

PRELIMINARY ORAL FLUID ANALYSIS

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House Bill 4701 (proposed substitute H-1)

Sponsor: Rep. Gary Howell

Committee: Judiciary

Complete to 1-24-22

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 4701 would amend the Michigan Vehicle Code to include preliminary oral fluid analyses in certain provisions that now apply to preliminary breath tests (PBTs); to allow a preliminary oral fluid analysis to be performed by a peace officer instead of only by a certified drug recognition expert; and to define the term “other bodily fluid” and add it to provisions that now pertain to a commercial motor vehicle roadside PBT.

Currently, a peace officer may require a person to submit to a PBT if, among other things, the officer has reasonable cause to believe that the person was operating a vehicle while his or her ability to do so was affected by the consumption of alcohol or a controlled substance or that the person was operating a commercial motor vehicle while his or her blood, breath, or urine contained any measurable amount of alcohol or a controlled substance.

The bill would amend the provision concerning operating a commercial motor vehicle to also apply it to alcohol or controlled substances contained in *other bodily fluid*. Similarly, provisions that currently apply to a request by a peace officer to submit to a PBT or for penalties for refusing a PBT also would apply to a request to submit to a *preliminary oral fluid analysis*.

Other bodily fluid would mean fluid from the human body capable of revealing the presence of controlled substances or their metabolites, including oral fluid or saliva.

Preliminary oral fluid analysis would mean the on-site taking of a preliminary oral fluid test, performed by a *peace officer*, from the oral fluid of a person for the purpose of detecting the presence of a controlled substance, as that term is defined in section 7104 of the Public Health Code. [This is the definition currently in the law, except that under current law the tests must be performed by a *certified drug recognition expert*.]

The following would apply to a preliminary oral fluid analysis administered under the bill:

- It could lead to an arrest based on the results of the analysis.
- The results would be admissible in a criminal prosecution for certain drunk or drugged driving violations or in an administrative hearing for one or more of the following purposes:
 - To assist the court or hearing officer in a determining a challenge to the validity of an arrest.
 - As evidence of the presence or nonpresence of a controlled substance in the defendant’s oral fluid *if offered by the defendant* to rebut testimony elicited on cross-examination of a *defense witness* that a preliminary oral fluid analysis showed the presence of a controlled substance that was not found to be present when a chemical test of the defendant’s blood or urine was administered under the act.

- As evidence of the presence or nonpresence of a controlled substance in the defendant's oral fluid *if offered by the prosecution* to rebut testimony elicited on cross-examination of a *prosecution witness* that a preliminary oral fluid analysis showed no presence of a controlled substance that was found to be present when a chemical test of the defendant's blood or urine was administered under the act.
- The person would remain subject to provisions of the act pertaining to chemical tests and administrative hearings regarding chemical tests.
- A person who refused to submit to a preliminary oral fluid analysis would be responsible for a civil infraction.

The bill would take effect 90 days after its enactment.

MCL 257.43b and 257.625a and proposed MCL 257.36d

FISCAL IMPACT:

The bill would likely result in an increase in the number of individuals found in violation and subsequently convicted. Depending on the number of additional convictions and the specific charges, House Bill 4701 would have an indeterminate fiscal impact on the state and on local units of government. Violations could be either civil infractions, misdemeanors, or felonies, depending on the circumstances.

The majority of revenue received from payment of fines for civil infractions would increase funding for public and county law libraries. A small portion of the revenue would be deposited into the state Justice System Fund, which supports various justice-related endeavors in the judicial and legislative branches of government and the Departments of State Police, Corrections, Health and Human Services, and Treasury.

New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction.

New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2021, the average cost of prison incarceration in a state facility was roughly \$44,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$4,600 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue.

The fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. Any increase in penal fine revenue from misdemeanor and felony convictions would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.