

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 187 CS  
Substances

Lawful Testing for Alcohol, Chemical Substances, or Controlled

**SPONSOR(S):** Porth and others

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 232

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Criminal Justice Committee</u>	<u>6 Y, 0 N, w/CS</u>	<u>Kramer</u>	<u>Kramer</u>
2) <u>Transportation Committee</u>	<u>14 Y, 0 N</u>	<u>Rousseau</u>	<u>Miller</u>
3) <u>Transportation &amp; Economic Development Appropriations Committee</u>	<u>15 Y, 0 N, w/CS</u>	<u>McAuliffe</u>	<u>Gordon</u>
4) <u>Justice Council</u>	<u>10 Y, 0 N, w/CS</u>	<u>Kramer</u>	<u>De La Paz</u>
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

HB 187 CS increases the sanction for refusing to submit to a lawful test of breath, urine or blood when an officer has reasonable cause to believe that a person was driving under the influence. Currently, such a refusal is a first degree misdemeanor if the person's driving privilege has previously been suspended for a prior refusal to submit to such a test. As a result of the bill, a first refusal to submit to a breath, blood or urine test will subject a person to having their driving privilege suspended for a year, as under current law, and to possible imprisonment for up to six months county jail. The bill makes a corresponding change to the relevant boating under the influence (BUI) statutes.

In order for a breath or blood test to be considered valid it must be performed substantially in accordance with methods approved by the Department of Law Enforcement and by an individual possessing a valid permit issued by the department. Upon the request of the person tested, the law requires that full information concerning the test taken at the direction of the law enforcement officer must be made available to the person or his or her attorney. The bill specifies what information must be provided and provides that full information does not include manual, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, full information will not include information in the possession of the manufacturer of the test instrument.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0187g.JC.doc  
**DATE:** 4/4/2006

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government / Safeguard Individual Liberty: The bill increases the sanction for a person to refuse to submit to a lawful breath, urine or blood test in a DUI or BUI case.

Promote Personal Responsibility: The bill will provide for increased sanctions for refusal to submit to a lawful breath, urine or blood test in DUI and BUI cases.

#### B. EFFECT OF PROPOSED CHANGES:

##### **DUI/BUI**

The offense of driving under the influence<sup>1</sup> (DUI) is committed if a person is driving or in the actual physical control of a vehicle within the state and:

- The person is under the influence of alcoholic beverages, any chemical substance or any controlled substance when affected to the extent that the person's normal faculties are impaired;
- The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
- The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

The offense is punishable as follows<sup>2</sup>:

- For a first conviction, by a fine of not less than \$250 or more than \$500 and by imprisonment for not more than six months.
- For a second conviction, by a fine of not less than \$500 or more than \$1,000 and by imprisonment for not more than nine months. If the second conviction was for an offense committed within five years of the date of a prior conviction, the court must order imprisonment for not less than 10 days.<sup>3</sup>
- For a third conviction that is not within 10 years of a prior conviction, by a fine of not less than \$1,000 or more than \$2,500 and by imprisonment for not more than 12 months.

A third conviction that occurs within 10 years of a prior conviction is a third degree felony, punishable by no less than 30 days in jail<sup>4</sup> and up to five years in prison and a fine of up to \$1000.<sup>5</sup> A fourth conviction, regardless of when it occurs, is a third degree felony, punishable by up to five years in prison and a fine of not less than \$1,000 or more than \$5,000.<sup>6</sup>

Section 327.35, F.S. prohibits the offense of boating under the influence (BUI) which has the same elements (other than the substitution of the word "vessel" for "vehicle") as the offense of driving under the influence. The fine and imprisonment provisions in the BUI statute are identical to those in the DUI statute.

##### **Implied consent**

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<sup>1</sup> s. 316.193(1), F.S.

<sup>2</sup> s. 316.193(2), F.S.

<sup>3</sup> s. 316.193(6)(b), F.S.

<sup>4</sup> s. 316.193(6)(c), F.S.

<sup>5</sup> s. 316.193(2)(b), F.S.

<sup>6</sup> Additionally, a person who has been convicted of DUI faces suspension of his or her driving privilege and may be required to place an ignition interlock device on his or her vehicle. Section 316.193 also increases sanctions for DUI which results in damage to the property or person of another, serious bodily injury or the death of another person. s. 316.193(3)(c), F.S.

Section 316.1932, F.S., sets forth what is commonly known as the implied consent law. Specifically, section 316.1932(1)(a)1, F.S., provides that:

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages.

Similarly, section 316.1932(1)(a)2, F.S. provides that a person who accepts the privilege of driving in the state is deemed to have consented to a urine test for the purpose of detecting the presence of a chemical substance or controlled substance. A breath or urine test must be incidental to a lawful arrest at the request of a law enforcement officer who has reasonable cause to believe the offender was driving under the influence.

A person is deemed to have given his or her consent to a blood test even if the person has not yet been arrested, if there is reasonable cause to believe the person was driving under the influence, if the person appears for treatment at a medical facility and if the administration of a breath or urine test is impractical or impossible.<sup>7</sup>

When an officer requests the breath, urine or blood test, the offender must be told that:

- Refusal to submit to the test will result in the suspension of the offender's driving privilege for one year.
- Refusal to submit to the test will result in the suspension of the offender's driving privilege for 18 months if the offender's driving privilege has previously been suspended for a refusal to submit.
- Refusal to submit to test is a misdemeanor if the offender's driving privilege has previously been suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood.

According to the DHSMV, there were 23,517 driver license suspensions in 2003 and 23,058 in 2004 for refusal to consent to a lawful test of breath, urine or blood.

### **Sanctions for refusing to comply**

Prior to the 2002 legislative session, if a driver refused to submit to a breath, blood or urine test after an arrest for driving under the influence (DUI), their driving privilege would be suspended. The refusal to submit was not a criminal offense. During the 2002 session, the law was changed to make a refusal to submit to a breath, urine or blood test a first degree misdemeanor if the offender's driving privilege has previously been suspended for a refusal to submit.<sup>8</sup>

HB 187 amends s. 316.1939, F.S. to make a first refusal to consent to a lawful test of breath, urine or blood punishable by up to six months in county jail. The bill also amends s. 316.1932, F.S. to require that an officer inform a person that his or her refusal to submit to the test will be punishable as a misdemeanor. The bill makes a corresponding change to the relevant BUI statutes, ss. 327.352 and 327.359, F.S.

### **Full information**

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<sup>7</sup> s. 316.1932(1)(c), F.S. The refusal to submit to a breath, urine or blood test is admissible into evidence in any criminal proceeding. The result of any test pursuant to this section which indicates the presence of a controlled substance is not admissible in a trial for the possession of a controlled substance. s. 316.1932(2), F.S.

<sup>8</sup> See 2002-263, Laws of Fla.

In order for a breath or blood test to be considered valid it must be performed substantially in accordance with methods approved by the Department of Law Enforcement and by an individual possessing a valid permit issued by the department.<sup>9</sup> Upon the request of the person tested, full information concerning the test taken at the direction of the law enforcement officer must be made available to the person or his or her attorney.<sup>10</sup>

In State v. Muldowny, 871 So.2d 911 (Fla. 2005), the Fifth District Court of Appeal stated that because this section requires that full information be disclosed:

It must necessarily follow that when a person risks the loss of driving privileges or perhaps freedom based upon the use and operation of a particular machine, full information includes operating manuals, maintenance manuals and schematics in order to determine whether the machine actually used to determine the extent of a defendant's intoxication is the same unmodified model that was approved pursuant to statutory procedures. It seems to us that one should not have privileges and freedom jeopardized by the results of a mystical machine that is immune from discovery, that inhales breath samples and that produces a report specifying a degree of intoxication.

The state had argued that it did not have possession of the requested information and that it was trade secret. The DCA affirmed the trial court's ruling excluding the breath test results. This is the only reported decision on this issue. Trial courts around the state have been divided on the issue.

The bill provides that full information will be provided concerning the *results of the test taken* and provides that full information is limited to the following:

1. The type of test administered and the procedures followed;
2. The time of the collection of the blood or breath test sampled;
3. The numerical results of the test indicating the alcohol content of the blood and breath;
4. The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test; and
5. If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance of such instrument.

The bill also provides that full information does not include manual, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, full information does not include information in the possession of the manufacturer of the test instrument.

#### C. SECTION DIRECTORY:

Section 1. Amends s. 316.1932, F.S., relating to refusal to submit to a breath, urine or blood test.

Section 2. Amends s. 316.1939, F.S., removing prior suspension as a condition for commission of offense by refusal to submit to a breath, urine or blood test in DUI case.

Section 3. Amends s. 327.352, F.S., relating to refusal to submit to breath, urine or blood test in BUI cases.

Section 4. Amends s. 327.359, F.S., removing prior suspension as a condition for commission of misdemeanor by refusal to submit to a breath, urine or blood test in BUI case.

Section 5. Provides October 1, 2005 effective date.

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<sup>9</sup> ss. 316.1934(3) and 327.354(3), F.S.

<sup>10</sup> s. 316.1932(1)(f)4, F.S.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See D. Fiscal Comments.

2. Expenditures:

See D. Fiscal Comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill will make a first refusal to submit to a lawful breath, urine or blood test punishable by up to six months in county jail. Currently, a person commits a first degree misdemeanor in refusing to submit to a breath, urine or blood test only if the person's driving privilege had previously been suspended for a refusal to submit to a test. Making a first refusal punishable by a term in jail may have an impact on county court caseloads and county jail populations. In recent years more than 20,000 drivers per year have refused to consent to the tests. The new law could reduce the number of first-time refusals, but how the proposed change would affect the number is unknown.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Individuals refusing for the first time to submit to a lawful breath, urine or blood test of alcohol or of chemical or controlled substances would be subject to up to six months incarceration.

According to DHSMV, persons requiring the placement of an approved ignition interlock device must currently pay a \$70 installation fee, a deposit of \$100 paid upon installation (and returned at the end of the required duration if the device is not damaged), and a \$2 a day fee.

### D. FISCAL COMMENTS:

The Department of Highway Safety and Motor Vehicles reports that the bill will not have a fiscal impact on the department.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

As originally filed, the bill expanded the circumstances in which a law enforcement officer could require that a blood sample be taken in DUI and BUI cases. On December 7, 2005, the Criminal Justice Committee amended the bill to remove this provision. The amendment also added the language relating to information that must be provided to a person who is the subject of a breath or blood test.

On February 23, 2006, this bill was considered by the Transportation Economic Development Appropriations Committee. An amendment was adopted which requires the Department of Highway Safety and Motor Vehicles, prior to reinstating a permanent or restricted license, to require the placement of an ignition interlock device in the vehicle of a person whose driver's license has been suspended for refusing to submit to a blood, breath, or urine test. For the first suspension the interlock device would be required for six months, and for a second or subsequent suspension the interlock device would be required for one year.

In addition, the bill requires the Department of Highway Safety and Motor Vehicles (DHSMV), prior to reinstating a permanent or restricted license, to require the placement of an ignition interlock device in the vehicle of a person whose driver's license has been suspended for refusing to submit to a blood, breath, or urine test. For the first suspension the interlock device would be required for six months, and for a second or subsequent suspension the interlock device would be required for one year. Current law does not provide for the installation of an ignition interlock device for refusing to submit to a blood, breath or urine test.

On April 4, 2007, the Justice Council adopted an amendment which removed the language relating to ignition interlock devices. The amendment also made a first refusal to submit to a breath, blood or urine test punishable by up to six months in county jail rather than as a first degree misdemeanor, punishable by up to one year in county jail.