

STATE OF NEW YORK

3955--A

2017-2018 Regular Sessions

IN ASSEMBLY

January 30, 2017

Introduced by M. of A. ORTIZ, MAYER, BUCHWALD, BYRNE, PICHARDO, QUART, SEPULVEDA, D'URSO -- Multi-Sponsored by -- M. of A. McDONOUGH -- read once and referred to the Committee on Transportation -- recommitted to the Committee on Transportation in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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

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

LBD02344-03-8

1 to discern whether the operator of a motor vehicle was in fact using his
2 or her cell phone immediately prior to or at the time of the collision.

3 Empowering our law enforcement with technology, which is able to imme-
4 diately determine cell phone usage without an inquiry into the content,
5 will allow enforcement of these laws after an accident while still
6 protecting essential privacy rights. Therefore, the legislature finds
7 that while technology has created this grave danger, it also has the
8 capacity to aid law enforcement in tackling and eradicating distracted
9 driving caused by mobile telephones and personal electronic devices.

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

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

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

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

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

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

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

1 revoked for failure to pass a reexamination or to an applicant who has
2 been issued a conditional or restricted use license under the provisions
3 of article twenty-one-A or thirty-one of this chapter.

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

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

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

15 § 6. The vehicle and traffic law is amended by adding a new section
16 1225-e to read as follows:

17 § 1225-e. Field testing of mobile telephones and portable electronic
18 devices. 1. For the purposes of this section, the following terms shall
19 have the following meanings:

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

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

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

40 (d) "Using" shall mean:

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

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

47 2. Every person operating a motor vehicle which has been involved in
48 an accident or collision involving damage to real or personal property,
49 personal injury or death, and who has in his possession at or near the
50 time of such accident or collision, a mobile telephone or personal elec-
51 tronic device, shall at the request of a police officer, surrender his
52 or her mobile telephone and/or portable electronic device to the police
53 officer solely for the purpose of field testing such mobile telephone
54 and/or portable electronic device. If such field testing determines
55 that the operator of the motor vehicle was using his or her mobile tele-
56 phone or portable electronic device in violation of section twelve

1 hundred twenty-five-c or twelve hundred twenty-five-d of this article,
2 the results of such testing shall constitute evidence of any such
3 violation.

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

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

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

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

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

1 privilege, as of the date of receipt of such waiver in accordance with
2 paragraph (d) of this subdivision.

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

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

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

erty of the state and shall be paid into the general fund of the state treasury.

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

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

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

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

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

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

(2) The applicant must provide identification by name and title, and must state the purpose of the communication. Upon being advised that an application for a court order to compel surrender of a mobile telephone and/or portable electronic device solely for the purpose of field testing is being made, the court shall place under oath the applicant and any other person providing information in support of the application as provided in subparagraph three of this paragraph. After being sworn the applicant must state that the person from whom the surrender of a mobile telephone or portable electronic device was requested was the operator of a motor vehicle and in the course of such operation, he or she caused serious physical injury to or the death of another person, and such person refused to surrender his or her mobile telephone or portable electronic device for field testing. The applicant must make specific allegations of fact to support such statement. Any person properly identified, may present sworn allegations of fact in support of the applicant's statement.

(3) Upon being advised that an oral application for a court order to compel a person to surrender his or her mobile telephone or portable

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

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

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

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

32 § 7. Section 837 of the executive law is amended by adding a new
33 subdivision 22 to read as follows:

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

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