



## OPERATING UNDER THE INFLUENCE

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### I. Purpose

This procedure will:

- a. explain the four elements necessary for an Operating Under the Influence (O.U.I.) arrest.
- b. provide general considerations and guidelines for roadside questioning and field sobriety tests.
- c. describe what actions will be taken by the arresting officer at the scene of the arrest.
- d. explain the duties of the booking officer and actions that must be taken when the arrested person refuses to submit to a breathalyzer test.
- e. provide guidelines for the administering of the breathalyzer test and further describe actions to take when the arrested person is under 21 years old.
- f. explain the right to an independent blood test (M.G.L. c. 263 § 5A) and provide guidelines when drawing and submitting blood.

### II. Elements of an O.U.I. Arrest

There are four elements to an O.U.I. arrest:

- a. Motor Vehicle: a motor vehicle is a vehicle “constructed and designed for propulsion by power other than muscular power.” (M.G.L. c. 90 § 1)
- b. Operation: operation of a motor vehicle extends to any act relating to the electrical or mechanical functioning of a vehicle that alone or in sequence with other acts will place a vehicle in motion. Operation examples include:
  - 1) The engine does not have to be running. In several cases, courts have found operation when the operator engaged the clutch, spun the wheels, or sat alone in the driver’s seat with feet near the pedals.
  - 2) Police may make inferences that a person has been operating a vehicle when, for example, an officer finds a driver asleep on a public way with the engine running, smelling of alcohol, with beer cans on the dash.
  - 3) However, sitting behind the wheel is not always sufficient evidence of operation. The officer should look for further evidence of operation.

- c. Public Way or Variation: A public way or variation is “any way of any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees.” (M.G.L. c. 90 § 24(1)(a)(1). )
- d. Under the Influence: The operator is under the influence if the operator has consumed enough alcohol or drugs to diminish his or her ability to operate the motor vehicle safely in a public place. The person is presumed to be under the influence if his or her blood alcohol level is 0.08% or higher. The person does not have to be drunk or unconscious, nor does the person have to have driven in an unsafe or erratic way to be considered under the influence. (61.1.5)

### **III. General Considerations and Guidelines**

When an officer has reasonable suspicion that the operator or a motor vehicle has been operating under the influence of alcohol or drugs, the officer will, using his or her discretion, take the following steps: (61.1.11)

#### **a. Roadside Questioning**

The officer may ask the operator general, on the scene, questions to help assess the situation. For example, the officer may ask:

- 1) Where the operator was coming from.
- 2) Whether the operator had been drinking.
- 3) How many drinks the operator had consumed.
- 4) Whether the operator has any medical conditions.

#### **b. Field Sobriety Tests**

The officer may request the operator to submit to a series of field sobriety tests.

- 1) Before administering the tests, the officer should assess the operator’s physical well-being. The officer may:
  - a) Ask the operator about any medical conditions or physical impairment that might prevent the operator from being able to perform the test.
  - b) Check to see that the operator can walk without falling.
  - c) Check the surrounding area for dangers such as ice, snow, cracks, etc.
- 2) The field tests might include:
  - a) Finger to nose.
  - b) Picking up coins from the ground.

- c) Walking in a straight line.
- d) Nine (9) step heel to toe and turn test.  
(This test should not be administered to people 50-60 pounds overweight, people over 60 years old, or people wearing heels greater than two inches high.)
- e) One legged stand.
- f) Recitation of alphabet.

(Note that pursuant to Com. v. McGrail, 419 Mass. 774 (1995) , Massachusetts motorists are under no legal obligation to submit to field sobriety tests even if requested to do so).

**c.** Actions at the Scene of the Arrest

- 1) If after administering the field sobriety tests, the officer has probable cause that the operator is under the influence of alcohol, the officer will place the person under arrest.
- 2) The officer will search for weapons.
- 3) The officer will use his discretion in assuring the arrested person's safety during his or her transportation to the police station. For example, if the arrested person is too intoxicated to balance, the officer might put him or her on the floor of the wagon instead of on the bench.
- 4) Duties of the officer at the scene of the tow
  - a) The officer will be responsible for taking an inventory of the content of any towed motor vehicle and listing the items on a Vehicle Inventory Form.
  - b) The officer will be responsible for listing any visible damage on the towed vehicle on the Vehicle Inventory Form.
  - c) The officer will ensure that the claim check is completed properly listing all pertinent information.
  - d) The officer will be responsible for turning in both the claim check and the Vehicle Inventory Form to the Front Desk as soon as possible. (61.1.5)

**d.** Booking Officer Duties

- 1) The officer will read the arrested person his *Miranda* rights.
- 2) The officer will book the offender according to policy. Additionally, the officer will read the Statutory Rights and Consent Form (Form A) to the arrested person. The officer will record the time when he administers these rights. The arrested person will sign the form. This form describes:

- a) The arrested person's rights to a doctor.
  - b) The right to a telephone call.
  - c) The opportunity to submit to a chemical (Breathalyzer) test.
  - d) A notice regarding commercial driver's licenses.
- 3) The officer will begin filling out the Electronic O.U.I. Reporting Data Collection Form. After completing all the information on the form, including the breathalyzer information detailed below, the officer will fax the form to the E.C.C. and they will electronically transmit the information to the Registry of Motor Vehicles.

**e. Breathalyzer Tests - Refusal to Submit**

If the operator is placed under arrest for Operating under the Influence, a certified breathalyzer operator will administer the breathalyzer test, if arrested person consents to take the test.

- 1) If the arrested person **refuses to submit** to the test:
  - a) The officer must inform him that his license or permit to operate a motor vehicle will be suspended for at least a period of 120 days but not more than one year for such a refusal.
  - b) If the person still refuses to take the test after the warning, the officer will:
    - (1) Immediately and on behalf of the Registrar take custody of the arrested person's driver's license or permit issued by the Commonwealth.
    - (2) Cut up and destroy his or her driver's license issued by the Commonwealth.
    - (3) Prepare Form D, the Police Notice of License Seizure. The officer will fax this form along with the Electronic O.U.I. Reporting Data Collection Form below to the ECC (Emergency Communications Center). The ECC will forward the forms to the Registry.
  - c) The officer, before whom such refusal was made, will immediately report such refusal on the Electronic O.U.I. Reporting Data Collection Form. (FORM F for commercial licenses). This report will:
    - (1) Set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on any such

public way or variation while under the influence of an intoxicating liquor.

- (2) State that such person has refused to submit to such chemical test or analysis when requested by such police officer to do so.
- (3) Identify which police officer requested said chemical test or analysis and a witness to said refusal.

- d) The officer will fax the Electronic O.U.I. Reporting Data Collection Form to the ECC along with the Police Notice of License Seizure. The ECC will fax the information to the Registry. The Registry will return the notice of intent to suspend and a temporary driving permit.
- e) The officer will provide such person who refused such test, on behalf of the registrar, with written notice of intent to suspend. (65.1.11)
- f) The officer will issue to the person, on behalf of the Registrar, a temporary driving permit unless:
  - 1) Driving privileges of the person were suspended, revoked, or canceled at the time the person was arrested.
  - 2) The person whose license was taken into custody was operating on an invalid license.
  - 3) The person was not entitled to driving privileges at the time of the arrest for any other reason.
  - 4) The person holds a license or permit granting driving privileges that was issued by another state or jurisdiction.
- g) If the arrested person does not explicitly refuse to take the test, he is deemed to have consented to the test pursuant to M.G.L. c. 90 § 24(1)(f)(1).
- h) The officer administering the breathalyzer test must be currently certified in the administration of such test. All training will be conducted in accordance with the Massachusetts Criminal Justice Training Council.

**f. Breathalyzer Test - Duties when Administering**

- 1) If the test shows that the percentage was 0.05% or less, there will be a presumption that the arrested person was not under the influence of intoxicating liquor, and he/she will be released from custody forthwith.

If the test shows that the percentage was more than 0.05% but less than 0.08% there will be no presumption that the arrested person was under the influence of intoxicating liquor.

If the test shows that the arrested person's blood alcohol percentage is 0.08 or higher, (unless the person is under the age of 21, see below) the officer will:

- a) Immediately and on behalf of the Registrar take custody of the arrested person's driver's license or permit issued by the Commonwealth.
- b) Cut up and destroy his or her driver's license issued by the Commonwealth.
- c) Prepare Form D, the Police Notice of License Seizure. The officer will fax this form along with the Electronic O.U.I. Collection Form to the ECC. The ECC will forward the forms to the Registry.

Reporting Data  
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- 2) The officer must set forth the following on the Electronic O.U.I. Reporting Data Collection Form (Form E for Commercial licenses):
  - a) Grounds for the officer's belief that the arrested person has been operating a motor vehicle on a public way or variation while under the influence of an intoxicating liquor.
  - b) The arrested person's blood alcohol level was 0.08 or higher.
  - c) The person who administered the test was trained and certified.
  - d) The officer performed the test according to regulations.
  - e) The equipment was functioning properly.
- 3) The officer will fax the Electronic O.U.I. Reporting Data Collection Form to the ECC along with the Police Notice of License Seizure. The ECC will fax the information to the Registry. The Registry will return the notice of intent to suspend and a temporary driving permit.
- 4) The officer will provide such person who tested 0.08, on behalf of the Registrar, with written notice of intent to suspend.
- 5) The officer will issue to the person, on behalf of the Registrar, a temporary driving permit unless:
  - a) Driving privileges of the person were suspended, revoked, or canceled at the time the person was arrested.
  - b) The person whose license was taken into custody was operating on an invalid license.
  - c) The person was not entitled to driving privileges at the time of the arrest for any other reason.

- d)** The person holds a license or permit granting driving privileges that was issued by another state or jurisdiction. (61.1.5)

**g.** Under 21 year olds

- 1)** When the arrested person is under 21 years of age and the breathalyzer test shows that the person has a blood alcohol level of 0.02 or higher, then the officer must:
  - a)** Immediately and on behalf of the Registrar take custody of the arrested person's driver's license or permit issued by the Commonwealth.
  - b)** Cut up and destroy his or her driver's license issued by the Commonwealth.
  - c)** Prepare Form D, the Police Notice of License Seizure. The officer will fax this form along with the Electronic O.U.I. Reporting Data Collection Form below to the ECC. The ECC will forward the forms to the Registry.
- 2)** The officer must set forth the following on the Electronic O.U.I. Reporting Data Collection Form (Form E for Commercial licenses):
  - a)** Grounds for the officer's belief that the arrested person has been operating a motor vehicle on a public way or variation while under the influence of an intoxicating liquor.
  - b)** The arrested person was under the age of 21 at the time of the arrest.
  - c)** The arrested person's blood alcohol level was 0.02 or higher.
  - d)** The person who administered the test was trained and certified.
  - e)** The officer performed the test according to regulations.
  - f)** The equipment was functioning properly.
- 3)** The officer will fax the Electronic O.U.I. Reporting Data Collection Form to the ECC along with the Police Notice of License Seizure. The ECC will fax the information to the Registry. The Registry will return the notice of intent to suspend and a temporary driving permit.
- 4)** The officer will provide such person under 21 years old who tested 0.02, on behalf of the Registrar, with written notice of intent to suspend.
- 5)** The officer will issue to the person, on behalf of the registrar, a temporary driving permit unless:
  - a)** Driving privileges of the person were suspended, revoked, or canceled at the time the person was arrested.

- b) The person whose license was taken into custody was operating on an invalid license.
- c) The person was not entitled to driving privileges at the time of the arrest for any other reason.
- d) The person holds a license or permit granting driving privileges that was issued by another state or jurisdiction.

**h. Right to Independent Blood Test**

A person arrested for driving under the influence has a right to an independent blood test pursuant to M.G.L. c. 263 § 5A.

- 1) The officer must inform the arrested person of his right to an independent blood test. If the arrested person has limited understanding of English, the officer must make a reasonable attempt to translate the information into the arrested person's native language. This duty is met by directing the person's attention to a printed notice of the right to an independent exam posted in the arrested person's native language.
- 2) If the individual requests an independent blood test, the officers must:
  - a) Facilitate a prompt bail hearing by calling the Bail Commissioner. The officer should record the time he calls the Commissioner.
  - b) Allow the individual access to a telephone. The officer may provide the individual access to the Phone Directory.
- 3) The operator must make all arrangements for the independent examination. The officer is under no obligation beyond those listed above to arrange for the test, to arrange for transportation, or to transport the arrested person to the test site.

**i. Drawing and Submitting Blood**

In a case where the operator is taken to a medical facility for treatment under M.G.L. c. 111 § 51:

- 1) The subject is deemed to have consented to the blood test pursuant to M.G.L. c. 90 § 24(1)(f)(1) unless the person is:
  - a) Hemophiliac.
  - b) Diabetic.
  - c) A person having a condition requiring anticoagulants.
- 2) If a person belongs to one of the exceptions listed above, the officer will use his or her discretion to either:

- a) Take the arrested person back to the station for a breathalyzer test; or
  - b) Have no result of blood alcohol or breath test.
- 3) If the person is not an exception and therefore consents to the blood test:
- a) The blood must be drawn by a medical doctor, a registered nurse, or a certified medical technician.
  - b) The blood must be drawn at the direction and in the presence of the police officer.
  - c) The officer must ask for two (2) tubes of blood containing a powdered anticoagulant (5-10 ml per tube).
  - d) The officer should tell the medical person that the sample is to be tested for alcohol so the area will be sterilized with a non alcohol solution.
  - e) The medical person or officer should refrigerate the samples until they can be delivered to the State Police Crime Lab to a certified analyst.
- 4) If the arrested person **refuses to submit** to the blood test:
- a) The officer must inform him that his license or permit to operate a motor vehicle will be suspended for at least a period of 120 days but not more than one year for such a refusal.
  - b) If the person still refuses to take the test after the warning, the police officer will:
    - 1) Immediately and on behalf of the Registrar take custody of the arrested person's driver's license or permit issued by the Commonwealth.
    - 2) Cut up and destroy his or her driver's license issued by the Commonwealth.
    - 3) Prepare Form D, the Police Notice of License Seizure. The officer will fax this form along with the Electronic O.U.I. Reporting Data Collection Form below to the ECC. The ECC will forward the forms to the Registry.
  - c) The officer before whom such refusal was made will immediately report such refusal on the Electronic O.U.I. Reporting Data Collection Form. (FORM F for commercial licenses). This report will:
    - 1) Set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on any such

public way or variation while under the influence of an intoxicating liquor. (61.1.11)

- Registry.
- 2) State that such person has refused to submit to such blood test or analysis when requested by such police officer to do so.
  - 3) Identify which police officer requested said blood test or analysis and a witness to said refusal.
- d) The officer will fax the Electronic O.U.I. Reporting Data Collection Form to the ECC along with the Police Notice of License Seizure. The ECC will fax the information to the Registry. The Registry will return the notice of intent to suspend and a temporary driving permit.
- e) The officer will provide such person who refused such test, on behalf of the Registrar, with written notice of intent to suspend.
- f) The officer will issue to the person, on behalf of the Registrar, a temporary driving permit unless:
- 1) Driving privileges of the person were suspended, revoked, or canceled at the time the person was arrested.
  - 2) The person whose license was taken into custody was operating on an invalid license.
  - 3) The person was not entitled to driving privileges at the time of the arrest for any other reason.
  - 4) The person holds a license or permit granting driving privileges that was issued by another state of jurisdiction.

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POLICE COMMISSIONER