

## Chapter Trans 311

## BREATH ALCOHOL TESTING, APPROVAL AND PERMIT PROGRAM

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Note: Chapter MVD 25 as it existed on May 31, 1978 was repealed and a new chapter MVD 25 was created effective June 1, 1978, renumbered to be Trans 311, effective August 1, 1981.

**Trans 311.01 Purpose.** The purpose of this chapter is to aid the department of transportation in the administration of the breath alcohol testing, approval and permit program as directed and authorized by s. 343.305 (10) (b), Stats.

History: Cr. Register, July, 1981, No. 307, eff. 8-1-81.

**Trans 311.02 Applicability.** The provisions of this chapter are applicable to all law enforcement agencies and personnel engaging in breath alcohol analyses in this state.

History: Cr. Register, July, 1981, No. 307, eff. 8-1-81.

**Trans 311.03 Definitions.** As used in this chapter:

(1) "Administrator" means the administrator of the division of state patrol in the Wisconsin department of transportation.

(2) "Agency" means a law enforcement agency in the state engaging in breath alcohol testing.

(3) "Agency trained technician" means a person who is approved by the secretary pursuant to the provisions of s. Trans 311.07 (1) and (2) and who is authorized to perform the responsibilities set forth in s. Trans 311.06 (3).

(3m) "Alcohol" means ethyl alcohol and may include methyl alcohol and isopropyl alcohol.

(4) "Ampoule" means a glass vial which contains a chemical solution compounded specifically for use in the breathalyzer but is not an integral component of the instrument.

(5) "Batch" means the entire quantity of a chemical compound or solution prepared at one time and with which a large quantity of ampoules, identified with the same control number, are filled.

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(7) "Breathalyzer Test Report and Operational Check List" means a report identified as form DSP 4036.

(7m) "Calibrating unit" means a device or devices which are designed to produce a predictable alcohol concentration reading on a breath alcohol test instrument through the use of reference solutions or by mechanical or physical means.

(9) "Certified instrument operator" means employes of a law enforcement agency or a health agency providing services to a law enforcement agency who have successfully completed a specialized training program and have been issued a class I or II permit.

(9m) "Department" means the Wisconsin department of transportation.

(10) "Instrument" means an item or combination of items of equipment designed to make a measurement of alcohol concentration, but does not include appurtenances used in conjunction with the instrument.

(11) "Instrument Maintenance and Calibration Report" means either that report identified as form DSP 4039 or that report identified as form DSP 4068.

(11m) "Internal standard" means an integral component of a breath alcohol test instrument which is designed to continuously monitor the calibration of the instrument.

(12) "Permit, Class I" means a certificate issued to a person authorizing that person to administer qualitative breath alcohol tests.

(13) "Permit, Class II" means a certificate issued to a person authorizing that person to administer quantitative breath alcohol tests.

(14) "Permit, Class III" means a certificate issued to a person authorizing that person to perform the duties of an agency trained technician.

(15) "Program director" means that person assigned the responsibility for the administration and supervision of the breath alcohol testing, approval and permit program of the department.

(16) "Qualitative breath alcohol analyses" means test of a person's breath the results of which indicate the presence or absence of alcohol in the person's breath by direct digital readout.

(17) "Quantitative breath alcohol analyses" means chemical tests of a person's breath which yield a specific result in grams of alcohol per 210 liters of breath.

(18) "Reference solution" means a solution compounded for use in calibrating units which, when equilibrated with air, yields a predictable result in grams of alcohol per 210 liters of breath.

(19) "Secretary" means the secretary of the Wisconsin department of transportation.

(20) "System blank analysis" means a chemical test of a specimen which is alcohol free to insure that the system produces a blank result on an alcohol free specimen.

(21) "Technical supervisor" means that person having the civil service title "Chemical Test Coordinator", or title to which that position may be reallocated, assigned the responsibility for the supervision of the breath alcohol testing, approval and permit program in one or more assigned areas of the state.

(22) "Time system operator" means a person employed by a law enforcement agency to receive or transmit messages on the time system communications network in the state.

History: Cr. Register, May, 1978, No. 269, eff. 6-1-78; renum. from MVD 25.01 and r. (19), (20), (22), (25) and (26), am. (1), (4), (5), (10), (14) to (18), r. and recr. (3), (7), (9) and (11), renum. (2) to be (3m) and am., renum. (6) to be (7m) and am., renum. (8) to be (9m) and am., cr. (2) and (11m), Register, July, 1981, No. 307, eff. 8-1-81; reprinted to correct error, Register, September, 1981, No. 309; emerg. am. (11), (16), (17) and (18), eff. 5-1-82; am. (11), (16), (17) and (18), Register, May, 1982, No. 317, eff. 6-1-82.

**Trans 311.04 Breath test instrument approval.** (1) All organizations or individuals selling or offering for sale instruments for the determination of the concentration or presence of alcohol in the breath in this state shall register the instruments with the department.

(a) It shall be the responsibility of the organization or individual selling or offering for sale instruments for the determination of the concentration or presence of alcohol in the breath, in this state, to make arrangements with the department to have the instrument evaluated. The organization or individual requesting the evaluation shall provide the department with instruments, related accessories, chemical reagents, complete directions and any other materials needed for the evaluation, and shall provide the program director with technical consultation when necessary during the evaluation.

(b) The department shall not accept for evaluation any instrument which has not met the performance standards set forth in this section.

(2) Instruments for quantitative breath alcohol analyses shall meet the performance standards established by the U.S. Department of Transportation, National Highway Traffic Safety Administration identified as, "Performance Standard for Evidential Breath Testers," NHTSA-STD-2001.01, January 1977. 38 Fed. Reg. 30,459 (1973).

Note: This reference is available from the office of the program director, Wisconsin department of transportation, division of state patrol, post office box 7912, Madison, Wisconsin 53707, or from the secretary of state or the revisor of statutes.

(3) Instruments for qualitative breath alcohol analyses shall meet the performance standards established by the U.S. Department of Transportation, National Highway Traffic Safety Administration, identified as, "Performance Standards for Screening Breath Alcohol Testers", NHTSA-STD-2003.00, December 1974.

Note: This reference is available from the office of the program director, Wisconsin department of transportation, division of state patrol, post office box 7912, Madison, Wisconsin 53707, or from the secretary of state or the revisor of statutes.

(4) Calibrating units for breath alcohol testers shall have the approval of the program director if manufactured prior to the adoption of federal standards or shall meet the performance standards established by the U.S. Department of Transportation, National Highway Traffic Safety Administration identified as, "Performance Standards for Calibrating

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Units for Breath Alcohol Testers" published in the Federal Register. 40 Fed. Reg. 36,167 (1975).

Note: This reference is available from the office of the program director, Wisconsin department of transportation, division of state patrol, post office box 7912, Madison, Wisconsin 53707, or from the secretary of state or the revisor of statutes.

(5) Internal standards for use with breath alcohol test instruments shall be approved by the program director only if they meet the following performance standards:

(a) The internal standard shall be a permanent, integral component of the instrument.

(b) The internal standard shall function to render the breath alcohol test instrument inoperable if the calibration of the breath alcohol test instrument exceeds the standard calibration value by more than 0.01 grams of alcohol per 210 liters of breath.

(6) The ability of any instrument or related accessories to meet the standards of performance set forth in this section shall be subject to evaluation by the program director and each type or category of instrument or device shall be approved by the program director prior to use in this state.

(7) The following quantitative breath alcohol test instruments are approved for use in Wisconsin:

- (a) Breathalyzer—models 900 and 900A.
- (b) Auto-Intoximeter.
- (c) Intoxilyzer model 4011AS.
- (d) Intoximeter model 3000.

(8) The following qualitative breath alcohol test instruments are approved for use in Wisconsin:

- (a) Alco Sensor II.
- (b) Alert model J3A.

(9) The following calibrating units are approved for use in Wisconsin:

- (a) Stephenson Breath Alcohol Simulator.
- (b) Smith and Wesson Mark IIA Simulator.
- (c) Luekey Simulator model LS.

(10) The Intoximeter model 3000 internal sample simulator is approved for use as an internal standard in Wisconsin.

(11) Other types or categories of breath alcohol test instruments or calibrating units shall be approved by the program director, as they are evidenced to the satisfaction of the program director, that they meet the performance standards established in this section.

History: Cr. Register, May 1978, No. 269, eff. 6-1-78; renum. MVD 25.02 to be Trans 311.04 (1) and am., renum. MVD 25.03 (1) and (2) (intro.) to be (2) and (3) and am.; r. (2) (a) to (k) and (2m), renum. MVD 25.03 (3) to be (4) and am.; cr. (5), renum. MVD 25.03 (4) to be (6) and am.; renum. MVD 25.04 (1) to (3) to be (7) to (9) and am., cr. (10), renum. MVD Register, April, 1983, No. 328

25.04 (4) to be (11) and am., Register, July, 1981, No. 307, eff. 8-1-81; emerg. am. (1) (a) and (5) (b), eff. 5-1-82; am. (1) (a) and (5) (b), Register, May, 1982, No. 317, eff. 6-1-82.

**Trans 311.05 Approved techniques and methods of performing chemical analysis of the breath.** (1) Methods of performing quantitative chemical analysis of the breath to determine the alcohol content of the blood shall be approved by the department.

(2) Techniques used in performing quantitative chemical analysis of the breath shall be those which are designed to insure accuracy, detect malfunctions and to safeguard personnel and equipment.

(3) Procedures for quantitative chemical analysis of the breath for the determination of the concentration of alcohol shall include, but shall not be limited to, the following controls in conjunction with the testing of each subject:

(a) Observation by a responsible person or combination of persons, of the test subject for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject shall not have ingested alcohol, regurgitated, or smoked.

(b) A system blank analysis.

(c) An analysis utilizing a calibrating unit or internal standard, the results of which analysis shall not exceed the established value of the calibrating unit by more than 0.01 grams of alcohol per 210 liters of breath.

(4) Results of analyses of breath for alcohol shall be expressed in terms grams of alcohol per 210 liters of breath.

History: Cr. Register, May, 1978, No. 269, eff. 6-1-78; renum. MVD 25.05 to be Trans 311.05 and am., Register, July, 1981, No. 307, eff. 8-1-81; am. (3) (intro.) and (c) and (4), eff. 5-1-82; am. (3) (intro.) and (c) and (4), Register, May, 1982, No. 317, eff. 6-1-82.

**Trans 311.06 Approval of breath alcohol testing programs.** (1) All breath alcohol testing programs in this state shall have the approval of and be certified by the program director.

(2) Approval and certification of any chemical breath alcohol testing program shall be contingent upon the law enforcement agencies' agreement to conform to and abide by any directives, orders, or policies issued or to be issued by the program director. This shall include, but shall not be limited to, the following:

(a) Program administration including reports, records and forms.

(b) Site location and security.

(c) Methods of operation and testing techniques.

(d) Supervision of the law enforcement agency breath alcohol test program by an agency trained technician who shall be responsible to a technical supervisor for activities in the program.

(3) Agency trained technicians shall:

(a) Comply with the procedure for testing and certifying the accuracy of breath alcohol test instruments set forth in this chapter.

(b) Comply with all directives pertaining to the preventive maintenance schedule for breath alcohol test instruments.

(c) Check for accuracy and calibrate if necessary, at intervals established by the program director, but in no instance longer than 60 days, all preliminary breath alcohol test instruments assigned to the agency.

(d) Insure that an adequate supply of materials and forms required in the breath alcohol testing program are available at all times.

(e) Transmit or cause to be transmitted, all breath alcohol test program related data or information requested by the program director or a technician supervisor.

(f) Provide instruction, utilizing the approved training program, in the proper operation and use of qualitative breath alcohol test instruments.

(g) Certify to a technical supervisor the competency of law enforcement agency personnel to administer qualitative breath alcohol tests.

(h) Testify in court when required regarding the maintenance and calibration of breath alcohol test instruments completed in compliance with this chapter.

(4) Technical supervisors shall exercise the authority granted them by this chapter, and in addition shall:

(a) Supervise the breath alcohol test activities of agency trained technicians and certified instrument operators.

(b) Complete field inspections of the total breath alcohol testing, approval and permit program including reports, records, operations and analyses.

(c) Train and evaluate breath alcohol test instrument operators and agency trained technicians and re-evaluate them at intervals established by the program director.

(d) Insure the continued proficiency and competency of agency trained technicians and certified instrument operators.

(e) Insure compliance with all provisions of this chapter.

(f) Make inspections and investigations in matters pertaining to the breath alcohol testing, approval and permit program as requested by the program director.

(g) Comply with all directives concerning the breath alcohol testing, approval and permit program issued by the program director.

(h) Maintain and submit records and reports as required by the program director.

History: Cr. Register, May, 1978, No. 269, eff. 6-1-78; renum. MVD 25.06 to be Trans 311.06 and am., Register, July, 1981, No. 307, eff. 8-1-81.

**Trans 311.07 Agency trained technicians and technical supervisors.** (1) The secretary shall, upon recommendation of the program director, approve agency trained technicians as required by s. 343.305 (10) (b) 3, Stats.

(2) The issuance of a class III permit bearing the signatures, original or facsimile, of the secretary and program director, shall establish that the holder of that permit has been approved by the secretary as an agency trained technician.

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(3) Technical supervisors shall be qualified for and hold a valid class III permit.

History: Cr. Register, May, 1978, No. 269, eff. 6-1-78; renum. MVD 25.07 to be Trans 311.07 and am., Register, July, 1981, No. 307, eff. 8-1-81.

**Trans 311.08 Approved training programs.** (1) Training programs for the training of law enforcement officers in the qualitative or quantitative chemical analysis of the breath to determine the presence or concentration of alcohol shall be approved by and under the direction of the department.

(2) Applicants to attend an approved training program in the quantitative chemical analysis of the breath shall meet the following qualifications:

(a) Applicants shall be high school graduates or the equivalent, or shall successfully complete a screening examination developed and administered by the department.

(b) Applicants shall be full time, permanent employes of a law enforcement agency or a health agency providing services to a law enforcement agency.

(c) The applicant shall have the recommendation of the chief administrative officer of the agency wherein employed.

(3) Applicants to attend an approved training program to qualify as an agency trained technician shall meet the following qualifications:

(a) Applicants shall be the holder of a class I and II permit which are in good standing.

(b) Applicants shall have the recommendation of the chief administrative officer of the agency wherein employed and the recommendation of a technical supervisor.

(4) Applicants to attend an approved training program in the qualitative chemical analysis of the breath shall have the recommendation of the chief administrative officer of the agency wherein employed.

History: Cr. Register, May, 1978, No. 269, eff. 7-1-78; renum. MVD 25.08 to be Trans 311.08 and am., Register, July, 1981, No. 307, eff. 8-1-81; emerg. am. (1), eff. 5-1-82; am. (1), Register, May, 1982, No. 317, eff. 6-1-82.

**Trans 311.09 Procedure for testing and certifying the accuracy of breath alcohol test instruments.** (1) All quantitative breath alcohol test instruments approved for use in this state shall be tested and certified for accuracy in accordance with the following standards:

(a) The instrument shall be maintained and the accuracy checked periodically by an individual holding a valid class III permit, at intervals established by a technical supervisor, but in no instance shall this period exceed 60 days.

(b) Each maintenance and accuracy check shall include, but shall not be limited to, a system blank analysis and analysis of a reference solution of known alcohol content, equilibrated with air prior to the time any maintenance procedures are completed. The result of this analysis shall not exceed the established reference solution value by more than 0.01 grams per 210 liters of the reference solution air. A system blank analysis and an analysis of a reference solution of a known alcohol content, equi-

brated with air, shall be completed immediately following the performance of maintenance procedures and the test result shall not exceed the established reference solution value by more than 0.01 grams of alcohol per 210 liters of the reference solution air.

(2) Each qualitative breath alcohol test instrument approved for use in this state shall be tested and the accuracy checked by an individual holding a valid class III permit.

(a) The tests and accuracy checks shall be conducted at intervals established by the program director but in no instance shall this period exceed 60 days.

(b) Each accuracy and calibration check shall consist of a test of the instrument employing an analysis of a reference solution of known alcohol content, equilibrated with air, the results of which analysis shall fall within tolerances established by the program director.

(3) It shall be the responsibility of the manufacturer or distributor of breathalyzer ampoules sold in this state to provide the department with a copy of an assay report which verifies the amount and composition of the chemicals in a random selection of each batch of ampoules.

(a) The assay shall be performed by an independent research laboratory.

(b) Each ampoule filled from a particular batch shall bear a control number which distinguishes that batch from any other.

(c) The program director may require an independent assay of the ampoule content and composition by any qualified person or agency of the program director's choice.

(d) Copies of all ampoule assay reports shall be placed on file with the department.

(4) Reference solutions for use in calibrating units shall be prepared by an individual or firm approved by the program director.

(a) Each lot of reference solutions shall be identified with a control number.

(b) An assay report shall be submitted to the department specifying the amount of alcohol which is contained in each milliliter of solution and the predicted result which shall be obtained when used with a breath alcohol test instrument.

History: Cr. Register, May, 1978, No. 269, eff. 6-1-78; renum. from MVD 25.09 and am., Register, July, 1981, No. 307, eff. 8-1-81; emerg. am. (1) (b), eff. 5-1-82; am. (1) (b), Register, May, 1982, No. 317, eff. 6-1-82.

**Trans 311.10 Qualifications for issuance and cause for revocation, suspension and cancellation of permits.** (1) Permits to administer qualitative or quantitative chemical tests of the breath for the purpose of determining the presence or concentration of alcohol in the blood or to perform the duties of an agency trained technician shall be issued only to those persons who have successfully completed a course of instruction prescribed by the program director.

(lg) Permit classes are identified as follows:

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(a) Class I permits—are valid only for the operation of qualitative breath alcohol test instruments, shall bear the signature, original or facsimile, of the program director and shall be issued for a 5-year period.

(b) Class II permits—are valid only for the operation of quantitative breath alcohol test instruments, shall bear the signature, original or facsimile, of the program director and shall be valid for a 2-year period.

(c) Class III permits—authorize the holder to perform the duties of an agency trained technician and are valid for a period of 2 years.

(Im) Class II and class III permits may be issued for periods of time other than 2 years to permit uniform expiration dates in an agency or may be extended when unusual circumstances exist.

(2) All classes of permits shall be renewed or reinstated only upon successful completion of the procedure prescribed by the program director.

(a) Permittees who are unsuccessful in the completion of any procedure required for the renewal of their permits shall have their permits revoked as of the date on which the failure took place and shall be given one opportunity, at the convenience of the department, to repeat the required procedure.

(b) Permittees who are unsuccessful in a second attempt to renew their permits shall not be issued a permit until they comply with the requirements for the issuance of an original permit as specified in sub. (1).

(3) Any class of permit which has been expired beyond two years shall not be renewed until the holder of that permit again complies with the requirements of sub. (1).

(4) The program director or a technical supervisor may at any time suspend a permit for failure of the holder to comply with the requirements of this chapter and shall revoke, suspend, or cancel any permit when revocation, suspension or cancellation is made mandatory by this chapter.

(5) Permits held by persons who are no longer employed by a law enforcement agency shall be cancelled and returned to the department. If the holder of the permit is subsequently employed by another law enforcement agency, the permit may be reinstated upon the written request of the chief administrative officer of the employing agency.

History: Cr. Register, May, 1978, No. 269, eff. 6-1-78; (1) renum. from MVD 25.10 and am., (2) (a) renum. from MVD 25.11 (7) (a) and am., cr. (2) (b), (3) renum. from MVD 25.11 (1) and am., (4) renum. from MVD 25.12 (6) and am., (5) renum. from MVD 25.12 (9) and am., Register, July, 1981, No. 307, eff. 8-1-81.

**Trans 311.11 Records and reports.** (1) All law enforcement agencies subject to the provisions of this chapter shall comply with the following record keeping and reporting procedures:

(a) Original copies of instrument maintenance and calibration reports shall be forwarded to the office of the program director immediately upon completion.

(b) The yellow copy of the breathalyzer test report and operational check list and the notice of result of preliminary breath test shall be forwarded to the office of the program director promptly, or to the time system operator in the agency daily, as directed by the program director.

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(2) A copy of all instrument maintenance and calibration reports shall be forwarded to the technical supervisor for the area immediately upon completion.

History: Cr. Register, May, 1978, No. 269, eff. 6-1-78; renum. from MVD 25.13 and am., Register, July, 1981, No. 307, eff. 8-1-81.

**Trans 311.12 Preservation of breathalyzer test ampoules.** Each breathalyzer test ampoule which has been used in the test of a person to determine the alcohol content of breath shall be preserved, subject to the following condition:

(1) Upon the completion of the chemical analysis of the person's breath, the person shall be informed that:

(a) The test ampoule shall be preserved for a period of 30 days after the test was given.

(b) During the 30-day period, the person may request the agency employing the person who conducted the analysis to transfer the test ampoule to an independent laboratory for preservation and testing. The person making the request shall pay a fee, set by and payable to the law enforcement authority, for the actual cost of transferring the ampoule. The person shall also pay a fee of \$5.00 for the cost of preserving the ampoule during all or part of the 30-day period. The fee shall be forwarded to the department for deposit in the transportation fund.

(c) If the person does not request the test ampoule during the 30-day period, the preserved ampoule shall be destroyed by the agency employing the person who conducted the analysis.

History: Emerg. cr. eff. 5-1-82; cr. Register, May, 1982, No. 317, eff. 6-1-82.