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The Necessity for National Standards in Breath Alcohol Testing

Posted on Sep 17, 2013 10:46am EDT



Why do all states throughout the U.S. have 0.08 per se laws, but there are no national standards for breath alcohol testing? In fact, the Federal Government has made it so. Each state establishes its own breath alcohol testing program; in which there are NO national standards they must follow. Oh yes, there are published recommendations, but NO federally, mandated standards.

In 1997, the Federal Government set up Section 1404 of TEA-21 establishing a new program of incentive grants (Under Section 163 of Chapter 1 of Title 23) to encourage states to establish a 0.08% blood alcohol concentration (BAC) as the legal limit for drunk driving offenses.[i] The grant authorized \$500 million dollars, over 6 years, to the states for passing 0.08 per se laws. This was the Federal Government's "carrot and stick" way of getting a national 0.08 per se law passed in each state without a Federal law or mandate.

The Federal Government has used the TEA-21 many times over the years to coax the states into implementing programs such as seatbelt laws, open container laws, zero tolerance for drinking drivers under 21 and many others.

The states have all now passed the 0.08 standard and it has become common to us all. So common that this summer, the National Transportation Safety Board (NTSB) made a recommendation to the National Highway Traffic Safety Administration (NHTSA) that they seek legislative authority to award incentive grants to states to encourage a new national per se blood alcohol concentrations (BAC) of 0.05 or lower.[ii]

Currently, per se laws basically say you are in violation of law if you drive with an alcohol concentration of 0.08 or greater. It does not matter how well or how badly you are driving. It does not matter if you violate any other law. The problem with per se laws is that you, as the driver, have no way to know when you are in violation of the law. I know what you are thinking- "Well, you should not drink at all and drive". However, we must remember- it is not against the law to drink and drive. No state has passed a law that you must be "alcohol free" to operate a motor vehicle. Cars have speedometers to let us know when we are driving too fast, but not breathalyzers to let us know if we are above the per se limit.

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There are three basic per se limits in the United States:

- 0.08 for persons 21 years old or older driving a private vehicle
- 0.04 for persons 21 years old or older driving a commercial motor vehicle
- 0.02 for persons under 21 driving a vehicle

In a vast majority of cases, the evidence of the alcohol concentration in court is a breath test result. The state's per se laws and implied consent laws created "short cuts" for the admissibility of the breath test result. This allows prosecutors to bypass the standard rules for the admissibility of scientific evidence in a criminal court. Normally, there is no scientific foundation established for the admissibility of the breath test result at a DUI trial. The way the laws are written allows the breath test result into court with very little to support the result.

Most states simply say that if you follow the established procedures, the breath test result is admissible. The problem is the procedures, breath testing instruments, protocols, calibration, sampling and all other aspects of a breath alcohol testing program vary drastically from state to state.

In 2008, the National Safety Council, Committee on Alcohol and Other Drugs established what they deemed "...the basic elements necessary for establishing quality assurance and fitness-for-purpose in evidential breath alcohol measurements." **[iii]**

They published recommendations that the states should follow for a quality and minimum acceptable breath alcohol testing program to support the per se laws in the states. The recommendations are as follows:

- *Instruments should be operated, and tests administered by, trained and qualified breath alcohol test instruments operators.*
- *Instruments should be approved by an appropriate agency and if used in the United States, also appear on the National Highway Traffic Safety Administration's Conforming Products list*
- *Testing protocols should employ a minimum pre-exhalation mouth alcohol deprivation period of 15 minutes*
- *Breath alcohol measurements should be conducted on at least duplicate independently exhaled end-expiratory breath samples; the breath samples results should agree within the applicable established and documented criteria*
- *At least on control analysis should be performed as part of each subject test sequence as an assessment of within-run accuracy and/or verification of calibration*
- *An ambient air blank/analysis should be performed before and after each breath and control sample analytical measurement*
- *Any non-compliance or non-conformity with established and documented evidential test sequence protocol criteria should require the performance of a complete new evidential test sequence*
- *Printout of all completed tests should show the results of all breath samples, ambient air analysis/blanks and control analyses performed during a subject test sequence*
- *Periodic calibration, verification of calibration and/or certification of instruments must be performed in conformance with the documented and approved protocol recognized by the applicable jurisdiction*
- *Periodic recertification of breath test instrument operators should be done in compliance with documented and established training criteria recognized by the applicable jurisdiction at least every five years*

As an expert consultant / witness in forensic breath analysis, I review breath test cases from across the country. I find that many states fail to comply with the recommendations

of the National Safety Council. Here is why the National Safety Council (NSC) made the recommendations and why I believe they MUST be added to the TEA-21 incentive monies that the states are eligible for:

"The significant weight assigned to breath alcohol results, along with the serious consequences arising from conviction on an impaired driving offense require evidential breath alcohol testing programs to implement appropriate quality assurance measures" [iv]

In 1994, Dr. Kurt M. Dubowski published in the Journal of Analytical Toxicology, *Quality Assurance in Breath – Alcohol Analysis*. [v] He listed six problem areas that he saw with state breath alcohol programs. The list includes:

- *Inadequate rules and regulations*
- *Lack of a comprehensive quality assurance program*
- *Lack of control test(s) accompanying every subject test*
- *Failure to observe and adequately document a proper pretest deprivation-observation period*
- *Failure to test replicate breath specimens*
- *Lack of periodic personnel training"*

Each state must establish breath testing programs that meet the scientific community's minimum standards for scientific reliability. The scientific community has been publishing recommendations regarding changes that need to take place. These changes are long overdue. We cannot allow states to continue to ignore these recommendations for scientific reliability; while incarcerating people based on the results of the breath alcohol test.

Join me in asking the National Highway Traffic Safety Administration (NHTSA) to seek legislative authority to award incentive grants to those states that establish minimum, acceptable practices in breath alcohol testing based on the National Safety Council's recommendations.

[i] Safety Incentives to Prevent Operation of Motor Vehicles by Intoxicated Persons, summary sheet, NHTSA, 2007

[ii] NTSB Recommendation H-13-01, June 3, 2013

[iii] National Safety Council Committee on Alcohol and Other Drugs, Recommendations of the Subcommittee on Alcohol Technology, Pharmacology and Toxicology, 2008

[iv] National Safety Council Committee on Alcohol and Other Drugs, Recommendations of the Subcommittee on Alcohol Technology, Pharmacology and Toxicology, 2008

[v] Journal of Analytical Toxicology, Vol 18, Oct 1994, Quality Assurance in Breath-Alcohol Analysis, Table I, Kurt M. Dubowski

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