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Wisconsin's OWI Laws

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Introduction

Wisconsin law prohibits the operation of a motor vehicle while under the influence of an intoxicant. For decades, Wisconsin's government has made efforts to reduce operating while intoxicated (OWI) and the associated fatalities. Efforts to reduce OWIs have taken several forms, including a variety of legislative initiatives, and Wisconsin's OWI laws combine to create an intricate, and sometimes byzantine, system of penalties and monitoring for a variety of activities and degrees of intoxication. Although the laws are complex, legislative and enforcement efforts have combined with broader societal trends to reduce the number of OWIs in Wisconsin over the last 15 years.

In Wisconsin, there were 22,294 convictions for OWI and certain related offenses in 2018, compared to 40,014 in 2004.¹ Although this is a significant reduction, the OWI problem is far from eliminated, and the state has continued to pursue this issue from a variety of angles, including through legislation. Some legislation seeks to increase penalties on drunk drivers, other legislation attempts to increase monitoring and enforcement, while still other legislation attempts to treat underlying substance abuse issues and prevent recidivism.

This report provides a broad overview of OWIs and related law in Wisconsin. First, it reviews the nature of the OWI problem here and how the state has made progress. Then, it offers a review of Wisconsin's OWI laws to explain how they function and how penalties are determined. Third, it reviews several proposals to change these laws, including recent enactments. Finally, it examines several court cases relating to OWIs in Wisconsin and what they mean for OWI enforcement.

The nature of the problem

Wisconsin's drinking culture is well established. In 2019, Wisconsin was ranked as having the highest prevalence of excessive drinking among all 50 states.² A widely circulated 2014 study noted that most Wisconsin counties have more than twice as many bars as grocery stores.³ Some also cite Wisconsin's perceived leniency towards OWIs as a reason so many individuals get behind the wheel while intoxicated.⁴ For example, in Wisconsin, an individual's first OWI is not a criminal offense. Regardless of the causes, from 1994 to 2010, Wisconsin averaged more than 9,300 alcohol-related crashes

1. Those offenses include having a prohibited alcohol content, causing great bodily harm with a vehicle while intoxicated, or committing homicide with a vehicle while intoxicated. Data from Wisconsin Department of Transportation, Bureau of Transportation Safety.

2. United Health Foundation, *America's Health Rankings, Annual Report 2019* (Minnetonka, MN: United Health Foundation, December 2019), 95.

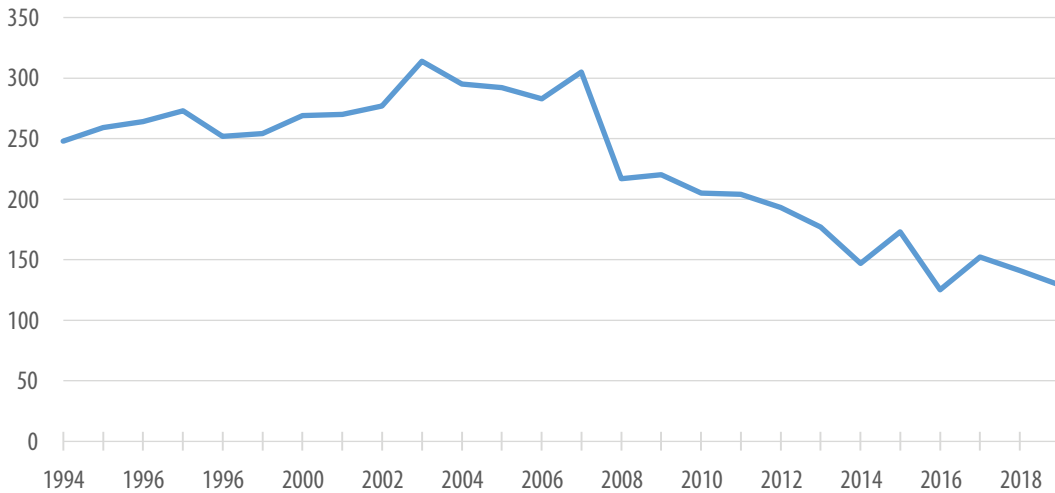
3. Reid Wilson, "Bars vs. Grocery Stores: Mapping America's Beer Belly," *Washington Post*, June 3, 2014.

4. Terri Pederson, "In Depth: Wisconsin OWI Laws Under Examination," *Beaver Dam Daily Citizen*, Oct 11, 2019; Bruce Vielmetti and Keith Schubert, "Probation, Not Prison, for a Fourth Drunk Driving Conviction? In Wisconsin, It's a Common Sentence," *Milwaukee Journal Sentinel*, June 19, 2019; Amy DuPont, "We Have a Problem in Wisconsin: Bill Would Make 1st Offense OWI a Crime, Publishable by 30 Days in Jail," *Fox6now.com*, January 8, 2019.

per year, including 1,200 crashes per year that resulted in severe injuries and 265 fatal crashes per year.⁵

Although Wisconsin's OWI problem has been well documented, the state has recently made progress in addressing the problem. In 2019, there were 6,058 alcohol-related crashes in Wisconsin, 554 of which involved severe injuries, and 129 of which involved fatalities.⁶ Wisconsin has shown a notable decline in the number of alcohol-related fatal crashes over the last 12 years. (See figure 1.) This decline appears to be related to an overall decrease in the amount of intoxicated driving in the state since the number of OWIs has also declined significantly over the last 12 years. (See figure 2.) These reductions mirror a nationwide decrease in alcohol-related driving deaths since 2008.

Figure 1. Alcohol-related fatal crashes in Wisconsin



Source: Wisconsin Traffic Operations and Safety Laboratory, "WisTransPortal Data Hub," <http://transportal.cee.wisc.edu/>.

The reasons for the continued decrease in alcohol-related fatal crashes are unclear; there is no single or predominant cause. Several policies Wisconsin has implemented are among those the Centers for Disease Control and Prevention (CDC) says are effective in combating drunk driving.⁷ These include laws intended to deter drunk driving, such as license revocations and suspensions, additional sanctions for driving with a high alcohol concentration, and test-refusal penalties.⁸ Wisconsin has increased the punishments that can be imposed on both first-time and repeat offenders.

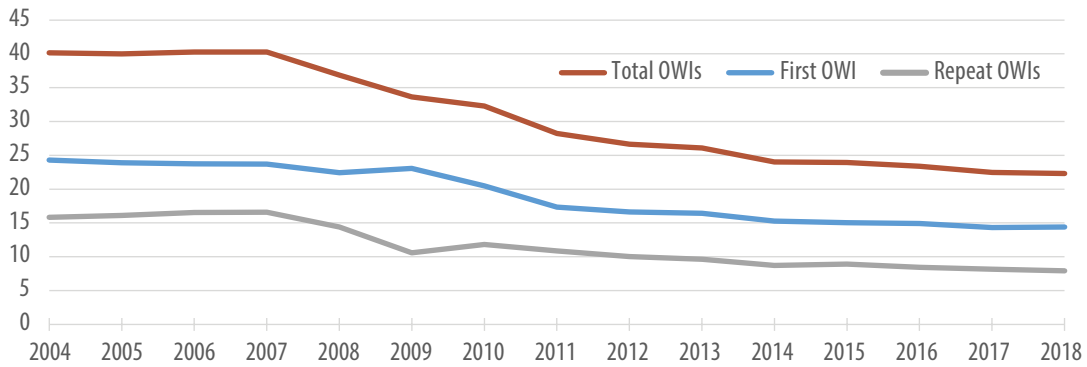
5. Wisconsin Traffic Operations and Safety Laboratory, "Crash Data Retrieval Facility," <https://transportal.cee.wisc.edu/>.

6. Wisconsin Traffic Operations and Safety Laboratory, "Crash Data Retrieval Facility."

7. Arthur Goodwin, Libby Thomas, Bevan Kirley, William Hall, Natalie O'Brien, and Kate Hill, *Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices*, 8th ed. (Washington, DC: National Highway Traffic Safety Administration, November 2015).

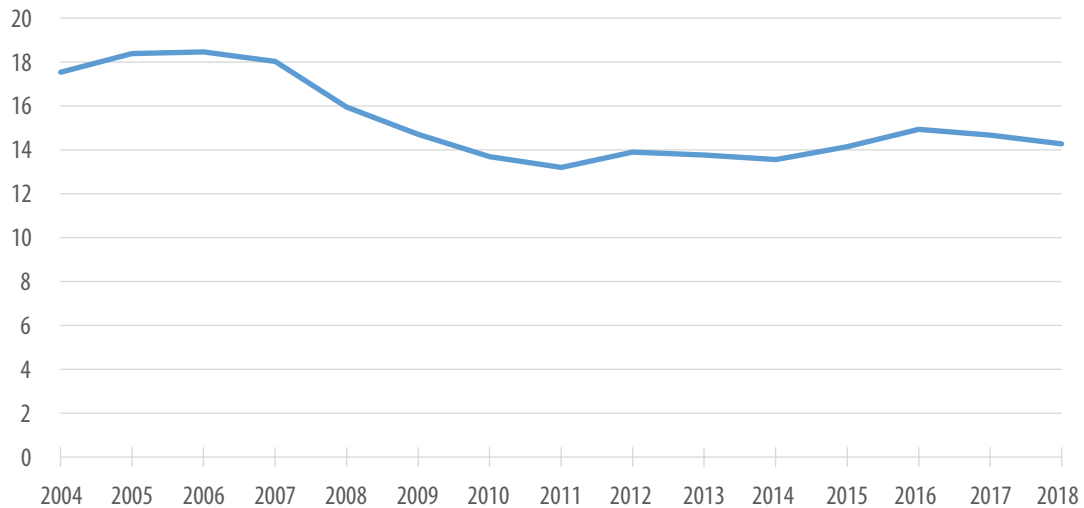
8. Goodwin et al., *Countermeasures that Work*, 1–12.

Figure 2. OWIs in Wisconsin (1,000s)



Source: Wisconsin Department of Transportation.

Figure 3. Fatal crashes with one driver's BAC > 0.1 in the United States (1,000s)



Source: National Highway Transportation Safety Administration, Fatality Analysis Reporting System.

Among recent legislative innovations is the implementation of ignition interlock devices (IIDs), which analyze the breath of vehicle operators to determine the presence of alcohol. In Wisconsin, these devices prevent a car from operating when they detect alcohol concentrations of 0.020 grams per 210 liters (roughly equivalent to having a 0.02 blood alcohol concentration [BAC]).⁹ From 2016 to 2019, 58,888 drivers were ordered to install IIDs. During that time, only 37,906 (64 percent) registered an installed IID, which may indicate significant noncompliance and circumvention, or that many drivers ordered to install IIDs simply give up on driving altogether.¹⁰ Figure 4 shows the number of IID orders issued in each county, per 1,000 residents.

9. Wis. Stat. §§ 340.01 (23v) and (46m) (c) and 343.307 (1).

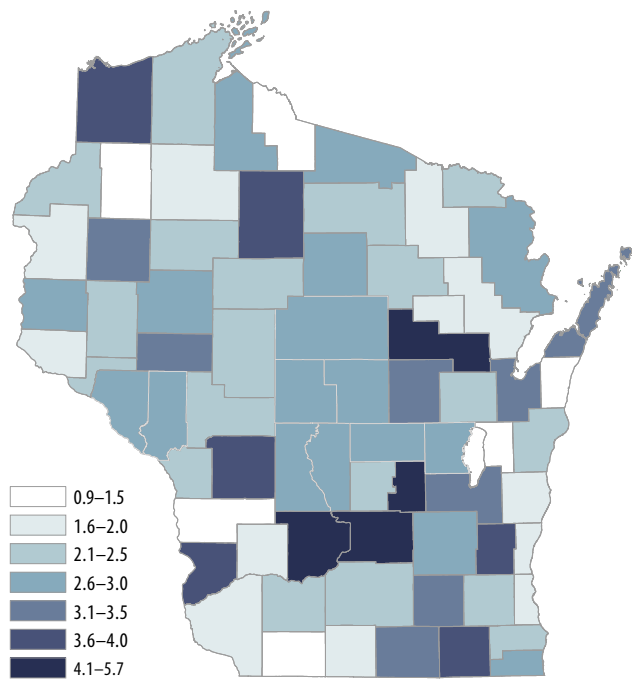
10. Marty Hobe, "Loophole Still Allows Wisconsin Drunk Drivers to Break the Law," WTMJ-TV, Feb 06, 2020, <https://www.tmj4.com/>.

The CDC also credits enforcement measures, like sobriety checkpoints and breathalyzers,¹¹ as well as prosecution and adjudication measures, like OWI courts.¹² OWI courts operate by giving offenders an intensive curriculum of treatment for their substance abuse and other mental health disorders, under the supervision of a judge and a staff of specialists. In Wisconsin, this concept was originally instituted for drug cases in drug courts, but in 2006, Waukesha County opened Wisconsin's first OWI court.¹³ OWI courts specifically handle cases of individuals who receive multiple OWIs.¹⁴ OWI courts treat offenders only after they plead guilty, as opposed to other problem-solving courts, which “divert” cases: making a dismissal of a charge contingent on successfully completing treatment or other court orders.¹⁵

OWI courts offer treatment and counseling for alcoholism and other substance abuse issues in an attempt to solve underlying problems and reduce recidivism.¹⁶ Successful completion of the treatment results in a reduction to the offender's sentence. Some courts, known as “hybrid courts,” deal with multiple types of offenders, which can include OWI offenders. Figure 5 displays Wisconsin's 33 OWI and hybrid courts.

There are several other strategies the CDC considers effective, and Wisconsin implements many in addition to those listed above. (See Recently enacted and proposed legislation, p.16.) In addition, broader societal changes may have had an effect. For example, the widespread popularity of ridesharing in cities may reduce the amount of drunk driving in cities, although the evidence is mixed.¹⁷

Figure 4. Ignition interlock devices per 1,000 residents, 2019



Source: Wisconsin Department of Transportation.

11. Goodwin et al., *Countermeasures that Work*, 1–21.

12. Goodwin et al., *Countermeasures that Work*, 1–29.

13. Waukesha County, *Waukesha County Alcohol Treatment Court Participant Handbook (3rd)* (Waukesha, WI, May 2016), 4.

14. Douglas Marlowe, Carolyn Hardin, and Carson Fox, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States* (Alexandria, VA: National Drug Court Institute, June 2016), 17.

15. *Wis. Stat. § 165.95*. Originally created at *Wis. Stat. § 16.964 (12)* by *2005 Wis. Act 25*.

16. Wisconsin Association of Treatment Court Professionals Standards Revision Committee, *Wisconsin Treatment Court Standards*, revised 2018.

17. Christopher N. Morrison, Sara F. Jacoby, Beidi Dong, M. Kit Delgado, and Douglas J. Wiebe, “Ridesharing and Motor

Figure 5. OWI and hybrid courts in Wisconsin

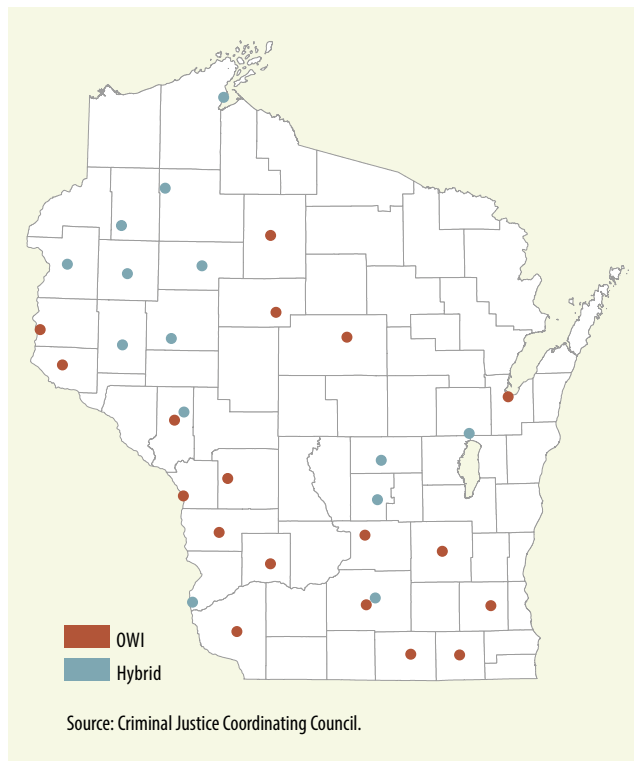
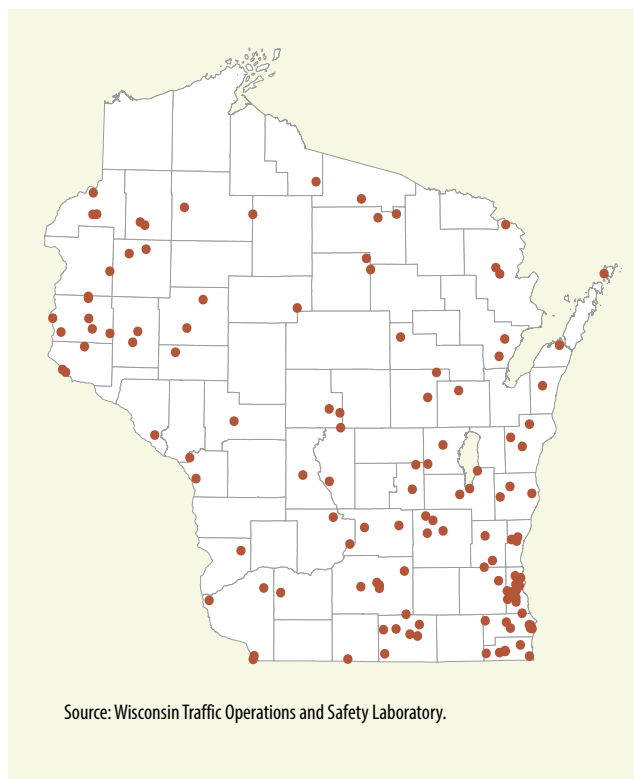


Figure 6. Alcohol-related fatal crashes, 2019



Despite these trends, there are still many incidents of drunk driving in Wisconsin. In 2018, there were 22,294 OWI convictions and certain related offenses.¹⁸ One hundred sixty people in Wisconsin died in alcohol-related crashes in 2018, according to the Wisconsin Department of Transportation (DOT).¹⁹ That is a rate of .30 deaths per thousand residents, which is nearly identical to the nationwide rate of .29 deaths per thousand residents.²⁰ Wisconsin ranks as having the 24th-highest rate per capita of over-the-limit crashes among U.S. states.²¹

The problem is statewide but more concentrated in some areas. Figure 7 shows that alcohol-related crashes per capita are highest in northern and central Wisconsin.

Vehicle Crashes in 4 US Cities: An Interrupted Time-Series Analysis,” *American Journal of Epidemiology* 187, no. 2 (June 14, 2017), 224–32.

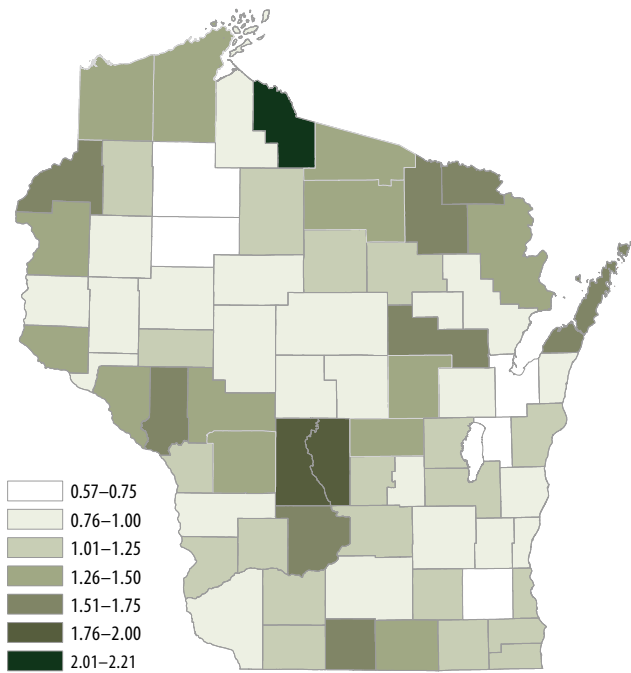
18. Those offenses include having a prohibited alcohol content, causing great bodily harm while intoxicated, or committing homicide while intoxicated. Data from Wisconsin Department of Transportation, Bureau of Transportation Safety.

19. Wisconsin Department of Transportation, “[Final year-end crash statistics](https://wisconsin.gov/),” <https://wisconsin.gov/>.

20. National Highway Traffic Safety Administration, “[Fatality and Injury Reporting System Tool](https://cdan.dot.gov/),” <https://cdan.dot.gov/>; United States Census Bureau, “[ACS Demographic and Housing Estimates](https://data.census.gov/),” <https://data.census.gov/>.

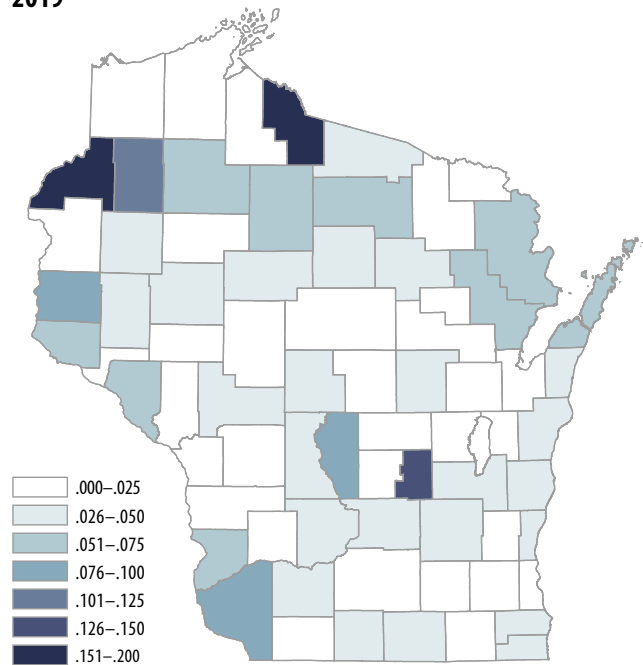
21. National Highway Traffic Safety Administration, “[Fatality and Injury Reporting System Tool](https://cdan.dot.gov/),” <https://cdan.dot.gov/>. The limit for an OWI in Wisconsin has been .08 since 2003 (See Wis. Stat. § 340.01 (46m) and [2003 Wis. Act 30, Section 9](#)). Only Utah has a lower BAC limit that applies generally, .05 ([Utah Code § 41-6a-502](#)).

Figure 7. Alcohol-related crashes per 1,000 residents, 2019



Source: Wisconsin Traffic Operations and Safety Laboratory.

Figure 8. Alcohol-related crash fatalities per 1,000 residents, 2019



Source: Wisconsin Traffic Operations and Safety Laboratory.

Car crashes that result in fatalities (figure 8) have a similar geographic trend. These trends, however, are not totally mirrored in the rates of OWIs. Figure 9 shows that OWIs are highest in central and northeast Wisconsin, but not always in the same localities as alcohol-related crashes.

The cost of drunk driving on the state is substantial. The economic costs include medical costs, property damage, lost productivity, legal costs, congestion on highways, and other crash costs.²² DOT estimates that alcohol-related crashes costed Wisconsinites over \$400 million in economic costs in 2015 alone.²³ Even greater are the total societal costs, which include intangible costs, like pain, suffering, and loss of life.²⁴

Before proceeding, it should be noted that not all OWIs are alcohol related. A growing number of OWI convictions involve restricted controlled substances. In 2014, the Wisconsin State Lab of Hygiene performed 4,093 drug tests on OWI blood samples. In 2019, that number had increased to 9,355.²⁵

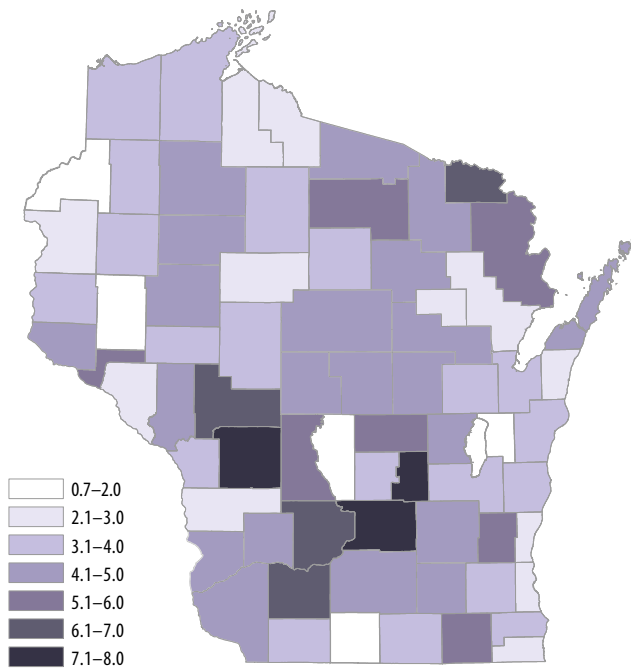
22. Lawrence Blincoc, Ted Miller, Eduard Zaloshnja, and Bruce Lawrence, National Center for Statistics and Analysis, *The Economic and Societal Impact of Motor Vehicle Crashes* (National Highway Traffic Safety Administration, Revised 2010), 5–9.

23. Wisconsin Department of Transportation, “[Economic Cost due to Drunk Driving](https://wisconsindot.gov/),” <https://wisconsindot.gov/>.

24. Blincoc et al., *The Economic and Societal Impact of Motor Vehicle Crashes*, 9–10.

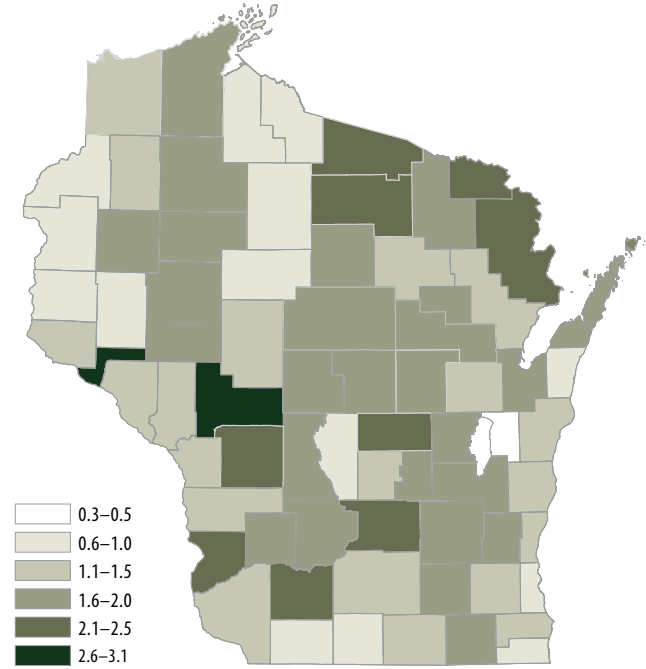
25. Melanie Conklin, “Wisconsin has a Growing Problem with Drugged Driving,” *Wisconsin Examiner*, March 5, 2020.

Figure 9. OWIs per 1,000 residents, 2018



Source: Wisconsin Department of Transportation.

Figure 10. Repeat OWIs per 1,000 residents, 2018



Source: Wisconsin Department of Transportation.

Current law

Though the general prohibition on operating while intoxicated is well known, the specific offenses and associated penalties are complex. This section provides a detailed review of Wisconsin’s OWI law and other laws pertaining to alcohol and drugs and the operation of vehicles.

OWI, related offenses, and chemical test refusals

OWI. An OWI offense consists of operating or driving a motor vehicle under any of the following circumstances:²⁶

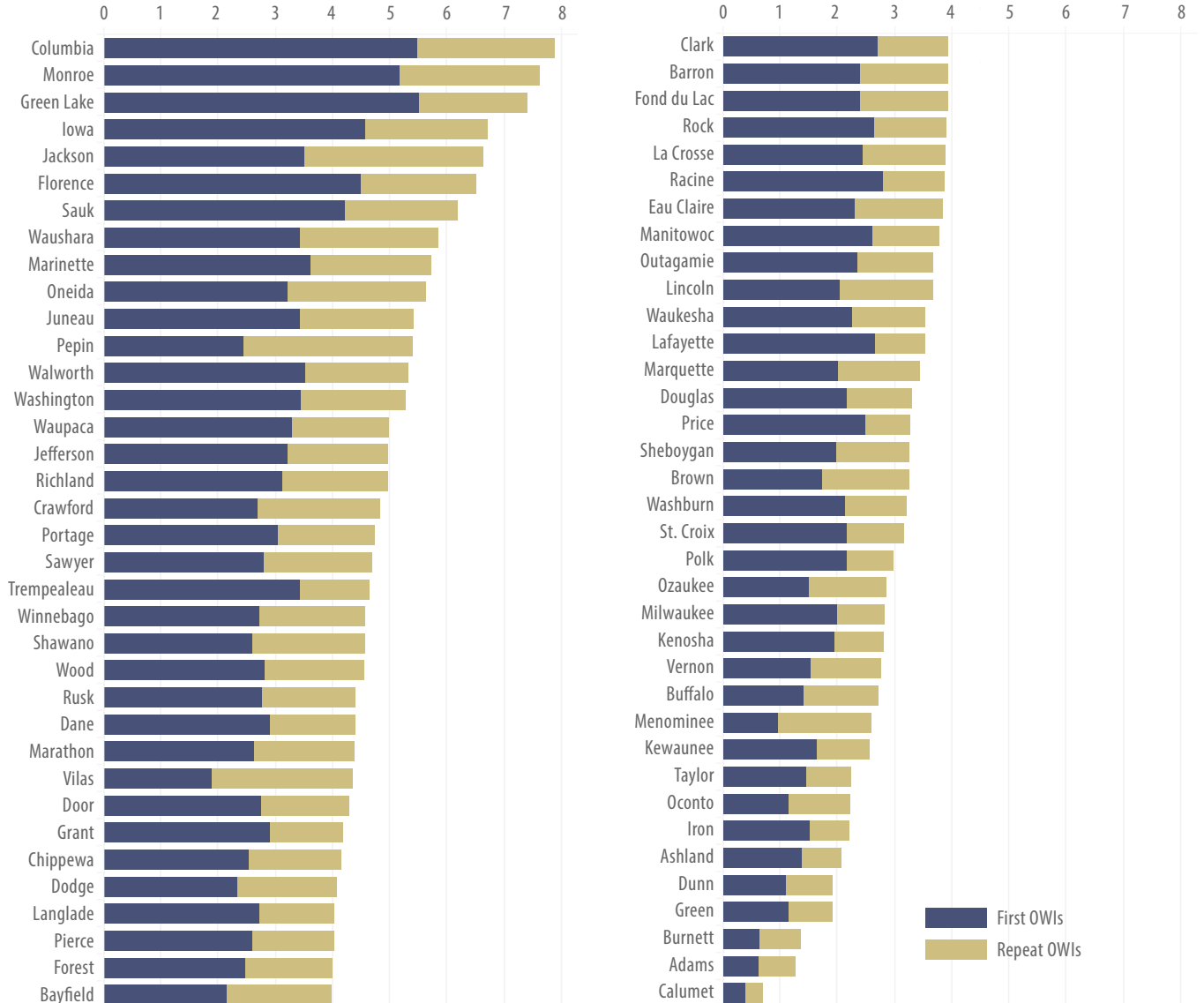
- While under the influence of an intoxicant, a controlled substance, a controlled substance analog, or any combination thereof, or while under the influence of any other drug or combination of intoxicant and drug to a degree that renders one incapable of safely driving.²⁷
- While having a detectable amount of a restricted controlled substance in one’s blood.²⁸

26. “Motor vehicle” is a defined term and excludes various types of vehicles, including all-terrain vehicles, utility terrain vehicles, and snowmobiles. Wis. Stat. § [340.01 \(35\)](#).

27. Wis. Stat. § [346.63 \(1\) \(a\)](#).

28. Wis. Stat. § [346.63 \(1\) \(am\)](#).

Figure 11. **First and repeat OWIs by county per 1,000 residents, 2018**



Source: Wisconsin Department of Transportation.

Restricted controlled substances include Schedule I substances and their analogs, cocaine and its metabolites, a heroin metabolite, methamphetamine, and delta-9-tetrahydrocannabinol (THC).²⁹

- While having a prohibited alcohol concentration.³⁰ Alcohol concentration is expressed as the number of grams of alcohol per 100 milliliters of a person’s blood or the number of grams of alcohol per 210 liters of a person’s breath. The prohibited alcohol concentra-

29. Wis. Stat. § 340.01 (50m).

30. Wis. Stat. § 346.63 (1) (b).

tion is generally 0.08,³¹ though a lower threshold is set for repeat offenders,³² operators of commercial motor vehicles,³³ and people under the legal drinking age.³⁴

Related offenses. There are three OWI-related offenses that are implicated when an OWI results in harm to another person: OWI causing injury, OWI causing great bodily harm, and OWI causing death.³⁵ In the case of “injury,” courts have held that term to include physical pain, illness, or any impairment of physical condition.³⁶ “Great bodily harm” is statutorily defined to mean a bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of bodily function.³⁷

Chemical test refusal. A chemical test refusal consists of refusing a law enforcement officer’s request to submit to chemical testing to determine the presence of alcohol, controlled substances and their analogs, or other drugs in one’s blood or breath.³⁸ A chemical test refusal is not a civil or criminal offense as the ramification is the revocation of one’s operating privilege, but a refusal is counted as a “prior offense” for the purpose of determining penalties.³⁹

Penalties

The penalty for an OWI or related offense depends on the total number of offenses the person has committed, as determined by counting the current offense together with certain prior offenses and chemical test refusals. Prior offenses that are counted include OWI, OWI causing injury, OWI causing great bodily harm, OWI causing death, operating an aircraft while intoxicated, and equivalent offenses committed in other jurisdictions.⁴⁰

OWI. A first-offense OWI is a civil infraction punishable by a forfeiture. A second- or third-offense OWI is a misdemeanor, punishable by a fine and a period of confinement. An OWI that is a fourth or subsequent offense is a felony, punishable by a fine and a period of confinement. The basic penalty structure is as follows:⁴¹

31. Wis. Stat. § 340.01 (46m) (a).

32. Wis. Stat. § 340.01 (46m) (c).

33. Wis. Stat. § 346.63 (5) (a) and (7) (a).

34. Wis. Stat. § 346.63 (2m).

35. Wis. Stat. §§ 346.63 (2) (a), 940.09 (1), and 940.25 (1). OWI causing great bodily harm or death is a crime that involves a “vehicle” as that term is defined for the criminal code. Wis. Stat. § 939.22 (44). “Vehicle” includes all-terrain vehicles, utility terrain vehicles, and snowmobiles. See *State v. Sohn*, 193 Wis. 2d 346, 357, 535 N.W.2d 1 (1995).

36. *Clark v. Erdmann*, 161 Wis. 2d 428, 438, 468 N.W.2d 18 (1991); *State v. Maddox*, 2003 WI App 188, ¶ 4, 266 Wis. 2d 1062, 668 N.W.2d 564 (unpublished).

37. Wis. Stat. § 939.22 (14).

38. Wis. Stat. § 343.305 (2) and (3).

39. Wis. Stat. §§ 343.305 (9) and (10) and 343.307 (1) (f).

40. Wis. Stat. § 343.307.

41. Wis. Stat. § 346.65 (2) (am).

Offense	Monetary penalty	Period of confinement
First	\$150 to \$300 forfeiture	None
Second	\$350 to \$1,100 fine	Five days to six months
Third	\$600 to \$2,000 fine	45 days to one year
Fourth	\$600 to \$10,000 fine	60 days to six years
Fifth or sixth	\$600 to \$25,000 fine	One year and six months to 10 years
Seventh, eighth, or ninth	Up to \$25,000 fine	Three years to 12 years, six months
Tenth or subsequent	Up to \$50,000 fine	Four years to 15 years

Under certain circumstances, different penalties apply. For instance, if a person has committed only one prior offense, occurring more than 10 years earlier, and the offense is not an OWI causing great bodily harm or an OWI causing death, the prior offense is not counted and the penalties for a first offense apply.⁴²

Penalties also differ if an OWI is committed with a child passenger in the vehicle. If the passenger is under 16 years of age, a first-offense OWI is treated as a criminal offense instead of a civil infraction, and a third-offense OWI is treated as a felony instead of a misdemeanor.⁴³ In addition, for second and subsequent OWI offenses that involve a passenger under 16 years of age, the applicable fines and periods of confinement are doubled.⁴⁴

Different penalties also apply if a person has a high alcohol concentration while committing a third-, fourth-, fifth-, or sixth-offense OWI. In such cases, fines are multiplied—doubled for an alcohol concentration of 0.17 to 0.199, tripled for an alcohol concentration of 0.20 to 0.249, and quadrupled for an alcohol concentration of 0.25 or above.⁴⁵

Some counties offer reduced periods of confinement to OWI offenders who successfully complete a period of probation that includes alcohol and other drug abuse treatment. In counties with this option, for a second-offense OWI, the maximum period of confinement is reduced from six months to seven days; for a third-offense OWI, the minimum period of confinement is reduced from 45 days to 14 days; and for a fourth-offense OWI, the minimum period of confinement is reduced from 60 days to 29 days.⁴⁶

Related offenses. A first-offense OWI causing injury is a misdemeanor.⁴⁷ An OWI causing injury that is a second or subsequent offense, any OWI causing great bodily harm, and any OWI causing death are felonies.⁴⁸ All are punishable by a fine and period of confinement. The basic penalty structure is as follows:

42. Wis. Stat. § 346.65 (2) (am) 2.

43. Wis. Stat. § 346.65 (2) (f).

44. Wis. Stat. § 346.65 (2) (f) 2.

45. Wis. Stat. § 346.65 (2) (g).

46. Wis. Stat. § 346.65 (2) (bm) to (dm).

47. Wis. Stat. § 346.65 (3m).

48. Wis. Stat. §§ 346.65 (3p), 940.09 (1c) (a) and (b), and 940.25 (1). OWI causing great bodily harm or death is a crime that involves a “vehicle” as that term is defined for the criminal code. Wis. Stat. § 939.22 (44). “Vehicle” includes all-terrain vehicles, utility terrain vehicles, and snowmobiles. See *State v. Sohn*, 193 Wis. 2d. 346, 535 N.W.2d 1 (1995).

Offense	Monetary penalty	Period of confinement
OWI causing injury, first	\$300 to \$2,000 fine	30 days to one year
OWI causing injury, second or subsequent	Up to \$10,000 fine	Up to six years
OWI causing great bodily harm	Up to \$25,000 fine	Up to 12 years, six months
OWI causing death, first	Up to \$100,000 fine	Five to 25 years
OWI causing death, second or subsequent	Up to \$100,000 fine	Five to 40 years

Under certain circumstances, different penalties apply to the offense of OWI causing injury. For instance, if a passenger under 16 years of age is in the vehicle at the time the offense is committed, the applicable fines and periods of confinement are doubled, and regardless of whether the offense is a first offense, it is treated as a felony instead of a misdemeanor.⁴⁹

Penalties may also differ in counties that offer a reduced period of confinement to offenders who successfully complete a period of probation that includes alcohol and other drug abuse treatment. In counties with this option, the fine remains the same, but the minimum period of confinement is reduced from 30 days to 15 days.⁵⁰

A court may also impose penalties that are less than the minimum required penalties when the person injured in the OWI is an adult in the same vehicle as the person committing the OWI and if the offense is a first offense.⁵¹

Chemical test refusal. There is no monetary penalty or period of confinement for a chemical test refusal; the ramification is the revocation of the person’s operator’s license.⁵²

Impact on the operating privilege

License revocation. A court or DOT must revoke the operator’s license of a person convicted of an OWI or related offense. The length of the revocation depends on the total number of offenses the person has committed.

Offense	Revocation period ⁵³
OWI, first	Six to nine months
OWI, second	One year to 18 months
OWI, third or subsequent	Two to three years
OWI causing injury	One to two years
OWI causing great bodily harm	Two years
OWI causing death	Five years

49. Wis. Stat. § 346.65 (3m) and (3p).

50. Wis. Stat. § 346.65 (3r).

51. Wis. Stat. § 346.65 (3t).

52. Wis. Stat. § 343.305 (9).

53. Wis. Stat. §§ 343.30 (1q) (b), 343.305 (10) (b), and 343.31 (3) (c), (e), and (f).

Offense	Revocation period
Chemical test refusal, first	One year
Chemical test refusal, second	Two years
Chemical test refusal, third or subsequent	Three years

Note: Permanent revocation is required (1) for a fourth or subsequent OWI or related offense that occurs within 15 years of the prior offense and (2) for a second or subsequent OWI or related offense if the person has two or more convictions for certain crimes involving the use of a motor vehicle.

If a passenger under 16 years of age is in the vehicle at the time the offense is committed, the minimum and maximum revocation periods are doubled.⁵⁴

In addition, a person who operates a commercial motor vehicle (CMV) on a highway or holds a commercial driver license is disqualified from operating a CMV for one year upon a conviction of any of these offenses committed while operating any motor vehicle. Upon conviction of any second or subsequent offense, the person is disqualified from operating a CMV for life.⁵⁵

Occupational license. If a person's operator's license is revoked, the person may be eligible for an occupational license.⁵⁶ An occupational license allows for limited driving privileges, such as driving to work or conducting homemaking activities, but may not be used for general recreational purposes.⁵⁷ The waiting period before a person is eligible for an occupational license depends on the total number of offenses the person has committed.

Offense	Waiting period ⁵⁸
OWI, first	None
OWI, second or subsequent	45 days
OWI causing injury, first	60 days
OWI causing injury, second or subsequent	One year
OWI causing great bodily harm, first	120 days
OWI causing great bodily harm, second or subsequent	One year
OWI causing death, first	120 days
OWI causing death, second or subsequent	One year
Chemical test refusal, first	30 days
Chemical test refusal, second	90 days*
Chemical test refusal, third or subsequent	120 days*

*For a chemical test refusal that is a second or subsequent offense, the waiting period is increased to one year if two or more of the person's counted offenses were committed within a five-year period.

54. Wis. Stat. §§ 343.30 (1q) (b) 4m., 343.305 (10) (b) 4m., and 343.31 (3) (c), (e), and (f).

55. Wis. Stat. § 343.315 (2) (a) and (c).

56. Wis. Stat. § 343.10 (2). If a person's operator's license was suspended or revoked within one year prior to the current suspension or revocation, the person is ineligible for an occupational license. Wis. Stat. § 343.10 (2) (a) 1.

57. Wis. Stat. § 343.10 (5).

58. Wis. Stat. §§ 343.30 (1q) (b) 2. to 4., 343.305 (10) (b) 2. to 4., and 343.31 (3m) (a) and (b).

A person who operates a motor vehicle in violation of any restriction on the person's occupational license may be charged with operating after a revocation (OAR).⁵⁹ The penalty for OAR is a fine of up to \$2,500 and up to one year of confinement, with increased penalties for repeat offenses and violations causing great bodily harm or death.⁶⁰

Ignition interlock device restrictions. For certain OWI or related offenses, courts must impose ignition interlock device (IID) restrictions.⁶¹ An IID is a device, installed in a vehicle, into which the operator must exhale prior to operation and at intervals while operating the vehicle. If an alcohol concentration above 0.02 is detected in the exhaled breath, the device prevents the vehicle from starting and, if the vehicle is already being operated, sounds an alarm and triggers the vehicle's lights to flash.⁶² A person subject to IID restrictions must install an IID on each motor vehicle titled or registered to the person. The person is also prohibited from operating any vehicle that is not equipped with an IID.⁶³

Courts must impose these IID restrictions upon a person convicted of an OWI or related offense that is a second or subsequent offense, a person convicted of a first-offense OWI or related offense with an alcohol concentration of 0.15 or higher, and a person who refuses to submit to chemical testing.⁶⁴ The restrictions must apply for at least one year but otherwise may not apply for more than the maximum license revocation period for the offense.⁶⁵

A person who tampers with or circumvents the operation of an IID, fails to have an IID installed as ordered by the court, or violates a court order imposing IID restrictions is liable to be punished by a fine of \$150 to \$600, a period of confinement of up to six months, or both.⁶⁶ A second violation within a five-year period is punishable by a fine of \$300 to \$1,000, a period of confinement of up to six months, or both.⁶⁷

Alcohol assessment and driver safety plan. Courts must order a person convicted of an OWI or related offense to submit to an assessment by an approved public treatment facility for examination of the person's use of alcohol or controlled substances or their analogs and development of a driver safety plan for the person.⁶⁸ The driver safety plan contains requirements with which the person must comply.⁶⁹ The Department of Health Services establishes standards for assessment procedures and driver safety plans.⁷⁰

59. Wis. Stat. § [343.44 \(1\) \(b\)](#).

60. Wis. Stat. § [343.44 \(2\) \(ar\) 2. to 4.](#)

61. Wis. Stat. § [343.301 \(1g\) \(a\)](#) and [\(am\) 1.](#) In lieu of or in addition to the IID requirement, the court may require the person to participate in a 24-7 sobriety program. Wis. Stat. § [343.301 \(1g\) \(am\) 2.](#)

62. Wis. Stat. § [340.01 \(46m\) \(c\)](#).

63. Wis. Stat. § [343.301 \(1g\) \(am\) 1.](#)

64. Wis. Stat. § [343.301 \(1g\) \(a\)](#).

65. Wis. Stat. § [343.301 \(2m\) \(a\)](#).

66. Wis. Stat. §§ [347.413 \(1\)](#) and [347.50 \(1s\)](#).

67. Wis. Stat. § [347.50 \(1s\)](#).

68. Wis. Stat. §§ [343.30 \(1q\) \(c\) 1.](#) and [343.305 \(10\) \(c\) 1.](#)

69. Wis. Stat. §§ [343.30 \(1q\) \(d\) 1.](#) and [343.305 \(10\) \(d\)](#).

70. Wis. Stat. §§ [343.30 \(1q\) \(c\) 2.](#) and [343.305 \(10\) \(c\) 2.](#); Wis. Admin. Code [DHS § 62.07 \(5\)](#).

A person convicted of an OWI or related offense that is a second or subsequent offense is ineligible for an occupational license and ineligible to reinstate a revoked license until he or she has completed an alcohol assessment.⁷¹

Fees and surcharges

A person convicted of an OWI or related offense must pay several fees and surcharges in addition to the specified penalty. The following are the fees and surcharges that may be required, if applicable to the offense committed:

Fee or surcharge type	Amount
Crime laboratories and drug law enforcement surcharge ⁷²	\$13.00
Jail surcharge ⁷³	\$10.00 (minimum)
License reinstatement fee ⁷⁴	\$140.00
Ignition interlock surcharge ⁷⁵	\$50.00
Driver improvement surcharge ⁷⁶	\$435.00
Safe ride program surcharge ⁷⁷	\$50.00
Penalty surcharge ⁷⁸	\$39.00 (minimum)
Criminal court fee ⁷⁹	\$163.00
Circuit court fee ⁸⁰	\$25.00
Court support services surcharge ⁸¹	\$68.00
Justice information system surcharge ⁸²	\$21.50
Crime victim and witness assistance surcharge ⁸³	\$67.00/\$92.00

Other alcohol and drug offenses

There are other statutory provisions related to alcohol and drugs and the operation of vehicles that are not counted as prior offenses when determining the penalty for an OWI or related offense.

Recreational vehicles. There is a prohibition on the intoxicated operation of an

71. Wis. Stat. §§ [343.10 \(2\) \(e\)](#), [343.30 \(1q\) \(b\) 3.](#) and [4.](#), [343.305 \(10\) \(b\) 3.](#) and [4.](#), and [343.38 \(1\) \(d\) 2.](#)

72. Wis. Stat. § [165.755 \(1\) \(a\)](#).

73. Wis. Stat. § [302.46 \(1\) \(a\)](#). The surcharge is the greater of \$10 or 1 percent of the penalty imposed.

74. Wis. Stat. § [343.21 \(1\) \(jr\)](#). This fee is in addition to the standard reinstatement fees.

75. Wis. Stat. § [343.301 \(5\)](#). The surcharge is imposed if a court orders IID restrictions.

76. Wis. Stat. § [346.655 \(1\)](#).

77. Wis. Stat. § [346.657 \(1\)](#).

78. Wis. Stat. § [757.05 \(1\) \(a\)](#). The surcharge is 26 percent of the penalty imposed.

79. Wis. Stat. § [814.60 \(1\)](#). This fee applies only to criminal cases.

80. Wis. Stat. § [814.63 \(1\) \(b\)](#). This fee applies only to forfeiture actions in circuit court.

81. Wis. Stat. § [814.85 \(1\) \(a\)](#). This surcharge applies only to forfeiture actions in circuit court.

82. Wis. Stat. § [814.86 \(1\)](#). This surcharge applies only to forfeiture actions in circuit court.

83. Wis. Stat. § [973.045 \(1\)](#). The surcharge is \$67 for a misdemeanor and \$92 for a felony conviction.

all-terrain or utility terrain vehicle,⁸⁴ off-highway motorcycle,⁸⁵ motorboat,⁸⁶ or snowmobile⁸⁷ that mirrors the motor vehicle OWI prohibitions. Penalties escalate with repeat offenses, but offenses are counted separately for each vehicle type.⁸⁸ OWI offenses involving recreational vehicles, including OWI causing injury, have no effect on the motor vehicle operating privilege. However, an OWI involving a recreational vehicle that causes great bodily harm or death has the same effect as an OWI violation committed with a motor vehicle.⁸⁹

CMV operation. No person may operate a CMV or be on duty time with respect to a CMV with an alcohol concentration above 0.0 or within four hours of consuming alcohol.⁹⁰ Penalties for violating these prohibitions vary, depending on the alcohol concentration and the number of prior offenses the person has committed, and include forfeitures or fines, periods of confinement, being placed out of service, and being disqualified from CMV operation.⁹¹

Absolute sobriety. A person who has not reached the legal drinking age is prohibited from operating a motor vehicle, all-terrain or utility terrain vehicle, off-highway motorcycle, or boat with an alcohol concentration above 0.0.⁹² A person who has not reached the age of 19 is prohibited from operating a snowmobile with an alcohol concentration above 0.0.⁹³ The penalty for violation of this prohibition while operating a motor vehicle is suspension of the operating privilege.⁹⁴ For violations involving the operation of a recreational vehicle, the penalty is a \$50 forfeiture.⁹⁵

Intoxicants in vehicles. In most cases, it is illegal for a person under the legal drinking age to possess or transport alcohol in a motor vehicle.⁹⁶ The penalty for violation of this prohibition is suspension of the person's operating privilege.⁹⁷

It is also illegal for a person to drink alcohol while in a motor vehicle on a public highway, and no person may possess an open container of alcohol in a privately owned motor vehicle on a public highway. Subject to exceptions, the owner or driver of a privately owned motor vehicle on a public highway may not keep or allow to be kept an open

84. Wis. Stat. § [23.33 \(4c\)](#).

85. Wis. Stat. § [23.335 \(12\)](#).

86. Wis. Stat. § [30.681 \(1\)](#).

87. Wis. Stat. § [350.101 \(1\)](#).

88. Wis. Stat. §§ [23.33 \(13\)](#), [23.335 \(23\)](#), [30.80 \(6\)](#), and [350.11 \(3\)](#).

89. Wis. Stat. §§ [939.22 \(44\)](#), [940.09 \(1\)](#), and [940.25 \(1\)](#). See *State v. Sohn*, 193 Wis. 2d 346, 357, 535 N.W.2d 1 (1995).

90. Wis. Stat. § [346.63 \(5\) to \(7\)](#).

91. Wis. Stat. §§ [343.315 \(2\) \(a\) and \(c\)](#) and [346.65 \(2j\) and \(2u\)](#).

92. Wis. Stat. §§ [23.33 \(4c\) \(a\) 3.](#), [23.335 \(12\) \(a\) 3.](#), [30.681 \(1\) \(bn\)](#), and [346.63 \(2m\)](#).

93. Wis. Stat. § [350.101 \(1\) \(c\)](#).

94. Wis. Stat. § [346.63 \(2m\)](#).

95. Wis. Stat. §§ [23.33 \(13\) \(b\) 4.](#), [23.335 \(23\) \(c\) 4.](#), [30.80 \(6\) \(a\) 6.](#), and [350.11 \(3\) \(a\) 4.](#)

96. Wis. Stat. § [346.93 \(1\)](#).

97. Wis. Stat. § [346.93 \(2f\)](#).

alcoholic beverage container in the passenger compartment of the vehicle.⁹⁸ The penalty for violation of these prohibitions is a forfeiture.⁹⁹

Recently enacted and proposed legislation

There is usually a fair amount of interest in the legislature to alter OWI laws every session. During the 2019–20 session, the following three acts made changes to OWI laws:

- [Act 31](#) (AB-17) created a mandatory minimum sentence of five years in prison for an OWI causing the death of another.
- [Act 106](#) (SB-6) imposed a mandatory minimum sentence of 18 months in prison for fifth- and sixth-offense OWI.
- [Act 107](#) (AB-222) made technical changes to the statutes providing for lifetime revocation of a person's operating privilege for certain OWI offenses.

In addition to these acts, several acts in recent sessions altered, and a number of other proposals sought to alter, several areas of OWI law, including penalties, operating privileges, prevention, treatment, court procedures, and OWI offenses for recreational vehicles. A summary of these enacted and introduced proposals is provided as follows.

Penalties for OWI offenses

One of the main areas of legislative interest is altering the penalties for OWI offenses. Recent proposals have sought to make a first-offense OWI a criminal offense, increase penalties for offenses, and require mandatory minimums for certain offenses. One common legislative proposal introduced in recent sessions is to change a first-offense OWI from a civil infraction to a criminal offense.¹⁰⁰ The most recently considered legislation, companion proposals [2019 Assembly Bill 18](#) and [2019 Senate Bill 9](#),¹⁰¹ would have made a first-offense OWI a Class C misdemeanor, which carries a fine of up to \$500 and a jail sentence of up to 30 days, or both.¹⁰²

There have been several acts and proposed bills to increase the penalties for subsequent OWI offenses. In 2016, [2015 Wisconsin Act 371](#) increased the penalty class for fourth and all subsequent OWI offenses. The act also increased the penalty for a fourth-offense OWI from a misdemeanor to a felony, regardless of when the previous offense was committed.¹⁰³ Other legislation proposed to increase the penalty for a third-offense OWI

98. Wis. Stat. § [346.935](#).

99. Wis. Stat. § [346.95 \(2m\)](#).

100. [2019 Wis. AB 18](#), [2019 Wis. SB 9](#), [2015 Wis. AB 363](#), and [2013 Wis. AB 846](#).

101. Companion proposals are identical bills introduced in both houses for simultaneous consideration.

102. The current penalty is a \$150–300 forfeiture. Wis. Stat. § [346.65 \(2\) \(am\) 1](#).

103. See Wis. Stat. § [346.65 \(2\) \(am\) 4](#). Prior to [2015 Wis. Act 371](#), a fourth-offense OWI was a misdemeanor unless it was committed within five years of a previous OWI offense, in which case it was a Class H felony. Wis. Stat. § [346.65 \(2\) \(am\) 4](#).

from a misdemeanor to a felony,¹⁰⁴ and [2015 Assembly Bill 444](#) proposed treating all second-offense OWIs the same, regardless of when a prior offense was committed.

Legislation has established or increased mandatory minimum sentences for certain OWI offenses. Two acts passed in the 2019–20 session established mandatory minimum sentences for certain OWI offenses. [2019 Wisconsin Act 31](#) established a mandatory minimum prison sentence of five years for a person convicted of an OWI causing death.¹⁰⁵ [2019 Wisconsin Act 106](#) increased the mandatory minimum prison sentence for fifth- and sixth-offense OWIs from six months to 18 months.¹⁰⁶ Proposed [2015 Assembly Bill 353](#) would have established a mandatory minimum sentence for an offense of OWI causing injury.

Operating privileges requirements

Recently enacted and proposed legislation addressed a person's operating privileges after conviction for an OWI offense. [2017 Wisconsin Act 172](#) made it so that a person's operating privilege is revoked permanently in certain circumstances.¹⁰⁷ However, the act does allow for a person whose operating privilege has been revoked to apply to have it reinstated after 10 years if he or she meets certain conditions. [2019 Wisconsin Act 107](#) made technical changes to this law.¹⁰⁸

Other legislation pertains to installing an IID on a vehicle after a person's operating privilege has been suspended or revoked. [2017 Wisconsin Act 124](#) changed the date an IID must be installed and when operating restrictions go into effect.¹⁰⁹ Additionally, the act required that the IID restriction be extended by six months every time a person violates the IID restriction.¹¹⁰ [2019 Senate Bill 384](#) proposed increasing the penalty for a violation of the IID requirement, providing the option of imprisonment of up to six months. Bills have been introduced in recent sessions that would expand the IID requirement to all first-offense OWIs, thereby requiring an IID for all OWI offenses.¹¹¹ Bills proposed in the 2015–16 session would have created a new type of license, an ignition interlock restricted license, that would replace the existing IID requirement.¹¹²

and [4m](#). (2013).

104. [2015 Wis. AB 447](#), [2013 Wis. AB 71](#), and [2013 Wis. SB 60](#).

105. See Wis. Stat. § [940.09 \(1c\) \(a\)](#) and [\(b\)](#). A prior proposal, [2015 Wis. AB 446](#), sought to implement a mandatory minimum prison sentence of seven years for the same offense.

106. See Wis. Stat. § [346.65 \(2\) \(am\) 5](#).

107. See Wis. Stat. § [343.31 \(1m\) \(b\)](#) and [\(c\)](#).

108. See Wis. Stat. § [343.31 \(1m\) \(b\)](#) and [\(c\) \(2019\)](#) and Wis. Stat. § [343.31 \(1m\) \(b\)](#) and [\(c\) \(2017\)](#).

109. See Wis. Stat. § [343.301 \(2m\) \(a\)](#).

110. See Wis. Stat. § [347.50 \(1t\)](#).

111. [2019 Wis. AB 61](#), [2019 Wis. SB 58](#), [2017 Wis. AB 915](#), [2017 Wis. SB 688](#), and [2015 Wis. SB 484](#).

112. [2015 Wis. AB 266](#) and [2015 Wis. SB 222](#).

Prevention

Only two bills have been considered in the three most recent sessions pertaining to prevention of OWI offenses: [2017 Assembly Bill 138](#), which was enacted as [2017 Wisconsin Act 125](#), allows funds provided under the safe-ride grant program to be used to advertise the service, and [2015 Senate Bill 683](#) would have allowed Milwaukee County or municipalities within Milwaukee County to create a pilot sobriety checkpoint program.¹¹³

Treatment

In 2016, Wisconsin enacted into law a 24-7 sobriety program that allows a court to order a person convicted of an OWI to attend a sobriety program.¹¹⁴ A person enrolled in the program is required to totally abstain from alcohol and drugs and is subject to testing for alcohol or drugs at least twice a day, but is not required to have an IID installed on vehicles he or she drives while participating in the program. Several bills proposed in recent sessions would have allowed a court to issue a reduced jail sentence for individuals convicted of certain OWI offenses if those individuals successfully completed probation.¹¹⁵

Court practices and procedures

The legislature considered a number of bills that alter court practices and procedures regarding OWI offenses. Two recent acts extended the authority of courts and circuit court commissioners to issue search warrants related to first-offense OWIs, which are noncriminal.¹¹⁶ Changes to procedures for prosecuting OWI offenses have been proposed, including requiring individuals charged with a first-offense OWI to appear in court or face a \$300 surcharge and extending the time limit for prosecuting certain OWI offenses.¹¹⁷ Several bills have proposed procedures for expunging the records of first-offense OWIs or criminal cases in which a person is not convicted.¹¹⁸ A proposal in the 2019-20 session sought to eliminate an exception to the required 12-hour detainment period following an arrest for an OWI offense that allows a person to be released early to a responsible adult.¹¹⁹

113. See Wis. Stat. § [85.55](#).

114. See Wis. Stat. §§ [165.957](#) and [343.301 \(1g\) \(am\)](#). A pilot sobriety program was first created in the 2015 biennial budget act, [2015 Wis. Act 55](#). [2015 Wis. Act 389](#) expanded the program and removed the IID requirement for individuals participating in the program.

115. [2017 Wis. AB 1040](#), [2017 Wis. SB 866](#), and [2015 Wis. SB 786](#).

116. [2015 Wis. Act 183](#) and [2017 Wis. Act 117](#). See Wis. Stat. §§ [757.69 \(1\) \(bn\)](#) and [968.13 \(1\) \(b\)](#) and [\(c\)](#).

117. [2019 Wis. AB 15](#), [2019 Wis. SB 7](#), and [2015 Wis. AB 352](#); [2019 Wis. AB 379](#) and [2019 Wis. SB 345](#).

118. [2019 Wis. AB 211](#), [2019 Wis. SB 198](#), [2019 Wis. AB 18](#), and [2019 Wis. SB 9](#); [2019 Wis. AB 1008](#).

119. [2019 Wis. AB 172](#) and [2019 Wis. SB 161](#).

OWI offenses for recreational vehicles

One act—[2015 Wisconsin Act 170](#), which created a new OWI offense for off-highway motorcycles—and several other bills have been considered that alter OWI offenses for recreational vehicles, including boats and snowmobiles.¹²⁰ Several bills have been proposed that would make OWI offenses for different recreational vehicles more consistent with one another.¹²¹ Additionally, these bills counted prior convictions for any OWI offense associated with a recreational vehicle when determining the OWI offense associated with a specific type of recreational vehicle. Several bills proposed increasing the age requirement from 19 to 21 for total sobriety to operate a snowmobile.¹²²

Recent issues before the courts

Given that OWI violations are common and the consequences far-reaching, it is unsurprising that Wisconsin's OWI laws are the subject of extensive litigation. This section summarizes a few of the issues that have occupied the courts in recent years.

Warrantless blood draws

Current law provides that a person operating a motor vehicle on a public highway has given consent to have a sample of his or her breath, blood, or urine subjected to a chemical test to determine the presence of alcohol, controlled substances, or other drugs.¹²³ This is commonly referred to as “implied consent.”¹²⁴ When a law enforcement officer requests a chemical test sample, the person may withdraw his or her consent.¹²⁵ If the person is unconscious, the person is presumed not to have withdrawn consent, and the officer may obtain a chemical test sample if the officer has probable cause to believe the person has committed an OWI or related offense.¹²⁶

When a law enforcement officer collects a blood sample, that constitutes a “search” for the purposes of the Fourth Amendment’s protection against unreasonable search and seizure.¹²⁷ Generally, searches conducted without a warrant are unlawful, even when

120. See Wis. Stat. § [23.335 \(12\)](#).

121. [2019 Wis. AB 356](#), [2019 Wis. SB 331](#), [2017 Wis. AB 873](#), and [2015 Wis. AB 224](#).

122. [2019 Wis. AB 7](#), [2019 Wis. SB 10](#), and [2017 Wis. AB 874](#).

123. Wis. Stat. § [343.305 \(2\)](#).

124. Wis. Stat. § [343.305 \(2\)](#).

125. Chemical test refusal results in the revocation of the person’s operating privilege and the imposition of IID restrictions or participation in a 24-7 sobriety program. Wis. Stat. §§ [343.301 \(1g\) \(a\) 1.](#) and [\(am\)](#) and [343.305 \(9\) \(a\)](#).

126. Wis. Stat. § [343.305 \(3\) \(b\)](#).

127. [Schmerber v. California](#), 384 U.S. 757, 767, 86 S. Ct. 1826 (1966). The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. [IV](#).

probable cause exists.¹²⁸ However, a warrantless search may be lawful if it falls under one of the “specifically established and well-delineated” exceptions to the warrant requirement.¹²⁹ One such exception is when the search is conducted pursuant to consent.¹³⁰

Another exception is a search conducted when the exigencies of the situation required conducting the search without a warrant.¹³¹ For many years, warrantless blood draws were held to be lawful in Wisconsin based on the exigencies of acquiring an accurate measure of a person’s BAC, a measurement that changes as alcohol is absorbed and subsequently dissipates in a person’s blood stream.¹³² In *State v. Bohling*, the Wisconsin Supreme Court held that “the dissipation of alcohol from a person’s blood stream constitutes a sufficient exigency to justify a warrantless blood draw,” effectively creating a *per se* rule.¹³³ This approach was abrogated by *Missouri v. McNeely*, in which the U.S. Supreme Court held that the natural metabolization of alcohol in the bloodstream does not create a *per se* exigency and that the existence of any exigency must be determined “case by case based on the totality of the circumstances.”¹³⁴

Another exception to the warrant requirement is a search that is conducted incident to a lawful arrest.¹³⁵ The search-incident-to-arrest doctrine permits the warrantless search of both the person being arrested and of the immediate area within their control.¹³⁶ The U.S. Supreme Court addressed the application of this doctrine to drunk driving cases in *Birchfield v. North Dakota*, holding that a breath test may be administered as a search incident to an arrest, but a blood test may not.¹³⁷ The court also addressed the idea of implied consent, holding that a person cannot be said to have consented to submit to a blood test when refusing to consent is a criminal offense.¹³⁸

Following *Birchfield*, the Wisconsin Supreme Court considered two cases that challenged the constitutionality of Wisconsin’s implied consent law. In *State v. Howes*, the court did not address the implied consent question and issued a split opinion.¹³⁹ In *State v. Mitchell*, the court did address the question but again issued a split opinion, with no resolution having the support of a majority of justices.¹⁴⁰

128. *Agnello v. United States*, 269 U.S. 20, 33, 46 S. Ct. 4 (1925).

129. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507 (1967).

130. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041 (1973).

131. *McDonald v. United States*, 335 U.S. 451, 456, 69 S. Ct. 191 (1948). Prevention of the imminent destruction of evidence is one such exigency. *Schmerber v. California*, 384 U.S. 757, 770–71, 86 S. Ct. 1826 (1966).

132. *State v. Bohling*, 173 Wis. 2d 529, 546–47, 494 N.W.2d 399 (1993).

133. *Id.* In this context, *per se* means a “blanket rule,” one that applies in every situation regardless of the circumstances. See, e.g., *Richards v. Wisconsin*, 520 U.S. 385, 387–88, 117 S. Ct. 1416 (1997).

134. *Missouri v. McNeely*, 569 U.S. 141, 165, 133 S. Ct. 1552 (2013). For a prime example of a finding of exigency based on the circumstances, see *State v. Tullberg*, 2014 WI 134, ¶ 2, 359 Wis. 2d 421, 857 N.W.2d 120.

135. *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467 (1973).

136. *Id.*

137. *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160, 2185 (2016).

138. *Id.* at 2186.

139. *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812.

140. *State v. Mitchell*, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151.

Mitchell was subsequently appealed, and the U.S. Supreme Court granted certiorari.¹⁴¹ The court failed to reach a majority opinion on the issue of implied consent and instead remanded the case for a determination as to whether the blood draw was justified by exigent circumstances.¹⁴²

The issue has been considered most recently by the Court of Appeals of Wisconsin. In 2020, the court issued its opinion in *State v. Prado*, in which a law enforcement officer ordered a warrantless blood draw of an unconscious driver involved in a fatal crash, Dawn Prado.¹⁴³ Prado successfully argued for the suppression of the results of the chemical test of her blood, and the state appealed.¹⁴⁴

The court of appeals in *Prado* provided a thorough review of federal and state cases before acknowledging that, despite the holdings in *McNeely*, *Birchfield*, and *Mitchell*, these questions have not yet been definitively resolved by the supreme court of either Wisconsin or the United States.¹⁴⁵ The court ultimately concluded that “the consent that incapacitated drivers are deemed to have given by Wisconsin’s implied consent statute and presumed not to have withdrawn by its incapacitated driver provision does not satisfy any exception to the Fourth Amendment’s warrant requirement.”¹⁴⁶ Therefore, the court held, searches authorized by the incapacitated driver provision “will always violate the Fourth Amendment.”¹⁴⁷ The state has petitioned the Wisconsin Supreme Court to review the decision.¹⁴⁸

Searches and expectation of privacy

In *State v. Randall*, the Wisconsin Supreme Court considered whether the defendant, Jessica Randall, could suppress the results of a blood test to which she did not consent, despite the blood itself having been obtained during a search to which the defendant did consent.¹⁴⁹ Randall was arrested for an OWI and consented to providing a blood sample for the purpose of determining its alcohol concentration.¹⁵⁰ However, prior to the sample actually being tested, Randall sent a letter to the Wisconsin State Laboratory of Hygiene revoking her consent and demanding the return or destruction of the sample.¹⁵¹ Randall

141. *Mitchell v. Wisconsin*, 588 U. S. ___, 139 S. Ct. 2525, 2532 (2019). A party seeking to appeal to the Supreme Court from a lower court decision must file a writ of certiorari. If the court agrees to review the case, they are said to have “granted certiorari.”

142. *Mitchell*, 139 S. Ct., at 2537–39.

143. *State v. Prado*, 2020 WI App 42, ¶ 1.

144. *Id.*

145. *Id.* ¶ 26.

146. *Id.* ¶ 63.

147. *Id.* ¶ 64.

148. State Petition for Review, at 4, *State v. Prado*, No. 2016AP308-CR, August 17, 2020, <https://acefiling.wicourts.gov/document/efiled/2016AP000308/280720>.

149. *State v. Randall*, 2019 WI 80, ¶ 1, 387 Wis. 2d 744, 930 N.W.2d 223.

150. *Id.* ¶ 2.

151. *Id.* ¶ 3.

filed two motions to suppress the results of the blood test, one of which was based on the fact that she had revoked consent to be searched.¹⁵² The circuit court granted this motion and, on appeal from the state, the court of appeals affirmed.¹⁵³

On further appeal from the state, the Wisconsin Supreme Court reversed the lower courts, though there was no majority opinion in the case.¹⁵⁴ The lead opinion, which was joined by one justice, concluded that a person arrested for an OWI has no privacy interest in the amount of alcohol in a sample of his or her blood obtained as a result of the arrest.¹⁵⁵ Where there is no privacy interest in the fruits of a search, the lead opinion concluded, the Fourth Amendment is not implicated.¹⁵⁶ The concurring opinion, which was joined by two justices, endorsed a different analysis but reached the same conclusion regarding the expectation of privacy.¹⁵⁷ Thus, though no majority opinion was reached, a majority of justices did agree that the testing of Randall's blood sample did not constitute an unlawful search because she had no reasonable expectation of privacy in the alcohol concentration of her blood sample.¹⁵⁸

Counting of prior offenses

The consequences for an OWI violation increase with each subsequent violation.¹⁵⁹ In *State v. Braunschweig*, the Wisconsin Supreme Court addressed whether prior offenses that have been expunged should be counted in determining the penalty for subsequent violations.¹⁶⁰ Justin Braunschweig was arrested for an OWI violation that was charged as a second offense, based on a previous conviction of OWI causing injury, which had been expunged.¹⁶¹ Braunschweig was convicted, the conviction was upheld by the court of appeals, and appeal was made to the Wisconsin Supreme Court.¹⁶²

The court explained that there is a difference between a conviction being expunged and vacated; the former results in the destruction of court records, while the latter completely removes the fact of the conviction.¹⁶³ The court also noted that the expunction statute explicitly does not apply to DOT, which maintains its own records of

152. *Id.* ¶ 5.

153. *Id.* ¶¶ 5–6.

154. *Id.* ¶ 6.

155. *Id.* ¶¶ 14–38.

156. *Id.* ¶ 39.

157. *Id.* ¶¶ 48–63.

158. *Id.* ¶¶ 39, 76.

159. Wis. Stat. § [346.65 \(2\) \(am\)](#).

160. *State v. Braunschweig*, 2018 WI 113, ¶ 2, 384 Wis. 2d 742, 921 N.W.2d 199.

161. *Id.* ¶¶ 4–5. When a person is under 25 at the time of a violation for which the maximum period of imprisonment is six years or less, Wis. Stat. § [973.015 \(1m\) \(a\) 1](#), allows the court to order that the record be expunged upon successful completion of the sentence.

162. *Braunschweig*, 2018 WI 113, ¶¶ 7–8.

163. *Id.* ¶ 19–21. Wis. Stat. § [974.06 \(1\)](#) provides that a person seeking postconviction relief may move the court to vacate, set aside, or correct the sentence.

convictions.¹⁶⁴ The court held that a certified DOT record can establish a prior offense for purposes of counting OWI-related offenses and affirmed the conviction.¹⁶⁵

The *Braunschweig* court also addressed the question of the burden of proof the state must meet in establishing prior OWI convictions.¹⁶⁶ The OWI penalty statutes do not specify a burden of proof, so it falls to the courts to prescribe one.¹⁶⁷ The court cited U.S. Supreme Court precedent establishing that prior offenses are mostly pertinent during sentencing and that “application of the preponderance standard at sentencing generally satisfies due process.”¹⁶⁸ In other words, a prior conviction is not itself an element of the charged offense that must be proven beyond a reasonable doubt.¹⁶⁹

Penalty enhancers

The applicable minimum penalty for an OWI offense is increased if, at the time the offense is committed, a passenger under 16 years of age is in the vehicle.¹⁷⁰ In addition, the applicable minimum penalty for certain repeat OWI offenses is increased if the person has a high alcohol concentration at the time the offense is committed.¹⁷¹ In *State v. Neill*, the Wisconsin Supreme Court was tasked with resolving how to calculate fines when both penalty enhancers are involved.¹⁷²

Charles Neill was arrested and charged with his third OWI, which he committed with a BAC of 0.353 percent and with his one-year-old child in the car.¹⁷³ Neill pleaded guilty and, in addition to being placed on probation, was ordered to pay a \$4,800 fine.¹⁷⁴ This figure was the result of doubling the \$600 minimum fine, as required for having a child in the vehicle, and then quadrupling the \$1,200 product, as required for having a BAC above 0.25.¹⁷⁵ Neill challenged this fine, which was affirmed by the court of appeals, but reversed by the Wisconsin Supreme Court.¹⁷⁶

The court noted that there are two separate penalty enhancers at issue, with each referencing the “applicable minimum,” which is \$600.¹⁷⁷ One enhancer requires doubling

164. *Braunschweig*, 2018 WI 113, ¶ 23. See Wis. Stat. § [973.015 \(1m\) \(a\) 1](#).

165. *Braunschweig*, 2018 WI 113, ¶¶ 31, 41–42.

166. *Id.* ¶ 32.

167. *Id.* ¶ 39.

168. *Id.* ¶ 37, citing [United States v. Watts](#), 519 U.S. 148, 156, 117 S. Ct. 633 (1997).

169. *Id.*

170. Wis. Stat. § [346.65 \(2\) \(f\)](#).

171. Wis. Stat. § [346.65 \(2\) \(g\)](#).

172. [State v. Neill](#), 2020 WI 15, ¶ 1, 390 Wis. 2d 248, 938 N.W.2d 521.

173. *Id.* ¶ 5.

174. *Id.* ¶ 6.

175. *Id.* ¶ 7.

176. *Id.* ¶¶ 2–3.

177. *Id.* ¶ 26.

this minimum; the other requires quadrupling it.¹⁷⁸ The court held that there is no statutory basis for using the increased minimum from one enhancement as the new minimum for the other enhancement.¹⁷⁹ The court also rejected Neill's argument that only the greater of two enhancements should apply, holding that the fine associated with each penalty enhancer must be paid to give effect to both enhancers required by law.¹⁸⁰ The court set Neill's total fine at \$3,600.¹⁸¹

Conclusion

The OWI problem in Wisconsin has improved in recent years, but it remains a serious challenge to the state. Alcohol-related crashes and alcohol-related crash fatalities remain far too high. The economic consequences of the OWI problem are paid by all Wisconsin residents. Addressing the problem has required, and will continue to require, a multifaceted approach, one that includes increased personal responsibility, education, addiction treatment, and enforcement of OWI laws. New legislation may also be needed. Recent changes in state law have provided new sanctions and established an intricate legal framework for preventing and addressing the consequences of the OWI problem. Despite these advancements, it is clear that it will ultimately take the concerted action of many institutions and individuals to achieve what all hold as a shared goal: a sustained reduction of instances of operating a motor vehicle while intoxicated. ■

178. *Id.* ¶ 28.

179. *Id.*

180. *Id.* ¶ 29.

181. *Id.* ¶ 30.

Appendix: Relevant acts from the 2015–16 to 2019–20 legislative sessions

Act	Type of regulation	Summary
2015 Act 389	Treatment—operating privileges	Allowed a court to order a person convicted of an OWI offense or refusing to take a sobriety test to participate in a sobriety program in lieu of having an IID installed.
2015 Act 371	Increased penalty	Increased the penalty for fourth and subsequent OWI offenses. The act made all fourth-offense OWIs a felony, regardless of when a prior offense was committed.
2015 Act 183	Court procedure	Extended authority of courts to issue a search warrant for anything pertaining to OWI offenses to include civil offenses.
2015 Act 170	New offense—recreational vehicles	Established an OWI offense for off-highway motorcycles.
2015 Act 55 (budget act)	Treatment	Established a 24-7 sobriety testing pilot program to be administered by DOJ and created a \$50 safe-ride program surcharge to be paid by individuals convicted of an OWI.
2017 Act 172	Increased penalty—operating privileges	Required permanent revocation of a person’s license under certain circumstances.
2017 Act 125	Prevention—safe-ride grant program	Allowed for funds provided under safe-ride program grants to be used to advertise the service.
2017 Act 124	Court procedure—operating privileges	Made changes to the procedure of implementing restrictions to operating privileges and the installation of an IID. The act also required that an IID operating privilege restriction be extended by six months for every violation.
2017 Act 117	Court procedure	Extended to circuit court commissioners the authority provided to circuit courts in 2015 Act 183 to issue a search warrant pertaining to any OWI offense, criminal or civil.
2019 Act 107	Increased penalty	Made technical changes to the statutes providing for lifetime revocation of a person’s operating privilege for a fourth or subsequent OWI offense.
2019 Act 106	Increased penalty	Increased the mandatory minimum sentence for fifth- and sixth-offense OWIs from 6 months to 18 months.
2019 Act 31	Increased penalty	Created a mandatory minimum sentence of five years in prison for an OWI causing the death of another.