

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 165

Penalties for Driving Under the Influence

SPONSOR(S): Nehr

TIED BILLS:

IDEN./SIM. BILLS: SB 470

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Public Safety & Domestic Security Policy Committee	9 Y, 0 N, As CS	Padgett	Kramer
2) Roads, Bridges & Ports Policy Committee	20 Y, 1 N, As CS	Brown	Miller
3) Criminal & Civil Justice Policy Council			
4) Criminal & Civil Justice Appropriations Committee			
5) Full Appropriations Council on General Government & Health Care			

SUMMARY ANALYSIS

Currently, a mandatory condition of probation for a first conviction for driving under the influence requires that the defendant perform 50 hours of community service. If the court determines that it is in the best interests of the state, in lieu of the 50 hours of community service, the defendant may pay a fine of \$10 per hour for each hour of community service ordered by the court. The \$10 fine is directed to the organization that would have benefited from the community service hours.

CS/CS/HB 165 amends s. 316.193(6), F.S. to raise the amount of the fine a defendant can elect to pay in lieu of community service from \$10 per hour to \$50 per hour. The bill provides that the revenue generated from the increased fine would be divided as follows:

- \$30 to the State Courts Revenue Trust Fund
- \$5 to the State Attorneys Revenue Trust Fund
- \$5 to the Public Defenders Revenue Trust Fund
- \$10 to the organization that would have benefited from the community service hours

The bill also creates a petition-and-review process for DUI offenders who have had their license permanently revoked for having 4 or more DUI convictions, allowing DHSMV to reinstate offenders' licenses. The resulting license has significant restrictions, and petitioners cannot apply until 10 after years since their last offense or release from prison (or longer). The reinstatement process created in CS/CS/HB 165 is similar to the current process for DUI manslaughter offenders who wish to receive a hardship license after five years.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### *Community service in lieu of fines*

Currently, s. 316.193, F.S. provides that a person commits the offense of driving under the influence (DUI) if the person is driving or in actual physical control of a motor vehicle and:

- is under the influence of alcoholic beverages, chemical substances, or controlled substances to the extent that the person's normal faculties are impaired; or
- the person has a blood alcohol level of .08 or more grams of alcohol per 100 milliliters of blood; or
- the person has a breath-alcohol level of .08 or more grams of alcohol per 210 liters of breath.<sup>1</sup>

The mandatory penalties for a first time DUI conviction include:

- a maximum of one year probation
- a fine of not less than \$500 and not more than \$1,000
- imprisonment for not more than 6 months
- completion of a DUI substance abuse program
- community service of a minimum 50 hours
- 10 day impoundment of the defendant's vehicle<sup>2</sup>

In lieu of 50 hours of community service, the court may order the defendant to pay \$10 per each hour of each hour of community service required.<sup>3</sup> To convert the community service requirement to a fine, the court must consider whether payment of a monetary fine is in the best interests of the state.<sup>4</sup> In making this determination, the only factor explicitly listed that the court may consider is the residence or location of the defendant during the probationary period.<sup>5</sup> The \$10 fine is directed to the organization that would have benefited from the community service.

---

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

<sup>2</sup> S. 316.193(1) – (6), F.S. The penalties for second or subsequent DUI convictions increase to varying degrees, however only a first DUI conviction requires community service as a mandatory condition of probation.

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

<sup>4</sup> Id.

<sup>5</sup> Id. (i.e. defendant lives out of state)

## Interlock devices

Section 316.193, F.S., requires an ignition interlock device (IID) to be installed on the vehicles of certain persons convicted of DUI when they qualify for a permanent or restricted driver's license.

Upon a first DUI conviction, no IID is required unless the person had a blood-alcohol level (BAL) of 0.15 percent<sup>6</sup> or higher, or was accompanied by a minor at the time of the infraction. (If these conditions are met, the court is mandated to require the placement of an IID for up to six months.)

Upon a second DUI conviction, the law requires the placement of an IID on all vehicles owned or leased by the offender for at least one year regardless of the violator's BAL or whether a minor was present in the vehicle.

Upon a third DUI conviction, the court must order an IID to be installed for at least 2 years. The IID must be of a type approved by DHSMV and must be placed and maintained at the offender's sole expense. Additionally, the offender is not permitted to drive any motor vehicle that does not have a functioning interlock device.

Section 316.1937, F.S., offers a judge the option of requiring an IID for first-time offenders. The court *may* prohibit any person who is convicted of DUI in violation of s. 316.193, F.S., from operating a motor vehicle during the period of probation unless the vehicle is equipped with a functioning IID.

These requirements are summarized in the table below:

**Ignition Interlock Device Penalties for DUI based on Convictions**

<b>DUI Conviction</b>	<b>IID Requirement</b>
1st Conviction	Optional – Up to 6 months if court-ordered
1st Conviction if 0.15 BAL or w/Minor in Car	Required - Up to 6 months
2nd Conviction	Required - At least 1 year
2nd Conviction if 0.15 BAL or w/Minor in Car	Required - At least 2 years
3rd Conviction	Required - At least 2 years

Violation of the conditions of s. 316.1937, F.S., will result in the revocation of the offender's driving privilege and imposition of a fine. If the court imposes the use of an IID, the court must:

- (1) Stipulate on the record the requirement for, and the period of, the use of a certified IID;
- (2) Order the records of the department reflect such requirement;
- (3) Order an IID be installed, as the court may determine necessary, on any vehicle owned or operated by the convicted person;
- (4) Determine the convicted person's ability to pay for installation of the device if the person claims inability to pay; and
- (5) Require proof of installation of the device and periodic reporting to the department for verification of the operation of the device in the convicted person's vehicle.

The law also provides guidelines regarding indigent offenders. If the court determines the convicted person is unable to pay for the installation of the IID, the court may order a portion of the fine paid by the person for a violation of s. 316.193, F.S., be allocated to defray the costs of installing the device.<sup>7</sup> Section 316.1938, F.S., requires DHSMV to certify the accuracy and precision of IIDs.

The current IID program has been in place since February 1, 2004. Two IID vendors have been contracted by the department to install, inspect and service the ignition interlock devices in Florida. "Interlock Systems of Florida" is the vendor for south Florida counties and has eight installation locations. "Interlock Group of Florida" is the vendor for north Florida counties and has eight installation

<sup>6</sup> S. 316.193(4), F.S. This "enhanced penalty" threshold was lowered from .20 percent to .15 by the 2008 Legislature. See 2008 SB 1992, Section 5.

<sup>7</sup> See s. 316.1937(2)(d), F.S.

locations. The Department originally contracted with these vendors for a five-year period. In 2008, the Department elected to renew contracts with the vendors for another five-year period.

The ignition device is programmed to require routine servicing at 30 to 60 day intervals. However, events involving misuse or non-compliance with program conditions may cause the service date to advance automatically. Service requirements must be strictly complied with; otherwise the interlock device will not allow the vehicle to be started, even if no alcohol is detected.

When considering the costs associated with IIDs, it is important to keep in mind that the offender is required to pay for the ignition interlock device, not the State. The cost (plus tax) to the convicted person for an IID is:

- \$70 for installation,
- \$67.50 for monthly monitoring and calibration, and
- \$100 refundable deposit or a \$5 monthly insurance charge.<sup>8</sup>

### *License revocation*

Section 322.28, F.S., provides DHSMV the authority to suspend or revoke driver's licenses for certain offenses. Specifically, s. 322.28(2)(e), F.S., provides that an offender convicted four times for violation of s. 316.193, F.S., or convicted for DUI manslaughter, shall have his or her license permanently revoked. The statute states that "No driver's license or driving privilege may be issued or granted to any such person." This sanction is worthy of historical review, based on changing attitudes towards the effectiveness of permanent revocation, and legal challenges to the Florida Statutes as they have developed in recent years.

Section 322.271(4), F.S. (1997), formerly provided that drivers whose licenses had been permanently revoked under section 322.28(2)(e), F.S. could, after five years, petition for reinstatement of the "driving privilege."<sup>9</sup> A petitioner had to establish that the required qualifications were met. DHSMV then had the discretion to issue a "hardship license" with specific restrictions.<sup>10</sup>

In 1998, the Legislature amended this provision by eliminating the eligibility for hardship licenses for drivers with four DUI convictions.<sup>11</sup> There were certain procedural problems due to a single-subject violation when the 1998 legislation was enacted. In 2002, these problems were resolved by reenactment of the statutes.<sup>12</sup> As mentioned above, a fourth DUI conviction now results in permanent revocation of a person's driving privilege.

A decision by the Florida Supreme Court recently confirmed these changes. The Court determined that, because DHSMV's permanent revocation of an offender's license is *not* a criminal sanction, s. 322.28(2)(e), F.S. is not an unconstitutional *ex post facto* law, as alleged by various petitioners.<sup>13</sup> In

---

<sup>8</sup> Information provided by DHSMV website regarding IIDs at <http://www.flhsmv.gov/ddl/IID.html>. Last visited March 13, 2009.

<sup>9</sup> The statute provided in pertinent part as follows:

(4) Notwithstanding the provisions of s. 322.28(2)(e), a person whose driving privilege has been permanently revoked because he or she has been convicted four times of violating s. 316.193 or former s. 316.1931 or because he or she has been convicted of DUI manslaughter in violation of s. 316.193 may, upon the expiration of 5 years after the date of such revocation or the expiration of 5 years after the termination of any term of incarceration under s. 316.193 or former s. 316.1931, whichever date is later, petition the department for reinstatement of his or her driving privilege.

Section 322.271(4), F.S. (1997).

<sup>10</sup> The petitioner had to demonstrate to DHSMV that in the last five years, (1) he had not been arrested for a drug-related offense, (2) had not driven a motor vehicle, (3) had been drug- and alcohol-free, and had completed an approved DUI program. Section 322.271(4), F.S. (1997).

<sup>11</sup> 322.271(4), Fla. Stat. (Supp. 1998).

<sup>12</sup> Specifically, the Legislature readopted the 2002 Florida Statutes, which in turn implemented the 1998 amendment. See *Dep't of Highway Safety & Motor Vehicles v. Gaskins*, 891 So. 2d 643, 644 (Fla. 2d DCA 2005).

<sup>13</sup> One petitioner, Lescher, contested his permanent revocation for four DUIs on the grounds that the 2000 law creating permanent revocations was an unconstitutional *ex post facto* law. The constitutional prohibition against *ex post facto* laws applies only to

*Lescher v. Fla. Dep't of Highway Safety and Motor Vehicles*, No. SC07-32 (July 3, 2008), the Florida Supreme Court applied certain legal tests and determined that neither the permanent revocation provisions nor the hardship license provisions are criminal sanctions.<sup>14</sup> “[A]s the Legislature intended, they are part of a civil regulatory scheme for the protection of the public.”<sup>15</sup>

Notwithstanding the changes to “four-DUI revocation,” a person whose license is permanently revoked for DUI manslaughter may still petition for license reinstatement after a 5 year period under 322.271, F.S., if the person has no other prior DUI convictions. The statute lays out a petition and review process whereby an offender may request a hardship license. Within 30 days, DHSMV will grant the petitioner a hearing. The petitioner must demonstrate to DHSMV that he or she:

- Has not been arrested for any drug-related offense in the prior 5 years,
- Has not driven a motor vehicle without a license in the prior 5 years,
- Has been drug-free for the prior 5 years, and
- Has completed a DUI program licensed by DHSMV.

DHSMV will then evaluate the petitioner’s qualification, fitness, and need to drive. If approved, the resulting hardship license must be restricted for employment purposes only, for the first year, and the person must be supervised by a licensed DUI program at least four times a year. The offender bears the cost of the DUI program oversight.

### Proposed Changes

CS/CS/HB 165 amends s. 316.193(6), F.S., to raise the amount of the fine a defendant can elect to pay in lieu of community service from \$10 per hour to \$50 per hour. Revenue generated by the increased fine is distributed as follows:

- \$30 to the State Courts Revenue Trust Fund
- \$5 to the State Attorneys Revenue Trust Fund
- \$5 to the Public Defenders Revenue Trust Fund
- \$10 to the organization that would have benefited from the community service hours

The bill amends the multiple-DUI penalty provisions of s. 316.193, F.S., to require all four-time DUI offenders use an IID for a period of 5 years, if such offenders ever receive a license or permit to drive legally. This requirement is restated in s. 322.2715, F.S., regarding DHSMV’s authorization to order IIDs for offenders.

---

criminal sanctions; therefore the Court was faced with answering the fundamental question, “Are license revocation sanctions criminal or non-criminal?” before determining the specifics of Lescher’s situation.

<sup>14</sup> In *Lescher v. Fla. Dep’t of Highway Safety and Motor Vehicles*, No. SC07-32 (July 3, 2008), the court wrote:

“Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction.” Hudson, 522 U.S. at 99. Under Hudson, the first step in the analysis is to ascertain the legislature’s intent, and then to determine the effect of the statute under the following seven factors:

- (1) “[w]hether the sanction involves an affirmative disability or restraint”;
- (2) “whether it has historically been regarded as a punishment”;
- (3) “whether it comes into play only on a finding of scienter”;
- (4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”;
- (5) “whether the behavior to which it applies is already a crime”;
- (6) “whether an alternative purpose to which it may rationally be connected is assignable for it”;
- and
- (7) “whether it appears excessive in relation to the alternative purpose assigned.”

Id. at 99-100 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

In the *Lescher* case, the Florida Supreme Court applied the *Hudson* factors above and determined that neither permanent revocation provisions nor hardship license provisions are criminal sanctions.

<sup>15</sup> *Lescher v. Fla. Dep’t of Highway Safety and Motor Vehicles*, No. SC07-32 (July 3, 2008), 17 – 18.

The bill also creates a petition-and-review process for four-time DUI offenders to have their license reinstated. The process created by CS/CS/HB 165 is very similar to the existing process for DUI manslaughter; however, the offender must wait 10 years from the last violation or release from incarceration. This period increases by another 5 years, for every DUI conviction over four; a petitioner with 5 DUIs must wait 15 years, a petitioner with 6 DUIs must wait 20 years.

Like the DUI manslaughter reinstatement process, the petitioner must demonstrate to DHSMV that he or she:

- Has not been arrested for any drug-related offense in the prior 5 years,
- Has not driven a motor vehicle without a license in the prior 5 years,
- Has been drug-free for the prior 5 years, and
- Has completed a DUI program licensed by DHSMV.

In the event the petition is granted and a hardship license issued, the license must be restricted to employment purposes only for the first year, and the driver must be monitored by a DHSMV-approved DUI Program, at his or her expense. The monitoring must be at least 4 times a year.

In addition to these requirements, which exist in current law for DUI manslaughter reinstatements, under the new four-time DUI reinstatement, the petitioner must install an ignition interlock device on all vehicles owned and regularly used, for a period of 5 years.<sup>16</sup> This is also at the offender's expense.

## B. SECTION DIRECTORY:

- Section 1** Amends s. 316.193, F.S.; providing for mandatory placement of an ignition interlock device on all vehicles owned and operated by a person convicted of four or more DUIs if the person obtains a restricted license or permit; increasing the amount of a fine that may be imposed under certain conditions; providing for distribution of the additional funds.
- Section 2** Amends s. 322.271, F.S.; providing a petition and license-reinstatement process for those persons whose license has been permanently revoked for multiple DUI convictions; providing timeframes and criteria for the petition and reinstatement process; requiring quarterly review of reinstated drivers by a licensed DUI program; requiring the reinstated license to be restricted for employment-only purposes for at least one year; requiring an ignition interlock device for reinstated drivers; requiring reinstated drivers to assume costs of supervision.
- Section 3** Amends s. 322.2715, F.S.; requiring a five-year ignition interlock requirement for persons convicted of four or more DUIs.
- Section 4** Amends s. 322.28, F.S.; providing an exception to permanent license revocation for persons approved through the petition and reinstatement process.
- Section 5** Provides an effective date of July 1, 2009.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

See FISCAL COMMENTS, below.

---

<sup>16</sup> Pursuant to s. 322.291, F.S., any person required to have an IID as a condition of his or her license may have the installation period time extended by one month, and be required to attend additional substance abuse education courses, if he or she violates the requirements for installation of the device three or more times.

2. Expenditures:

See FISCAL COMMENTS, below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See FISCAL COMMENTS, below.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Repeat DUI offenders who have had their licenses permanently revoked would be required to pay for ignition interlock device maintenance and DUI program services. However, if such persons are able to reform and drive safely under the restricted license, the ability to drive could improve their general economic situation even after payment of these fees.

D. FISCAL COMMENTS:

The increase in the amount of the fine in lieu of community service hours could result in an increase in revenue to the State Courts Revenue Trust Fund, the State Attorneys Revenue Trust Fund, and the Public Defenders Revenue Trust Fund. Alternatively, increasing the 'buyout' could lessen the likelihood that offenders would pay, thereby decreasing fiscal revenue. The community and general public could still benefit from this arrangement, though indirectly, from the additional community service hours performed.

DHSMV is authorized by s. 322.21(8)(a) and (b), F.S., to collect a license reinstatement fee from any driver receiving a license following a suspension, regardless of whether the reinstatement follows a hearing, or the person simply waits out the required period. This fee for reinstatement following a suspension is \$35 (of which \$15 is deposited in the General Revenue Fund and \$20 in the Highway Safety Operating Trust Fund<sup>17</sup>), and the fee for reinstatement following a revocation is \$60 (of which \$35 is deposited into the General Revenue Fund and \$25 in the Highway Safety Operating Trust Fund.<sup>18</sup>) A person seeking a license after a fourth DUI as provided in the bill would be required to pay the \$60 reinstatement fee, resulting in a positive fiscal impact to General Revenue and to the Highway Safety Operating Trust Fund.

DHSMV does not charge any fee to a person requesting a hearing by the department's hearing officers. According to DHSMV, there may be a significant negative fiscal impact as a result of the bill, although the amount is indeterminate, based on the number of additional requests for hearing that could be requested by multiple-DUI offenders.

### 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:

---

<sup>17</sup> Section 322.21(8)(a), F.S.

<sup>18</sup> Section 322.21(8)(b), F.S.

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

HB 165 amended s. 316.193, F.S., to provide that a judge may only allow a defendant to pay a monetary fine in lieu of performing community service if the defendant would face an “undue hardship” by performing the community service.

On February 4, 2009, the Public Safety & Domestic Security Policy Committee made amendments to the bill. CS/HB 165 raises the hourly amount of the fine a defendant can elect to pay in lieu of performing community service from \$10 per hour to \$50 per hour, and provides distribution details for the additional revenue collected.

On March 11, 2009, the Roads, Bridges, and Ports Policy Committee adopted a strike-everything amendment and reported the bill favorably. The amendment kept the \$50 per hour fines described above, and added a petition-and-review process for driver’s license reinstatement. The amendment allows a four-time DUI offender whose license has been permanently revoked, to petition DHSMV for reinstatement. The requirements for a petition are more stringent than those for a DUI-manslaughter reinstatement (increasing the waiting period from 5 to 10 years), and the resulting hardship license has an additional restriction – the offender must use an ignition interlock for at least 5 years.