

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR  
SENATE BILL 440

**48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007**

AN ACT

RELATING TO CRIMINAL LAW; MODIFYING THE CRIME OF DRIVING UNDER  
THE INFLUENCE OF INTOXICATING LIQUOR TO ALLOW THREE HOURS FOR  
THE ADMINISTRATION OF A CHEMICAL TEST TO DETERMINE ALCOHOL  
CONCENTRATION; PROVIDING FOR THE ADMISSIBILITY OF CHEMICAL  
TESTS TAKEN MORE THAN THREE HOURS AFTER DRIVING; RECONCILING  
MULTIPLE AMENDMENTS TO THE SAME SECTION OF LAW IN LAWS 2005;  
DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 66-8-102 NMSA 1978 (being Laws 1953,  
Chapter 139, Section 54, as amended by Laws 2005, Chapter 241,  
Section 5 and by Laws 2005, Chapter 269, Section 5) is amended  
to read:

"66-8-102. PERSONS UNDER THE INFLUENCE OF INTOXICATING  
LIQUOR OR DRUGS--AGGRAVATED DRIVING WHILE UNDER THE INFLUENCE

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underscored material = new  
[bracketed material] = delete

1 OF INTOXICATING LIQUOR OR DRUGS--PENALTY.--

2 A. It is unlawful for a person who is under the  
3 influence of intoxicating liquor to drive a vehicle within this  
4 state.

5 B. It is unlawful for a person who is under the  
6 influence of any drug to a degree that renders ~~[him]~~ the person  
7 incapable of safely driving a vehicle to drive a vehicle within  
8 this state.

9 C. It is unlawful for:

10 (1) a person ~~[who]~~ to drive a vehicle in this  
11 state if the person has an alcohol concentration of eight one  
12 hundredths or more in ~~[his]~~ the person's blood or breath ~~[to~~  
13 ~~drive a vehicle within this state]~~ and the alcohol  
14 concentration results from alcohol consumed before or while  
15 driving the vehicle as established by a chemical test given  
16 within three hours of driving the vehicle; or

17 (2) a person ~~[who]~~ to drive a commercial motor  
18 vehicle in this state if the person has an alcohol  
19 concentration of four one hundredths or more in ~~[his]~~ the  
20 person's blood or breath ~~[to drive a commercial motor vehicle~~  
21 ~~within this state]~~ and the alcohol concentration results from  
22 alcohol consumed before or while driving the vehicle as  
23 established by a chemical test given within three hours of  
24 driving the commercial motor vehicle.

25 D. Aggravated driving while under the influence of

1 intoxicating liquor or drugs consists of a person who:

2 (1) drives a vehicle in this state and has an  
3 alcohol concentration of sixteen one hundredths or more in  
4 ~~[his]~~ the person's blood or breath ~~[while driving a vehicle~~  
5 ~~within this state]~~ and the alcohol concentration results from  
6 alcohol consumed before or while driving the vehicle as  
7 established by a chemical test given within three hours of  
8 driving the vehicle;

9 (2) has caused bodily injury to a human being  
10 as a result of the unlawful operation of a motor vehicle while  
11 driving under the influence of intoxicating liquor or drugs; or

12 (3) refused to submit to chemical testing, as  
13 provided for in the Implied Consent Act, and in the judgment of  
14 the court, based upon evidence of intoxication presented to the  
15 court, was under the influence of intoxicating liquor or drugs.

16 E. A person under first conviction pursuant to this  
17 section shall be punished, notwithstanding the provisions of  
18 Section 31-18-13 NMSA 1978, by imprisonment for not more than  
19 ninety days or by a fine of not more than five hundred dollars  
20 (\$500), or both; provided that if the sentence is suspended in  
21 whole or in part or deferred, the period of probation may  
22 extend beyond ninety days but shall not exceed one year. Upon  
23 a first conviction pursuant to this section, an offender shall  
24 be sentenced to not less than twenty-four hours and not more  
25 than forty-eight hours of community service. In addition, the

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1 offender may be required to pay a fine of three hundred dollars  
2 (\$300). The offender shall be ordered by the court to  
3 participate in and complete a screening program described in  
4 Subsection K of this section and to attend a driver  
5 rehabilitation program for alcohol or drugs, also known as a  
6 "DWI school", approved by the bureau and also may be required  
7 to participate in other rehabilitative services as the court  
8 shall determine to be necessary. In addition to those  
9 penalties, when an offender commits aggravated driving while  
10 under the influence of intoxicating liquor or drugs, the  
11 offender shall be sentenced to not less than forty-eight  
12 consecutive hours in jail. If an offender fails to complete,  
13 within a time specified by the court, any community service,  
14 screening program, treatment program or DWI school ordered by  
15 the court or fails to comply with any other condition of  
16 probation, the offender shall be sentenced to not less than an  
17 additional forty-eight consecutive hours in jail. Any jail  
18 sentence imposed pursuant to this subsection for failure to  
19 complete, within a time specified by the court, any community  
20 service, screening program, treatment program or DWI school  
21 ordered by the court or for aggravated driving while under the  
22 influence of intoxicating liquor or drugs shall not be  
23 suspended, deferred or taken under advisement. On a first  
24 conviction pursuant to this section, any time spent in jail for  
25 the offense prior to the conviction for that offense shall be

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1 credited to any term of imprisonment fixed by the court. A  
2 deferred sentence pursuant to this subsection shall be  
3 considered a first conviction for the purpose of determining  
4 subsequent convictions.

5 F. A second or third conviction pursuant to this  
6 section shall be punished, notwithstanding the provisions of  
7 Section 31-18-13 NMSA 1978, by imprisonment for not more than  
8 three hundred sixty-four days or by a fine of not more than one  
9 thousand dollars (\$1,000), or both; provided that if the  
10 sentence is suspended in whole or in part, the period of  
11 probation may extend beyond one year but shall not exceed five  
12 years. Notwithstanding any provision of law to the contrary  
13 for suspension or deferment of execution of a sentence:

14 (1) upon a second conviction, an offender  
15 shall be sentenced to a jail term of not less than ninety-six  
16 consecutive hours, forty-eight hours of community service and a  
17 fine of five hundred dollars (\$500). In addition to those  
18 penalties, when an offender commits aggravated driving while  
19 under the influence of intoxicating liquor or drugs, the  
20 offender shall be sentenced to a jail term of not less than  
21 ninety-six consecutive hours. If an offender fails to  
22 complete, within a time specified by the court, any community  
23 service, screening program or treatment program ordered by the  
24 court, the offender shall be sentenced to not less than an  
25 additional seven consecutive days in jail. A penalty imposed

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1 pursuant to this paragraph shall not be suspended or deferred  
2 or taken under advisement; and

3 (2) upon a third conviction, an offender shall  
4 be sentenced to a jail term of not less than thirty consecutive  
5 days, ninety-six hours of community service and a fine of seven  
6 hundred fifty dollars (\$750). In addition to those penalties,  
7 when an offender commits aggravated driving while under the  
8 influence of intoxicating liquor or drugs, the offender shall  
9 be sentenced to a jail term of not less than sixty consecutive  
10 days. If an offender fails to complete, within a time  
11 specified by the court, any community service, screening  
12 program or treatment program ordered by the court, the offender  
13 shall be sentenced to not less than an additional sixty  
14 consecutive days in jail. A penalty imposed pursuant to this  
15 paragraph shall not be suspended or deferred or taken under  
16 advisement.

17 G. Upon a fourth conviction pursuant to this  
18 section, an offender is guilty of a fourth degree felony and,  
19 notwithstanding the provisions of Section 31-18-15 NMSA 1978,  
20 shall be sentenced to a term of imprisonment of eighteen  
21 months, six months of which shall not be suspended, deferred or  
22 taken under advisement.

23 H. Upon a fifth conviction pursuant to this  
24 section, an offender is guilty of a fourth degree felony and,  
25 notwithstanding the provisions of Section 31-18-15 NMSA 1978,

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1 shall be sentenced to a term of imprisonment of two years, one  
2 year of which shall not be suspended, deferred or taken under  
3 advisement.

4 I. Upon a sixth conviction pursuant to this  
5 section, an offender is guilty of a third degree felony and,  
6 notwithstanding the provisions of Section 31-18-15 NMSA 1978,  
7 shall be sentenced to a term of imprisonment of thirty months,  
8 eighteen months of which shall not be suspended, deferred or  
9 taken under advisement.

10 J. Upon a seventh or subsequent conviction pursuant  
11 to this section, an offender is guilty of a third degree felony  
12 and, notwithstanding the provisions of Section 31-18-15 NMSA  
13 1978, shall be sentenced to a term of imprisonment of three  
14 years, two years of which shall not be suspended, deferred or  
15 taken under advisement.

16 K. Upon any conviction pursuant to this section, an  
17 offender shall be required to participate in and complete,  
18 within a time specified by the court, an alcohol or drug abuse  
19 screening program approved by the department of finance and  
20 administration and, if necessary, a treatment program approved  
21 by the court. The requirement imposed pursuant to this  
22 subsection shall not be suspended, deferred or taken under  
23 advisement.

24 L. Upon a second or third conviction pursuant to  
25 this section, an offender shall be required to participate in

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1 and complete, within a time specified by the court:

2 (1) not less than a twenty-eight-day  
3 inpatient, residential or in-custody substance abuse treatment  
4 program approved by the court;

5 (2) not less than a ninety-day outpatient  
6 treatment program approved by the court;

7 (3) a drug court program approved by the  
8 court; or

9 (4) any other substance abuse treatment  
10 program approved by the court.

11 The requirement imposed pursuant to this subsection shall  
12 not be suspended, deferred or taken under advisement.

13 M. Upon a felony conviction pursuant to this  
14 section, the corrections department shall provide substance  
15 abuse counseling and treatment to the offender in its custody.  
16 While the offender is on probation or parole under its  
17 supervision, the corrections department shall also provide  
18 substance abuse counseling and treatment to the offender or  
19 shall require the offender to obtain substance abuse counseling  
20 and treatment.

21 N. Upon a conviction pursuant to this section, an  
22 offender shall be required to obtain an ignition interlock  
23 license and have an ignition interlock device installed and  
24 operating on all motor vehicles driven by the offender,  
25 pursuant to rules adopted by the bureau. Unless determined by

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1 the sentencing court to be indigent, the offender shall pay all  
2 costs associated with having an ignition interlock device  
3 installed on the appropriate motor vehicles. The offender  
4 shall operate only those vehicles equipped with ignition  
5 interlock devices for:

6 (1) a period of one year, for a first  
7 offender;

8 (2) a period of two years, for a second  
9 conviction pursuant to this section;

10 (3) a period of three years, for a third  
11 conviction pursuant to this section; or

12 (4) the remainder of the offender's life, for  
13 a fourth or subsequent conviction pursuant to this section.

14 0. Five years from the date of conviction and every  
15 five years thereafter, a fourth or subsequent offender may  
16 apply to a district court for removal of the ignition interlock  
17 device requirement provided in this section and for restoration  
18 of a driver's license. A district court may, for good cause  
19 shown, remove the ignition interlock device requirement and  
20 order restoration of the license; provided that the offender  
21 has not been subsequently convicted of driving a motor vehicle  
22 while under the influence of intoxicating liquor or drugs.  
23 Good cause may include an alcohol screening and proof from the  
24 interlock vendor that the person has not had violations of the  
25 interlock device.

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1           P. In the case of a first, second or third offense  
2 under this section, the magistrate court has concurrent  
3 jurisdiction with district courts to try the offender.

4           Q. A conviction pursuant to a municipal or county  
5 ordinance in New Mexico or a law of any other jurisdiction,  
6 territory or possession of the United States or of a tribe,  
7 when that ordinance or law is equivalent to New Mexico law for  
8 driving while under the influence of intoxicating liquor or  
9 drugs, and prescribes penalties for driving while under the  
10 influence of intoxicating liquor or drugs, shall be deemed to  
11 be a conviction pursuant to this section for purposes of  
12 determining whether a conviction is a second or subsequent  
13 conviction.

14           R. In addition to any other fine or fee that may be  
15 imposed pursuant to the conviction or other disposition of the  
16 offense under this section, the court may order the offender to  
17 pay the costs of any court-ordered screening and treatment  
18 programs.

19           S. With respect to this section and notwithstanding  
20 any provision of law to the contrary, if an offender's sentence  
21 was suspended or deferred in whole or in part and the offender  
22 violates any condition of probation, the court may impose any  
23 sentence that the court could have originally imposed and  
24 credit shall not be given for time served by the offender on  
25 probation.

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1 T. As used in this section:

2 (1) "bodily injury" means an injury to a  
3 person that is not likely to cause death or great bodily harm  
4 to the person, but does cause painful temporary disfigurement  
5 or temporary loss or impairment of the functions of any member  
6 or organ of the person's body;

7 (2) "commercial motor vehicle" means a motor  
8 vehicle or combination of motor vehicles used in commerce to  
9 transport passengers or property if the motor vehicle:

10 (a) has a gross combination weight  
11 rating of more than twenty-six thousand pounds inclusive of a  
12 towed unit with a gross vehicle weight rating of more than ten  
13 thousand pounds;

14 (b) has a gross vehicle weight rating of  
15 more than twenty-six thousand pounds;

16 (c) is designed to transport sixteen or  
17 more passengers, including the driver; or

18 (d) is of any size and is used in the  
19 transportation of hazardous materials, which requires the motor  
20 vehicle to be placarded under applicable law; and

21 (3) "conviction" means an adjudication of  
22 guilt and does not include imposition of a sentence."

23 Section 2. Section 66-8-110 NMSA 1978 (being Laws 1978,  
24 Chapter 35, Section 518, as amended by Laws 2003, Chapter 51,  
25 Section 12 and by Laws 2003, Chapter 90, Section 5) is amended

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1 to read:

2 "66-8-110. USE OF TESTS IN CRIMINAL ACTIONS OR CIVIL  
3 ACTIONS--LEVELS OF INTOXICATION--MANDATORY CHARGING.--

4 A. The results of a test performed pursuant to the  
5 Implied Consent Act may be introduced into evidence in any  
6 civil action or criminal action arising out of the acts alleged  
7 to have been committed by the person tested for driving a motor  
8 vehicle while under the influence of intoxicating liquor or  
9 drugs.

10 B. When the blood or breath of the person tested  
11 contains:

12 (1) an alcohol concentration of less than four  
13 one hundredths, it shall be presumed that the person was not  
14 under the influence of intoxicating liquor;

15 (2) an alcohol concentration of at least four  
16 one hundredths but less than eight one hundredths:

17 (a) no presumption shall be made that  
18 the person either was or was not under the influence of  
19 intoxicating liquor, unless the person is driving a commercial  
20 motor vehicle; and

21 (b) the amount of alcohol in the  
22 person's blood or breath may be considered with other competent  
23 evidence in determining whether the person was under the  
24 influence of intoxicating liquor; or

25 (3) an alcohol concentration of four one

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1 hundredths or more and the person is driving a commercial  
2 vehicle, it shall be presumed that the person is under the  
3 influence of intoxicating liquor.

4 C. The arresting officer shall charge the person  
5 tested with a violation of Section 66-8-102 NMSA 1978 when the  
6 blood or breath of the person contains an alcohol concentration  
7 of:

8 (1) eight one hundredths or more; or

9 (2) four one hundredths or more if the person  
10 is driving a commercial motor vehicle.

11 D. When a person is less than twenty-one years of  
12 age and the blood or breath of the person contains an alcohol  
13 concentration of two one hundredths or more, the person's  
14 driving privileges shall be revoked pursuant to the provisions  
15 of the Implied Consent Act.

16 E. If the test performed pursuant to the Implied  
17 Consent Act is administered more than three hours after the  
18 person was driving a vehicle, the test result may be introduced  
19 as evidence of the alcohol concentration in the person's blood  
20 or breath at the time of the test and the trier of fact shall  
21 determine what weight to give the test result for the purpose  
22 of determining a violation of Section 66-8-102 NMSA 1978.

23 [~~E.~~] F. The determination of alcohol concentration  
24 shall be based on the grams of alcohol in one hundred  
25 milliliters of blood or the grams of alcohol in two hundred ten

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1 liters of breath.

2 ~~[F. The presumptions in Subsection B of]~~ G.

3 Nothing in this section [do not] or in Section 66-8-102 NMSA  
4 1978 shall limit the introduction or consideration of other  
5 competent evidence concerning whether or not the person was  
6 under the influence of intoxicating liquor at the time of  
7 driving or whether or not the defendant's ability to operate a  
8 vehicle was impaired by the consumption of alcohol at the time  
9 or driving.

10 ~~[G.]~~ H. If a person is convicted of driving a motor  
11 vehicle while under the influence of intoxicating liquor, the  
12 trial judge shall ~~[be required to]~~ inquire into the past  
13 driving record of the person before sentence is entered in the  
14 matter."

15 Section 3. EMERGENCY.--It is necessary for the public  
16 peace, health and safety that this act take effect immediately.