

# STATE OF NEW YORK

---

3955

2017-2018 Regular Sessions

## IN ASSEMBLY

January 30, 2017

---

Introduced by M. of A. ORTIZ -- read once and referred to the Committee on Transportation

AN ACT to amend the vehicle and traffic law and the executive law, in relation to the field testing of mobile telephones and portable electronic devices after a motor vehicle accident or collision involving damage to real or personal property, personal injury or death

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Legislative intent. The legislature hereby finds that the  
2 use of mobile telephones and/or personal electronic devices has dras-  
3 tically increased the prevalence of distracted driving. This destructive  
4 behavior endangers the lives of every driver and passenger traveling on  
5 New York state roadways. In 2001, this legislature enacted legislation  
6 prohibiting the use of mobile telephones while driving, and in 2009  
7 updated the law to include all portable electronic devices. The execu-  
8 tive branch initiated a public campaign against cell phone use while  
9 driving, and has even established "text stops" along all major highways.  
10 While these efforts have brought much needed attention to the dangers of  
11 distracted driving, reports indicate that 67 percent of drivers admit to  
12 continued use of their cell phones while driving despite knowledge of  
13 the inherent danger to themselves and others on the road. A 10 year  
14 trend of declining collisions and casualties was reversed this year as  
15 crashes are up 14 percent, and fatalities increased 8 percent, suggest-  
16 ing that the problem has not only gotten worse, but is still greatly  
17 misunderstood.

18 Furthermore, law enforcement has a difficult time enforcing these  
19 public safety laws, especially after an accident where it is impossible  
20 to discern whether the operator of a motor vehicle was in fact using his  
21 or her cell phone immediately prior to or at the time of the collision.

22 Empowering our law enforcement with technology, which is able to imme-  
23 diately determine cell phone usage without an inquiry into the content,

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

LBD02344-01-7

1 will allow enforcement of these laws after an accident while still  
2 protecting essential privacy rights. Therefore, the legislature finds  
3 that while technology has created this grave danger, it also has the  
4 capacity to aid law enforcement in tackling and eradicating distracted  
5 driving caused by mobile telephones and personal electronic devices.

6 The legislature further finds that a driver's license is a privilege  
7 granted by the state, and maintaining such privilege requires continued  
8 compliance with established conditions enumerated in law. One such  
9 condition is implied consent, an accepted mechanism in combating driving  
10 while under the influence of alcohol. Studies have concluded that text-  
11 ing while driving impairs a driver to the level of .08 blood alcohol  
12 level. Therefore, it is in the state's interest to treat this impairment  
13 with a similar methodology to that of drunk driving. The state's  
14 invested interest in promoting public safety and preventing senseless  
15 loss of life justifies the creation of Evan's law.

16 § 2. Short title. This act shall be known and may be cited as "Evan's  
17 law".

18 § 3. Section 215 of the vehicle and traffic law is amended by adding  
19 two new subdivisions (d) and (e) to read as follows:

20 (d) The commissioner shall, jointly with the commissioner of criminal  
21 justice services, promulgate rules and regulations, and take any other  
22 action necessary to implement the provisions of section twelve hundred  
23 twenty-five-e of this chapter, relating to field testing of mobile tele-  
24 phones and portable electronic devices. Such actions shall include the  
25 testing and determination of the reliability and accuracy of electronic  
26 scanning devices used for such field testing. The commissioner and  
27 commissioner of criminal justice services shall approve electronic scan-  
28 ning devices which are reliable and accurate for the purpose of conduct-  
29 ing field testing.

30 (e) The commissioner shall conduct a public education campaign relat-  
31 ing to the field testing of mobile telephones and portable electronic  
32 devices, and the implied consent to such testing of any person operating  
33 a motor vehicle in this state. Such campaign shall include information  
34 pamphlets provided with each application for a learner's permit or driv-  
35 er's license, and each renewal thereof.

36 § 4. Paragraph (h) of subdivision 2 of section 503 of the vehicle and  
37 traffic law, as amended by section 1 of part PP of chapter 59 of the  
38 laws of 2009, is amended to read as follows:

39 (h) An applicant whose driver's license has been revoked pursuant to  
40 (i) section five hundred ten of this title, (ii) section eleven hundred  
41 ninety-three of this chapter, ~~and~~ (iii) section eleven hundred nine-  
42 ty-four of this chapter, and (iv) section twelve hundred twenty-five-e  
43 of this chapter, shall, upon application for issuance of a driver's  
44 license, pay to the commissioner a fee of one hundred dollars. When the  
45 basis for the revocation is a finding of driving after having consumed  
46 alcohol pursuant to the provisions of section eleven hundred  
47 ninety-two-a of this chapter, the fee to be paid to the commissioner  
48 shall be one hundred dollars. Such fee is not refundable and shall not  
49 be returned to the applicant regardless of the action the commissioner  
50 may take on such person's application for reinstatement of such driving  
51 license. Such fee shall be in addition to any other fees presently  
52 levied but shall not apply to an applicant whose driver's license was  
53 revoked for failure to pass a reexamination or to an applicant who has  
54 been issued a conditional or restricted use license under the provisions  
55 of article twenty-one-A or thirty-one of this chapter.

§ 5. Subparagraph (iv) of paragraph (a) of subdivision 2 of section 511 of the vehicle and traffic law, as amended by chapter 607 of the laws of 1993, is amended and a new paragraph (v) is added to read as follows:

(iv) such person has in effect three or more suspensions, imposed on at least three separate dates, for failure to answer, appear or pay a fine, pursuant to subdivision three of section two hundred twenty-six or subdivision four-a of section five hundred ten of this chapter[-]; or

(v) the suspension or revocation is based upon refusal to surrender a mobile telephone or portable electronic device for field testing pursuant to section twelve hundred twenty-five-e of this chapter.

§ 6. The vehicle and traffic law is amended by adding a new section 1225-e to read as follows:

§ 1225-e. Field testing of mobile telephones and portable electronic devices. 1. For the purposes of this section, the following terms shall have the following meanings:

(a) "Field testing" shall mean the use of an electronic scanning device, approved and utilized in accordance with rules jointly promulgated by the commissioner and the commissioner of criminal justice services, to determine whether or not the operator of a motor vehicle was using a mobile telephone or a portable electronic device in violation of section twelve hundred twenty-five-c or twelve hundred twenty-five-d of this article. Provided, that such use of an electronic scanning device shall be limited to determining whether the operator of a motor vehicle was using a mobile telephone or portable electronic device in violation of either such section at or near the time of the accident or collision which provides the grounds for such testing. Furthermore, no such electronic scan shall include the content or origin of any communication or game conducted, or image or electronic data viewed, on a mobile telephone or portable electronic device.

(b) "Mobile telephone" shall mean a mobile telephone as defined in paragraph (a) of subdivision one for section twelve hundred twenty-five-c of this article.

(c) "Portable electronic device" shall mean a portable electronic device as defined in paragraph (a) of subdivision two of section twelve hundred twenty-five-d of this article.

(d) "Using" shall mean:

(1) for the purposes of mobile telephones, using as defined in paragraph (c) of subdivision one of section twelve hundred twenty-five-c of this article; and

(2) for the purposes of portable electronic devices, using as defined in paragraph (b) of subdivision two of section twelve hundred twenty-five-d of this article.

2. Every person operating a motor vehicle which has been involved in an accident or collision involving damage to real or personal property, personal injury or death, and who has in his possession at or near the time of such accident or collision, a mobile telephone or personal electronic device, shall at the request of a police officer, surrender his or her mobile telephone and/or portable electronic device to the police officer solely for the purpose of field testing such mobile telephone and/or portable electronic device. If such field testing determines that the operator of the motor vehicle was using his or her mobile telephone or portable electronic device in violation of section twelve hundred twenty-five-c or twelve hundred twenty-five-d of this article, the results of such testing shall constitute evidence of any such violation.

1     3. (a) Any person who operates a motor vehicle in this state shall be  
2 deemed to have given consent to field testing of his or her mobile tele-  
3 phone and/or portable electronic device for the purpose of determining  
4 the use thereof while operating a motor vehicle provided that such test-  
5 ing is conducted by or at the direction of a police officer, after such  
6 person has operated a motor vehicle involved in an accident or collision  
7 involving damage to real or personal property, personal injury or death.

8     (b)(1) If a person operating a motor vehicle involved in an accident  
9 or collision involving damage to real or personal property, personal  
10 injury or death has in his or her possession a mobile telephone or port-  
11 able electronic device, having thereafter been requested to surrender  
12 such mobile telephone and/or portable electronic device for field test-  
13 ing, and having been informed that the person's license or permit to  
14 drive and any non-resident operating privilege shall be immediately  
15 suspended and subsequently revoked, shall be revoked for refusal to  
16 surrender his or her mobile telephone and/or portable electronic device  
17 solely for the purpose of field testing, whether or not the person is  
18 found guilty of a violation of section twelve hundred twenty-five-c or  
19 twelve hundred twenty-five-d of this article, refuses to surrender his  
20 or her mobile telephone or portable electronic device solely for the  
21 purpose of field testing, unless a court order has been granted pursuant  
22 to subdivision four of this section, field testing shall not be  
23 conducted and a written report of such refusal shall be immediately made  
24 by the police officer before whom such refusal was made. Such report may  
25 be verified by having the report sworn to, or by affixing to such report  
26 a form notice that false statements made therein are punishable as a  
27 class A misdemeanor pursuant to section 210.45 of the penal law and such  
28 form notice together with the subscription of the deponent shall consti-  
29 tute a verification of the report.

30     (2) The report of the police officer shall set forth the grounds to  
31 believe that the person operated a motor vehicle involved in an accident  
32 or collision involving damage to real or personal property, personal  
33 injury or death while in possession of a mobile telephone or portable  
34 electronic device, that said person had refused to surrender his or her  
35 mobile telephone or portable electronic device for field testing, and  
36 that no field test was administered. The report shall be transmitted to  
37 the commissioner by the police officer within forty-eight hours of the  
38 refusal.

39     (3) For persons charged with a violation of section twelve hundred  
40 twenty-five-c or twelve hundred twenty-five-d of this article, the  
41 license or permit to drive and any non-resident operating privilege  
42 shall, upon the basis of such written report, be temporarily suspended  
43 by the court without notice pending the determination of a hearing as  
44 provided in paragraph (c) of this subdivision. Copies of such report  
45 must be transmitted by the court to the commissioner and such transmit-  
46 tal may not be waived even with the consent of all the parties. Such  
47 report shall be forwarded to the commissioner within forty-eight hours  
48 of such filing of charges.

49     (4) The court or the commissioner shall provide such person with a  
50 scheduled hearing date, a waiver form and such other information as may  
51 be required by the commissioner. If a hearing, as provided in paragraph  
52 (c) of this subdivision, is waived by such person, the commissioner  
53 shall immediately revoke the license, permit or non-resident operating  
54 privilege, as of the date of receipt of such waiver in accordance with  
55 paragraph (d) of this subdivision.

1     (c) Any person whose license or permit to drive or any non-resident  
2 operating privilege has been suspended pursuant to paragraph (b) of this  
3 subdivision is entitled to a hearing in accordance with a hearing sched-  
4 ule to be promulgated by the commissioner. If the department fails to  
5 provide for such hearing fifteen days after the receipt of a report of a  
6 refusal, the license, permit to drive or non-resident operating privi-  
7 lege of such person shall be reinstated pending a hearing pursuant to  
8 this section. The hearing shall be limited to the following issues: (1)  
9 did such person operate a motor vehicle involved in an accident or  
10 collision involving damage to real or personal property, personal injury  
11 or death; (2) did such person possess a mobile telephone or portable  
12 electronic device at or near the time of such accident or collision; (3)  
13 was such person given sufficient warning, in clear or unequivocal  
14 language, prior to such refusal that such refusal to surrender his or  
15 her mobile telephone and/or portable electronic device for field testing  
16 would result in the immediate suspension and subsequent revocation of  
17 such person's license or operating privilege; and (4) did such person  
18 refuse to surrender his or her mobile telephone and/or portable elec-  
19 tronic device solely for the purpose of field testing. If, after such  
20 hearing, the hearing officer, acting on behalf of the commissioner,  
21 finds on any one of such issues in the negative, the hearing officer  
22 shall immediately terminate any suspension arising from such refusal.  
23 If, after such hearing, the hearing officer, acting on behalf of the  
24 commissioner finds all of the issues in the affirmative, such officer  
25 shall immediately revoke the license or permit to drive or any non-resi-  
26 dent operating privilege in accordance with paragraph (d) of this subdivi-  
27 sion. A person who has had a license or permit to drive or non-resi-  
28 dent operating privilege suspended or revoked pursuant to this  
29 subdivision may appeal the findings of the hearing officer in accordance  
30 with article three-A of this chapter. Any person may waive the right to  
31 a hearing under this section. Failure by such person to appear for the  
32 scheduled hearing shall constitute a waiver of such hearing; provided,  
33 however, that such person may petition the commissioner for a new hear-  
34 ing which shall be held as soon as practicable.

35     (d) (1) Any license which has been revoked pursuant to paragraph (c)  
36 of this subdivision shall not be restored for at least one year after  
37 such revocation, nor thereafter, except in the discretion of the commis-  
38 sioner. However, no such license shall be restored for at least eighteen  
39 months after such revocation, nor thereafter except in the discretion of  
40 the commissioner, in any case where the person has had a prior revoca-  
41 tion resulting from refusal to surrender his or her mobile telephone or  
42 portable electronic device for field testing within five years imme-  
43 diately preceding the date of such revocation.

44     (2) Except as otherwise provided, any person whose license, permit to  
45 drive or any non-resident operating privilege is revoked pursuant to the  
46 provisions of this section shall also be liable for a civil penalty in  
47 the amount of five hundred dollars, except that if such revocation is a  
48 second or subsequent revocation pursuant to this section issued within a  
49 five year period, the civil penalty shall be in the amount of seven  
50 hundred fifty dollars. No new driver's license or permit shall be  
51 issued, or non-resident operating privilege restored to such person  
52 unless such penalty has been paid. All penalties collected by the  
53 department pursuant to the provisions of this section shall be the prop-  
54 erty of the state and shall be paid into the general fund of the state  
55 treasury.



1 (e) The commissioner shall promulgate such rules and regulations as  
2 may be necessary to effectuate the provisions of this section.

3 (f) Evidence of a refusal to surrender a mobile telephone or portable  
4 electronic device for field testing shall be admissible in any trial,  
5 proceeding or hearing based on a violation of the provisions of section  
6 twelve hundred twenty-five-c or twelve hundred twenty-five-d of this  
7 article but only upon a showing that the person was given sufficient  
8 warning, in clear and unequivocal language, of the effect of such  
9 refusal and that the person persisted in the refusal.

10 (g) Upon the request of the person who surrendered his or her mobile  
11 telephone and/or portable electronic device for field testing the  
12 results of such testing shall be made available to such person.

13 4. (a) Notwithstanding the provisions of subdivision three of this  
14 section, no person who operates a motor vehicle in this state while  
15 possessing a mobile telephone or portable electronic device may refuse  
16 to surrender such mobile telephone or portable electronic device solely  
17 for the purpose of field testing when a court order for such testing has  
18 been issued in accordance with the provisions of this subdivision.

19 (b) Upon refusal by any person to surrender his or her mobile tele-  
20 phone and/or portable electronic device for the purpose of field test-  
21 ing, the testing shall not be conducted unless a police officer or a  
22 district attorney, as defined in subdivision thirty-two of section 1.20  
23 of the criminal procedure law, requests and obtains a court order to  
24 compel a person to surrender his or her mobile telephone or portable  
25 electronic device for field testing upon proof that such person was the  
26 operator of a motor vehicle and in the course of such operation, he or  
27 she caused serious physical injury, as defined in subdivision ten of  
28 section 10.00 of the penal law, to or the death of another person.

29 (c)(1) An application for a court order to compel surrender of a  
30 mobile telephone or portable electronic device for field testing, may be  
31 made to any supreme court justice, county court judge or district court  
32 judge in the judicial district in which the incident occurred, or if the  
33 incident occurred in the city of New York before any supreme court  
34 justice or judge of the criminal court of the city of New York. Such  
35 application may be communicated by telephone, radio or other means of  
36 electronic communication, or in person.

37 (2) The applicant must provide identification by name and title, and  
38 must state the purpose of the communication. Upon being advised that an  
39 application for a court order to compel surrender of a mobile telephone  
40 and/or portable electronic device solely for the purpose of field test-  
41 ing is being made, the court shall place under oath the applicant and  
42 any other person providing information in support of the application as  
43 provided in subparagraph three of this paragraph. After being sworn the  
44 applicant must state that the person from whom the surrender of a mobile  
45 telephone or portable electronic device was requested was the operator  
46 of a motor vehicle and in the course of such operation, he or she caused  
47 serious physical injury to or the death of another person, and such  
48 person refused to surrender his or her mobile telephone or portable  
49 electronic device for field testing. The applicant must make specific  
50 allegations of fact to support such statement. Any person properly iden-  
51 tified, may present sworn allegations of fact in support of the appli-  
52 cant's statement.

53 (3) Upon being advised that an oral application for a court order to  
54 compel a person to surrender his or her mobile telephone or portable  
55 electronic device for field testing is being made, a judge or justice  
56 shall place under oath the applicant and any other person providing

1 information in support of the application. Such oath or oaths and all of  
2 the remaining communication must be recorded, either by means of a voice  
3 recording device or a stenographic record made, the judge must have the  
4 record transcribed, certify to the accuracy of the transcription and  
5 file the original record and transcription with the court within seven-  
6 ty-two hours of the issuance of the court order. If the longhand notes  
7 are taken, the judge shall subscribe a copy and file it with the court  
8 within twenty-four hours of the issuance of the order.

9 (4) If the court is satisfied that the requirements for the issuance  
10 of a court order pursuant to the provisions of paragraph (b) of this  
11 subdivision have been met, it may grant the application and issue an  
12 order requiring the person to surrender his or her mobile telephone or  
13 portable electronic device for the purpose of field testing. When a  
14 judge or justice determines to issue an order to compel surrender of a  
15 mobile telephone or portable electronic device for the purpose of field  
16 testing based on an oral application, the applicant therefor shall  
17 prepare the order in accordance with the instructions of the judge or  
18 justice. In all cases the order shall include the name of the issuing  
19 judge or justice, the name of the applicant, and the date and time it  
20 was issued. It must be signed by the judge or justice if issued in  
21 person, or by the applicant if issued orally.

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

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

30 § 7. Section 837 of the executive law is amended by adding a new  
31 subdivision 21 to read as follows:

32 21. Acting by and through the commissioner, to, jointly with the  
33 commissioner of motor vehicles, promulgate rules and regulations, and  
34 take any other action necessary to implement the provisions of section  
35 twelve hundred twenty-five-e of the vehicle and traffic law, relating to  
36 field testing of mobile telephones and portable electronic devices. Such  
37 actions shall include the testing and determination of the reliability  
38 and accuracy of electronic scanning devices used for such field testing.  
39 The commissioner and commissioner of motor vehicles shall approve elec-  
40 tronic scanning devices which are reliable and accurate for the purpose  
41 of conducting field testing.

42 § 8. This act shall take effect immediately, except that sections  
43 four, five and six of this act shall take effect two years after this  
44 act shall have become a law.