Model Revocation on Administrative Determination (ROAD) Law

Early License Revocation for Driving While Under the Influence

U.S. Department of Transportation
National Highway Traffic Safety Administration

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Background and Purpose of Study

Virtually all of the states have laws which provide for some driver licensing action, generally a suspension or revocation, against a person who has been convicted of driving a motor vehicle while under the influence of alcohol or drugs. Unfortunately, these laws do not always provide rapid and certain means of removing these drivers from the road and deterring this dangerous driving conduct.

Most of the laws base the licensing action upon the person's conviction for driving while under the influence. When the criminal court finds the person guilty, it enters a conviction. The law requires a record of this conviction to be forwarded to the department of motor vehicles. Generally, this is the first and only notice the department will receive that the person has committed the offense. On the basis of this record of the conviction, the department takes the license action authorized or required by law.

Unfortunately, convictions are not always fast and sure in drunk driving cases. A backlog of cases in the court may mean a delay of many months before the criminal charges come to trial. Even without a backlog, a defendant who is intent upon delaying the conviction can usually do so with a wide range of dilatory tactics.

A conviction for driving while under the influence can often be avoided altogether through plea bargaining. The charge is reduced to some lesser offense in exchange for a guilty plea. This produces a conviction, but not for the offense of driving while under the influence. This is especially likely to happen where there is a backlog of cases in the court, an overworked prosecutor, or a prosecutor who is sympathetic with the drunk driver and doesn't want him to lose his license.

There are also pre-trial or pre-conviction diversion programs operating in some courts. These programs pull the defendant out of the criminal adjudication and into an educational or treatment program before a conviction is entered. If the person completes the program, the charges are often dropped. While some aspects of such programs may be valuable, they do result in avoidance of a conviction for drunk driving, making it impossible for the department to take license action in the case. Indeed, the department may never learn of such cases!

It should be noted, of course, that there are many courts where adjudications of drunk driving charges proceed promptly and without the problems and abuses discussed above. But there are also many courts where the problems do exist.

There appears to be a need for a rapid and certain method of withdrawing the driving privilege from a person who drives a motor vehicle while under the influence of alcohol and/or drugs. A rapid and certain method would help to get problem drinkers off the highways quickly. A rapid and certain method will also serve as a greater deterrent to drunk driving since there will be a better connection between the illegal act and its consequences for the person—loss of the drivers license. It will also make a clear statement to all concerned that the state is willing and able to take immediate and effective action against those persons who endanger other highway users by driving while they are under the influence. The development and definition of such a rapid and certain method is the purpose of this project.

We believe the most effective way to avoid the described delays is through license suspension before the offender appears in court. Only in the District of Columbia have driver licenses of persons charged with drunk driving been suspended, prior to conviction, under a continuing program. A more recent development in withdrawing the licenses of persons who drive while under the influence is the "administrative per se" approach, so called because it parallels the "illegal per se" approach to the criminal offense.

Under the illegal per se approach, it is a crime to drive with more than a specified alcohol concentration. (Previously, evidence of alcohol concentration only created a presumption that the person was under the influence.) The administrative per se approach to license suspension is similar. The license is suspended or revoked on the basis of a department finding that the person drove a motor vehicle while having an alcohol concentration of 0.10 or more. The most important factor in the finding is obviously the chemical test evidence. This concept was first used by the state of Minnesota in a law adopted in 1976.

Subsequently, similar laws were adopted in Iowa and Oklahoma, and a bill was introduced in New York. Delaware and West Virginia have also adopted laws which are comparable in that they provide for a pre-conviction withdrawal, but which are not, strictly speaking, administrative *per se* laws because the action is not based solely on the alcohol concentration level.

The primary task involved in this project was to study these existing laws and bills, and to develop a model law which can be adopted by the legislature in other states to allow a withdrawal of the license prior to a conviction for driving while under the influence. The analysis of the existing laws and bills is contained in Appendix A, *infra*. Part I of that Appendix contains a summary of each of the laws/bills studied. Part II of that Appendix contains a tabular comparison of 30 issues in those laws/bills. The overall result of the work on this objective is the Model Revocation on Administrative Determination (ROAD) Law.

Model Revocation on Administrative Determination (ROAD) Law
Text Only (With Line Numbers)
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Model Revocation on Administrative Determination (ROAD) Law

§ 1—Revocation on administrative determination

(a) The department shall revoke the license of any person upon its determination that the person drove or was in actual physical control of a vehicle under any of the following circumstances:

1. While the alcohol concentration in the person's blood or breath was 0.10 or more, based on the definition of alcohol concentration in section 11 of this Act; or
2. While the person was under the influence of alcohol, as established by evidence other than an alcohol concentration of 0.10 or more; or
3. While the person was under the influence of any drug or combination of drugs to a degree which rendered the person incapable of safely driving a vehicle; or
4. While the person was under the combined influence of alcohol and any drug or drugs to a degree which rendered the person incapable of safely driving a vehicle.

(b) The department shall make a determination of these facts on the basis of the report of a law enforcement officer required in section 2 of this Act, and this determination shall be final unless a hearing is requested and held. If a hearing is held, the department shall review the matter and make a final determination on the basis of evidence received at the hearing.

(c) The determination of these facts by the department is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect any revocation under this section.

§ 2—Report by law enforcement officers

(a) A law enforcement officer who arrests any person for a violation of (§ *) shall forward to the department a verified report of all information relevant to the enforcement action, including information which adequately identifies the arrested person, a statement of the officer's grounds for belief that the person violated (§ *), a report of the results of any chemical tests which were conducted, and a copy of the citation and complaint filed with the court. (* *Insert reference to state code section which prohibits driving a vehicle while under the influence of alcohol/drugs*).

(b) The report required by this section shall be made on forms supplied by the department or in a manner specified by regulations of the department.

§ 3—Notice of revocation

(a) Upon receipt of the report of the law enforcement officer, the department shall make the determination described in section 1 of this Act. If the department determines that the person is subject to license revocation, and if notice of revocation has not already been served upon the person by the enforcement officer as required in section 4, the department shall issue a notice of revocation.

(b) The notice of revocation shall be mailed to the person at the last known address shown on the department's records, and to the address provided by the enforcement officer's report if that address differs from the address of record. The notice is deemed received three days after mailing, unless returned by postal authorities.

(c) The notice of revocation shall clearly specify the reason and statutory grounds for the revocation, the effective date of the revocation, the right of the person to request a hearing, the procedure for requesting a hearing, and the date by which that request for a hearing must be made.

§ 4—Notice of revocation served by enforcement officer

(a) Whenever the chemical test results are available to the law enforcement officer while the arrested person is still in custody, and where the results show an alcohol concentration of 0.10 or more, the officer, acting on behalf of the department, shall serve the notice of revocation personally on the arrested person.

(b) When the law enforcement officer serves the notice of revocation, the officer shall take possession of any drivers license issued by this state which is held by the person. When the officer takes possession of a valid drivers license issued by this state, the officer, acting on behalf of the department, shall issue a temporary permit which is valid for seven days after its date of issuance.

(c) A copy of the completed notice of revocation form, a copy of any completed temporary permit form, and any drivers license taken into possession under this section, shall be forwarded to the department by the officer along with the report required in section 2 of this Act.

(d) The department shall provide forms for notice of revocation and for temporary permits to law enforcement agencies.

§ 5—Effective date and period of revocation

(a) The license revocation shall become effective seven days after the subject person has received the notice of revocation as provided in section 4, or is deemed to have received the notice of revocation by mail as provided in section 3. If a written request for a hearing is received by the department within that same seven-day period, the effective date of the revocation shall be stayed until a final order is issued following the hearing. Provided, that any delay in the hearing which is caused or requested by the subject person or counsel representing that person shall not result in a stay of the revocation during the period of delay.

(b) The period of license revocation under this section shall be as follows:

1. The period shall be three months if the person's driving record shows no prior alcohol or drug related enforcement contacts during the immediately preceding five years.

2. The period shall be one year if the person's driving record shows one or more prior alcohol or drug related enforcement contacts during the immediately preceding five years.

3. For purposes of this section, "alcohol or drug related enforcement contacts" shall include any revocation under this Act, any suspension or revocation entered in this or any other state for a refusal to submit to chemical testing under an implied consent law, and any conviction in this or any other state for a violation which involves driving a vehicle while having an unlawful alcohol concentration, or while under the influence of alcohol, drugs, or alcohol and drugs.

(c) Where a license is revoked under this section and the person is also convicted on criminal charges arising out of the same occurrence for a violation of (§ *), both the revocation under this section and the revocation under (§ **) shall be imposed, but the periods of revocation shall run concurrently, and the total period of revocation shall not exceed (the longer of the two revocation periods). (* *Insert reference to the state code section which prohibits driving while under the influence of alcohol/drugs.* ** *Insert reference to state code section which requires license revocation or suspension upon conviction for driving while under the influence).*

§ 6—Restoration of license

(a) The periods of revocation specified by section 5 of this Act are intended to be minimum periods of revocation for the described conduct. No license shall be restored under any circumstances and no restricted or hardship permit shall be issued during the revocation period.

(b) Upon the expiration of the period of revocation under this Act, if the person's license is still suspended or revoked on other grounds, the person may seek a restricted permit if authorized by the other applicable sections of law, subject to the requirements of subsection (c) of this section.

(c) Following a license revocation, the department shall not issue a new license or otherwise restore the driving privilege unless it is satisfied, after an investigation of the character, habits, and driving ability of the person, that it will be safe to grant the privilege of driving a motor vehicle on the highways.

113 § 7—**Request for hearing**

114 (a) Any person who has received a notice of revocation may make a written request
115 for a review of the department's determination at a hearing. The request may be made
116 on a form available at each office of the department. If the person's drivers license has
117 not been previously surrendered, it must be surrendered at the time the request for a
118 hearing is made.
119 (b) The request for a hearing must be made within seven days after the person received
120 the notice of revocation as provided in section 4, or is deemed to have received the
121 notice by mail as provided in section 3. If written request for a hearing is not received
122 within the seven-day period, the right to a hearing is waived, and the determination of
123 the department which is based upon the enforcement officer's report becomes final.
124 (c) If a written request for a hearing is made after expiration of the seven-day period,
125 and if it is accompanied by the applicant's verified statement explaining the failure to
126 make a timely request for a hearing, the department shall receive and consider the
127 request. If the department finds that the person was unable to make a timely request
128 due to lack of actual notice of the revocation or due to factors of physical incapacity
129 such as hospitalization or incarceration, the department shall waive the period of
130 limitation, reopen the matter, and grant the hearing request. In such a case, a stay of
131 the revocation pending issuance of the final order following the hearing shall not be
132 granted.
133 (d) At the time the request for a hearing is made, if it appears from the record that the
134 person is the holder of a valid drivers license issued by this state, and that the drivers
135 license has been surrendered as required, the department shall issue a temporary permit
136 which will be valid until the scheduled date for the hearing. If necessary, the depart-
137 ment may later issue an additional temporary permit or permits in order to stay the
138 effective date of the revocation until the final order is issued following the hearing, as
139 required by section 5.
140 (e) The hearing shall be scheduled to be held within not more than 20 days of the
141 filing of the request for a hearing. The department shall provide a written notice of the
142 time and place of the hearing to the party requesting the hearing at least 10 days prior to
143 the scheduled hearing, unless the parties agree to waive this requirement.
144
145 § 8—**Hearing**

146 (a) The hearing shall be held in the county where the arrest occurred, unless the
147 parties agree to a different location.
148 (b) The presiding hearing officer shall be the commissioner or an authorized rep-
149 resentative designated by the commissioner. The presiding hearing officer shall have
150 authority to administer oaths and affirmations; to examine witnesses and take testi-
151 mony; to receive relevant evidence; to issue subpoenas, take depositions, or cause
152 depositions or interrogatories to be taken; to regulate the course and conduct of the
153 hearing; and to make a final ruling on the issue.
154 (c) The sole issue at the hearing shall be whether by a preponderance of the evidence
155 the person drove or was in actual physical control of a vehicle under any of the
156 circumstances set out in section 1 (a) of this Act. If the presiding hearing officer finds
157 the affirmative of this issue, the revocation order shall be sustained. If the presiding
158 hearing officer finds the negative of the issue, the revocation order shall be rescinded.
159 (d) The hearing shall be recorded. The decision of the presiding hearing officer shall
160 be rendered in writing, and a copy will be provided to the person who requested the
161 hearing.
162 (e) If the person who requested the hearing fails to appear without just cause, the
163 right to a hearing shall be waived, and the determination of the department which is
164 based upon the enforcement officer's report becomes final.
165
166 § 9—**Judicial review**

167 (a) Within 30 days of the issuance of the final determination of the department under
168 this Act, a person aggrieved by the determination shall have the right to file a petition in
169 (a court of record) in the county of (the county where the main office of the department

170 is located) for judicial review. (*Insert appropriate references within the parentheses*).
171 (b) The review shall be on the record, without taking additional testimony. If the
172 court finds that the department exceeded its constitutional or statutory authority, made
173 an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or
174 made a determination which is unsupported by the evidence in the record, the court
175 may reverse the department's determination.
176 (c) The filing of a petition for judicial review shall not result in an automatic stay of
177 the revocation order. The court may grant a stay of the order only upon motion and
178 hearing, and upon a finding that there is a reasonable probability that the petitioner will
179 prevail upon the merits, and that the petitioner will suffer irreparable harm if the order
180 is not stayed.
181
182 **§ 10—Administrative procedure act, application**
183 The administrative procedure act of this state [applies to the extent it is consistent
184 with] [OR] [does not apply to] proceedings under sections 7, 8, and 9 of this Act relating
185 to the administrative hearing and judicial review. (*Select one option.*)
186
187 **§ 11—Definitions**
188 The following words and phrases when used in this Act shall have the meanings
189 indicated in this section:
190 **Alcohol concentration.** Alcohol concentration shall mean either grams of alcohol
191 per 100 milliliters of blood or grams of alcohol per 210 liters of breath.
192 **Commissioner.** Commissioner shall mean the commissioner of the department of
193 motor vehicles of this state.
194 **Department.** Department shall mean the department of motor vehicles of this
195 state.
196 **Drivers license.** Drivers license shall mean a license to drive a motor vehicle
197 issued under the laws of this state, and the certificate issued by the department which
198 provides evidence of the license.
199 **License.** License shall mean any drivers license or any other license, permit, or
200 privilege to drive a motor vehicle issued under or granted by the laws of this state. The
201 term includes any temporary license or instruction permit, any nonresident operating
202 privilege, and the privilege of any person to drive a motor vehicle whether or not the
203 person holds a valid drivers license.
204 **Revocation.** Revocation shall mean the termination by formal action of the de-
205 partment of a person's license. A revoked license is not subject to renewal or restora-
206 tion except that an application for a new license may be presented and acted upon by the
207 department after the expiration of the revocation period.
208 **State.** State shall mean a state, territory, or possession of the United States, the
209 District of Columbia, the Commonwealth of Puerto Rico, and any province of Canada.
210 **Suspension.** Suspension shall mean the temporary withdrawal by formal action of
211 the department of a person's license. The suspension shall be for a period specifically
212 designated by the department.

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Model Revocation on Administrative Determination (ROAD) Law

§1—Revocation on administrative determination

(a) The department shall revoke the license of any person upon its determination that the person drove or was in actual physical control of a vehicle under any of the following circumstances:

1. While the alcohol concentration in the person's blood or breath was 0.10 or more, based on the definition of alcohol concentration in section 11 of this Act; or
2. While the person was under the influence of alcohol, as established by evidence other than an alcohol concentration of 0.10 or more; or
3. While the person was under the influence of any drug or combination of drugs to a degree which rendered the person incapable of safely driving a vehicle; or
4. While the person was under the combined influence of alcohol and any drug or drugs to a degree which rendered the person incapable of safely driving a vehicle.

(b) The department shall make a determination of these facts on the basis of the report of a law enforcement officer required in section 2 of this Act, and this determination shall be final unless a hearing is requested and held. If a hearing is held, the department shall review the matter and make a final determination on the basis of evidence received at the hearing.

(c) The determination of these facts by the department is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect any revocation under this section.

Comments and Implementation Guidelines

General. This section provides the basis of Revocation On Administrative Determination (ROAD). Instead of waiting for the criminal adjudication process to result in a conviction, the department makes its own independent determination of the same facts, and revokes if it appears to be warranted.

ROAD provides for revocation rather than suspension because at the conclusion of a period of license revocation, the license is not automatically returned. Instead, the person may apply for a new license which may be granted if the person is found to be qualified. See the definitions of "revocation" and "suspension" in section 11, and the provision on license restoration in section 6 (c). We believe that whenever a license is withdrawn due to an offense relating to the use of alcohol or drugs, it is important that the department investigate and determine that it will be reasonably safe to allow the person to drive before it issues a new license. The Delaware, Iowa, Minnesota, Oklahoma, and West Virginia laws all provide for license revocation.

Subsection (a). Revocation is mandatory under this section upon a finding of specified facts. If the person drove under the circumstances described, the license must be revoked. Of the laws and bills studied, only the District of Columbia provides for discretionary action; all the others are mandatory.

The four ROAD elements are the same as those described in the criminal offense of driving while under the influence of alcohol/drugs under UVC § 11-902 (Supp. 1979). A finding that the person drove a vehicle under any one of the four circumstances would result in a conviction on the criminal charges. The department must make the same finding in order to revoke the license.

ROAD goes beyond "administrative per se" laws which provide for revocation only on the basis of the alcohol concentration. ROAD also provides for revocation where the person was under the influence of drugs, or a combination of alcohol and drugs, and where the person was under the influence of alcohol but chemical test evidence is not available. In this respect, ROAD follows the approach of the Delaware and West Virginia laws.

The term "alcohol concentration" is defined in section 11. This definition is extremely important and must not be omitted from the law.

Subsection (b). ROAD allows the department to base the revocation on the police officer's report alone, if a hearing is not requested. If there is a hearing, the revocation must then be based on the evidence presented at the hearing.

Subsection (c). This subsection makes it clear that the revocation under ROAD is an administrative action which is completely independent of the adjudication of the criminal charges. An acquittal in criminal court will have no affect upon the revocation.

§ 2—Report by law enforcement officers

(a) A law enforcement officer who arrests any person for a violation of (insert code reference—see Note below) shall forward to the department a verified report of all information relevant to the enforcement action, including information which adequately identifies the arrested person, a statement of the officer's grounds for belief that the person violated (insert code reference—see Note below), a report of the results of any chemical tests which were conducted, and a copy of the citation and complaint filed with the court.

(b) The report required by this section shall be made on forms supplied by the department or in a manner specified by regulations of the department.

Comments and Implementation Guidelines

Note. At the two points indicated in subsection (a), reference to the state code section which prohibits driving while under the influence—the section which is directly comparable to UVC § 11-902 (Supp. 1979)—should be inserted.

General. Under the current laws of most states, the department receives records of convictions and of implied consent refusals. The department would be unaware of most drunk driving enforcement contacts until a conviction is reported. This ROAD section provides the mechanism for getting information to the department immediately concerning all arrests for driving while under the influence.

Subsection (a). The subsection requires the officer to forward the kind of information which the department will need to determine whether to revoke the license.

The officer's report must be verified. This should be done in accordance with procedures established under other state law and generally used in the state. The report could be verified by being sworn under oath or affirmation. Another method used in some states is to affix immediately above the signature a statement that any false statement in the report is punishable as a criminal offense. This statement, together with the signature of the officer, would constitute verification.

Subsection (b). In developing the forms and/or regulations required by this section, the department should consider encouraging the utilization of copies of documents which must be prepared by the enforcement officer for other purposes, whenever feasible. The forms and regulations should also provide for the combination of this report with the officer's report of a refusal to submit to chemical testing, in appropriate cases.

§ 3—Notice of revocation

(a) Upon receipt of the report of the law enforcement officer, the department shall make the determination described in section 1 of this Act. If the department determines that the person is subject to license revocation, and if notice of revocation has not already been served upon the person by the enforcement officer as required in section 4, the department shall issue a notice of revocation.

(b) The notice of revocation shall be mailed to the person at the last known address shown on the department's records, and to the address provided by the enforcement officer's report if that address differs from the address of record. The notice is deemed received three days after mailing, unless returned by postal authorities.

(c) The notice of revocation shall clearly specify the reason and statutory grounds for the revocation, the effective date of the revocation, the right of the person to request a hearing, the procedure for requesting a hearing, and the date by which that request for a hearing must be made.

Comments and Implementation Guidelines

General. Sections 3 and 4 of ROAD provide two methods for serving the notice of revocation. In most cases, the notice will be served personally by the enforcement officer. Where that is not done, section 3 provides that the department will serve the notice by mail. Section 3 also specifies the minimum content of the notice.

Subsection (a). If the department determines that a license should be revoked, and if the notice has not already been given by the enforcement officer, the department issues the notice.

Subsection (b). There are several important elements here. First, the department must send the notice to the address shown on the department's records. The licensee has a legal obligation to keep the department apprised of a current address, and the department is entitled to treat that as the address to be used to give a legal notice. Nevertheless, the address provided in the officer's report is likely, as a practical matter, to be more current. If the two addresses differ, ROAD requires mailing a notice to both. The idea is to give actual notice, and the burden of mailing two notices is slight. ROAD does not specify the type of mail to be used, leaving that to the discretion of the department.

ROAD creates a presumption that the notice which is mailed is received by the person three days after it is mailed, unless it is returned. This presumption allows the process to continue, even where there is no evidence of actual notification. The notice of revocation should specify the effective date of the revocation, which would be the tenth day after the notice is mailed—three days for the mail, and seven days after the notice is presumed to be received.

ROAD does not preclude the use of other methods of service of the notice. The service by mail is required, but other methods might also be utilized. The arresting officer, for example, could be asked to serve the notice when the person is encountered in court on the criminal charges.

Court rulings vary from state to state on the question of the necessity of actual notice. Court rulings in your state should be carefully considered in developing implementation procedures for this section. For example, if a revocation will be without effect in your state unless actual notice is given, the department should use a form of mail which will supply some evidence of notification such as certified mail with return receipt. The presumption that a mailed notice is received after three days will not hold up if your state is one which requires actual notice. It should be a part of your law, nevertheless, because it allows the department to specify the revocation effective date in the notice, but it should not be relied upon for more than that. The implementation procedures should provide for continued attempts to give the notice through alternative methods until the department has evidence of actual notice.

One advantage (and one reason for) the relatively short (seven-day) hearing request period is that it quickly clears the actual notice problem as to all those who apply for a hearing, relieving the depart-

ment of further attempts to give notice. In applying for a hearing, the person admits actual notice.

The best way to deal with the problem of actual notice is to maximize the use of notices issued by enforcement officers under section 4. This would be done by using chemical test procedures which provide immediate results. If service of the notice must be made under section 3, some problems are probably unavoidable, especially in those states which require actual notice.

Subsection (c). This subsection specifies the minimum content of the notice of revocation. It applies to notices served under either section 3 or section 4.

ROAD provides that the beginning of the revocation period and the end of the hearing-request period both occur seven days after the notice of revocation is received. There are several possible interpretations of precise time limits, however, and department regulations should clarify these time points in a manner which is consistent with other practices of the department. Both of these time points should be specified in the revocation notice. To avoid confusion, a calendar date should be used rather than a statement such as, "seven days from receipt of this notice."

We recommend that the notice of revocation should include all of the following information: clear notice that the person's drivers license and privilege to drive in this state is revoked; that the revocation is effective on a specified date; the reason for the revocation, including the time and place of the arrest, and the offense charged; that the person has the right to a hearing to contest the department's determination; that a timely request for a hearing will delay the effective date of the revocation until the hearing has been resolved; that the hearing must be requested before a specified date; that failure to make written request for a hearing on or before that date will result in the right to a hearing being waived; that the person is required to surrender the license card to the department immediately, and will receive a temporary license valid until the effective date of the revocation; the address of the department office where the license may be surrendered and a hearing request may be filed; that the period of revocation is three months for a first offender, and one year for others; and that following the period of revocation the person may make application for a new license, if qualified at that time.

§ 4—Notice of revocation served by enforcement officer

(a) Whenever the chemical test results are available to the law enforcement officer while the arrested person is still in custody, and where the results show an alcohol concentration of 0.10 or more, the officer, acting on behalf of the department, shall serve the notice of revocation personally on the arrested person.

(b) When the law enforcement officer serves the notice of revocation, the officer shall take possession of any drivers license issued by this state which is held by the person. When the officer takes possession of a valid drivers license issued by this state, the officer, acting on behalf of the department, shall issue a temporary permit which is valid for seven days after its date of issuance.

(c) A copy of the completed notice of revocation form, a copy of any completed temporary permit form, and any drivers license taken into possession under this section, shall be forwarded to the department by the officer along with the report required in section 2 of this Act.

(d) The department shall provide forms for notice of revocation and for temporary permits to law enforcement agencies.

Comments and Implementation Guidelines

General. We anticipate that most of the notices of revocation would be served under the provisions of section 4.

Subsection (a). This subsection establishes very clear criteria for certain action by the enforcement officer. When the officer has obtained chemical test results showing an alcohol concentration of 0.10 or more, the officer must serve the notice of revocation if the person is still in custody. The officer does so on behalf of the department.

Subsection (b). At the same time the revocation notice is served, the officer takes possession of the person's drivers license. This is one of the most important aspects of the law. Although it is certainly possible to revoke a license without recovering possession of the drivers license card, such a revocation will be more difficult to enforce. Accordingly, an attempt is generally made to secure possession of a revoked drivers license. This can be a very difficult and time consuming process, however. This ROAD subsection, which is based on the laws of Minnesota, Oklahoma, Delaware, and Iowa, should alleviate much of the difficulty in securing possession of revoked licenses.

Under the ROAD provision, only licenses issued by the state where the arrest is made are picked up. This is also the specific provision of the Delaware and Iowa laws. A state cannot revoke the license issued by another state; it can only revoke the nonresident's operating privilege in the state. Taking possession of a nonresident's home-state drivers license would be a questionable practice which would not advance the interests of either of the states.

The most serious problem involved with taking possession of the drivers license card while the license remains valid is that it leaves the person without the most effective means of driver identification. The temporary permit which is substituted for the drivers license will be significantly less effective in identifying the licensee; it will have much less recognition as a valid drivers license; and it will be much more susceptible to counterfeiting and other kinds of fraudulent use. We have included this concept in ROAD be-

cause of the significant advantage of securing the drivers license at the time of arrest, and because the duration of the temporary permit should be very brief. Nevertheless, we would encourage further study to develop an alternative means of securing possession of revoked licenses. One concept which should be studied involves stamping or punching the drivers license to indicate that it is void after a particular date, and then returning it to the licensee. The District of Columbia law incorporates a similar concept, although the punch which is used does not place a date on the license.

The temporary permit which is issued is valid for seven days. This is consistent with ROAD section 5 which provides that the revocation is effective seven days after the notice is served.

Subsection (c). Copies of all the documents must be forwarded to the department along with the officer's report.

Subsection (d). The department must provide forms for the notice of revocation and the temporary permit to appropriate law enforcement agencies.

The forms should be so designed that when completed by the enforcement officer, the notice of revocation form will meet the requirements of section 3 (c), and the temporary permit will contain all of the relevant restrictions and descriptive information contained on the drivers license.

Several states are using a single form for the notice of revocation and temporary permit. While this may be a very convenient form, it results in a temporary permit which has few attributes of a drivers license. We recommend that the temporary permit form be designed to be as effective as possible in identifying the licensee and making the connection between person and driving record, in providing recognizable evidence of a driving privilege issued by this state, and in preventing counterfeit and fraudulent use.

§ 5—Effective date and period of revocation

(a) The license revocation shall become effective seven days after the subject person has received the notice of revocation as provided in section 4, or is deemed to have received the notice of revocation by mail as provided in section 3. If a written request for a hearing is received by the department within that same seven-day period, the effective date of the revocation shall be stayed until a final order is issued following the hearing. Provided, that any delay in the hearing which is caused or requested by the subject person or counsel representing that person shall not result in a stay of the revocation during the period of delay.

(b) The period of license revocation under this section shall be as follows:

1. The period shall be three months if the person's driving record shows no prior alcohol or drug related enforcement contacts during the immediately preceding five years.

2. The period shall be one year if the person's driving record shows one or more prior alcohol or drug related enforcement contacts during the immediately preceding five years.

3. For purposes of this section, "alcohol or drug related enforcement contacts" shall include any revocation under this Act, any suspension or revocation entered in this or any other state for a refusal to submit to chemical testing under an implied consent law, and any conviction in this or any other state for a violation which involves driving a vehicle while having an unlawful alcohol concentration, or while under the influence of alcohol, drugs, or alcohol and drugs.

(c) Where a license is revoked under this section and the person is also convicted on criminal charges arising out of the same occurrence for a violation of (insert code reference—see Note 1 below), both the revocation under this section and the revocation under (insert code reference—see Note 2 below) shall be imposed, but the periods of revocation shall run concurrently, and the total period of revocation shall not exceed (the longer of the two revocation periods).

Comments and Implementation Guidelines

Note 1. In the space indicated in subsection (c), a reference to the state code section which prohibits driving while under the influence of alcohol/drugs—the section which is comparable to UVC § 11–902 (Supp. 1979)—should be inserted.

Note 2. In the second indictated space in subsection (c), a reference to the state code section providing for mandatory license revocation following a conviction for driving while under the influence of alcohol/drugs—the section which is comparable to UVC § 6–205 (2) (Supp. 1979)—should be inserted.

General. This section contains a basic framework of time requirements and specifications applicable to the Act. Details of interpretation should be provided in regulations.

Subsection (a). The subsection specifies that the period of revocation begins seven days after the revocation notice is received, unless a hearing is requested. It further specifies that the hearing-request period ends seven days after the notice is received. There are several possible interpretations of these time provisions, and some problems which must be considered.

We would suggest that the seven-day period should begin on the day following the receipt of the notice of revocation, and that the revocation should become effective at the end of the seven days, that is, at midnight ending the seventh day. Thus, if a person receives the notice of revocation on January 1, the first day of the seven-day period would be January 2; the last day of the period would be January 8. The license would be valid on January 8th, all day. The license would be revoked on January 9th, all day and thereafter.

That method of figuring the time period should be satisfactory for determining the effective date of the revocation. It may not work so well for the hearing-request period, however. The seven days in the hearing-request period probably should only be counted on those days when the department offices are open for business. Otherwise, the final day or days may fall on a weekend or holiday when the department is not open to receive the request or provide the necessary form. Also, a midnight deadline may not be appropriate if the department offices close earlier in the day.

We suggest that only department business days should be counted, and that the deadline would be extended to the close-of-business hour (or perhaps noon) of the day following the midnight deadline. This will give the person a full seven business days. Thus, if the person receives the notice of revocation on Wednesday, January 1, the first day of the period would be January 2. January 4 and 5 (Saturday and Sunday) are not counted. The seventh day of the period would be Friday, January 10. The deadline for requesting a hearing would be at the close of business on the next business day, Monday, January 13.

The same kind of considerations must apply to the presumption that a mailed notice is received three days after mailing. Only postal delivery days should be counted. Thus to determine the effective date of revocation when the notice is mailed, the department should allow three postal delivery days, starting to count the day after the notice is mailed, plus seven calendar days.

This figuring of dates should be done by the department, according to regulations. The person who is the subject of the revocation action should receive a notice which clearly specifies the calendar date and time at which his license is revoked, and the calendar date and time which is the deadline for requesting a hearing.

Subsection (a) also specifies that a timely request for a hearing results in a stay of the revocation until a final order is issued following the hearing. This approach assures that the licensee will have an opportunity for a hearing before the license is revoked. This is a conservative approach. Given several recent U.S. Supreme Court cases on the subject, especially *Machey* v. *Montrym*, 433 U.S. 1 (1978), we believe that a carefully drafted law providing for immediate suspension without a prior hearing would be constitutional. Society has an important interest in getting dangerous drunk drivers off the roads immediately, and this would justify a summary suspension, especially if a post-suspension hearing is provided very quickly. For an extremely well-documented and reasoned report which supports this conclusion, see J. Reese, Summary Suspension of Driver Licenses of Drunken Drivers—Constitutional Dimensions (August 8, 1982) (an unpublished paper presented at the 14th Annual Institute on Motor Vehicle and Traffic Law, Boulder, Colo.). Professor Reese has included (page 13) suggestions for the design and content of such a statute.

Nevertheless, we also understand that the concept involved in ROAD is a fairly new one. It involves determination by an administrative body of essentially the same facts which have always been and continue to be determined by a court of law. The criminal trial affords the accused person a very complete hearing before he or she is found guilty. The innocent-until-proven-guilty concept is deeply embedded. We think that the ROAD concept will be more acceptable to the public and to legislators if it affords an opportunity for a hearing prior to the revocation. Hence, we have chosen the more conservative approach. If the department can move quickly to provide the hearings, the delay in revoking the drunk driver's license should be brief, and the law will be perceived as being essentially fair.

Subsection (a) also provides that if the person whose license is being revoked requests or causes any delay in the hearing, the stay of revocation must be terminated on the originally scheduled hearing date. It is important to establish that the person cannot keep the license longer by delaying the hearing.

Subsection (b). The subsection specifies the period of ROAD revocations. For a first offender, the license is revoked for a period of three months. This is the same as the period specified by the laws of Delaware, Minnesota, and Oklahoma, and by the New York bill.

For the person who is a repeat offender, the revocation period is one year. This is the same as the Delaware law. A person is a repeat offender if the record shows one or more alcohol or drug related enforcement contacts within the past five years. Prior contacts would include any prior ROAD revocation, any conviction for driving while under the influence in this state or another, and any suspension or revocation for refusing a chemical test in this state or another. In order to implement this provision, department driver records would have to be maintained for the period necessary to determine repeat offenders—we have recommended five years. The department should also give effect to records generated in other states, incorporating them into records maintained by the department. UVC § 6–106 (c) (1968) provides the legal foundation for doing so, and should be adopted if the state has no comparable provision now.

It is important to consider how the ROAD revocation periods compare with other suspensions and revocations related to drunk driving. If the ROAD revocation is longer than an implied consent revocation, for example, the ROAD law may serve as an inducement to test refusals. That would be very undesirable.

Subsection (c). This subsection deals with the relationship between the ROAD revocation and the conviction revocation based upon the same offense. Most states have a provision comparable to UVC § 6–205 (2) (Supp. 1979) requiring revocation (or suspension) on the basis of a conviction for driving while under the influence. (If your state law provides for suspension rather than revocation, the references in this subsection should be revised accordingly.) Subsection (c) specifies that both of the revocation periods are to be imposed, but that they run concurrently, and the total period of revocation imposed is equivalent to the longer of the two periods. Thus, assuming that the period of revocation under ROAD is three months, and the period of revocation based upon a conviction is six months, the maximum period of revocation based upon the same offense would be six months. This would be true regardless of when or in what order the two revocations are imposed. The time during which the license is revoked under the earlier revocation is credited to the later revocation when it becomes effective.

§ 6—Restoration of license

(a) The periods of revocation specified by section 5 of this Act are intended to be minimum periods of revocation for the described conduct. No license shall be restored under any circumstances and no restricted or hardship permit shall be issued during the revocation period.

(b) Upon the expiration of the period of revocation under this Act, if the person's license is still suspended or revoked on other grounds, the person may seek a restricted permit if authorized by the other applicable sections of law, subject to the requirements of subsection (c) of this section.

(c) Following a license revocation, the department shall not issue a new license or otherwise restore the driving privilege unless it is satisfied, after an investigation of the character, habits, and driving ability of the person, that it will be safe to grant the privilege of driving a motor vehicle on the highways.

Comments and Implementation Guidelines

General. This section specifies the conditions for restoration of the driving privilege revoked under ROAD. It makes it clear that no privilege may be restored prior to expiration of the revocation period.

Subsection (a). The basic goal of ROAD is to revoke the license quickly, and for an adequate period of time to impress the licensee with the seriousness of the offense and the resolution of the state to take firm, immediate, responsive action. We believe that the issuance of a limited privilege on the basis of hardship considerations at a time when the license would otherwise be revoked would seriously undermine that goal. The three-month period of revocation for a first offender under ROAD is a relatively short license deprivation, given the seriousness of the offense. Many states specify revocation of six months to one year for this offense. This relatively short revocation period has been selected in the belief that it is better to completely deprive the person of the driving privilege for a short period than to restrict that privilege to necessary or occupational driving for a longer period. We urge the states to treat this three-month revocation period as a minimum period of total withdrawal of the driving privilege. After expiration of this three-month period, if the person is still under suspension or revocation under the provisions of another law, then a limited license might be issued as described in the discussion relating to subsection (b).

Subsection (b). If the period of a revocation based upon a conviction for driving while under the influence is longer than the ROAD revocation period (and it should be), the person will probably still be under revocation when the ROAD revocation period expires. Subsection (b) makes it clear that a limited license could be issued at this time, as provided for in other law. Optimally, such a limited license would NOT be based upon hardship considerations. It will constitute a hardship for anyone to have the driving privilege revoked, but that's not a good reason to restore the license. A better basis for restoring a limited driving privilege would be some evidence that the person has made progress in recognizing and correcting the alcohol or drug use problem which led to the offense. Many states are now requiring satisfactory completion of a prescribed treatment program as a condition to issuance of a limited license, rather than just returning the privilege to anyone who can show a hardship.

Subsection (c). This provision makes it clear that at the conclusion of *any* license revocation, the license is not automatically returned. Instead, the person must make application for a new license. Before issuing a new license, the department must be satisfied that it will be safe to permit the person to drive. This subsection is based upon UVC § 6–208 (b) (1968).

§ 7—Request for hearing

(a) Any person who has received a notice of revocation may make a written request for a review of the department's determination at a hearing. The request may be made on a form available at each office of the department. If the person's drivers license has not been previously surrendered, it must be surrendered at the time the request for a hearing is made.

(b) The request for a hearing must be made within seven days after the person received the notice of revocation as provided in section 4, or is deemed to have received the notice by mail as provided in section 3. If written request for a hearing is not received within the seven-day period, the right to a hearing is waived, and the determination of the department which is based upon the enforcement officer's report becomes final.

(c) If a written request for a hearing is made after expiration of the seven-day period, and if it is accom-

panied by the applicant's verified statement explaining the failure to make a timely request for a hearing, the department shall receive and consider the request. If the department finds that the person was unable to make a timely request due to lack of actual notice of the revocation or due to factors of physical incapacity such as hospitilization or incarceration, the department shall waive the period of limitation, reopen the matter, and grant the hearing request. In such a case, a stay of the revocation pending issuance of the final order following the hearing shall not be granted.

(d) At the time the request for a hearing is made, if it appears from the record that the person is the holder of a valid drivers license issued by this state, and that the drivers license has been surrendered as required, the department shall issue a temporary permit which will be valid until the scheduled date for the hearing. If necessary, the department may later issue an additional temporary permit or permits in order to stay the effective date of the revocation until the final order is issued following the hearing, as required by section 5.

(e) The hearing shall be scheduled to be held within not more than 20 days of the filing of the request for a hearing. The department shall provide a written notice of the time and place of the hearing to the party requesting the hearing at least 10 days prior to the scheduled hearing, unless the parties agree to waive this requirement.

Comments and Implementation Guidelines

General. This section contains substantive and procedural provisions relating to the request for a hearing, including late requests, the issuance of a temporary permit to delay the revocation till after the hearing, and the hearing notice and scheduling requirements.

Subsection (a). The request for a hearing must be in writing and may be made on a form supplied by the department. When the person submits the hearing request, an opportunity is provided to collect any license card not yet surrendered.

The hearing request procedure also provides an opportunity for a brief administrative review of the case. If a clear mistake has been made (such as a mistake in identity), it is to the advantage of all involved to interrupt the procedure without the need for a hearing. The review might involve an over-the-counter interview with the person when the hearing-request form is submitted. It could involve space on the form where the person could explain any clear defenses which should interrupt the procedure without a hearing. The department should develop procedures for an internal review which will effectively identify any such cases and bring them to the immediate attention of a department official with authority to terminate the revocation procedure.

Subsection (b). This subsection specifies the consequences of failure to make a timely request for a hearing. The right to a hearing is waived, although subsection (c) makes certain exceptions. Where a hearing is not held, for whatever reason, the officer's verified report becomes the sole basis of the revocation.

Subsection (c). This subsection provides for a waiver of the hearing request deadline in cases where the department finds, on the basis of the person's verified statement, that the person received no actual notice of the revocation until it was too late to make a timely request for a hearing, or that the person was physically unable to make a timely request due to factors such as being confined in a hospital or in jail. In these cases, however, no stay of revocation is provided. The department should, in such cases, do all that is possible to expedite the hearing, including an offer to hold the hearing within 24 or 48 hours if the person will waive the 10-day notice requirement in subsection (d).

Subsection (d). This subsection provides for issuance of a temporary permit or permits, as necessary, to effectuate the stay of the revocation until the final order is issued. Note that a temporary permit is provided only to a person whose license is otherwise valid, and who has surrendered that license as required by the law.

Obviously, there will be cases where the person declares that the license card cannot be surrendered because it has been lost, stolen, or destroyed. In such cases, a verified statement of such facts would suffice in lieu of surrender of the license.

Subsection (e). The hearing should be held as quickly as possible. The 20-day limit is suggested as a maximum, rather than as a guide. It is necessary, however, to provide adequate notice to the parties as to the time and place of the hearing. This must be provided sufficiently ahead of time to permit the person to prepare for the hearing. Hence, the ROAD law specifies a ten–day notice requirement. The parties may agree to waive the ten-day requirement, however, and this provision should be utilized as much as possible. Any such waiver agreement should be in writing.

§ 8—Hearing

(a) The hearing shall be held in the county where the arrest occurred, unless the parties agree to a different location.

(b) The presiding hearing officer shall be the commissioner or an authorized representative designated by the commissioner. The presiding hearing officer shall have authority to administer oaths and affirmations; to examine witnesses and take testimony; to receive relevant evidence; to issue subpoenas, take depositions, or cause depositions or interrogatories to be taken; to regulate the course and conduct of the hearing; and to make a final ruling on the issue.

(c) The sole issue at the hearing shall be whether by a preponderance of the evidence the person drove or was in

actual physical control of a vehicle under any of the circumstances set out in section 1 (a) of this Act. If the presiding hearing officer finds the affirmative of this issue, the revocation order shall be sustained. If the presiding hearing officer finds the negative of the issue, the revocation order shall be rescinded.

(d) The hearing shall be recorded. The decision of the presiding hearing officer shall be rendered in writing, and a copy will be provided to the person who requested the hearing.

(e) If the person who requested the hearing fails to appear without just cause, the right to a hearing shall be waived, and the determination of the department which is based upon the enforcement officer's report becomes final.

Comments and Implementation Guidelines

General. This section specifies substantive and procedural requirements relating to the hearing.

Subsection (a). Venue for the hearing is the county where the arrest occurred. The obvious reason for this specification is that this county is likely to be most convenient for any witnesses, especially for the arresting law enforcement officer. West Virginia has experienced considerable difficulty with their law which provides for a hearing in the county of residence of the offender; the arresting officer is often unable to attend if the county is far away.

The parties may agree to hold the hearing in a different location. One possibility here is that such an agreement could also cover related matters. Thus, the department might agree to hold the hearing in the offender's county of residence, provided that the offender will not object to witnesses from the county of arrest giving their testimony by telephone. The presiding hearing officer may have authority under subsection (b) to take testimony in that manner regardless of objections, but an agreement would resolve any problem. The use of telephone testimony in administrative hearings is becoming more common. It should be encouraged because it is a time-efficient manner for the police officers and other witnesses to testify.

Subsection (b). These are fairly standard powers given to a hearing officer in an administrative hearing of the type contemplated here. Note that the hearing officer is specifically authorized to make the final ruling. There is no need for the commissioner to make the final decision. There is no departmental discretion being exercised. The task of the hearing officer is strictly fact finding. The action of the department is mandatory, based upon the facts found to exist.

Subsection (c). The issue before the hearing officer is exactly the same issue which the department is required to determine under section 1. It is essentially the same determination which is made in the criminal court, although in the administrative hearing the standard of proof (preponderance of evidence) differs, and a less formal procedure prevails.

Subsection (d). A record of all evidence, testimonial and documentary, must be established at the hearing. Judicial review under section 9 is based solely on the record.

Subsection (e). If the person fails to appear at the hearing without any just excuse, the matter is treated as if the right to a hearing had been waived. The stay of revocation is terminated, that the determination made under section 1 becomes final.

§9—Judicial review

(a) Within 30 days of the issuance of the final determination of the department under this Act, a person aggrieved by the determination shall have the right to file a petition in (a court of record) in the county of (the county where the main office of the department is located) for judicial review.

(b) The review shall be on the record, without taking additional testimony. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the department's determination.

(c) The filing of a petition for judicial review shall not result in an automatic stay of the revocation order. The court may grant a stay of the order only upon motion and hearing, and upon a finding that there is a reasonable probability that the petitioner will prevail upon the merits, and that the petitioner will suffer irreparable harm if the order is not stayed.

Comments and Implementation Guidelines

General. This section specifies the substantive and procedural requirements relative to judicial review of the administrative determination.

Subsection (a). Venue for judicial review is shifted to the county where the main office of the department is located. This is for the convenience of the department's attorneys. The petition for judicial review must be filed within 30 days of the final determination by the department.

Subsection (b). The review is on the record established by the department at the hearing. The law does not permit the court to hold a new hearing or to redetermine the facts. The court's review is strictly limited to the grounds for reversing the department which are listed in this subsection.

Subsection (c). No stay of the revocation is provided on judicial review, although the court may order one in the circumstances described in this section.

§10—Administrative procedure act, application

The administrative procedure act of this state[applies to the extent it is consistent with][OR][does not apply to]proceedings under sections 7, 8, and 9 of this Act relating to the administrative hearing and judicial review.

Comments and Implementation Guidelines

General. Here the state should select one of the two options. Many of the state administrative procedure acts are full of complex provisions which have little relevancy to the type of hearing contemplated by this Act. The same is true as to the provisions regarding judicial review. Sections 7 through 9 of ROAD provide the essential legal framework for the kind of hearing and judicial review which is appropriate for the license revocations contemplated by the Act. Each state needs to assess its own APA to determine whether its provisions should also apply to the administrative actions taken under this Act.

§ 11—Definitions

The following words and phrases when used in this act shall have the meanings indicated in this section:

1. Alcohol concentration. Alcohol concentration shall mean either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

2. Commissioner. Commissioner shall mean the commissioner of the department of motor vehicles of this state.

3. Department. Department shall mean the department of motor vehicles of this state.

4. Drivers license. Drivers license shall mean a license to drive a motor vehicle issued under the laws of this state, and the certificate issued by the department which provides evidence of the license.

5. License. License shall mean any drivers license or any other license, permit, or privilege to drive a motor vehicle issued under or granted by the laws of this state. The term includes any temporary license or instruction permit, any nonresident operating privilege, and the privilege of any person to drive a motor vehicle whether or not the person holds a valid drivers license.

6. Revocation. Revocation shall mean the termination by formal action of the department of a person's license. A revoked license is not subject to renewal or restoration except that an application for a new license may be presented and acted upon by the department after the expiration of the revocation period.

7. State. State shall mean a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any province of Canada.

8. Suspension. Suspension shall mean the temporary withdrawal by formal action of the department of a person's license. The suspension shall be for a period specifically designated by the department.

Comments and Implementation Guidelines

Alcohol concentration. This definition is taken without revision from UVC § 11-902.1 (a) 5 (Supp. 1979). The definition is vital. It must not be omitted from the law. It should not be modified except with the assistance of competent experts in the field of chemical testing.

The definition allows the chemical test results to be expressed directly as concentration in either the blood or the breath. Many older chemical test laws allow test results to be expressed only in terms of the blood alcohol concentration (BAC). Where breath tests are used under those laws, the test results must be converted to be expressed in terms of blood alcohol levels. No such conversion is necessary under the alcohol concentration definition in section 11.

It is especially important to the ROAD concept that breath testing be utilized, and that the accuracy and speed of the results should be maximized. This will allow the law enforcement officer, in appropriate cases, to give the revocation notice and take possession of the drivers license. This is important to the success of the ROAD approach.

General. The other definitions in this section are based on the driver licensing definitions in the *Uniform Vehicle Code*. They are basic terms which are already defined in the driver licensing laws of many states. They should be a part of the legal context into which the ROAD law fits. If they are not part of the overall driver licensing law, they should be specifically adopted as part of this Act.

Appendix A—Part I
Summary of State Laws
Revocation on Administrative Determination (ROAD)

DELAWARE. The Delaware law was adopted in 1982, and becomes effective on October 20, 1982.[1]

Overview. The law provides for mandatory revocation (three months for a first offender) based upon certification by the officer that there was probable cause to believe the offender was driving while under the influence, that a chemical test was conducted, and that the offender was arrested for that offense either before or after the test. The revocation is *not* initially based upon the test results, but at the hearing stage a BAC of 0.10 or more is "conclusive evidence"of a violation. The revocation can be based upon a violation involving the influence of drugs as well as alcohol. The revocation is independent of the disposition of the criminal charges. Immediate notice of revocation is given by the arresting officer, who takes the Delaware license and issues a temporary permit valid for 10 days. Revocation is effective after 10 days unless a hearing is requested.

Action by the Enforcement Officer. Where an offender is arrested for driving while under the influence and a chemical test is administered, the officer who directed the administration of the test is required to certify the following to the department:

1. That there was probable cause to believe the offender was driving while under the influence, in violation of state law or local ordinance;
2. That a chemical test was conducted; and
3. That the offender was arrested and charged with a violation of the state law which prohibits driving while under the influence (or any substantially conforming local ordinance).

On behalf of the department, the officer must also serve notice of revocation on the offender, take possession of the Delaware license of the offender, and issue a temporary license valid for 10 days, with provision for an additional period of validity if the offender requests a hearing in writing within the 10-day period. The officer must forward the license to the department along with the certification described above.

The officer's actions are not necessarily based upon the results of the chemical test. The arrest can be made either before or after the chemical test. If the officer has probable cause and makes the arrest, the officer must make the certification to the department.

Action by the Department. The law provides that upon certification of the police officer as described above, the department *shall* revoke the offender's drivers license for a period of 3 months for a first offender, 1 year for a second offender, or 18 months for a third/subsequent offender. Prior offenses include any convictions for driving while under the influence in Delaware or any other state, prior revocations under this provision or for an implied consent refusal, or prior first-offender, pre-judgment diversions, all within the past five years.

The action is initiated by the department on the basis of the officer's probable cause and arrest. It may be based upon any violation of the law, whether it involves alcohol, drugs, or combined influence. The action is sustained during the hearing process by an administrative finding that the offender was in violation of the law.

In addition to the revocation, the department must require the offender to attend a course of instruction or a rehabilitation program established under other provisions of the law. A license may not be restored prior to satisfactory completion of the course or program, payment of all relevant fees by the offender, and a favorable character investigation by the department.

Hearing. If the offender makes a written request for a hearing within 10 days of issuance of the temporary permit, a hearing must be scheduled within 30 days of the request. The revocation will be stayed until the final decision of the hearing officer. The temporary permit may be extended accordingly. The hearing is before the secretary or a designee, and shall cover the following issues:

1. Whether the police officer had probable cause to believe the person was in violation of the law prohibiting driving while under the influence (Tit. 21, § 4177, or a local ordinance substantially conforming to § 4177);
2. Whether the offender was arrested for the violation;
3. Whether a chemical test was conducted; and
4. Whether by a preponderance of the evidence it appears that the person was in violation of the law (§ 4177 or local ordinance). For purposes of this issue, a blood alcohol concentration of 0.10 percent or more, or a positive indication of drugs, "shall be conclusive evidence of said violation."

Judicial review of the hearing is available, but the appeal does not operate to stay the revocation of the license.

Miscellaneous. Here are some miscellaneous related provisions of the Delaware law:

- Delaware's law which defines the illegal *per se* criminal offense is unusual. One subsection prohibits driving a vehicle while under the influence of alcohol. A second subsection provides that a person whose blood alcohol concentration is one-tenth of one percent or more by weight, as shown by chemical analysis of a blood, breath, or urine sample taken within four hours of the alleged offense, "shall be guilty" of violating the other subsection.

- The provisions described above are incorporated with the implied consent law in such a way that an offender who refuses the test is subject to immediate notice of revocation and withdrawal of the license just as the offender who submits to the test, except that the period of revocation is substantially greater for the test refusal.

[1] Delaware H.B. No. 780, 131st Gen. Assembly (1982).

• The implied consent law provides that if the officer chooses to seek the test under the implied consent law, which is done by giving the offender the warning of the consequences of a refusal, a test may not be made if the offender refuses. But the officer can also choose to not utilize the implied consent law, taking reasonable steps to conduct the chemical test without the consent of the offender.

• Another Delaware law provides for mandatory revocation upon conviction for driving while under the influence. The law does not specify how the conviction revocation and the administrative revocation are related. Delaware officials indicate that theoretically both are imposed and run concurrently, although they do not do the extra paperwork on the second revocation. In most cases, there is no conviction on the first offense because of the diversion program described below.

• Another section describes a first-offender, prejudgment diversion into a treatment program. When this program results in dismissal of the criminal charges, the court must make a written report of this fact to the department. Also, the drivers license of any person who enters this program is immediately revoked for a period of one year, and the law specifies that this revocation is not concurrent with or part of any period of revocation established under other provisions of this subchapter (which includes the revocation provisions described above). A limited license based upon hardship is available after 90 days.

• The law provides that chemical test results are admissible in the trial of any action or proceeding arising out of acts alleged to have been committed by a person while under the influence.

Comments. Here are some general observations regarding the Delaware law:

• The law establishes a conclusive presumption applicable to the administrative hearing. A BAC of 0.10 percent or more, or "a positive indication of drugs," is conclusive evidence of a violation. We doubt that this presumption in regard to drugs can stand since no quantitative standard is specified.

• The law authorizes eight new positions within the department to help administer the provisions—four hearing officers and four clerks. State officials point out that these positions will be funded through an increase in the fee for reinstatement of a license—up from $15 to $125. They feel that good drivers should not have to pay for the problems caused by bad drivers.

• officials believe one important aspect of the new law is that a hardship license is not available in cases of revocation for refusal to take the test, but is available to the person who takes the test and is diverted into a first-offender treatment program. They feel this will encourage taking the test.

DISTRICT OF COLUMBIA. The District of Columbia law has been in effect for many years. The most recent version of the law results from a recompilation which was completed in 1981.[2]

Overview. This law is much broader in scope than any of the others described in this study. It authorizes a preconviction suspension or revocation for any of a number of specified offenses. When an offender is charged with one of these offenses, the police must serve notice of suspension/revocation. The officer does not pick up the offender's license, but does stamp it to indicate that the notice has been served. If and when the offender requests a hearing, the license must be surrendered in exchange for a temporary permit. The license action is effective five days after the notice is given (ten days for nonresidents), but a hearing requested within five days stays the action. At the hearing, the department must prove sufficient grounds for the proposed action.

Action by the Enforcement Officer. When an offender is charged with one of the offenses specified in the law, a designated police department official must interview the offender and serve on that person a notice of suspension or revocation on a form provided by the department. The specified offenses include the following: operating while under the influence of intoxicating liquor or drugs; homicide by motor vehicle; leaving the scene of a personal injury accident; reckless driving resulting in personal injury; any felony in which a motor vehicle is used; operating a motor vehicle at a speed more than 30 mph over the limit; and any violation resulting in an accident where collateral of $50 or more, or bond in any amount, is required under court rules. The official must notify the department by telephone at the time the notice is given, and must forward a copy of the notice to the department within 24 hours. The official must also place a stamped notation on the offender's District of Columbia license indicating that the notice has been served.

Action by the Department. Any of the offenses described above is grounds for either a suspension or revocation, in the discretion of the department, prior to conviction. The period of the suspension is from 2 to 30 days for a first suspension, or from 15 to 90 days for a subsequent suspension, based upon the seriousness of the case. The period of revocation is six months. Notice and opportunity for a hearing must be provided prior to the effective date of the suspension or revocation. The notice may be served by mail or in person; it must sufficiently describe the proposed action and the grounds for it. When the offender makes a timely written request for a hearing, the department is authorized to require surrender of the license. In such cases, the department must issue a temporary license valid until the hearing examiner's decision is issued.

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[2] 18 D.C.M.R. §§ 300.2, 301.1, 302, 306, 307, 308, 309, 1004, 1005 (1981).

Hearing. When the offender makes a written request for a hearing within five days of the notice of suspension/revocation, a hearing must be provided before a department hearing examiner, and the license action is stayed pending the hearing. At the hearing, the department is required to prove sufficient grounds for the proposed action. The hearing examiner must report findings of fact and, where applicable, conclusions of law. Following the hearing, the department may dismiss the action, order the proposed action to be taken, grant probation or allow a limited license in some cases where justified, or suspend the license where a revocation was proposed, based upon considerations of the licensee's driving record, character, need for the license, and safety of the public.

Miscellaneous. Here are some miscellaneous related provisions of the District of Columbia law:

- License revocation is mandatory upon conviction for most but not all of the same offenses listed above.
- Where the physical or mental condition of the offender is such that they would not understand the suspension/revocation notice, the police official does not serve the notice but makes a report of the offender's condition to the department.
- Comments. Here are some general observations regarding the District of Columbia law:
- Because of its size, the District has some rather significant advantages in implementing a law of this type. It is very easy, for example, for the police to give notice to the department concerning an arrest. Also, the arresting officer is readily available to appear at the hearing. This may explain why the District has utilized laws of this type for many years.
- The law does not specify whether the license action is independent of the adjudication of the criminal charges. District licensing officials report that if the offender is convicted, they will enter a revocation based upon the conviction. Where the offender is found "not guilty" by the court, the license will be returned, but if the charges are disposed of in any other way, the suspension or revocation may be continued. Thus, for example, if the charges are dropped because the prosecutor decided not to prosecute the case, the department may hold another hearing and determine that a license suspension or revocation should be imposed, nevertheless.
- The law specifies that the police official is to stamp the face of the license. District officials report that the license is actually punched with a perforating device which imprints the letters, "DOT" on the license. This gives notice to the enforcement officers in the field that some action against the license is in process within the Department of Transportation. The field officer encountering such a license can then check with the department to determine the validity of the license. Again, this is easier due to the small size of the District. Of course, the license would continue to appear valid to an enforcement officer in another state.

IOWA. The Iowa law was adopted in 1982, and became effective on July 1, 1982.[3]

Overview. The law provides for mandatory revocation (for 120 days on a first offense) based upon the officer's sworn report of test results showing a BAC of 0.10 percent or more. This independent of the disposition of criminal charges. The revocation is effective 20 days after notice is given. If test results are available immediately, the arresting officer can give the notice, collecting the license and issuing a temporary permit valid for 20 days. Opportunity for a hearing is provided, although it will not necessarily occur prior to the effective date of the revocation. A restricted license based on hardship is available.

Action by the Enforcement Officer. The peace officer must certify to the department the following two facts:

1. That reasonable grounds existed to believe the person was operating a motor vehicle in violation of section 321.281 (the state code section which prohibits operating a motor vehicle on the highways while under the influence or while having a BAC of 0.13 percent or more).
2. That the person submitted to chemical testing and test results indicate a BAC of 0.10 percent or more.

Where the chemical test results are available, the peace officer may serve immediate notice of revocation on behalf of the department. In such a case, the officer takes possession of the person's Iowa license and issues a temporary license valid for 20 days. The officer sends the license to the department along with the affidavit of test results.

The peace officer is required to advise any person requested to submit to chemical testing that if the results indicate a BAC of 0.10 percent or more, or if the person refuses to submit to the test, the department will revoke the license. The officer must advise the person of the revocation periods applicable in each of those circumstances (the revocation periods applicable to refusals are longer than those applicable to test results).

Action by the Department. The law provides that upon the officer's certification as described above, the department "*shall*" revoke the person's license. The period of revocation is 120 days if the person has no prior alcohol-related revocations within the past 6 years, 240 days if the person has one prior revocation, and 1 year if the person has two or more prior revocations.

The revocation is effective 20 days after notice of revocation is given. That notice may be given by certified mail or by the peace officer as described above.

Hearing. A person who has received notice of revocation or who has been issued a twenty-day permit as described above may make written request for a hearing. Such request must be made within 10 days of the effective date of the issuance of the 20-day permit. The department must grant a hearing within 20 days of receipt of the written request. The scope of the hearing is limited to the

[3]Iowa H. File No. 2369, 1982 Legis. Serv. 548 (West).

following issues:

1. Whether the peace officer had reasonable grounds to believe the person was operating a motor vehicle in violation of section 321.281;

2. Whether the person refused the test, or the test results if the person submitted;

3. Whether the person should be issued a temporary restricted license.

The law specifies that the hearing *may* be recorded. Judicial review is available in accordance with the state's administrative procedure act.

Miscellaneous. Here are some miscellaneous related provisions of the Iowa law:

- Where a license has been revoked on the basis of test results, the law does not authorize revocation based upon a conviction growing out of the same event.
- The presumptive BAC level specified by the law for the offense of operating while under the influence is 0.10 percent. Iowa law does not define the illegal *per se* criminal offense.
- The law contains extensive provisions authorizing withdrawal of a specimen for chemical testing pursuant to a search warrant in cases involving a traffic accident which has resulted in a death or a serious personal injury.
- On application, the department may issue a "temporary restricted license" to a person whose license has been revoked as described above if necessary to performance of the person's normal occupation or for transportation to and from a treatment program, but the person shall not operate a vehicle for pleasure while holding the restricted license.

Comments. Here are some general observations regarding the Iowa law:

- Iowa officials indicate they are very pleased with their new law, although it has been in effect for only a few weeks. They indicate the revocation is completely independent of the criminal case disposition. If the person is acquitted in the criminal court, the license will remain revoked.
- The law specifies that the officer must certify "that the person submitted to chemical testing. . . ." before the department can revoke on the basis of the test results. This appears to preclude a revocation based upon a chemical test performed pursuant to a search warrant without the consent of the person subjected to the test.
- The BAC level specified for revocation (0.10 percent) is the same as the level at which a person is presumed to be under the influence, but it is lower than the illegal *per se* level (0.13 percent). We think that a person whose license is revoked may be able to argue effectively that at the lower level he should only be presumed to be operating illegally, and that the revocation procedures specified in the law afford him no opportunity to rebut this presumption. The defined scope of the hearing, for example, does not include that issue. We believe that while a different BAC level for the administrative action is sustainable, it causes unnecessary difficulty. The difficulty could be avoided by reducing the illegal *per se* level to 0.10 percent. Iowa officials indicate they do not believe this will be a problem.
- Written request for a hearing must be made within ten days of "the effective date of the revocation . . .or the issuing of the temporary permit." But those two points in time are at least 20 days different—more where the revocation notice is given by mail. The temporary permit is issued at the same time notice of revocation is given, and the effective date of the revocation is 20 days after the notice is given. Which of these dates marks the beginning of the 10—day limitation on requesting a hearing? Iowa officials indicate they are aware of this problem.
- If a hearing may be requested up to 10 days after the effective date of the revocation and the hearing must be held within 20 days following the request, as the law specifies, then the hearing might be held as late as 30 days *after* the revocation takes effect. Even if the law is interpreted to require a request for a hearing to be made within 10 days after the notice of revocation is given, a hearing held 20 days later might still be 10 days *after* the effective date of the revocation. Iowa officials indicate they will stay revocations pending the outcome of the hearing.

MINNESOTA. The Minnesota law was adopted in 1976. It was subsequently amended, most recently in 1982. Some of the 1982 amendments were effective on April 1, 1982; others are effective July 1, 1982.

Overview. The law provides for mandatory revocation (for a period of 90 days) based upon the peace officer's cetification of probable grounds to believe the offender was driving while under the influence, and chemical test results showing an alcohol concentration of 0.10 or more. The revocation appears to be effective 7 days after notice of revocation is given. The peace officer who directs the administration of the chemical test is required to give notice of revocation where the test results exceed the legal level. The officer must take the offender's license, and issue a temporary license valid for 7 days. Administrative review (without hearing) is available at any time during the revocation period. Judicial review and hearing is available if a petition is filed within 30 days of revocation. Neither review stays the revocation. Opportunity for a hearing is *not* provided prior to the effective date of the revocation.

Action by the Enforcement Officer. At the time a chemical test specimen is requested, the officer must inform the offender of the following:

1. That if testing is refused, the license will be revoked for a period of 6 months;

2. That if testing indicates that the offender is under the influence, criminal penalties will apply, and the

[4]Minn. Stat. Ann. §§ 169.212, .123, .1231, 171.19, 634.15, as amended by Ch. 423, 1982 Session Law Serv., No. 2 (West).

license may be revoked for a period of 90 days;

3. That the offender has a limited right to consult an attorney, but this may not unreasonable delay administration of the test;

4. That the offender has the right to have additional independent tests made.

If the offender submits to the test and it indicates an alcohol concentration of 0.10 or more, the officer must report the test results to the department, and to the appropriate prosecuting authorities. The officer must certify the following facts to the department:

1. That reasonable and probable grounds existed to believe the offender had been driving, operating, or in physical control of a motor vehicle while under the influence of alcohol or a controlled substance;

2. That the offender submitted to chemical testing;

3. That the test results indicate an alcohol concentration of 0.10 or more.

The peace officer is also required, on behalf of the department, to serve immediate notice of intention to revoke and of revocation. The officer must take the offender's license, and must issue a temporary license effective for 7 days. The officer must send the offender's license to the department along with the required certification.

Action by the Department. Upon receipt of the officer's certification as described above, the department is required to revoke the offender's license (license, permit, nonresident privilege, or privilege to receive a license) for a period of 90 days.

One section of the law specifies that the revocation becomes effective at the time the department, or the peace officer acting in behalf of the department, notifies the offender of the revocation. This is inconsistent, however, with the section which requires the peace officer, at the same time, to issue a temporary permit which is valid for 7 days. We interpret the law as providing for revocation to become effective 7 days following notice.

The notice of revocation, whether given by the officer or by the department, must advise the offender of the right to administrative and judicial review under the law. If the notice is mailed, it is deemed received 3 days after mailing to the last known address of the offender.

Hearing. The Minnesota provisions relating to hearing and review are very unusual. As amended in 1982, they no longer afford an oportunity for a hearing prior to the effective date of the revocation. There are two independent tracks for review:

1. Administrative Review. At any time during the revocation period, the offender may request in writing a review of the revocation by the department. Upon such a request, the department must review the evidence upon which the revocation was based and any other material information brought to its attention. It must determine whether there is sufficient cause to sustain the order, and must report the results of the review in writing within 15 days of the request. The process is not a hearing, and it is not a prerequisite to judicial review. Request for administrative review does not stay the revocation.

2. Judicial Review. Within 30 days of receipt of the revocation notice, the offender may petition a county or municipal court for review. The petition for judicial review does not stay the revocation. The court may order a stay only if the hearing has not been held within 60 days after the petition is filed. The hearing is before the judge. It may be conducted at the same time as the pre-trial motions in the criminal prosecution of the same charges, if any. The hearing is recorded. The department may be represented by its own attorney or by the local prosecuting attorney. The scope of the hearing is limited to the following issues:

1. Whether the peace officer had reasonable and probable grounds to believe the offender was driving, operating, or in physical control of a motor vehicle while under the influence of alcohol or a controlled substance;

2. Whether the offender was lawfully arrested for violation of the state law against driving while under the influence, or was involved in an accident, or refused to take a preliminary screening test, or took the screening test and it recorded an alcohol concentration of 0.10 or more;

3. Whether the peace officer informed the offender of his rights and of the consequences of taking or refusing the test;

4. Whether the test was taken and results indicated an alcohol concentration of 0.10 or more at the time of testing;

5. Whether the testing method used was valid and reliable, and the test results were accurately evaluated.

Within 14 days of the hearing, the court must file its order either rescinding or sustaining the revocation. The decision may be appealed to the district court.

Miscellaneous. Here are some miscellaneous related provisions of the Minnesota law:

- Minnesota law does define the illegal *per se* criminal offense. The illegal level is 0.10.
- Another section of the law specifies that whenever the evidentiary test shows an alcohol concentration of 0.07 or more, that result must be reported to the department. Presumably, the officer who directed the administration of the test would bear this reporting responsibility. The department must keep this report in the driver's file, and whenever there are two or more such reports within a 2 year period, the department *may* require the driver to have an "alcohol problem assessment" at the driver's expense. If the driver refuses the assessment, or refuses necessary treatment, the department may deny a license for up to 90 days.
- Another section provides for mandatory revocation of license upon conviction for driving while under the influence. The revocation period ranges from 30 days to more than two years, depending upon the offender's prior record, and upon the consequences (any personal injury or death) of the current violation. A person whose license is

revoked under the provisions described in this summary is not subject to revocation based on conviction on the first or second offense, but is subject to the additional revocation on a third or subsequent offense.

• The provisions described in this summary are incorporated with the implied consent provisions so that an offender who refuses the test is subject to immediate notice or revocation and withdrawal of license just as the offender who submits to the test, although the revocation period for a refusal is 6 months compared with 90 days for the person who fails the test.

• The law provides that the results of an evidentiary test administered within two hours of the alleged violation is deemed to be the alcohol concentration at the time of the violation. Where the test is administered after more than two hours, it is still "competent evidence."

• The law provides that the department may issue a limited license subject to conditions and limitations necessary to the interests of public safety to any offender whose license is revoked as described above. Also, if the offender completes a treatment program, and provided the offender has not had a prior alcohol-related revocation within the past 3 years, the department can terminate the revocation period 30 days early, restoring the license.

Comments. Here are some general observations regarding the Minnesota law:

• The law provides an "administrative review" and a hearing, but neither will necessarily occur prior to the effective date of the revocation. Minnesota officials indicate that the purpose of the administrative review is to catch cases where there is a legitimate question of the identity of the offender, or where there is just not enough information to support the revocation. They have already disposed of several cases on administrative review. They have also had cases where the offender requested to be allowed to appear in person at the administrative review (as defined by the law, it is only a review of the record). They have not denied these requests. In some cases, this administrative review can be held prior to the expiration of the temporary permit (7 days). In such a case, they wind up providing what is essentially an administrative hearing prior to the effective date of the revocation. It is questionable whether they can do this on a large scale, however.

• Minnesota is the creator of the concept of revoking the license on the basis of the chemical test results prior to a conviction for driving while under the influence. They have encountered problems with a backlog of hearings, primarily due to some unique provisions in their former law. The new law tries to resolve these problems. They report the experience so far has been excellent.

NEW YORK. A relevant law has not yet been adopted, but a bill was introduced in Assembly on March 22, 1982.[5] This summary reflects the provisions of that bill.

Overview. The bill provides for mandatory suspension (for a period of 90 days) of the license of a person who is found to have operated a motor vehicle while having one-tenth of one percent or more alcohol in the blood. The finding is made by the department at a hearing, or on the basis of the officer's report if no hearing is requested. The suspension is effective immediately after the hearing, or 5 days after the chemical test if no hearing is requested. The suspension is independent of the disposition of the criminal charges. There is no provision for the officer to take possession of the offender's license, but when a chemical test is administered, the offender must be given written notice of the right to request a hearing.

Action by the Enforcement Officer. Whenever a chemical test administered pursuant to the implied consent law indicates that the offender operated a motor vehicle while having one-tenth of one percent or more by weight of alcohol in the blood, the officer administering the test must report this fact to the department. The report must be made at such time and in such form as specified in regulations; the bill does specify two means for verification of the report.

Whenever a chemical test is performed, the officer must give the offender a written notice of the right to a hearing if requested within 5 days of the chemical test. The bill does *not* specifically require giving notice of the consequences of test results showing a BAC of 0.10 percent or more.

Action by the Department. When the department receives a report as described above, if a request for a hearing is made within 5 days of the chemical test, the department must conduct a hearing within 15 days of the request. If the department finds that the offender operated a motor vehicle while having one-tenth of one percent or more by weight of alcohol in the blood, the department must immediately suspend the license of the offender. If the offender fails to request a hearing within five days of the chemical test, the right to a hearing is waived, and the department must immediately suspend the license. The period of suspension is 90 days.

Hearing. As noted above, if the offender requests a hearing within 5 days of the chemical test, a hearing must be held within 15 days of the request. If a hearing is not requestedwithin five days, the right to a hearing is waived.

Miscellaneous. Here are some miscellaneous related provisions of the New York bill, and of existing New York law:

• New York law does define the illegal *per se* criminal offense. The illegal level is 0.10 percent.

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[5]N.Y. Assembly Bill No. 11047, introduced March 22, 1982. The issue at the hearing is whether the offender operated a motor vehicle while having one-tenth of one percent or more by weight of alcohol in the blood.

• The bill would amend the law relating to alcohol/drug rehabilitation program to allow participation by those whose licenses are suspended under the procedures described above as well as those who are convicted of alcohol or drug-related traffic offenses.

Comments. None.

OKLAHOMA. The Oklahoma law was adopted and later amended in 1982. The provisions regarding revocation based upon test results go into effect after April 1, 1983.[6]

Overview. The law provides for mandatory revocation (for 90 days) based upon the officer's sworn report and test results showing alcohol concentration (blood or breath) of 0.10 or more. The revocation is effective 30 days after notice is given. Where test results are immediately available, the notice is given and the license is seized by the arresting officer. The officer then issues a receipt which constitutes valid evidence of the driving privilege for 30 days. Opportunity for hearing is provided prior to the revocation's effective date. All this is independent of disposition of the criminal charges. Another section requires revocation upon conviction for driving while under the influence.

Action by the Enforcement Officer. Any arrested person whose alcohol concentration is 0.10 or more as shown by blood or breath testing under the implied consent law is required to surrender their license (license, permit, or other evidence of the driving privilege) to the arresting officer. The officer is required to seize any such license surrendered or found on the offender during a legal search. If the license appears to be valid, the officer must issue a receipt on a form provided by the department. The receipt is recognized as a valid license for 30 days from its date of issuance. The receipt form also contains a notice of revocation, effective in 30 days. The officer is required to forward the following to the department, either in person or by mail, within 72 hours of the issuance of the receipt:

1. The seized license;
2. A copy of the receipt issued to the offender;
3. A written report of the test results; and
4. A sworn report of the reasonable grounds to believe the offender was driving while under the influence.

Failure of the officer to file the report within 72 hours does not affect the authority of the department to revoke.

Action by the Department. The law provides that upon receipt of the officer's report showing that the offender had an alcohol concentration of 0.10 or more and that the officer had reasonable grounds to believe the offender was driving while
under the influence, the department *shall* revoke the license (or nonresident privilege or the privilege of having a license issued) for a period of 90 days. Revocation is effective 30 days after the offender is given written notice, either by the officer as described above or by the department.

Hearing. Upon a written request received within 15 days after the notice of revocation is given, the department must grant the offender an opportunity to be heard. The request operates to stay the revocation until disposition of the hearing, unless the offender is currently under suspension/revocation for some other reason. If necessary, the department may issue temporary permits while the hearing is pending. The hearing is held before the commissioner or an authorized agent, and covers the following issues:

1. Whether the officer had reasonable grounds to believe the offender was driving while under the influence;
2. Whether the person was arrested;
3. Whether the testing procedures used were in accordance with state regulations;
4. Whether the offender was advised that the license would be revoked if test results reflected an alcohol concentration of 0.10 or more;
5. Whether the test results in fact reflected an alcohol concentration of 0.10 or more; and
6. Whether the blood or breath specimen was obtained within two hours of the arrest.

The hearing must be recorded. After the hearing, the revocation may be rescinded or sustained.

Miscellaneous. Here are some miscellaneous related provisions of the Oklahoma law:

• Oklahoma law, as amended in 1982, does define the illegal *per se* criminal offense. The illegal alcohol concentration level 0.10.

• Another section provides for mandatory license revocation for six months *upon conviction* for driving while under the influence. The law does not specify whether this revocation and the one imposed on the basis of the test results are to run concurrently or consecutively.

• Making application for a renewal or duplicate license while the applicant's license is in the custody of a law enforcement officer or the department is an offense punishable by a fine of not more than $500, *and* by imprisonment for not less than seven days or more than six months. A notice of this offense and penalties must be included on the revocation notice form.

• The results of chemical tests for alcohol concentration are admissible in civil actions (the former law excluded such use of test results).

• The provisions are incorporated with the implied consent law in such a way that an offender who refuses the test is subject to immediate notice of revocation and seizure of license just as the offender whose test results are 0.10 or more.

Comments. None.

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[6]Okla. Chpt. 273, 1982 Session Law Service, No. 2 (West); amended by Chpt. 294, 1982 Session Law Service, No. 4 (West).

WEST VIRGINIA. The West Virginia law was adopted in 1981, and became effective on September 1, 1981.[7]

Overview. The law provides for a temporary suspension based upon the officer's sworn report and any applicable test results. Suspension is ordered by the department after determination of certain facts. If it determines from the reports that the offender had a BAC of 0.10 percent or more, or that the offender was under the influence of a drug, it must mail a suspension notice to the offender. The suspension is effective ten days after receipt of the notice, and a hearing may be requested within those ten days. During pendency of a hearing, the temporary suspension is stayed. Based upon determinations at the hearing, the license may be revoked for specified periods ranging from six months to life, depending upon the person's prior record and the nature and consequences of the current violation. All of this is independent of the disposition of the criminal charges.

Action by the Enforcement Officer. The officer who makes an arrest for a violation of section 17C–5–2 (the state code section which prohibits driving while under the influence) must make a sworn report to the department within 24 hours, including the following information:

1. The name and address of the person arrested;
2. The specific offense charged (§17C–5–2 includes several different offenses relating to driving while under the influence of alcohol and drugs);
3. If applicable, a copy of the results of any "secondary" tests of blood, breath, or urine (secondary tests are those other than the preliminary breath test which is used only to determine whether to arrest); and
4. The certification of the officer that the tests were administered in accordance with law, and that the officer believes the results to be correct.

Action by the Department. The law provides that if the commissioner makes the following determinations on the basis of the officer's sworn statement and the test results, the commissioner "*shall*" temporarily suspend the offender's license:

1. That the person was arrested for an offense described in section 17C–5–2; and
2. That at the time of the test the person's BAC was 0.10 percent or more; *or*
3. That at the time of the arrest the person was under the influence of a controlled substance or drug.

The temporary suspension may not become effective until ten days after receipt of a copy of the suspension order by the offender. No duration period for this temporary suspension is specified. It appears to remain in effect until the license is either revoked or restored based upon determinations at the hearing. It is unclear what would happen if the offender failed to request a hearing.

The law also specifies that upon receipt of the affidavit of a police officer as described above, the department must search all appropriate records of the offender for prior offenses relating to driving while under the influence, and must forward an abstract of same to the police officer within 24 hours.

Hearing. If the offender whose license has been temporarily suspended submits a written request for a hearing within ten days of receipt of the suspension notice, a hearing opportunity must be provided. The hearing must be before the commissioner or a designated agent, and must be held within 20 days of the request, unless postponed or continued. The commissioner is authorized to issue subpoenas and subpoenas *duces tecum* (a subpoena for the production of records) in connection with the hearing.

The law requires the commissioner to make specific findings in regard to the following issues:

1. Whether the arresting officer had reasonable grounds to believe the person was driving while under the influence;
2. Whether the person was lawfully arrested for an offense involving driving while under the influence; and
3. Whether the tests were administered in accordance with the provisions of law.

The law specifies that the principal issue at the hearing shall be as follows:

> [W]hether the person did drive a motor vehicle while under the influence of alcohol, or under the influence of any controlled substance, or under the influence of any other drug to a degree which renders him incapable of safely driving, or under the combined influence of alcohol and any controlled substance or any other drug to a degree which renders him incapable of safely driving, or did drive a motor vehicle while having an alcoholic concentration in his blood of ten hundredths of one percent (.10), or more, by weight.[8]

If the commissioner makes a determination adverse to the offender on the principal issue, the license must be revoked for a period of six months, or for a period of ten years if the license has previously been suspended under this provision, or for the life of the offender if the license has previously been suspended more than once under this provision.

Additionally, the commissioner may make determinations which relate to the nature and consequences of the violation, and these determinations affect the period of revocation. Thus if a death resulted and the offender's conduct was reckless, the revocation period is ten years or life, depending upon the offender's prior record of suspensions. If a death resulted and the offender's conduct was negligent, the revocation period is five years or life, depending upon the prior record. If bodily injury to another resulted, the revocation period is two years or ten years, depending upon the prior record. These determinations are based upon the preponderance of the evidence.

[7]W. Va. Acts 1981, Chpt. 159, codified as W. Va. Code §§ 17B–2–7, –8; 17B–3–5, –8, –9; 17C–5–2, –2a, –4, –5, –6, –7, –8, –9, –10; 17C–5A–1, –2, –3, –4; and 60–6–24 (Supp. 1981).

[8]W. Va. Code § 17C–5A–2 (c) (Supp. 1981).

Each of the possible determinations parallels a separate criminal offense defined by section 17C–5–2.

If the commissioner finds in favor of the offender on the issues discussed above, the temporary suspension order will be rescinded. If the finding is adverse to the offender, judicial review is available, but the revocation order will not be stayed during the pendency of that review unless the court orders a stay following a hearing and finding that there is a reasonable probability that the offender will prevail upon the merits and that irreparable harm will result if a stay is not granted.

Miscellaneous. Here are some miscellaneous related provisions of the West Virginia law:

- The law contains extensive provisions relating to the early reissuance of the license revoked for various time periods as described above. Each provision specifies a minimum time period which must elapse, requires the offender to successfully complete a treatment program and to pay all associated costs, and requires the commissioner to determine that the offender is not likely to repeat the offense and that the offender's driving will not constitute an unusual and immediate danger to the public.
- The law specifies that a person who drives a motor vehicle on the highway is deemed to have given consent to the administrative procedures described in the law for determination of whether his license should be revoked/suspended for driving while under the influence. The effect of this "implied consent" provision is unclear.
- West Virginia does not define the illegal *per se* criminal offense. The presumptive BAC level specified by the law for the offense of driving while under the influence is 0.10 percent.
- Another section requires the department to mark a license which is reissued following a suspension with the type of violation for which the suspension was entered and the date of the violation.

Comments. Here are some general observations regarding the West Virginia law:

- During the hearing stage, the commissioner's authority to determine certain facts and to impose certain sanctions (long-term revocations) is greatly expanded. The law does not make it clear whether the commissioner has this authority apart from the hearing process. It is also unclear whether the commissioner is authorized to hold a hearing without the participation of the offender. What would happen if the offender failed to request a hearing? Without a hearing, it appears that the commissioner only has authority to impose a temporary suspension, and can only examine the record and the police officer's report. During a hearing, the commissioner may call witnesses, examine many more issues, and impose a long-term revocation. Does this chill the offender's right to a hearing?
- West Virginia officials indicate the law is generally working well, but they are having trouble keeping up with the hearings. They have just hired two new people to help out. The hearing examiners forward their findings to the department headquarters for a final decision on the matter. It is at this final decision stage that they are having a problem keeping up.
- One other problem results from the laws specification of the licensee's county of residence as the location of the hearing. Where the offense occurs in another county across the state, they are finding it difficult to have the officers present at the hearing. They lose some suspensions because the officer can't travel to the hearing. They are considering proposing a change in the law.

Appendix A—Part II

Comparison of State Laws
Revocation on Administrative Determination (ROAD)

The six state laws and one bill which were summarized in Appendix A—Part I are compared in a series of tables in Part II. The tables compare the laws in terms of 30 substantive issues. The jurisdictions compared are:

Delaware

District of Columbia

Iowa

Minnesota

New York

Oklahoma

West Virginia

	Delaware	Dist. of Columbia	Iowa	Minnesota	New York	Oklahoma	West Virginia
What license action does the law contemplate? R = Revocation. S = Suspension. * = Temporary suspension followed by revocation.	R	S or R	R	R	S	R	*
Is the license action mandatory or discretionary? M = Mandatory. D = Discretionary.	M	D	M	M	M	M	M
What is the period of license action? A = All offenses. 1 = First offense. 2 = Second offense (and subsequent if no 3). 3 = Third and subsequent offenses. * = These periods may be increased based on the nature and consequences of the offense. See the Law Summary. D = Day(s); M = Month(s); Y = Year(s)	1 = 3M 2 = 12M 3 = 18M	Suspend 1 = 2-30D 2 = 15-90D Revoke 1 = 6M 2 = DMV decides	1 = 120D 2 = 240D 3 = 1 Y	A = 90D	A = 90D	A = 90D	1 = 6M* 2 = 10Y* 3 = Life*
How does this suspension/revocation period compare with the period imposed for refusing to submit to testing under the implied consent law? Same = The periods are essentially the same. More = This period is longer than the implied consent period. Less = This period is shorter than the implied consent period.	Less	Less	Less	Less	Less	Less	Less
How does this suspension/revocation period compare with the period imposed following a conviction for driving while under the influence? Same = The periods are essentially the same. More = This period is longer than the DUI conviction period. Less = This period is shorter than the DUI period.	Less	Less	Unclear	More	Less	Less	Unclear
Is this suspension/revocation temporary, pending adjudication of the criminal charges, or is it independent of disposition of those charges? T = Temporary. I = Independent. * = Unclear, see the Law Summary.	I	*	I	I	I	I	I
The primary basis for the suspension/revocation is: AC = Evidence the offender drove a motor vehicle while having an alcohol concentration of 0.10 or more. UI = Evidence the offender drove a motor vehicle while under the influence of alcohol and/or drugs; test results showing the alcohol concentration are relevant evidence. MR = Evidence the licensee committed any of the designated mandatory revocation offenses.	UI	MR	AC	AC	AC	AC	UI

Revocation on Administrative Determination (ROAD)

Comparison of State Laws

	Delaware	Dist. of Columbia	Iowa	Minnesota	New York	Oklahoma	West Virginia
Notice of suspension/revocation is generally given to the offender by: PO = The arresting police agency. PI = The arresting police agency, if chemical test results are available in time. DMV = Only the department can give the notice.	PO	PO	PI	PI	DMV	PI	DMV
The facts which trigger issuance of the suspension/revocation notice are as follows:							
— Officer had probable cause to believe offender violated law by driving while under the influence.	X		X	X			
— Offender was arrested and charged with driving while under the influence.	X					X	X
— Offender was arrested and charged with any of the specified mandatory revocation offenses.		X					
— A chemical test was conducted under the implied consent law.	X		X	X	X	X	
— Test results indicate an alcohol concentration of 0.10 or more.			X	X	X	X	
— A determination is made that at the time of arrest the offender had an alcohol concentration of 0.10 or more, or the offender was under the influence of drugs.							X
Does the arresting officer pick up the license card, if it is in the offender's immediate possession, and issue a temporary permit in its place? YES = Yes, whenever the officer initiates license action. (YES) = Yes, as above, but only when the person holds a license of the state where the arrest is made. (NO) = No, the officer does not pick up the license, but does stamp the face of the license to indicate license action is pending. NO = No, the officer does not pick up the license.	(YES)	(NO)	(YES)	YES	NO	YES	NO
What is the period of validity (in days) of the temporary permit issued by the officer?	10	—	20	7	—	30	—
The facts which trigger the requirement that the arresting officer make a certified report to the department of motor vehicles are as follows:							
— Officer had probable cause to believe offender violated law by driving while under the influence.	X			X			
— Offender was arrested and charged with driving while under the influence.	X					X	X
— A chemical test was conducted under the implied consent law.	X			X	X	X	
— Test results indicate an alcohol concentration of 0.10 or more.				X	X	X	
— The officer served the suspension/revocation notice upon the offender.			X				
— **Notice must be given to the department, but the law makes no mention of a certified report.		**					
What is the time limitation within which the officer's certified report must be submitted to the department? I = Immediately. R = Time to be specified by regulations.	none	—	I	none	R	72 hours	24 hours

	Delaware	Dist. of Columbia	Iowa	Minnesota	New York	Oklahoma	West Virginia
The officer must certify the following facts in the report to the department, or include the information with the report: C = These facts must be certified. A = This information, if available, must accompany the report.							
— That the officer had probable cause to believe the offender violated the law by driving while under the influence.	C		C	C		C	
— That the offender was arrested and charged with the offense of driving while under the influence.	C					C	C
— That a chemical test was conducted under the implied consent law.	C		C	C	C		
— That the test results indicate an alcohol concentration of 0.10 or more.			C	C	C		
— A written report of the test results.						A	A
— A statement that the tests were administered according to state law, and that the officer believes the results to be correct.							C
— The name and address of the offender.							C
— A copy of the receipt given for the license.						A	
— The license card surrendered by the offender.	A		A	A		A	
Is the officer who administers the chemical test required to warn the offender that an alcohol concentration of 0.10 or more will result in suspension/revocation of the license?	NO	NO	YES	YES	NO	YES	NO
Is an opportunity for a hearing provided prior to the effective date of the suspension/revocation? YES = Yes, a timely request for a hearing operates to stay the suspension/revocation until the hearing is determined. NO = A request for a hearing does not stay the action, and a hearing will not necessarily be provided prior to the effective date.	YES	YES	NO	NO	YES	YES	YES
How many days does the offender have following receipt of the suspension/revocation notice to request a hearing?	10	5	10	30*	5	15	10
Within how many days of the request for a hearing must the hearing be held? (NS = Not Specified)	30	NS	20	60*	15	NS	20
Is the hearing administrative or judicial? A = Administrative hearing. J = Judicial hearing. J/A = Judicial hearing, but administrative "review" is also available; see the Law Summary.	A	A	A	J/A*	A	A	A

*The Minnesota provisions described here relate to the judicial hearing because it is most comparable to the hearing provided by the other states. Minnesota also offers an administrative review, which is not a full hearing and is not a prerequisite to the judicial hearing. See the Law Summary for more details.

	Delaware	Dist. of Columbia	Iowa	Minnesota	New York	Oklahoma	West Virginia
In what county is the hearing held? A = In the county where the events and arrest occurred, unless the parties agree otherwise. (A) = In the county where the events and arrest occurred, without exception. R = In the county where the offender resides, unless the parties agree otherwise. NS = Law does not specify the county of the hearing.	NS	NS	A	(A)*	NS	A	R
Is the hearing recorded? M = The law specifies that the hearing *May* be recorded. S = The law specifies that the hearing *Shall* be recorded. NS = The law does not specify.	NS	S	M	S*	NS	S	NS
The law specifies that the following issues are within the scope of the hearing:							
— Whether the police officer had probable cause to believe the offender was violating the law which prohibits driving while under the influence.	X		X	X		X	X
— Whether the offender was arrested for the offense of driving while under the influence.	X					X	X
— Whether the offender was *lawfully* arrested for the offense of driving while under the influence, or was involved in an accident, or refused to take a preliminary screening test, or took the screening test and it recorded an alcohol concentration of 0.10 or more.				X			
— Whether a chemical test was conducted.	X			X			
— The results of the chemical test.			X				
— Whether the test results in fact reflected an alcohol concentration of 0.10 or more.				X		X	
— Whether the testing method used was valid and reliable, and the test results were accurately evaluated.				X			
— Whether the tests were administered in accordance with the provisions of law and regulations.						X	X
— Whether the blood or breath specimen was obtained within two hours of arrest.						X	
— Whether the officer informed the offender of his or her rights, and of the consequences of taking and/or refusing the test.				X		X	
— Whether the person was actually violating the law which prohibits driving while under the influence.	X						X
— Whether the person was actually violating the law which prohibits driving while having an alcohol concentration of 0.10 or more.					X		X
— Whether there are sufficient grounds to support the proposed suspension or revocation.		X					
— Whether the offender should be issued a temporary restricted license during the suspension/revocation period.			X				

*The Minnesota provisions described here relate to the judicial hearing because it is most comparable to the hearing provided by the other states. Minnesota also offers an administrative review, which is not a full hearing and is not a prerequisite to the judicial hearing. See the Law Summary for more details.

Revocation on Administrative Determination (ROAD)

Comparison of State Laws

	Delaware	Dist. of Columbia	Iowa	Minnesota	New York	Oklahoma	West Virginia
Does the law specify the standard of proof for the hearing? PE = The standard is the "preponderance of the evidence." CP = No standard is specified, but the law provides that the hearing is conducted according to the rules of civil procedure. NS = No standard is specified.	PE	NS	NS	CP	NS	NS	PE
Are any presumptions applicable to the hearing created on the basis of the chemical test results? PF = Test results showing an alcohol concentration of 0.10 or more create a prima facie presumption that the offender was under the influence of alcohol. CP = A conclusive presumption of a violation is created by test results showing an alcohol concentration of 0.10 or more, or showing "a positive indication of drugs." NP = No presumption applicable to the hearing is created, although the law may create a presumption applicable to the criminal prosecution.	CP	PF	NP	NP	NP	NP	PF
Following an adverse decision in the hearing, is judicial review available to the offender? NS = Not specified in the law. * = Review is by appeal to the district court.	YES	YES	YES	YES*	NS	NS	YES
Does a petition for judicial review stay the license action? NS = Not specified.	NO	NS	NS	NS	NS	NS	NO
Does the law provide that the jurisdiction's administrative procedure act is applicable to the judicial review? NS = Not specified.	NS	YES	YES	NS	NS	NS	NS
Is the person who refuses to submit to the implied consent test subjected to the same immediate notice of suspension or revocation as the person whose test shows an alcohol concentration of 0.10 or more?	YES	NO	YES	YES	—	YES	—
Does the jurisdiction also have a law providing for mandatory revocation of license upon *conviction* for driving while under the influence? (YES) = Yes, but the provision is specifically inapplicable to a person whose license has already been revoked for the same offense prior to the conviction. In the case of a third or subsequent offense, however, Minnesota law makes both revocations applicable.	YES	YES	(YES)	(YES)	YES	YES	NO
Do the laws of this jurisdiction also define the *per se* criminal offense making it illegal to drive with a specified alcohol concentration? If so, what is the minimum specified level?	0.10	NO	0.13	0.10	0.10	0.10	NO

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