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I N   S E N A T E

May 15, 2014

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Introduced by Sen. ROBACH -- read twice and ordered printed, and when printed to be committed to the Committee on Transportation

AN ACT to amend the vehicle and traffic law, in relation to saliva swabs and chemical tests in certain cases

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. Subdivisions 1, 2 and 3 of section 1194 of the vehicle and  
2 traffic law, as added by chapter 47 of the laws of 1988, paragraphs (a)  
3 and (b) of subdivision 2 as amended by chapter 196 of the laws of 1996,  
4 subparagraphs 1 and 2 of paragraph (d) of subdivision 2 as amended by  
5 chapter 732 of the laws of 2006 and item (iii) of clause c of subpara-  
6 graph 1 of paragraph (d) of subdivision 2 as amended by section 37 of  
7 part LL of chapter 56 of the laws of 2010, are amended to read as  
8 follows:

9     1. Arrest and field testing. (a) Arrest. Notwithstanding the  
10 provisions of section 140.10 of the criminal procedure law, a police  
11 officer may, without a warrant, arrest a person, in case of a violation  
12 of subdivision one of section eleven hundred ninety-two of this article,  
13 if such violation is coupled with an accident or collision in which such  
14 person is involved, which in fact has been committed, though not in the  
15 police officer's presence, when the officer has reasonable cause to  
16 believe that the violation was committed by such person.

17     (b) Field testing. Every person operating a motor vehicle which has  
18 been involved in an accident or which is operated in violation of any of  
19 the provisions of this chapter shall, at the request of a police offi-  
20 cer, submit to a breath test AND/OR SALIVA SWAB to be administered by  
21 the police officer. If EITHER such test indicates that such operator has  
22 consumed alcohol OR IS UNDER THE INFLUENCE OF A DRUG OR DRUGS, OR BOTH,  
23 the police officer may request such operator to submit to a chemical  
24 test in the manner set forth in subdivision two of this section.

25     2. Chemical tests. (a) When authorized. Any person who operates a  
26 motor vehicle in this state shall be deemed to have given consent to a  
27 chemical test of one or more of the following: breath, blood, urine, or  
28 saliva, for the purpose of determining the alcoholic and/or drug content

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

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1 of the blood provided that such test is administered by or at the direc-  
2 tion of a police officer with respect to a chemical test of breath,  
3 urine or saliva or, with respect to a chemical test of blood, at the  
4 direction of a police officer:

5 (1) having reasonable grounds to believe such person to have been  
6 operating in violation of any subdivision of section eleven hundred  
7 ninety-two of this article and within two hours after such person has  
8 been placed under arrest for any such violation; or having reasonable  
9 grounds to believe such person to have been operating in violation of  
10 section eleven hundred ninety-two-a of this article and within two hours  
11 after the stop of such person for any such violation,

12 (2) within two hours after a breath test OR SALIVA SWAB, as provided  
13 in paragraph (b) of subdivision one of this section, indicates [that]  
14 THE CONSUMPTION OF alcohol [has been consumed] OR DRUGS by such person  
15 and in accordance with the rules and regulations established by the  
16 police force of which the officer is a member;

17 (3) for the purposes of this paragraph, "reasonable grounds" to  
18 believe that a person has been operating a motor vehicle after having  
19 consumed alcohol in violation of section eleven hundred ninety-two-a of  
20 this article shall be determined by viewing the totality of circum-  
21 stances surrounding the incident which, when taken together, indicate  
22 that the operator was driving in violation of such subdivision. Such  
23 circumstances may include any visible or behavioral indication of alco-  
24 hol consumption by the operator, the existence of an open container  
25 containing or having contained an alcoholic beverage in or around the  
26 vehicle driven by the operator, or any other evidence surrounding the  
27 circumstances of the incident which indicates that the operator has been  
28 operating a motor vehicle after having consumed alcohol at the time of  
29 the incident; or

30 (4) notwithstanding any other provision of law to the contrary, no  
31 person under the age of twenty-one shall be arrested for an alleged  
32 violation of section eleven hundred ninety-two-a of this article.  
33 However, a person under the age of twenty-one for whom a chemical test  
34 is authorized pursuant to this paragraph may be temporarily detained by  
35 the police solely for the purpose of requesting or administering such  
36 chemical test whenever arrest without a warrant for a petty offense  
37 would be authorized in accordance with the provisions of section 140.10  
38 of the criminal procedure law or paragraph (a) of subdivision one of  
39 this section.

40 (b) Report of refusal TO SUBMIT TO A CHEMICAL TEST. (1) If: (A) such  
41 person having been placed under arrest; or (B) after a breath test indi-  
42 cates the presence of alcohol in the person's system; or (C) with regard  
43 to a person under the age of twenty-one, there are reasonable grounds to  
44 believe that such person has been operating a motor vehicle after having  
45 consumed alcohol in violation of section eleven hundred ninety-two-a of  
46 this article; and having thereafter been requested to submit to such  
47 chemical test and having been informed that the person's license or  
48 permit to drive and any non-resident operating privilege shall be imme-  
49 diately suspended and subsequently revoked, or, for operators under the  
50 age of twenty-one for whom there are reasonable grounds to believe that  
51 such operator has been operating a motor vehicle after having consumed  
52 alcohol in violation of section eleven hundred ninety-two-a of this  
53 article, shall be revoked for refusal to submit to such chemical test or  
54 any portion thereof, whether or not the person is found guilty of the  
55 charge for which such person is arrested or detained, refuses to submit  
56 to such chemical test or any portion thereof, unless a court order has

1 been granted pursuant to subdivision three of this section, the test  
2 shall not be given and a written report of such refusal shall be imme-  
3 diately made by the police officer before whom such refusal was made.  
4 Such report may be verified by having the report sworn to, or by affix-  
5 ing to such report a form notice that false statements made therein are  
6 punishable as a class A misdemeanor pursuant to section 210.45 of the  
7 penal law and such form notice together with the subscription of the  
8 deponent shall constitute a verification of the report.

9 (2) The report of the police officer shall set forth reasonable  
10 grounds to believe such arrested person or such detained person under  
11 the age of twenty-one had been driving in violation of any subdivision  
12 of section eleven hundred ninety-two or eleven hundred ninety-two-a of  
13 this article, that said person had refused to submit to such chemical  
14 test, and that no chemical test was administered pursuant to the  
15 requirements of subdivision three of this section. The report shall be  
16 presented to the court upon arraignment of an arrested person, provided,  
17 however, in the case of a person under the age of twenty-one, for whom a  
18 test was authorized pursuant to the provisions of subparagraph two or  
19 three of paragraph (a) of this subdivision, and who has not been placed  
20 under arrest for a violation of any of the provisions of section eleven  
21 hundred ninety-two of this article, such report shall be forwarded to  
22 the commissioner within forty-eight hours in a manner to be prescribed  
23 by the commissioner, and all subsequent proceedings with regard to  
24 refusal to submit to such chemical test by such person shall be as set  
25 forth in subdivision three of section eleven hundred ninety-four-a of  
26 this article.

27 (3) For persons placed under arrest for a violation of any subdivision  
28 of section eleven hundred ninety-two of this article, the license or  
29 permit to drive and any non-resident operating privilege shall, upon the  
30 basis of such written report, be temporarily suspended by the court  
31 without notice pending the determination of a hearing as provided in  
32 paragraph (c) of this subdivision. Copies of such report must be trans-  
33 mitted by the court to the commissioner and such transmittal may not be  
34 waived even with the consent of all the parties. Such report shall be  
35 forwarded to the commissioner within forty-eight hours of such arraign-  
36 ment.

37 (4) The court or the police officer, in the case of a person under the  
38 age of twenty-one alleged to be driving after having consumed alcohol,  
39 shall provide such person with a scheduled hearing date, a waiver form,  
40 and such other information as may be required by the commissioner. If a  
41 hearing, as provided for in paragraph (c) of this subdivision, or subdi-  
42 vision three of section eleven hundred ninety-four-a of this article, is  
43 waived by such person, the commissioner shall immediately revoke the  
44 license, permit, or non-resident operating privilege, as of the date of  
45 receipt of such waiver in accordance with the provisions of paragraph  
46 (d) of this subdivision.

47 (c) Hearings. Any person whose license or permit to drive or any non-  
48 resident driving privilege has been suspended pursuant to paragraph (b)  
49 of this subdivision is entitled to a hearing in accordance with a hear-  
50 ing schedule to be promulgated by the commissioner. If the department  
51 fails to provide for such hearing fifteen days after the date of the  
52 arraignment of the arrested person, the license, permit to drive or  
53 non-resident operating privilege of such person shall be reinstated  
54 pending a hearing pursuant to this section. The hearing shall be limited  
55 to the following issues: (1) did the police officer have reasonable  
56 grounds to believe that such person had been driving in violation of any

1 subdivision of section eleven hundred ninety-two of this article; (2)  
2 did the police officer make a lawful arrest of such person; (3) was such  
3 person given sufficient warning, in clear or unequivocal language, prior  
4 to such refusal that such refusal to submit to such chemical test or any  
5 portion thereof, would result in the immediate suspension and subsequent  
6 revocation of such person's license or operating privilege whether or  
7 not such person is found guilty of the charge for which the arrest was  
8 made; and (4) did such person refuse to submit to such chemical test or  
9 any portion thereof. If, after such hearing, the hearing officer, acting  
10 on behalf of the commissioner, finds on any one of said issues in the  
11 negative, the hearing officer shall immediately terminate any suspension  
12 arising from such refusal. If, after such hearing, the hearing officer,  
13 acting on behalf of the commissioner finds all of the issues in the  
14 affirmative, such officer shall immediately revoke the license or permit  
15 to drive or any non-resident operating privilege in accordance with the  
16 provisions of paragraph (d) of this subdivision. A person who has had a  
17 license or permit to drive or non-resident operating privilege suspended  
18 or revoked pursuant to this subdivision may appeal the findings of the  
19 hearing officer in accordance with the provisions of article three-A of  
20 this chapter. Any person may waive the right to a hearing under this  
21 section. Failure by such person to appear for the scheduled hearing  
22 shall constitute a waiver of such hearing, provided, however, that such  
23 person may petition the commissioner for a new hearing which shall be  
24 held as soon as practicable.

25 (d) Sanctions. (1) Revocations. a. Any license which has been revoked  
26 pursuant to paragraph (c) of this subdivision shall not be restored for  
27 at least one year after such revocation, nor thereafter, except in the  
28 discretion of the commissioner. However, no such license shall be  
29 restored for at least eighteen months after such revocation, nor there-  
30 after except in the discretion of the commissioner, in any case where  
31 the person has had a prior revocation resulting from refusal to submit  
32 to a chemical test, or has been convicted of or found to be in violation  
33 of any subdivision of section eleven hundred ninety-two or section elev-  
34 en hundred ninety-two-a of this article not arising out of the same  
35 incident, within the five years immediately preceding the date of such  
36 revocation; provided, however, a prior finding that a person under the  
37 age of twenty-one has refused to submit to a chemical test pursuant to  
38 subdivision three of section eleven hundred ninety-four-a of this arti-  
39 cle shall have the same effect as a prior finding of a refusal pursuant  
40 to this subdivision solely for the purpose of determining the length of  
41 any license suspension or revocation required to be imposed under any  
42 provision of this article, provided that the subsequent offense or  
43 refusal is committed or occurred prior to the expiration of the  
44 retention period for such prior refusal as set forth in paragraph (k) of  
45 subdivision one of section two hundred one of this chapter.

46 b. Any license which has been revoked pursuant to paragraph (c) of  
47 this subdivision or pursuant to subdivision three of section eleven  
48 hundred ninety-four-a of this article, where the holder was under the  
49 age of twenty-one years at the time of such refusal, shall not be  
50 restored for at least one year, nor thereafter, except in the discretion  
51 of the commissioner. Where such person under the age of twenty-one years  
52 has a prior finding, conviction or youthful offender adjudication  
53 resulting from a violation of section eleven hundred ninety-two or  
54 section eleven hundred ninety-two-a of this article, not arising from  
55 the same incident, such license shall not be restored for at least one  
56 year or until such person reaches the age of twenty-one years, whichever

1 is the greater period of time, nor thereafter, except in the discretion  
2 of the commissioner.

3 c. Any commercial driver's license which has been revoked pursuant to  
4 paragraph (c) of this subdivision based upon a finding of refusal to  
5 submit to a chemical test, where such finding occurs within or outside  
6 of this state, shall not be restored for at least eighteen months after  
7 such revocation, nor thereafter, except in the discretion of the commis-  
8 sioner, but shall not be restored for at least three years after such  
9 revocation, nor thereafter, except in the discretion of the commis-  
10 sioner, if the holder of such license was operating a commercial motor vehi-  
11 cle transporting hazardous materials at the time of such refusal. Howev-  
12 er, such person shall be permanently disqualified from operating a  
13 commercial motor vehicle in any case where the holder has a prior find-  
14 ing of refusal to submit to a chemical test pursuant to this section or  
15 has a prior conviction of any of the following offenses: any violation  
16 of section eleven hundred ninety-two of this article; any violation of  
17 subdivision one or two of section six hundred of this chapter; or has a  
18 prior conviction of any felony involving the use of a motor vehicle  
19 pursuant to paragraph (a) of subdivision one of section five hundred  
20 ten-a of this chapter. Provided that the commissioner may waive such  
21 permanent revocation after a period of ten years has expired from such  
22 revocation provided:

23 (i) that during such ten year period such person has not been found to  
24 have refused a chemical test pursuant to this section and has not been  
25 convicted of any one of the following offenses: any violation of section  
26 eleven hundred ninety-two of this article; refusal to submit to a chemi-  
27 cal test pursuant to this section; any violation of subdivision one or  
28 two of section six hundred of this chapter; or has a prior conviction of  
29 any felony involving the use of a motor vehicle pursuant to paragraph  
30 (a) of subdivision one of section five hundred ten-a of this chapter;

31 (ii) that such person provides acceptable documentation to the commis-  
32 sioner that such person is not in need of alcohol or drug treatment or  
33 has satisfactorily completed a prescribed course of such treatment; and

34 (iii) after such documentation is accepted, that such person is grant-  
35 ed a certificate of relief from disabilities or a certificate of good  
36 conduct pursuant to article twenty-three of the correction law by the  
37 court in which such person was last penalized.

38 d. Upon a third finding of refusal and/or conviction of any of the  
39 offenses which require a permanent commercial driver's license revoca-  
40 tion, such permanent revocation may not be waived by the commissioner  
41 under any circumstances.

42 (2) Civil penalties. Except as otherwise provided, any person whose  
43 license, permit to drive, or any non-resident operating privilege is  
44 revoked pursuant to the provisions of this section shall also be liable  
45 for a civil penalty in the amount of five hundred dollars except that if  
46 such revocation is a second or subsequent revocation pursuant to this  
47 section issued within a five year period, or such person has been  
48 convicted of a violation of any subdivision of section eleven hundred  
49 ninety-two of this article within the past five years not arising out of  
50 the same incident, the civil penalty shall be in the amount of seven  
51 hundred fifty dollars. Any person whose license is revoked pursuant to  
52 the provisions of this section based upon a finding of refusal to submit  
53 to a chemical test while operating a commercial motor vehicle shall also  
54 be liable for a civil penalty of five hundred fifty dollars except that  
55 if such person has previously been found to have refused a chemical test  
56 pursuant to this section while operating a commercial motor vehicle or

1 has a prior conviction of any of the following offenses while operating  
2 a commercial motor vehicle: any violation of section eleven hundred  
3 ninety-two of this article; any violation of subdivision two of section  
4 six hundred of this chapter; or has a prior conviction of any felony  
5 involving the use of a commercial motor vehicle pursuant to paragraph  
6 (a) of subdivision one of section five hundred ten-a of this chapter,  
7 then the civil penalty shall be seven hundred fifty dollars. No new  
8 driver's license or permit shall be issued, or non-resident operating  
9 privilege restored to such person unless such penalty has been paid. All  
10 penalties collected by the department pursuant to the provisions of this  
11 section shall be the property of the state and shall be paid into the  
12 general fund of the state treasury.

13 (3) Effect of rehabilitation program. No period of revocation arising  
14 out of this section may be set aside by the commissioner for the reason  
15 that such person was a participant in the alcohol and drug rehabili-  
16 tation program set forth in section eleven hundred ninety-six of this  
17 article.

18 (e) Regulations. The commissioner shall promulgate such rules and  
19 regulations as may be necessary to effectuate the provisions of subdivi-  
20 sions one and two of this section.

21 (f) Evidence. Evidence of a refusal to submit to such chemical test or  
22 any portion thereof shall be admissible in any trial, proceeding or  
23 hearing based upon a violation of the provisions of section eleven  
24 hundred ninety-two of this article but only upon a showing that the  
25 person was given sufficient warning, in clear and unequivocal language,  
26 of the effect of such refusal and that the person persisted in the  
27 refusal.

28 (g) Results. Upon the request of the person who was tested, the  
29 results of such test shall be made available to such person.

30 3. Compulsory chemical tests. (a) Court ordered chemical tests.  
31 Notwithstanding the provisions of subdivision two of this section, no  
32 person who operates a motor vehicle in this state may refuse to submit  
33 to a chemical test of one or more of the following: breath, blood, urine  
34 or saliva, for the purpose of determining the alcoholic and/or drug  
35 content of the blood when a court order for such chemical test has been  
36 issued in accordance with the provisions of this subdivision.

37 (b) When authorized. Upon refusal by any person to submit to a chemi-  
38 cal test or any portion thereof as described above, the test shall not  
39 be given unless a police officer or a district attorney, as defined in  
40 subdivision thirty-two of section 1.20 of the criminal procedure law,  
41 requests and obtains a court order to compel a person to submit to a  
42 chemical test to determine the alcoholic or drug content of the person's  
43 blood upon a finding of reasonable cause to believe that:

44 (1) such person was the operator of a motor vehicle and in the course  
45 of such operation a person other than the operator was killed or  
46 suffered serious physical injury as defined in section 10.00 of the  
47 penal law; and

48 (2) a. either such person operated the vehicle in violation of any  
49 subdivision of section eleven hundred ninety-two of this article, or

50 b. a breath test OR SALIVA SWAB administered by a police officer in  
51 accordance with paragraph (b) of subdivision one of this section indi-  
52 cates [that] THE CONSUMPTION OF alcohol [has been consumed] OR DRUGS by  
53 such person; OR A POLICE OFFICER TRAINED AND CERTIFIED AS A DRUG RECOG-  
54 NITION EXPERT OR A POLICE OFFICER WHO HAS COMPLETED TRAINING PURSUANT TO  
55 THE FEDERAL ADVANCED ROADSIDE IMPAIRED DRIVING ENFORCEMENT PROGRAM HAS

1 REASON TO BELIEVE THAT SUCH PERSON IS UNDER THE INFLUENCE OF DRUGS OR  
2 THE COMBINED INFLUENCE OF DRUGS AND ALCOHOL; and

3 (3) such person has been placed under lawful arrest; and

4 (4) such person has refused to submit to a chemical test or any  
5 portion thereof, requested in accordance with the provisions of para-  
6 graph (a) of subdivision two of this section or is unable to give  
7 consent to such a test.

8 (c) Reasonable cause; definition. For the purpose of this subdivision  
9 "reasonable cause" shall be determined by viewing the totality of  
10 circumstances surrounding the incident which, when taken together, indi-  
11 cate that the operator was driving in violation of section eleven  
12 hundred ninety-two of this article. Such circumstances may include, but  
13 are not limited to: evidence that the operator was operating a motor  
14 vehicle in violation of any provision of this article or any other  
15 moving violation at the time of the incident; any visible indication of  
16 alcohol or drug consumption or impairment by the operator; the existence  
17 of DRUGS OR DRUG PARAPHERNALIA; OR an open container containing an alco-  
18 holic beverage in or around the vehicle driven by the operator; any  
19 other evidence surrounding the circumstances of the incident which indi-  
20 cates that the operator has been operating a motor vehicle while  
21 impaired by the consumption of alcohol or drugs or intoxicated at the  
22 time of the incident.

23 (d) Court order; procedure. (1) An application for a court order to  
24 compel submission to a chemical test or any portion thereof, may be made  
25 to any supreme court justice, county court judge or district court judge  
26 in the judicial district in which the incident occurred, or if the inci-  
27 dent occurred in the city of New York before any supreme court justice  
28 or judge of the criminal court of the city of New York. Such application  
29 may be communicated by telephone, radio or other means of electronic  
30 communication, or in person.

31 (2) The applicant must provide identification by name and title and  
32 must state the purpose of the communication. Upon being advised that an  
33 application for a court order to compel submission to a chemical test is  
34 being made, the court shall place under oath the applicant and any other  
35 person providing information in support of the application as provided  
36 in subparagraph three of this paragraph. After being sworn the applicant  
37 must state that the person from whom the chemical test was requested was  
38 the operator of a motor vehicle and in the course of such operation a  
39 person, other than the operator, has been killed or seriously injured  
40 and, based upon the totality of circumstances, there is reasonable cause  
41 to believe that such person was operating a motor vehicle in violation  
42 of any subdivision of section eleven hundred ninety-two of this article  
43 and, after being placed under lawful arrest such person refused to  
44 submit to a chemical test or any portion thereof, in accordance with the  
45 provisions of this section or is unable to give consent to such a test  
46 or any portion thereof. The applicant must make specific allegations of  
47 fact to support such statement. Any other person properly identified,  
48 may present sworn allegations of fact in support of the applicant's  
49 statement.

50 (3) Upon being advised that an oral application for a court order to  
51 compel a person to submit to a chemical test is being made, a judge or  
52 justice shall place under oath the applicant and any other person  
53 providing information in support of the application. Such oath or oaths  
54 and all of the remaining communication must be recorded, either by means  
55 of a voice recording device or verbatim stenographic or verbatim long-  
56 hand notes. If a voice recording device is used or a stenographic record

1 made, the judge must have the record transcribed, certify to the accura-  
2 cy of the transcription and file the original record and transcription  
3 with the court within seventy-two hours of the issuance of the court  
4 order. If the longhand notes are taken, the judge shall subscribe a copy  
5 and file it with the court within twenty-four hours of the issuance of  
6 the order.

7 (4) If the court is satisfied that the requirements for the issuance  
8 of a court order pursuant to the provisions of paragraph (b) of this  
9 subdivision have been met, it may grant the application and issue an  
10 order requiring the accused to submit to a chemical test to determine  
11 the alcoholic and/or drug content of his blood and ordering the with-  
12 drawal of a blood sample in accordance with the provisions of paragraph  
13 (a) of subdivision four of this section. When a judge or justice deter-  
14 mines to issue an order to compel submission to a chemical test based on  
15 an oral application, the applicant therefor shall prepare the order in  
16 accordance with the instructions of the judge or justice. In all cases  
17 the order shall include the name of the issuing judge or justice, the  
18 name of the applicant, and the date and time it was issued. It must be  
19 signed by the judge or justice if issued in person, or by the applicant  
20 if issued orally.

21 (5) Any false statement by an applicant or any other person in support  
22 of an application for a court order shall subject such person to the  
23 offenses for perjury set forth in article two hundred ten of the penal  
24 law.

25 (6) The chief administrator of the courts shall establish a schedule  
26 to provide that a sufficient number of judges or justices will be avail-  
27 able in each judicial district to hear oral applications for court  
28 orders as permitted by this section.

29 (e) Administration of compulsory chemical test. An order issued pursu-  
30 ant to the provisions of this subdivision shall require that a chemical  
31 test to determine the alcoholic and/or drug content of the operator's  
32 blood must be administered. The provisions of paragraphs (a), (b) and  
33 (c) of subdivision four of this section shall be applicable to any chem-  
34 ical test administered pursuant to this section.

35 S 2. This act shall take effect on the first of November next succeed-  
36 ing the date on which it shall have become a law.