

5345

2013-2014 Regular Sessions

I N S E N A T E

May 16, 2013

Introduced by Sen. FUSCHILLO -- 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.

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

LBD10975-01-3

1 2. Chemical tests. (a) When authorized. Any person who operates a
2 motor vehicle in this state shall be deemed to have given consent to a
3 chemical test of one or more of the following: breath, blood, urine, or
4 saliva, for the purpose of determining the alcoholic and/or drug content
5 of the blood provided that such test is administered by or at the direc-
6 tion of a police officer with respect to a chemical test of breath,
7 urine or saliva or, with respect to a chemical test of blood, at the
8 direction of a police officer:

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

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

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

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

44 (b) Report of refusal TO SUBMIT TO A CHEMICAL TEST. (1) If: (A) such
45 person having been placed under arrest; or (B) after a breath test indi-
46 cates the presence of alcohol in the person's system; or (C) with regard
47 to a person under the age of twenty-one, there are reasonable grounds to
48 believe that such person has been operating a motor vehicle after having
49 consumed alcohol in violation of section eleven hundred ninety-two-a of
50 this article; and having thereafter been requested to submit to such
51 chemical test and having been informed that the person's license or
52 permit to drive and any non-resident operating privilege shall be imme-
53 diately suspended and subsequently revoked, or, for operators under the
54 age of twenty-one for whom there are reasonable grounds to believe that
55 such operator has been operating a motor vehicle after having consumed
56 alcohol in violation of section eleven hundred ninety-two-a of this

1 article, shall be revoked for refusal to submit to such chemical test or
2 any portion thereof, whether or not the person is found guilty of the
3 charge for which such person is arrested or detained, refuses to submit
4 to such chemical test or any portion thereof, unless a court order has
5 been granted pursuant to subdivision three of this section, the test
6 shall not be given and a written report of such refusal shall be imme-
7 diately made by the police officer before whom such refusal was made.
8 Such report may be verified by having the report sworn to, or by affix-
9 ing to such report a form notice that false statements made therein are
10 punishable as a class A misdemeanor pursuant to section 210.45 of the
11 penal law and such form notice together with the subscription of the
12 deponent shall constitute a verification of the report.

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

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

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

51 (c) Hearings. Any person whose license or permit to drive or any non-
52 resident driving privilege has been suspended pursuant to paragraph (b)
53 of this subdivision is entitled to a hearing in accordance with a hear-
54 ing schedule to be promulgated by the commissioner. If the department
55 fails to provide for such hearing fifteen days after the date of the
56 arraignment of the arrested person, the license, permit to drive or

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

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

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

1 resulting from a violation of section eleven hundred ninety-two or
2 section eleven hundred ninety-two-a of this article, not arising from
3 the same incident, such license shall not be restored for at least one
4 year or until such person reaches the age of twenty-one years, whichever
5 is the greater period of time, nor thereafter, except in the discretion
6 of the commissioner.

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

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

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

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

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

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

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

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

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

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

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

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

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

48 (1) such person was the operator of a motor vehicle and in the course
49 of such operation a person other than the operator was killed or
50 suffered serious physical injury as defined in section 10.00 of the
51 penal law; and

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

54 b. a breath test OR SALIVA SWAB administered by a police officer in
55 accordance with paragraph (b) of subdivision one of this section indi-
56 cates [that] THE CONSUMPTION OF alcohol [has been consumed] OR DRUGS by

1 such person; OR A POLICE OFFICER TRAINED AND CERTIFIED AS A DRUG RECOG-
2 NITION EXPERT OR A POLICE OFFICER TRAINED AND CERTIFIED PURSUANT TO THE
3 FEDERAL ADVANCED ROADSIDE IMPAIRED DRIVING ENFORCEMENT PROGRAM HAS
4 REASON TO BELIEVE THAT SUCH PERSON IS UNDER THE INFLUENCE OF DRUGS OR
5 THE COMBINED INFLUENCE OF DRUGS AND ALCOHOL; and

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

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

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

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

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

53 (3) Upon being advised that an oral application for a court order to
54 compel a person to submit to a chemical test is being made, a judge or
55 justice shall place under oath the applicant and any other person
56 providing information in support of the application. Such oath or oaths

1 and all of the remaining communication must be recorded, either by means
2 of a voice recording device or verbatim stenographic or verbatim long-
3 hand notes. If a voice recording device is used or a stenographic record
4 made, the judge must have the record transcribed, certify to the accura-
5 cy of the transcription and file the original record and transcription
6 with the court within seventy-two hours of the issuance of the court
7 order. If the longhand notes are taken, the judge shall subscribe a copy
8 and file it with the court within twenty-four hours of the issuance of
9 the order.

10 (4) If the court is satisfied that the requirements for the issuance
11 of a court order pursuant to the provisions of paragraph (b) of this
12 subdivision have been met, it may grant the application and issue an
13 order requiring the accused to submit to a chemical test to determine
14 the alcoholic and/or drug content of his blood and ordering the with-
15 drawal of a blood sample in accordance with the provisions of paragraph
16 (a) of subdivision four of this section. When a judge or justice deter-
17 mines to issue an order to compel submission to a chemical test based on
18 an oral application, the applicant therefor shall prepare the order in
19 accordance with the instructions of the judge or justice. In all cases
20 the order shall include the name of the issuing judge or justice, the
21 name of the applicant, and the date and time it was issued. It must be
22 signed by the judge or justice if issued in person, or by the applicant
23 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 (e) Administration of compulsory chemical test. An order issued pursu-
33 ant to the provisions of this subdivision shall require that a chemical
34 test to determine the alcoholic and/or drug content of the operator's
35 blood must be administered. The provisions of paragraphs (a), (b) and
36 (c) of subdivision four of this section shall be applicable to any chem-
37 ical test administered pursuant to this section.

38 S 2. This act shall take effect on the first of November next after it
39 shall have become a law.