

## Chapter Jus 19

### FREQUENT SOBRIETY TESTING PILOT PROGRAM

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**Note:** Chapter Jus 19 was created by emergency rule, EmR1805, effective February 6, 2018 through July 5, 2018.

**Jus 19.01 Purpose.** The purpose of this chapter is to establish, as required by s. 165.957 (3), Stats., standards, timelines, and procedures for a frequent sobriety testing pilot program in the state of Wisconsin, and to effectuate the purpose of s. 165.957, Stats.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.02 Applicability.** This chapter applies to the department of justice, the department of corrections, participating counties, circuit courts, and district attorneys, and participants in the frequent sobriety testing pilot program.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.03 Definitions.** In this chapter:

(1) “Agency” means a sheriff’s office or an entity designated by a sheriff of a county selected by the department to participate in the frequent sobriety testing pilot program.

(2) “Alcohol concentration” means the alcohol content of blood, breath, or urine by weight.

(3) “Breath test” means the collection of a breath sample to measure breath alcohol concentration.

(4) “Continuous monitoring” means breath or transdermal testing for the presence of alcohol that is conducted at least once every hour.

(5) “Controlled substance” has the meaning given in s. 961.01 (4), Stats.

(6) “Court” means a circuit court in the state of Wisconsin.

(7) “Data collection system” means a computer application providing for the entry of specific, structured variables into a database to track key data elements for analysis and reporting.

(8) “Deferred prosecution agreement” means a written agreement between a criminal defendant and a district attorney in which the district attorney agrees to suspend the prosecution for a specified period provided that the defendant complies with conditions included in the agreement.

(9) “Department” means the department of justice.

(10) “District attorney” means the district attorney of a county participating in the program who has jurisdiction over the prosecution of a participant.

(11) “Drug patch” means any type of device affixed to a person’s skin to test for the presence of controlled substances in the person’s body.

(12) “Non-OWI offense” means an offense that is not an OWI offense.

(13m) “OWI conviction” means a conviction under s. 940.09 (1) or 940.25, Stats., or a suspension, revocation, or other conviction as enumerated in s. 343.307 (1), Stats.

(14m) “OWI offense” means a violation of s. 940.09 (1) or 940.25, Stats., or the statutes, laws, and local ordinances enumerated in s. 343.307 (1), Stats.

(15) “Participant” means an adult person who has been ordered by a court or the department of corrections to refrain from using alcohol or controlled substances, or both, as a condition of release and has been ordered by a court or the department of corrections to participate in the program. “Participant” also means an adult person who has agreed to participate in the program as a condition of a deferred prosecution agreement or who volunteers to participate in the program.

(16) “Participation agreement” means an agreement between a participant and an agency in which the participant agrees to comply with the program requirements.

(17) “Program” means the frequent sobriety testing pilot program, which requires a participant to abstain from the use of alcohol or a controlled substance, or both, for a specified period of time, during which the participant shall submit to twice-a-day or continuous testing of the participant’s blood, breath, urine, or other bodily substance, in order to determine if alcohol or a controlled substance, or both, is present in the participant’s body.

(18) “Sanction” means a consequence imposed for a violation of the participation agreement and may include arrest.

(19) “Testing” has the meaning given in s. 165.957 (1) (b), Stats.

(20) “Testing site” means the facility designated by the agency and approved by the department where the program shall be administered including testing, installation of remote transdermal alcohol monitoring equipment, collection of fees from participants, and entry of participant information into the data collection system. An agency may designate more than one testing site.

(21) “Transdermal alcohol monitoring” means the use of a device to detect alcohol in a person’s body by measuring ethanol vapors released through the skin.

(22) “Twice-a-day testing” means testing a participant for the use of alcohol at least twice daily, with testing times approximately 12 hours apart.

(23) “Urinalysis testing” means collecting and analyzing urine specimens to detect the presence of alcohol or controlled substances, or both.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.; correction in (13), (14) made under s. 13.92 (4) (b) 7., Stats., and renum. (13) and (14) to (14m) and (13m) under s. 13.92 (4) (b) 1., Stats., Register April 2019 No. 760.

**Jus 19.04 Program participation and enrollment.**

(1) Before commencing participation in the program, a participant shall sign a written participation agreement with the agency using a form approved by the department. The agreement shall include the initial duration of the person's participation in the program as ordered by the court or department of corrections, or provided in a deferred prosecution agreement, and shall include all of the following:

- (a) The type and frequency of testing.
- (b) The location of the testing site.
- (c) Fee schedule, listing fee types enumerated in s. Jus 19.12
- (1) (a) and amount of each fee.
- (d) Payment procedures, including time within which each type of fee shall be paid.
- (e) The participant's obligations and responsibilities.
- (f) Potential sanctions for the participant's noncompliance, up to and including termination, as determined by the agency.

(2) A participant shall sign the agreement in the presence of a person designated by the agency, acknowledging and agreeing to the terms and conditions imposed by the court or department of corrections or provided in a deferred prosecution agreement. The agency shall deliver a copy of the signed participation agreement to the participant.

(3) In conjunction with the participation agreement, the participant shall sign a consent form allowing the release of personal and testing information to the agency and department for enforcement and reporting purposes. The personal information may include name, date of birth, state identification number, address, telephone, and other information deemed necessary or appropriate by the agency and department and outlined in the consent form. The format of the consent form shall be approved by the department. The participant shall receive a copy of the signed consent form.

(4) A participant shall be enrolled in the program for a minimum initial enrollment period of 90 days and a maximum initial enrollment period of 365 days except when ordered as a condition of pretrial release.

(5) Program participation may be extended beyond the initial enrollment period at the discretion of the court, the department of corrections, or the district attorney, according to whether program participation is a pretrial, postconviction, or deferred prosecution condition. Before an individual's program participation may be extended, the individual shall sign an amended written participation agreement using a form approved by the department. An individual's participation in the program may not exceed 18 months.

(6) A participant may not be enrolled in the program while in physical custody.

(7) A person on work release may be ordered to participate in the program or may volunteer to participate in the program.

(8) Participation in the program may not replace a participant's statutory obligations or any other condition imposed by the court or the department of corrections or as part of a deferred prosecution agreement.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.05 Agency agreement with the department.**

(1) Each agency participating in the program shall sign a written agreement with the department outlining the respective responsibilities of the agency and the department.

(2) By signing the agreement, the agency agrees to abide by this chapter and any other guidelines and procedures established by the department for the administration of the program.

(3) The agreement shall require the agency to provide an accounting to the department of all fees, costs, and other payments collected from participants, in a manner directed by the department.

(4) The agreement shall list the data collection and reporting requirements outlined in s. Jus 19.13 and s. 165.957 (6), Stats.

(5) The agreement shall direct the agency to remit to the department a portion of all program fee amounts collected from its participants. The department shall use these payments to recoup its expenditures for administering the program and installing, maintaining, and administering the data collection system. The department shall return to the agency any fees paid under the agreement not used to support the program.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.06 Conditions of bond or pretrial release.**

The court may require a defendant to participate in the program as a condition of bond or pretrial release if any of the following apply:

(1) The defendant has 2 or more OWI convictions and is currently charged with a non-OWI offense.

(2) The defendant is charged with a 3rd or subsequent OWI offense.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.07 Conditions of deferred prosecution.**

A district attorney may require a defendant to participate in the program as a condition of a deferred prosecution agreement if the defendant has 2 or more OWI convictions and the deferred prosecution agreement is based on a non-OWI offense.

**Note:** Under s. 967.055 (3), Stats., a prosecutor may not place a person in a deferred prosecution program if the person is accused of or charged with an OWI offense. Neither s. 165.957, Stats., nor this rule allow the use of deferred prosecution agreements in OWI cases.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.08 Conditions post-conviction.**

The court or department of corrections may order a defendant convicted of an offense to participate in the program as a condition of probation, parole, or extended supervision if any of the following applies:

(1) The defendant is being or has been sentenced for a 2nd or subsequent OWI offense.

(2) The defendant has 2 or more OWI convictions and is being or has been sentenced for a non-OWI offense.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.09 Volunteers.**

A defendant with 2 or more OWI convictions may voluntarily participate in the program. A voluntary participant shall agree to abstain from alcohol and controlled substances while released on bond, on release under s. 969.01 (1), Stats., on probation, while participating in a deferred prosecution agreement, or on parole or extended supervision. Volunteers shall adhere to all program requirements.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.10 Testing.**

(1) Testing may include any combination of breath testing, drug patch testing, blood testing, urinalysis, or transdermal alcohol monitoring, provided that the method selected supports either continuous monitoring or twice-a-day testing. Other testing methods or schedules may be used if approved by the agency and the department. The testing methods at each testing site shall be determined by the agency in collaboration with the department.

(2) An ignition interlock device, as defined in s. 340.01 (23v), Stats., is not an acceptable testing method for the program.

(3) The agency shall provide the testing equipment and may enter into a contract with a private vendor to obtain the equipment needed to carry out the program.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.11 Compliance and sanctions. (1) ENROLLMENT.** The court, department of corrections, or district attorney's office shall inform the agency when a participant is ordered to participate in the program as a pretrial or postconviction condition, or agrees to participate in the program under a deferred prosecution agreement. A new participant shall contact the agency, within a time specified by the court, department of corrections, or district attorney, to enroll in the program. Enrollment commences when the participant signs the participation agreement and consent form as provided in s. Jus 19.04 (1) to (3). If the participant fails to enroll, the agency shall notify the court, the department of corrections, or the district attorney, according to whether program participation is a pretrial, postconviction, or deferred prosecution condition. A court may issue a bench warrant directing law enforcement to take the participant into custody and ordering the participant to appear before the court. Volunteers may enroll by contacting a testing site.

(2) **FAILING A TEST.** (a) A test that reveals the presence of alcohol or a controlled substance is a violation of the participation agreement and shall result in a sanction.

(b) If a test reveals the presence of alcohol or a controlled substance, the agency may conduct a confirmation test.

(c) If a test reveals the presence of alcohol or a controlled substance, the agency may take the participant into custody for a violation of the participation agreement.

(d) According to whether program participation is a pretrial, postconviction, or deferred prosecution condition, the agency shall immediately notify the court, the department of corrections, or the district attorney that the participant has violated the participation agreement by failing a test.

(3) **MISSING OR BEING LATE FOR A TEST.** (a) Missing a test at a designated time at the designated testing site without the agency's approval is a violation of the participation agreement and may result in a sanction. The agency may consider a participant who is late for on-site testing in violation of the participation agreement and may impose a sanction.

(b) If a participant fails to appear for a scheduled test, the agency shall immediately notify the court, the department of corrections, or the district attorney, according to whether program participation is a pretrial, postconviction, or deferred prosecution condition. A court may issue a bench warrant directing law enforcement to take the participant into custody and ordering the participant to appear before the court.

(c) Unless prior arrangements have been made between the participant and the agency, a test at a nondesignated testing site is a violation of the participation agreement.

(d) At the discretion of the agency, a participant who must travel outside the area of the designated testing site may be tested at an alternative location with advance written approval from the agency.

(e) The agency may excuse a participant from a scheduled test based upon exigent circumstances, including inclement weather, emergency, or documented health problems.

(f) The agency shall record in the data collection system a participant's failure to appear for a test or a participant's excused absence from a test.

(4) **TAMPERING WITH A TEST.** (a) The agency shall impose a sanction on a participant who tampers with a test.

(b) A participant who damages any equipment in the course of tampering with a test shall reimburse the agency for the cost of the damaged equipment.

(c) The agency shall record the tampering as a violation of the participation agreement in the data collection system.

(5) **STANDING ORDER.** A court may issue a standing order establishing procedures for taking into custody participants who have violated a participation agreement in any way, including using alcohol or any controlled substance, failing a test, missing a test, being late for on-site testing, or tampering with a test.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19; correction in (1) made under s. 35.17, Stats., Register April 2019 No. 760.

**Jus 19.12 Fees. (1)** (a) Except as provided in par. (b), the agency shall collect program fees from participants, including administrative fees, testing or daily monitoring fees according to test type, and installation and deactivation fees for remote transdermal alcohol monitoring devices.

(b) According to whether program participation is a pretrial, postconviction, or deferred prosecution condition, the court, the department of corrections, or the district attorney may recommend a reduction or waiver of fees for a participant. However, the agency shall make the final determination on a fee reduction or waiver. The agency may decline to enroll a person in the program if any fees were reduced or waived without the agency's consent. An agency that agrees to reduce or waive a fee shall, in making payments to the department under s. Jus 19.05 (5), remit to the department the amount it would have remitted without the reduction or waiver.

(2) The department shall determine all fee amounts in consultation with the participating agencies. The fee amounts shall reflect the program costs to the agency and the department. The department shall provide a standard fee schedule to each agency. The fee schedule shall be reviewed and updated annually as necessary to reflect actual program costs.

(3) The department may, upon request of an agency, approve a fee modification on a showing by the agency that a higher fee is necessary to cover program costs.

(4) (a) The agency may use the fees collected for any of the following:

1. To pay a vendor for any test administered.
2. Other testing costs.
3. Administrative program costs.
4. Costs associated with program support services.
5. Equipment maintenance and replacement costs.
6. Program compliance costs.
7. To make the payments to the department required under s. Jus 19.05 (5).

(b) The agency shall report to the department how the fees are expended annually or as requested by the department.

(5) (a) Except as provided in par. (b), the agency may not administer a test before the testing fee is paid. The participant may pay the testing fee only with cash or a money order. The agency shall provide a receipt to the participant. The agency may accept advance payment from a participant.

(b) In its discretion, an agency may administer a test without prior payment based upon exigent circumstances.

(6) The agency shall refund any positive balance to a participant who has successfully completed the program. The agency

may not refund any positive balance to a participant who is terminated from the program.

(7) The agency shall report a participant's failure to pay any required program fees to the court, the department of corrections, or the district attorney, according to whether program participation is a pretrial, postconviction, or deferred prosecution condition.

(8) A participant's failure to pay fees may result in termination from the program at the recommendation of the agency, the court, the department of corrections, or the district attorney, according to whether program participation is a pretrial, postconviction, or deferred prosecution condition.

(9) The agency may terminate a voluntary participant for failure to pay required program fees.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.13 Reporting requirements and data collection system.** (1) An agency shall use the data collection system designated by the department to track participant information, to record testing data, and to monitor fees collected.

(2) The agency shall enter all of the following information about a participant into the data collection system:

- (a) Enrollment information.
- (b) Demographic information.
- (c) Type, frequency, and duration of program participation.
- (d) Compliance with enrollment procedures.
- (e) Execution of participation agreement and consent form.
- (f) Testing results.
- (g) Discharge information.
- (h) Fees and other money due and collected.
- (i) Additional information requested by the department.

(3) Data collection shall occur on an ongoing basis as participants are enrolled in or discharged from the program and as tests are completed. All data shall be entered or uploaded in the data collection system as soon as possible, within 48 hours whenever possible, after being gathered or received by the agency.

(4) All information in the data collection system shall be kept current and confidential as required by law. The accuracy and completeness of the data is the responsibility of the agency.

(5) The department shall, in order help monitor data quality and program progress, communicate with agencies on at least a quarterly basis about key statistics and performance metrics. Agencies shall address and respond to any data quality issues identified through this process.

(6) The department shall use the data provided by the agencies to evaluate program outcomes and effectiveness as required by s. 165.957 (7), Stats.

(7) The department may require participating agencies, courts, the department of corrections, and district attorneys to provide specific information on program functioning and operations as part of the evaluation process required by s. 165.957 (7) (b) and (c), Stats.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.14 Reimbursement for lost or damaged equipment.** (1) A participant who loses or intentionally damages any testing equipment shall reimburse the agency for the lost or damaged equipment.

(2) Any amount owed by the participant as reimbursement for lost or damaged equipment shall be assessed to the participant and paid to the participating county's frequent sobriety testing pilot program fund.

(3) The agency shall report any failure by a participant to pay an assessed reimbursement to the court, or the department of corrections, or the district attorney, according to whether program participation is a pretrial, postconviction, or deferred prosecution condition. A participant who fails to pay the reimbursement may be taken into custody or a court may issue an arrest warrant for the participant.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.15 Discharge from the program.** (1) A participant shall be discharged from the program when any of the following occurs:

(a) The participant has successfully completed the program.

(b) The participant is terminated from the program by the court, the department of corrections, or the district attorney, according to whether program participation is a pretrial, postconviction, or deferred prosecution condition, due to the participant's violation of program requirements.

(c) The participant is administratively discharged from the program because the court, the department of corrections, or the district attorney, according to whether program participation is a pretrial, postconviction, or deferred prosecution condition, has determined that the participant is no longer required to participate in the program or the participant is unable to continue program participation.

(2) A participant completes the program when he or she has complied with the program requirements for the duration specified in the participation agreement and:

(a) If in the program as a condition of bond or other pretrial release, there has been a final disposition of the criminal charge, including acquittal or conviction and imposition of sentence.

(b) If in the program on a deferred prosecution agreement, the participant has met the requirements of the deferred prosecution agreement and there has been a final disposition of the criminal charge.

(c) If in the program as a condition of probation, parole, or extended supervision, the participant has served the time and satisfied the conditions set by the court in the order of probation, parole, or extended supervision.

(3) When a participant is discharged from the program, the court, department of corrections, or district attorney, according to whether program participation is a pretrial, postconviction, or deferred prosecution condition, shall inform the agency.

(4) The agency shall enter the participant's discharge from the program into the data collection system upon notification that the participant has completed the program, has been terminated from the program, or has been administratively discharged.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.

**Jus 19.16 Repeat participant.** The court, department of corrections, or district attorney, with concurrence of the agency, may authorize a participant to participate in the program no more than 2 additional times after the participant has been discharged from the program.

**History:** EmR1805: emerg cr., eff. 2-6-18; CR 18-068: cr. Register April 2019 No. 760, eff. 5-1-19.