

2013 DRAFTING REQUEST

Bill

Received: 4/23/2013 Received By: emueller
Wanted: As time permits Same as LRB:
For: Jim Ott (608) 266-0486 By/Representing: Jim Ott
May Contact: Drafter: emueller
Subject: Drunk Driving - penalties Addl. Drafters:
Drunk Driving - refusals/testing Extra Copies: PJH, RPN

Submit via email: YES
Requester's email: Rep.OttJ@legis.wisconsin.gov
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Mandatory minimum sentences for certain OWI offenses; persons who can perform a blood draw

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	emueller 4/24/2013	kfollett 4/26/2013	phenry 4/26/2013	_____			
/1	phurley 4/26/2013	kfollett 4/26/2013	phenry 4/26/2013	_____	sbasford 4/26/2013		Crime
/2				_____	mbarman 4/26/2013	mbarman 4/26/2013	Crime

FE Sent For:



Not
Needed

<END>

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/?	emueller 4/24/2013	kfollett 4/26/2013	phenry 4/26/2013	<u> </u> gm			
/1		12kf 4/26	y 6c ph	<u> </u> ph	sbasford 4/26/2013		Crime

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/?	emueller	1/15/13	4/				
1/1	EJM 4/24/13	4/26	ph	gm ph			

FE Sent For:

<END>

4/24

Rep. Jim Ott

- clarify mandatory rules in 7+ Owe
State v. Williams Ct. app. 2011 AP 2868
- talk w/ David Moore at Leg. Council
- also email from Ron Dagle
- works for Henry 5/2

Mueller, Eric

From: Rep.OttJ
Sent: Tuesday, April 23, 2013 3:20 PM
To: Mueller, Eric
Cc: Mueller, Virginia
Subject: FW: "Quicky OWI" Amendment Suggestions

Eric,

Here is the note I received from the DA. Both issues could be handled in the same bill. If you have any questions my cell is 414-758-9411. I would hope to have a public hearing on this bill on May 2nd. Thanks you for your help.

Jim Ott

From: Ron Dague [<mailto:rondague@yahoo.com>]
Sent: Monday, April 22, 2013 10:31 PM
To: Rep.OttJ
Cc: ron.dague@da.wi.gov
Subject: "Quicky OWI" Amendment Suggestions

Rep. Ott,

Thank you for contacting me regarding this opportunity to fix some problems. I am in the middle of the second of back-to-back jury trials, but I didn't want to miss this opportunity, so I sent this from my personal email.

1st Suggestion:

This amendment would be minor word change, but would eliminate a loophole through which defense attorneys attack the admissibility of blood results.

Current Law under 343.305(5)(b) " Blood may be withdrawn from the person arrested for violation of s. 346.63 (1), (2), (2m), (5) or (6) or 940.25, ors. 940.09 ...only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician."

If the blood is drawn by a phlebotomist, rather than drawn by a nurse, med tech, etc, we need to get proof that they were "acting under the direction of a physician" or we lose the presumption of accuracy and dependability of test results. This can be a problem in that at a busy emergency room, it often isn't clear under which physician the phlebotomist is acting under when drawing statutorily ordered blood draw at the request of the police. This requires the phlebotomist has to testify and perhaps a supervising person that can testify as to the "direction of physician" element. At best it is a waste of citizen and court time. At worst, our case is weakened if we can't get that testimony.

This makes no sense, since most blood is drawn by phlebotomist. Adding language to include "Phlebotomist and any other medical professional who customarily draws blood in the medical facility or profession" either in addition to, or eliminating the "acting under the direction of a physician." Language would solve this problem. The physician language never creates a problem but almost seem unnecessary if we can add the other language.

2nd Suggestion

The OWI causing injury, 346.63(2) has the penalty in 346.65(3m) which says, in part: "may be imprisoned for not less than 30 days nor more than one year in the county jail."

Note the use of "may." That means that there is no presumptive minimum. The court can order no jail time at all! I believe the intention was to have a sentence between 30 days to one year, not no jail at all. By replacing "may" with "shall," the judge will have to impose at least 30-days for OWI causing Injury convictions. All the other criminal OWI offenses use the "shall" language.

Feel free to contact me if I can be of further assistance. I will keep in touch regarding more extensive issues when we both have time!

Thank you

Ron Dague
ADA Milwaukee County

414-975-3468



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-0549/PD 2234/1
KJF/EVM:kjf:ls

Due 4/26

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

RMNR

11/4/24/13

INSERTS

pdf ✓

Soon

reger

1
2
3

AN ACT to amend 346.65 (2) (am) 6. and 346.65 (2) (am) 7. of the statutes;
relating to: penalties for operating-while-intoxicated offenses and providing
a penalty. *and testing*

Analysis by the Legislative Reference Bureau

Under current law, a person who commits a seventh, eighth, or ninth offense related to drunken driving or driving under the influence of an intoxicant or other drug (OWI) is guilty of a Class G felony. The penalty for a Class G felony is a fine not to exceed \$25,000 or imprisonment not to exceed ten years, or both. The confinement portion of a bifurcated sentence imposed on a person convicted of a seventh, eighth, or ninth OWI may not be less than three years. A person who commits a tenth or subsequent OWI is guilty of a Class F felony. The penalty for a Class F felony is a fine not to exceed \$25,000 or imprisonment not to exceed 12 years and 6 months, or both. The confinement portion of a bifurcated sentence imposed on a person convicted of a tenth or subsequent OWI may not be less than four years.

This bill specifies that a person who is convicted of a seventh, eighth, or ninth OWI must be given a bifurcated sentence and that the confinement portion of the sentence may not be less than three years and that a person who is convicted of a tenth or subsequent OWI must be given a bifurcated sentence and that the confinement portion of the sentence may not be less than four years.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a

INS-Analysis

report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

INS
2-1

1 SECTION 1. 346.65 (2) (am) 6. of the statutes is[✓] amended to read:

2 346.65 (2) (am) 6. Except as provided in par. (f), is guilty of a Class G felony if

3 the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime,

4 plus the total number of suspensions, revocations, and other convictions counted

5 under s. 343.307 (1), equals 7, 8, or 9, except that suspensions, revocations, or

6 convictions arising out of the same incident or occurrence shall be counted as one.

7 The court shall impose a bifurcated sentence under s. 973.01 and the confinement

8 portion of ~~a~~ the bifurcated sentence imposed on the person ~~under s. 973.01~~ shall be

9 not less than 3 years.

10 SECTION 2. 346.65 (2) (am) 7. of the statutes is[✓] amended to read:

11 346.65 (2) (am) 7. Except as provided in par. (f), is guilty of a Class F felony if

12 the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime,

13 plus the total number of suspensions, revocations, and other convictions counted

14 under s. 343.307 (1), equals 10 or more except that suspensions, revocations, or

15 convictions arising out of the same incident or occurrence shall be counted as one.

16 The court shall impose a bifurcated sentence under s. 973.01 and the confinement

17 portion of ~~a~~ the bifurcated sentence imposed on the person ~~under s. 973.01~~ shall be

18 not less than 4 years.

INS
2-15
Change 21
component
to
text: ins: inapp

19 SECTION 3. **Initial applicability.** The treatment of section 346.65(2)(am)6. and 7. and

20 (1) This act first applies to violations committed or refusals occurring on the (3m) of the statutes

effective date of this subsection, but does not preclude the counting of other

1 convictions, suspensions, or revocations as prior convictions, suspensions, or
2 revocations for purposes of administrative action by the department of
3 transportation, sentencing by a court, or revocation or suspension of motor vehicle
4 operating privileges.

5

(END)

DNote

1 INS-Analysis

2

Current law specifies that a person who is convicted of causing injury to another while committing an OWI or while operating a commercial motor vehicle while the person has an alcohol concentration of 0.04 or more but less than 0.08 must be fined not less than \$300 nor more than \$2,000 and may be imprisoned for not less than 30 days nor more than one year in the county jail. This bill specifies that the convicted person must be imprisoned for not less than 30 days nor more than one year.

Current law also specifies that a blood draw for alcohol or other controlled substance testing may be performed only by a physician, registered nurse, medical technologist, physician assistant, or person acting under the direction of a physician. This bill adds phlebotomists and other medical professionals who customarily draw blood to list of persons who may perform a blood draw.

the

3

4 INS 2-1

5

6 SECTION 1. 343.305 (5) (b) of the statutes is amended to read:

7 343.305 (5) (b) Blood may be withdrawn from the person arrested for violation
8 of s. 346.63 (1), (2), (2m), (5), or (6) or 940.25, or s. 940.09 where the offense involved
9 the use of a vehicle, or a local ordinance in conformity with s. 346.63 (1), (2m), or (5),
10 or as provided in sub. (3) (am) or (b) to determine the presence or quantity of alcohol,
11 a controlled substance, a controlled substance analog, or any other drug, or any
12 combination of alcohol, controlled substance, controlled substance analog, and any
13 other drug in the blood only by a physician, registered nurse, medical technologist,
14 physician assistant, phlebotomist, or other medical professional who customarily
15 draws blood, or person acting under the direction of a physician.

History: 1987 a. 3, 27, 399; 1989 a. 7, 31, 56, 105, 359; 1991 a. 39, 251, 277; 1993 a. 16, 105, 315, 317, 491; 1995 a. 27 ss. 6412cnL, 9126 (19); 1995 a. 113, 269, 425, 426, 436, 448; 1997 a. 35, 84, 107, 191, 237, 290; 1999 a. 9, 32, 109; 2001 a. 16 ss. 3421m to 3423j, 4060gk, 4060hw, 4060hy; 2001 a. 104; 2003 a. 97, 199; 2005 a. 332, 413; 2007 a. 20 ss. 3303 to 3315, 9121 (6) (a); 2007 a. 136; 2009 a. 100, 103, 163; 2011 a. 120, 242.

16

1 INS 2-19

2

3 **SECTION 2.** 346.65 (3m) of the statutes is amended to read:

4 346.65 (3m) Except as provided in sub. (3p) or (3r), any person violating s.
5 346.63 (2) or (6) shall be fined not less than \$300 nor more than \$2,000 and ~~may~~ shall
6 be imprisoned for not less than 30 days nor more than one year in the county jail.
7 If there was a minor passenger under 16 years of age in the motor vehicle at the time
8 of the violation that gave rise to the conviction under s. 346.63 (2) or (6), the offense
9 is a felony, the applicable minimum and maximum fines or periods of imprisonment
10 for the conviction are doubled and the place of imprisonment shall be determined
11 under s. 973.02.

History: 1971 c. 278; 1973 c. 218; 1977 c. 193; 1979 c. 221; 1981 c. 20; 1985 a. 80, 337; 1987 a. 3, 27, 398, 399; 1989 a. 105, 176, 271; 1991 a. 39, 251, 277, 315; 1993 a. 198, 317, 475; 1995 a. 44, 338, 359, 425; 1997 a. 27, 135, 199, 237, 277, 283, 295; 1999 a. 32, 109; 2001 a. 16 ss. 3443k, 4060gm, 4060hw, 4060hy; 2001 a. 109; 2003 a. 33, 97, 139, 326; 2005 a. 149, 317, 389; 2007 a. 97, 111; 2009 a. 100, 180; 2011 a. 258.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2234/7dn

Date

EVM: kjf

ATTN: Rep. Jim Ott

Please review the attached draft carefully to ensure that it is consistent with your intent. The following are several issues you may wish to consider in your review of this draft.

1. Mr. Dague suggested removing "acting under the direction of a physician." I did not make this change as it appears inconsistent with the intent of your request. The "under the direction" language appears to allow any person, including a person who is not a medical professional, to withdraw blood if under the direction of a physician. Removing this language would, therefore, eliminate a category of persons authorized to perform blood draws. Please let me know if you want this changed.

2. This draft adds phlebotomists and "other medical professionals who customarily draw blood" to the list of persons who may draw blood under s. 343.305 (5) (b). The use of "customarily" in the description of the second group is somewhat ambiguous. Is this provision necessary? If you want to add a catch-all, some other possible options that might be less ambiguous include: "other medical professionals trained in drawing blood" or "medical professionals who draw blood as part of their usual duties at the medical facility." Would you instead like to specifically catalog additional authorized persons?

3. Would you like to treat ss. 23.33 (4p) (b) 4., 30.684 (2) (d), or 350.104 (2) (d) similarly to s. 343.305 (5) (b)?

4. The mandatory minimum issue that Mr. Dague identifies is slightly different from the issue raised in State v. Williams, Wis. Ct. App. No. 2011AP2868. This draft addresses both issues. Please let me know if this does not meet your intent.

Please let me know if you would like any changes made to the attached draft or if you have any questions.

Eric V. Mueller
Legislative Attorney
Phone: (608) 261-7032
E-mail: eric.mueller@legis.wisconsin.gov

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2234/1dn
EVM:kjf.ph

April 26, 2013

ATTN: Rep. Jim Ott

Please review the attached draft carefully to ensure that it is consistent with your intent. The following are several issues you may wish to consider in your review of this draft.

1. Mr. Dague suggested removing "acting under the direction of a physician." I did not make this change as it appears inconsistent with the intent of your request. The "under the direction" language appears to allow any person, including a person who is not a medical professional, to withdraw blood if under the direction of a physician. Removing this language would, therefore, eliminate a category of persons authorized to perform blood draws. Please let me know if you want this changed.
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Please let me know if you would like any changes made to the attached draft or if you have any questions.

Eric V. Mueller
Legislative Attorney
Phone: (608) 261-7032
E-mail: eric.mueller@legis.wisconsin.gov



Stays

12

2013 BILL

today

pwf

regr

1 AN ACT *to amend* 346.65 (2) (am) 6. and 346.65 (2) (am) 7. of the statutes;
2 relating to: penalties and testing for operating-while-intoxicated offenses
3 and providing a penalty.

Analysis by the Legislative Reference Bureau

Under current law, a person who commits a seventh, eighth, or ninth offense related to drunken driving or driving under the influence of an intoxicant or other drug (OWI) is guilty of a Class G felony. The penalty for a Class G felony is a fine not to exceed \$25,000 or imprisonment not to exceed ten years, or both. The confinement portion of a bifurcated sentence imposed on a person convicted of a seventh, eighth, or ninth OWI may not be less than three years. A person who commits a tenth or subsequent OWI is guilty of a Class F felony. The penalty for a Class F felony is a fine not to exceed \$25,000 or imprisonment not to exceed 12 years and 6 months, or both. The confinement portion of a bifurcated sentence imposed on a person convicted of a tenth or subsequent OWI may not be less than four years.

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BILL

not less than \$300 nor more than \$2,000 and may be imprisoned for not less than 30 days nor more than one year in the county jail. This bill specifies that the convicted person must be imprisoned for not less than 30 days nor more than one year.

Current law also specifies that a blood draw for alcohol or other controlled substance testing may be performed only by a physician, registered nurse, medical technologist, physician assistant, or person acting under the direction of a physician. This bill adds phlebotomists and other medical professionals who customarily draw blood to the list of persons who may perform a blood draw.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

are authorized to

In sec 17

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 343.305 (5) (b) of the statutes is amended to read:

2 343.305 (5) (b) Blood may be withdrawn from the person arrested for violation
3 of s. 346.63 (1), (2), (2m), (5), or (6) or 940.25, or s. 940.09 where the offense involved
4 the use of a vehicle, or a local ordinance in conformity with s. 346.63 (1), (2m), or (5),
5 or as provided in sub. (3) (am) or (b) to determine the presence or quantity of alcohol,
6 a controlled substance, a controlled substance analog, or any other drug, or any
7 combination of alcohol, controlled substance, controlled substance analog, and any
8 other drug in the blood only by a physician, registered nurse, medical technologist,
9 physician assistant, phlebotomist, or other medical professional who customarily
10 draws blood, or person acting under the direction of a physician.

11 SECTION 2. 346.65 (2) (am) 6. of the statutes is amended to read

12 346.65 (2) (am) 6. Except as provided in par. (f), is guilty of a Class G felony if
13 the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime,
14 plus the total number of suspensions, revocations, and other convictions counted
15 under s. 343.307 (1), equals 7, 8, or 9, except that suspensions, revocations, or

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BILL

1 convictions arising out of the same incident or occurrence shall be counted as one.
2 The court shall impose a bifurcated sentence under s. 973.01 and the confinement
3 portion of ~~a~~ the bifurcated sentence imposed on the person under s. 973.01 shall be
4 not less than 3 years.

5 **SECTION 3.** 346.65 (2) (am) 7. of the statutes is amended to read:

6 346.65 (2) (am) 7. Except as provided in par. (f), is guilty of a Class F felony if
7 the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime,
8 plus the total number of suspensions, revocations, and other convictions counted
9 under s. 343.307 (1), equals 10 or more except that suspensions, revocations, or
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13 not less than 4 years.

14 **SECTION 4.** 346.65 (3m) of the statutes is amended to read:

15 346.65 (3m) Except as provided in sub. (3p) or (3r), any person violating s.
16 346.63 (2) or (6) shall be fined not less than \$300 nor more than \$2,000 and ~~may~~ shall
17 be imprisoned for not less than 30 days nor more than one year in the county jail.
18 If there was a minor passenger under 16 years of age in the motor vehicle at the time
19 of the violation that gave rise to the conviction under s. 346.63 (2) or (6), the offense
20 is a felony, the applicable minimum and maximum fines or periods of imprisonment
21 for the conviction are doubled and the place of imprisonment shall be determined
22 under s. 973.02.

23 **SECTION 5. Initial applicability.**

24 (1) The treatment of section 346.65 (2) (am) 6. and 7. and (3m) of the statutes
25 first applies to violations committed or refusals occurring on the effective date of this

Insert 2

BILL

1 subsection, but does not preclude the counting of other convictions, suspensions, or
2 revocations as prior convictions, suspensions, or revocations for purposes of
3 administrative action by the department of transportation, sentencing by a court, or
4 revocation or suspension of motor vehicle operating privileges.

5 (END)

1 physician assistant, phlebotomist, or other medical professional who is authorized
 2 to draw blood, or person acting under the direction of a physician and the person who
 3 withdraws the blood, the employer of that person and any hospital where blood is
 4 withdrawn have immunity from civil or criminal liability as provided under s.
 5 895.53.

History: 1985 a. 331; 1987 a. 3; 1993 a. 105; 1995 a. 27 s. 9126 (19); 2003 a. 97; 2007 a. 20 s. 9121 (6) (a).

6 INSERT 2:

7 SECTION 3. 350.104 (2) (d) of the statutes is amended to read:

8 350.104 (2) (d) *Validity; procedure.* A chemical test of blood or urine conducted
 9 for the purpose of authorized analysis is valid as provided under s. 343.305 (6). The
 10 duties and responsibilities of the laboratory of hygiene, department of health
 11 services and department of transportation under s. 343.305 (6) apply to a chemical
 12 test of blood or urine conducted for the purpose of authorized analysis under this
 13 section. Blood may be withdrawn from a person arrested for a violation of the
 14 intoxicated snowmobiling law only by a physician, registered nurse, medical
 15 technologist, physician assistant, phlebotomist, or other medical professional who is
 16 authorized to draw blood, for person acting under the direction of a physician and the
 17 person who withdraws the blood, the employer of that person and any hospital where
 18 blood is withdrawn have immunity from civil or criminal liability as provided under
 19 s. 895.53

History: 1987 a. 399; 1989 a. 359; 1993 a. 105; 1995 a. 27 s. 9126 (19); 2003 a. 97; 2007 a. 20 s. 9121 (6) (a).

check

Barman, Mike

From: Mueller, Virginia
Sent: Friday, April 26, 2013 4:01 PM
To: LRB.Legal
Subject: Draft Review: LRB -2234/2 Topic: Mandatory minimum sentences for certain OWI offenses; persons who can perform a blood draw

Please Jacket LRB -2234/2 for the ASSEMBLY.