STATE OF NEW YORK

2306

2017-2018 Regular Sessions

IN SENATE

January 12, 2017

Introduced by Sens. MURPHY, AVELLA, RANZENHOFER -- 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 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:

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

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

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

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

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

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

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

(d) The commissioner shall, jointly with the commissioner of criminal justice services, promulgate rules and regulations, and take any other action necessary to implement the provisions of section twelve hundred twenty-five-e of this chapter, relating to field testing of mobile telephones and portable electronic devices. Such actions shall include the testing and determination of the reliability and accuracy of electronic scanning devices used for such field testing. The commissioner and commissioner of criminal justice services shall approve electronic scanning devices which are reliable and accurate for the purpose of conducting field testing.

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

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

(h) An applicant whose driver's license has been revoked pursuant to (i) section five hundred ten of this title, (ii) section eleven hundred ninety-three of this chapter, [~~and~~] (iii) section eleven hundred ninety-four of this chapter**, and (iv) section twelve hundred twenty-five-e of this chapter**, shall, upon application for issuance of a driver's license, pay to the commissioner a fee of one hundred dollars. When the basis for the revocation is a finding of driving after having consumed alcohol pursuant to the provisions of section eleven hundred ninety-two-a of this chapter, the fee to be paid to the commissioner shall be one hundred dollars. Such fee is not refundable and shall not be returned to the applicant regardless of the action the commissioner may take on such person's application for reinstatement of such driving license. Such fee shall be in addition to any other fees presently levied but shall not apply to an applicant whose driver's license was revoked for failure to pass a reexamination or to an applicant who has

been issued a conditional or restricted use license under the provisions 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.

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

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

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

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

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

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

(c) Any person whose license or permit to drive or any non-resident operating privilege has been suspended pursuant to paragraph (b) of this subdivision is entitled to a hearing in accordance with a hearing schedule to be promulgated by the commissioner. If the department fails to provide for such hearing fifteen days after the receipt of a report of a refusal, the license, permit to drive or non-resident operating privilege of such person shall be reinstated pending a hearing pursuant to this section. The hearing shall be limited to the following issues: (1) did such person operate a motor vehicle involved in an accident or collision involving damage to real or personal property, personal injury or death; (2) did such person possess a mobile telephone or portable electronic device at or near the time of such accident or collision; (3) was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to surrender his or her mobile telephone and/or portable electronic device for filed testing would result in the immediate suspension and subsequent revocation of such person's license or operating privilege; and (4) did such person refuse to surrender his or her mobile telephone and/or portable electronic device solely for the purpose of field testing. If, after such hearing, the hearing officer, acting on behalf of the commissioner, finds on any one of such issues in the negative, the hearing officer shall immediately terminate any suspension arising from such refusal. If, after such hearing, the hearing officer, acting on behalf of the commissioner finds all of the issues in the affirmative, such officer shall immediately revoke the license or permit to drive or any non-resident operating privilege in accordance with paragraph (d) of this subdivision. A person who has had a license or permit to drive or non-resident operating privilege suspended or revoked pursuant to this subdivision may appeal the findings of the hearing officer in accordance with article three-A of this chapter. Any person may waive the right to a hearing under this section. Failure by such person to appear for the scheduled hearing shall constitute a waiver of such hearing; provided, however, that such person may petition the commissioner for a new hearing which shall be held as soon as practicable.

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

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

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

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

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

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

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

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

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