properly implement  
203 the provisions of this section.

204 (2) The Legislature finds that an emergency exists and,  
205 therefore, the Secretary shall file by July 1, 2010, an  
206 emergency rule to implement this section pursuant to the  
207 provisions of section fifteen, article three, chapter twenty-  
208 nine-a of this code.

209 (k) Nothing in this section may be construed to prohibit  
210 day report or community correction programs, authorized  
211 pursuant to article eleven-c, chapter sixty-two of this  
212 code, from administering a comprehensive safety and  
213 treatment program pursuant to this section.

**§17C-5A-3a. Establishment of and participation in the Motor  
Vehicle Alcohol Test and Lock Program.**

1 (a)(1) The Division of Motor Vehicles shall control and  
2 regulate a Motor Vehicle Alcohol Test and Lock Program  
3 for persons whose licenses have been revoked pursuant to  
4 this article or the provisions of article five of this chapter



5 or have been convicted under section two, article five of  
6 this chapter, or who are serving a term of a conditional  
7 probation pursuant to section two-b, article five of this  
8 chapter.

9 (2) The program shall include the establishment of a  
10 users fee for persons participating in the program which  
11 shall be paid in advance and deposited into the Driver's  
12 Rehabilitation Fund: Provided, That on and after the first  
13 day of July, two thousand seven, any unexpended balance  
14 remaining in the Driver's Rehabilitation Fund shall be  
15 transferred to the Motor Vehicle Fees Fund created under  
16 the provisions of section twenty-one, article two, chapter  
17 seventeen-a of this code and all further fees collected shall  
18 be deposited in that fund.

19 (3) (A) Except where specified otherwise, the use of the  
20 term "program" in this section refers to the Motor Vehicle  
21 Alcohol Test and Lock Program.

22 (B) The Commissioner of the Division of Motor Vehicles  
23 shall propose legislative rules for promulgation in accor-  
24 dance with the provisions of chapter twenty-nine-a of this  
25 code for the purpose of implementing the provisions of this  
26 section. The rules shall also prescribe those requirements  
27 which, in addition to the requirements specified by this  
28 section for eligibility to participate in the program, the  
29 commissioner determines must be met to obtain the  
30 commissioner's approval to operate a motor vehicle  
31 equipped with a motor vehicle alcohol test and lock  
32 system.

33 (C) Nothing in this section may be construed to prohibit  
34 day report or community correction programs authorized  
35 pursuant to article eleven-c, chapter sixty-two of this  
36 code, or a home incarceration program authorized pursu-  
37 ant to article eleven-B, chapter sixty-two of this code,  
38 from being a provider of motor vehicle alcohol test and

39 lock systems for eligible participants as authorized by this  
40 section.

41 (4) For purposes of this section, a “motor vehicle alcohol  
42 test and lock system” means a mechanical or computerized  
43 system which, in the opinion of the commissioner, prevents  
44 the operation of a motor vehicle when, through the sys-  
45 tem’s assessment of the blood alcohol content of the person  
46 operating or attempting to operate the vehicle, the person  
47 is determined to be under the influence of alcohol.

48 (5) The fee for installation and removal of ignition  
49 interlock devices shall be waived for persons determined  
50 to be indigent by the Department of Health and Human  
51 Resources pursuant to section three, article five-a, chapter  
52 seventeen-c of this code. The commissioner shall establish  
53 by legislative rule, proposed pursuant to article three,  
54 chapter twenty-nine-a of this code, procedures to be  
55 followed with regard to persons determined by the De-  
56 partment of Health and Human Resources to be indigent.  
57 The rule shall include, but is not limited to, promulgation  
58 of application forms; establishment of procedures for the  
59 review of applications; and the establishment of a mecha-  
60 nism for the payment of installations for eligible offend-  
61 ers.

62 (6) On or before the fifteenth day of January, of each  
63 year, the commissioner of the division of motor vehicles  
64 shall report to the Legislature on:

65 (A) The total number of offenders participating in the  
66 program during the prior year;

67 (B) The total number of indigent offenders participating  
68 in the program during the prior year;

69 (C) The terms of any contracts with the providers of  
70 ignition interlock devices; and

71 (D) The total cost of the program to the state during the  
72 prior year.

73 (b)(1) Any person whose license is revoked for the first  
74 time pursuant to this article or the provisions of article  
75 five of this chapter is eligible to participate in the program  
76 when the person's minimum revocation period as specified  
77 by subsection (c) of this section has expired and the person  
78 is enrolled in or has successfully completed the safety and  
79 treatment program or presents proof to the commissioner  
80 within sixty days of receiving approval to participate by  
81 the commissioner that he or she is enrolled in a safety and  
82 treatment program: *Provided*, That anyone whose license  
83 is revoked for the first time pursuant to subsection (k),  
84 section two of this article must participate in the program  
85 when the person's minimum revocation period as specified  
86 by subsection (c) of this section has expired and the person  
87 is enrolled in or has successfully completed the safety and  
88 treatment program or presents proof to the commissioner  
89 within sixty days of receiving approval to participate by  
90 the commissioner that he or she is enrolled in a safety and  
91 treatment program.

92 (2) Any person whose license has been suspended  
93 pursuant to the provisions of subsection (n), section two of  
94 this article for driving a motor vehicle while under the age  
95 of twenty-one years with an alcohol concentration in his  
96 or her blood of two hundredths of one percent or more, by  
97 weight, but less than eight hundredths of one percent, by  
98 weight, is eligible to participate in the program after  
99 thirty days have elapsed from the date of the initial  
100 suspension, during which time the suspension was actually  
101 in effect: *Provided*, That in the case of a person under the  
102 age of eighteen, the person is eligible to participate in the  
103 program after thirty days have elapsed from the date of  
104 the initial suspension, during which time the suspension  
105 was actually in effect or after the person's eighteenth  
106 birthday, whichever is later. Before the commissioner

107 approves a person to operate a motor vehicle equipped  
108 with a motor vehicle alcohol test and lock system, the  
109 person must agree to comply with the following condi-  
110 tions:

111 (A) If not already enrolled, the person shall enroll in and  
112 complete the educational program provided in subsection  
113 (d), section three of this article at the earliest time that  
114 placement in the educational program is available, unless  
115 good cause is demonstrated to the commissioner as to why  
116 placement should be postponed;

117 (B) The person shall pay all costs of the educational  
118 program, any administrative costs and all costs assessed  
119 for any suspension hearing.

120 (3) Notwithstanding the provisions of this section to the  
121 contrary, a person eligible to participate in the program  
122 under this subsection may not operate a motor vehicle  
123 unless approved to do so by the commissioner.

124 (c) A person who participates in the program under  
125 subdivision (1), subsection (b) of this section is subject to  
126 a minimum revocation period and minimum period for the  
127 use of the ignition interlock device as follows:

128 (1) For a person whose license has been revoked for a  
129 first offense for six months pursuant to the provisions of  
130 section one-a of this article for conviction of an offense  
131 defined in subsection (d) or (g), section two, article five of  
132 this chapter or pursuant to subsection (j), section two of  
133 this article, the minimum period of revocation for partici-  
134 pation in the test and lock program is fifteen days and the  
135 minimum period for the use of the ignition interlock  
136 device is one hundred and twenty-five days;

137 (2) For a person whose license has been revoked for a  
138 first offense pursuant to section seven, article five of this  
139 chapter, the minimum period of revocation for participa-

140 tion in the test and lock program is forty-five days and the  
141 minimum period for the use of the ignition interlock  
142 device is one year;

143 (3) For a person whose license has been revoked for a  
144 first offense pursuant to section one-a of this article for  
145 conviction of an offense defined in subsection (e), section  
146 two, article five of this chapter or pursuant to subsection  
147 (j), section two of this article, the minimum period of  
148 revocation for participation in the test and lock program  
149 is forty-five days and the minimum period for the use of  
150 the ignition interlock device is two hundred seventy days;

151 (4) For a person whose license has been revoked for a  
152 first offense pursuant to the provisions of section one-a of  
153 this article for conviction of an offense defined in subsec-  
154 tion (a), section two, article five of this chapter or pursu-  
155 ant to subsection (f), section two of this article, the  
156 minimum period of revocation before the person is eligible  
157 for participation in the test and lock program is twelve  
158 months and the minimum period for the use of the ignition  
159 interlock device is two years;

160 (5) For a person whose license has been revoked for a  
161 first offense pursuant to the provisions of section one-a of  
162 this article for conviction of an offense defined in subsec-  
163 tion (b), section two, article five of this chapter or pursu-  
164 ant to subsection (g), section two of this article, the  
165 minimum period of revocation is six months and the  
166 minimum period for the use of the ignition interlock  
167 device is two years;

168 (6) For a person whose license has been revoked for a  
169 first offense pursuant to the provisions of section one-a of  
170 this article for conviction of an offense defined in subsec-  
171 tion (c), section two, article five of this chapter or pursuant  
172 to subsection (h), section two of this article, the minimum  
173 period of revocation for participation in the program is

174 two months and the minimum period for the use of the  
175 ignition interlock device is one year;

176 (7) For a person whose license has been revoked for a  
177 first offense pursuant to the provisions of section one-a of  
178 this article for conviction of an offense defined in subsec-  
179 tion (j), section two, article five of this chapter or pursuant  
180 to subsection (m), section two of this article, the minimum  
181 period of revocation for participation in the program is  
182 two months and the minimum period for the use of the  
183 ignition interlock device is ten months;

184 (d) Notwithstanding any provision of the code to the  
185 contrary, a person shall participate in the program if the  
186 person is convicted under section two, article five of this  
187 chapter or the person's license is revoked under section  
188 two of this article or section seven, article five of this  
189 chapter and the person was previously either convicted or  
190 his or her license was revoked under any provision cited in  
191 this subsection within the past ten years. The minimum  
192 revocation period for a person required to participate in  
193 the program under this subsection is one year and the  
194 minimum period for the use of the ignition interlock  
195 device is two years, except that the minimum revocation  
196 period for a person required to participate because of a  
197 violation of subsection (n), section two of this article or  
198 subsection (i), section two, article five of this chapter is  
199 two months and the minimum period of participation is  
200 one year. The division shall add an additional two months  
201 to the minimum period for the use of the ignition interlock  
202 device if the offense was committed while a minor was in  
203 the vehicle. The division shall add an additional six  
204 months to the minimum period for the use of the ignition  
205 interlock device if a person other than the driver received  
206 injuries. The division shall add an additional two years to  
207 the minimum period for the use of the ignition interlock  
208 device if a person other than the driver is injured and the  
209 injuries result in that person's death. The division shall

210 add one year to the minimum period for the use of the  
211 ignition interlock device for each additional previous  
212 conviction or revocation within the past ten years. Any  
213 person required to participate under this subsection must  
214 have an ignition interlock device installed on every vehicle  
215 he or she owns or operates.

216 (e) Notwithstanding any other provision in this code, a  
217 person whose license is revoked for driving under the  
218 influence of drugs is not eligible to participate in the  
219 Motor Vehicle Alcohol Test and Lock Program.

220 (f) An applicant for the test and lock program may not  
221 have been convicted of any violation of section three,  
222 article four, chapter seventeen-b of this code for driving  
223 while the applicant's driver's license was suspended or  
224 revoked within the six-month period preceding the date of  
225 application for admission to the test and lock program  
226 unless such is necessary for employment purposes.

227 (g) Upon permitting an eligible person to participate in  
228 the program, the commissioner shall issue to the person,  
229 and the person is required to exhibit on demand, a driver's  
230 license which shall reflect that the person is restricted to  
231 the operation of a motor vehicle which is equipped with an  
232 approved motor vehicle alcohol test and lock system.

233 (h) The commissioner may extend the minimum period  
234 of revocation and the minimum period of participation in  
235 the program for a person who violates the terms and  
236 conditions of participation in the program as found in this  
237 section, or legislative rule, or any agreement or contract  
238 between the participant and the division or program  
239 service provider. If the commissioner finds that any  
240 person participating in the program pursuant to section  
241 two-b, article five of this chapter must be removed  
242 therefrom for violation(s) of the terms and conditions  
243 thereof, he shall notify the person, the court that imposed  
244 the term of participation in the program, and the prosecut-

245 ing attorney in the county wherein the order imposing  
246 participation in the program was entered.

247 (i) A person whose license has been suspended pursuant  
248 to the provisions of subsection (n), section two of this  
249 article who has completed the educational program and  
250 who has not violated the terms required by the commis-  
251 sioner of the person's participation in the program is  
252 entitled to the reinstatement of his or her driver's license  
253 six months from the date the person is permitted to  
254 operate a motor vehicle by the commissioner. When a  
255 license has been reinstated pursuant to this subsection, the  
256 records ordering the suspension, records of any adminis-  
257 trative hearing, records of any blood alcohol test results  
258 and all other records pertaining to the suspension shall be  
259 expunged by operation of law: Provided, That a person is  
260 entitled to expungement under the provisions of this  
261 subsection only once. The expungement shall be accom-  
262 plished by physically marking the records to show that the  
263 records have been expunged and by securely sealing and  
264 filing the records. Expungement has the legal effect as if  
265 the suspension never occurred. The records may not be  
266 disclosed or made available for inspection and in response  
267 to a request for record information, the commissioner shall  
268 reply that no information is available. Information from  
269 the file may be used by the commissioner for research and  
270 statistical purposes so long as the use of the information  
271 does not divulge the identity of the person.

272 (j) In addition to any other penalty imposed by this code,  
273 any person who operates a motor vehicle not equipped  
274 with an approved motor vehicle alcohol test and lock  
275 system during that person's participation in the Motor  
276 Vehicle Alcohol Test and Lock Program is guilty of a  
277 misdemeanor and, upon conviction thereof, shall be  
278 confined in jail for a period not less than one month nor  
279 more than six months and fined not less than one hundred  
280 dollars nor more than five hundred dollars. Any person



281 who attempts to bypass the alcohol test and lock system is  
282 guilty of a misdemeanor and, upon conviction thereof,  
283 shall be confined in jail not more than six months and  
284 fined not less than one hundred dollars nor more than one  
285 thousand dollars: Provided, That notwithstanding any  
286 provision of this code to the contrary, a person enrolled  
287 and participating in the test and lock program may  
288 operate a motor vehicle solely at his or her job site if the  
289 operation is a condition of his or her employment. For the  
290 purpose of this section, job site does not include any street  
291 or highway open to the use of the public for purposes of  
292 vehicular traffic.

**ARTICLE 5C. OFFICE OF ADMINISTRATIVE HEARINGS.**

**§17C-5C-1. Office created; appointment of Chief Hearing Examiner.**

1 (a) The Office of Administrative Hearings is created as  
2 a separate operating agency within the Department of  
3 Transportation.

4 (b) The Governor, with the advice and consent of the  
5 senate, shall appoint a director of the office who shall  
6 serve as the administrative head of the office and as chief  
7 hearing examiner.

8 (c) Prior to appointment, the Chief Hearing Examiner  
9 shall be a citizen of the United States and a resident of  
10 this state who is admitted to the practice of law in this  
11 state.

12 (d) The salary of the Chief Hearing Examiner shall be set  
13 by the Secretary of the Department of Transportation.  
14 The salary shall be within the salary range for comparable  
15 administrators as determined by the State Personnel  
16 Board created by section six, article six, chapter  
17 twenty-nine of this code.

18 (e) The Chief Hearing Examiner during his or her term  
19 shall:

20 (1) Devote his or her full time to the duties of the posi-  
21 tion;

22 (2) Not otherwise engage in the active practice of law or  
23 be associated with any group or entity which is itself  
24 engaged in the active practice of law: *Provided*, That  
25 nothing in this paragraph may be construed to prohibit the  
26 Chief Hearing Examiner from being a member of a  
27 national, state or local bar association or committee, or of  
28 any other similar group or organization, or to prohibit the  
29 Chief Hearing Examiner from engaging in the practice of  
30 law by representing himself, herself or his or her immedi-  
31 ate family in their personal affairs in matters not subject  
32 to this article.

33 (3) Not engage directly or indirectly in any activity,  
34 occupation or business interfering or inconsistent with his  
35 or her duties as Chief Hearing Examiner;

36 (4) Not hold any other appointed public office or any  
37 elected public office or any other position of public trust;  
38 and

39 (5) Not be a candidate for any elected public office, or  
40 serve on or under any committee of any political party.

41 (f) The Governor may remove the Chief Hearing Exam-  
42 iner only for incompetence, neglect of duty, official  
43 misconduct or violation of subsection (e) of this section,  
44 and removal shall be in the same manner as that specified  
45 for removal of elected state officials in section six, article  
46 six, chapter six of this code.

47 (g) The term of the Chief Hearing Examiner shall be six  
48 years. A person holding the position of Chief Hearing  
49 Examiner may be reappointed to that position subject to  
50 the provisions of subsection (b).

**§17C-5C-2. Organization of Office.**

1 (a) The Chief Hearing Examiner is the chief administra-  
2 tor of the Office of Administrative Hearings and he or she  
3 may employ hearing examiners and other clerical person-  
4 nel necessary for the proper administration of this article.

5 (1) The Chief Hearing Examiner may delegate adminis-  
6 trative duties to other employees, but the Chief Hearing  
7 Examiner shall be responsible for all official delegated  
8 acts.

9 (2) All employees of the Office of Administrative Hear-  
10 ings, except the Chief Hearing Examiner, shall be in the  
11 classified service and shall be governed by the provisions  
12 of the statutes, rules and policies of the classified service  
13 in accordance with the provisions of article six, chapter  
14 twenty-nine of this code.

15 (3) Notwithstanding any provision of this code to the  
16 contrary, those persons serving as hearing examiners  
17 within the Division of Motor Vehicles on the effective date  
18 of this article as enacted during the Regular Session of the  
19 2010 Legislature, shall be eligible and given first prefer-  
20 ence in hiring as hearing examiners pursuant to this  
21 article.

22 (b) The Chief Hearing Examiner shall:

23 (1) Direct and supervise the work of the office staff;

24 (2) Make hearing assignments;

25 (3) Maintain the records of the office;

26 (4) Review and approve decisions of hearing examiners  
27 as to legal accuracy, clarity and other requirements;

28 (5) Submit to the Legislature, on or before the fifteenth  
29 day of February, an annual report summarizing the  
30 office's activities since the end of the last report period,

31 including a statement of the number and type of matters  
32 handled by the office during the preceding fiscal year and  
33 the number of matters pending at the end of the year; and

34 (6) Perform the other duties necessary and proper to  
35 carry out the purposes of this article.

36 (c) The administrative expenses of the office shall be  
37 included within the annual budget of the Department of  
38 Transportation.

**§17C-5C-3. Jurisdiction of Office of Administrative Hearings.**

1 The Office of Administrative Hearings jurisdiction to  
2 hear and determine all:

3 (1) Appeals from an order of the Commissioner of the  
4 Division of Motor Vehicles suspending a license pursuant  
5 to section eight, article two-B, chapter seventeen-B of this  
6 code;

7 (2) Appeals from decisions or orders of the Commissioner  
8 of the Division of Motor Vehicles suspending or revoking  
9 a license pursuant to sections three-c, six and twelve,  
10 article three, chapter seventeen-B of this code;

11 (3) Appeals from orders of the Commissioner of the  
12 Division of Motor Vehicles pursuant to section two, article  
13 five-A, of this chapter, revoking or suspending a license  
14 under the provisions of section one of this article or  
15 section seven, article five of chapter;

16 (4) Appeals from decisions or orders of the Commissioner  
17 of the Division of Motor Vehicles denying, suspending,  
18 revoking, refusing to renew any license or imposing any  
19 civil money penalty for violating the provisions of any  
20 licensing law contained in chapters seventeen-B and  
21 seventeen-c that are administered by the Commissioner of  
22 the Division of Motor Vehicles; and

23 (5) Other matters which may be conferred on the office  
24 by statute or legislatively approved rules.

**§17C-5C-4. Hearing Procedures.**

1 (a) A hearing before the office shall be heard de novo  
2 and conducted pursuant to the provisions of the contested  
3 case procedure set forth in article five, chapter  
4 twenty-nine-a of this code to the extent not inconsistent  
5 with the provisions of chapters seventeen-B and  
6 seventeen-c of this code. In case of conflict, the provisions  
7 of chapters seventeen-B and seventeen-c of this code shall  
8 govern.

9 (b) Notwithstanding any provision of this code to the  
10 contrary, the Commissioner of the Division of Motor  
11 Vehicles may be represented at hearings conducted by the  
12 Office and evidence submitted by the Commissioner may  
13 be considered in such hearings with or without such  
14 representation.

15 (c) The West Virginia Rules of Evidence governing  
16 proceedings in the courts of this state shall be given like  
17 effect in hearings held before a hearing examiner. All  
18 testimony shall be given under oath.

19 (d) Except as otherwise provided by this code or legisla-  
20 tive rules, the Commissioner of Motor Vehicles has the  
21 burden of proof.

22 (e) The hearing examiner may request proposed findings  
23 of fact and conclusions of law from the parties prior to the  
24 issuance by the office of the decision in the matter.

25 (f) Hearings shall be exempt from the requirements of  
26 article one, chapter twenty-nine-b of this code.

**§17C-5C-5. Transition from Division of Motor Vehicles to the  
Office of Administrative Hearings.**

1 (a) In order to implement an orderly and efficient  
2 transition of the administrative hearing process from the

3 Division of Motor Vehicles to the Office of Administrative  
4 Hearings, the Secretary of the Department of Transporta-  
5 tion may establish interim policies and procedures for the  
6 transfer of administrative hearings for appeals from  
7 decisions or orders of the Commissioner of the Division of  
8 Motor Vehicles denying, suspending, revoking, refusing to  
9 renew any license or imposing any civil money penalty for  
10 violating the provisions of any licensing law contained in  
11 chapters, seventeen-A, seventeen-B, seventeen-C,  
12 seventeen-D and seventeen-E of this code, currently  
13 administered by the Commissioner of the Division of  
14 Motor Vehicles, no later than October 1, 2010.

15 (b) On the effective date of this article, all equipment  
16 and records necessary to effectuate the purposes of this  
17 article shall be transferred from the Division of Motor  
18 Vehicle to the Office of Administrative Hearings: *Pro-*  
19 *vided*, That in order to provide for a smooth transition, the  
20 Secretary of Transportation may establish interim policies  
21 and procedures, determine the how equipment and records  
22 are to be transferred and provide that the transfers  
23 provided for in this subsection take effect no later than  
24 October 1, 2010.

## **CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**

### **ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.**

#### **§61-11-22. Pretrial diversion agreements; conditions; drug court programs.**

1 (a) A prosecuting attorney of any county of this state or  
2 a person acting as a special prosecutor may enter into a  
3 pretrial diversion agreement with a person under investi-  
4 gation or charged with an offense against the state of West  
5 Virginia, when he or she considers it to be in the interests  
6 of justice. The agreement is to be in writing and is to be  
7 executed in the presence of the person's attorney, unless  
8 the person has executed a waiver of counsel.

9 (b) Any agreement entered into pursuant to the provi-  
10 sions of subsection (a) of this section may not exceed  
11 twenty-four months in duration. The duration of the  
12 agreement must be specified in the agreement. The terms  
13 of any agreement entered into pursuant to the provisions  
14 of this section may include conditions similar to those set  
15 forth in section nine, article twelve, chapter sixty-two of  
16 this code relating to conditions of probation. The agree-  
17 ment may require supervision by a probation officer of the  
18 circuit court, with the consent of the court. An agreement  
19 entered into pursuant to this section must include a  
20 provision that the applicable statute of limitations be  
21 tolled for the period of the agreement.

22 (c) A person who has entered into an agreement for  
23 pretrial diversion with a prosecuting attorney and who has  
24 successfully complied with the terms of the agreement is  
25 not subject to prosecution for the offense or offenses  
26 described in the agreement or for the underlying conduct  
27 or transaction constituting the offense or offenses de-  
28 scribed in the agreement, unless the agreement includes a  
29 provision that upon compliance the person agrees to plead  
30 guilty or nolo contendere to a specific related offense, with  
31 or without a specific sentencing recommendation by the  
32 prosecuting attorney.

33 (d) No person charged with a violation of the provisions  
34 of section two, article five, chapter seventeen-c of this  
35 code may participate in a pretrial diversion program:  
36 *Provided*, That a court may defer proceedings in accor-  
37 dance with section two-b, article five, chapter seventeen-c  
38 of this code. No person charged with a violation of the  
39 provisions of section twenty-eight, article two of this  
40 chapter may participate in a pretrial diversion program  
41 unless the program is part of a community corrections  
42 program approved pursuant to the provisions of article  
43 eleven-c, chapter sixty-two of this code. No person  
44 indicted for a felony crime of violence against the person

45 where the alleged victim is a family or household member  
46 as defined in section two hundred three, article  
47 twenty-seven, chapter forty-eight of this code or indicted  
48 for a violation of the provisions of sections three, four or  
49 seven, article eight-b of this chapter is eligible to partici-  
50 pate in a pretrial diversion program. No defendant  
51 charged with a violation of the provisions of section  
52 twenty-eight, article two of this chapter or subsections (b)  
53 or (c), section nine, article two of this chapter where the  
54 alleged victim is a family or household member is eligible  
55 for pretrial diversion programs if he or she has a prior  
56 conviction for the offense charged or if he or she has  
57 previously been granted a period of pretrial diversion  
58 pursuant to this section for the offense charged. Notwith-  
59 standing any provision of this code to the contrary,  
60 defendants charged with violations of the provisions of  
61 section twenty-eight, article two, chapter sixty-one of this  
62 code or the provisions of subsection (b) or (c), section nine,  
63 article two of said chapter where the alleged victim is a  
64 family or household member as defined by the provisions  
65 of section two hundred three, article twenty-seven,  
66 chapter forty-eight of this code are ineligible for partici-  
67 pation in a pretrial diversion program before the July 1,  
68 2002, and before the community corrections subcommittee  
69 of the Governor's Committee on Crime, Delinquency and  
70 Correction established pursuant to the provisions of  
71 section two, article eleven-c, chapter sixty-two of this  
72 code, in consultation with the working group of the  
73 subcommittee, has approved guidelines for a safe and  
74 effective program for diverting defendants charged with  
75 domestic violence.

76 (e) The provisions of section twenty-five of this article  
77 are inapplicable to defendants participating in pretrial  
78 diversion programs who are charged with a violation of  
79 the provisions of section twenty-eight, article two, chapter  
80 sixty-one of this code. The community corrections sub-



81 committee of the Governor's Committee on Crime, Delin-  
82 quency and Correction established pursuant to the provi-  
83 sions of section two, article eleven-c, chapter sixty-two of  
84 this code shall, upon approving any program of pretrial  
85 diversion for persons charged with violations of the  
86 provisions of section twenty-eight, article two, chapter  
87 sixty-one of this code, establish and maintain a central  
88 registry of the participants in the programs which may be  
89 accessed by judicial officers and court personnel.

**§61-11-25. Expungement of criminal records for those found  
not guilty of crimes or against whom charges  
have been dismissed.**

1 (a) Any person who has been charged with a criminal  
2 offense under the laws of this state and who has been  
3 found not guilty of the offense, or against whom charges  
4 have been dismissed, and not in exchange for a guilty plea  
5 to another offense, may make a motion in the circuit court  
6 in which the charges were filed to expunge all records  
7 relating to the arrest, charge or other matters arising out  
8 of the arrest or charge: *Provided*, That no record in the  
9 Division of Motor Vehicles may be expunged by virtue of  
10 any order of expungement entered pursuant to section  
11 two-b, article five, chapter seventeen-C of this code:  
12 *Provided further*, That any person who has previously  
13 been convicted of a felony may not make a motion for  
14 expungement pursuant to this section. The term records  
15 as used in this section includes, but is not limited to, arrest  
16 records, fingerprints, photographs, index references or  
17 other data whether in documentary or electronic form,  
18 relating to the arrest, charge or other matters arising out  
19 of the arrest or charge. Criminal investigation reports and  
20 all records relating to offenses subject to the provisions of  
21 article twelve, chapter fifteen of this code because the  
22 person was found not guilty by reason of mental illness,  
23 mental retardation or addiction are exempt from the  
24 provisions of this section.

25 (b) The expungement motion shall be filed not sooner  
26 than sixty days following the order of acquittal or dis-  
27 missal by the court. Any court entering an order of  
28 acquittal or dismissal shall inform the person who has  
29 been found not guilty or against whom charges have been  
30 dismissed of his or her rights to make a motion for  
31 expungement pursuant to this section.

32 (c) Following the filing of the motion, the court may set  
33 a date for a hearing. If the court does so, it shall notify the  
34 prosecuting attorney and the arresting agency of the  
35 motion and provide an opportunity for a response to the  
36 expungement motion.

37 (d) If the court finds that there are no current charges or  
38 proceedings pending relating to the matter for which the  
39 expungement is sought, the court may grant the motion  
40 and order the sealing of all records in the custody of the  
41 court and expungement of any records in the custody of  
42 any other agency or official including law-enforcement  
43 records. Every agency with records relating to the arrest,  
44 charge or other matters arising out of the arrest or charge,  
45 that is ordered to expunge records, shall certify to the  
46 court within sixty days of the entry of the expungement  
47 order, that the required expungement has been completed.  
48 All orders enforcing the expungement procedure shall also  
49 be sealed.

50 (e) Upon expungement, the proceedings in the matter  
51 shall be deemed never to have occurred. The court and  
52 other agencies shall reply to any inquiry that no record  
53 exists on the matter. The person whose record is expunged  
54 shall not have to disclose the fact of the record or any  
55 matter relating thereto on an application for employment,  
56 credit or other type of application.

57 (f) Inspection of the sealed records in the court's posses-  
58 sion may thereafter be permitted by the court only upon a  
59 motion by the person who is the subject of the records or

60 upon a petition filed by a prosecuting attorney that  
61 inspection and possible use of the records in question are  
62 necessary to the investigation or prosecution of a crime in  
63 this state or another jurisdiction. If the court finds that  
64 the interests of justice will be served by granting the  
65 petition, it may be granted.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*[Handwritten Signature]*

.....  
Chairman Senate Committee

*[Handwritten Signature]*

.....  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

*[Handwritten Signature]*

.....  
Clerk of the Senate

*[Handwritten Signature]*

.....  
Clerk of the House of Delegates

*[Handwritten Signature]*

.....  
President of the Senate

*[Handwritten Signature]*

.....  
Speaker House of Delegates

The within *is approved* this the *2nd*

Day of *April*, 2010.

*[Handwritten Signature]*

.....  
Governor

PRESENTED TO THE  
GOVERNOR

APR 01 2010

Time 4:10 pm