WISCONSIN LEGISLATIVE COUNCIL STAFF

INFORMATION MEMORANDUM 90-7

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OVERVIEW OF WISCONSIN LAWS RELATING TO OPERATING A VEHICLE WHILE INTOXICATED AND POSSESSION OR DRINKING OF ALCOHOL BEVERAGES IN A MOTOR VEHICLE

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INTRODUCTION

This Information Memorandum provides an overview of current Wisconsin laws relating to (1) operating a vehicle [i.e., a motor vehicle, all-terrain vehicle (ATV), boat or snowmobile] while intoxicated and (2) possession or drinking of alcohol beverages (i.e., beer or intoxicating liquor) in a motor vehicle. This Memorandum also describes innovative laws in several other states relating to sanctions for operating a motor vehicle while intoxicated (OWI).

This Memorandum includes relevant laws enacted through the 1989-90 Legislative Session. In particular, it refers to pertinent changes made in 1989 Wisconsin Act 105, relating to licensing and operation of commercial motor vehicles (CMV); in general, those changes take effect January 1, 1991.

The Memorandum is divided into the following parts:

PART I

BACKGROUND

A. INTRODUCTION

The following quotation from a recent Wisconsin State Bar publication provides an overview of the history of drunk driving laws in Wisconsin:

> The Wisconsin Legislature first tackled the problem of impaired driving in 1911 ["No intoxicated person shall operate, ride or drive any automobile, motorcycle or other similar motor vehicle along or upon any public highway of this state." s. 1636-49, Stats. of 1911]. The relevant laws have since been repeatedly altered, each change representing a legislative design to grapple more effectively with a hazard that prior law had failed to check. This variegated legislative history in turn provides a reliable forecast of continued change in the definition of the impaired driving offenses, in the procedures for their enforcement and adjudication, and in the manner of dealing with convicted offenders.
>
> A significant overhaul of the impaired driving statutes occurred during the 1981-82 session of the Wisconsin Legislature [Ch. 20, Laws of 1981]. That revision constitutes the substantive core of present law, although a number of changes have been enacted in the interim. To that core must also be added the significant gloss of judicial interpretation generated in a plethora of appellate opinions on the subject [Hammer, Traffic Law and Practice in Wisconsin, ATS-CLE, State Bar of Wisconsin, pp. 4-6 and 4-7, (1987) (Revised 1989)].

B. MAJOR CHANGES IN CH. 20, LAWS OF 1981

The major changes in Ch. 20, Laws of 1981, which substantially revised the laws relating to operation of a motor vehicle while intoxicated, included:

1. Establishing 0.1% or more blood alcohol concentration (BAC) as a per se drunk driving violation (i.e., proof by the prosecutor that a driver's BAC was 0.1% or more is sufficient proof for a drunk driving conviction).

2. Requiring drivers convicted of drunk driving or improperly refusing to take a chemical test under the implied consent law to submit to an assessment of their use of alcohol or drugs and to submit to alcohol or drug treatment, if necessary.

3. Increasing and altering the structure of penalties and license sanctions for drunk driving violations.

4. Creating a driver improvement surcharge of $150, for OWI-related services provided by state and county agencies, whenever the court imposes a fine or forfeiture for a drunk driving violation. The surcharge is currently $250.

5. Revising the law relating to drinking, possession or keeping of alcohol beverages in a motor vehicle on a highway.

C. OTHER MAJOR CHANGES SINCE CH. 20, LAWS OF 1981

Since the enactment of Ch. 20, Laws of 1981, subsequent Acts which have made major changes in the drunk driving laws include:

1. 1985 Wisconsin Act 337 which, besides changing the legal drinking age to 21: (a) provided increased penalties for drivers with a BAC of 0.2% or more (so-called "aggravated drunk driving"); (b) changed the license sanction for first offense drunk driving from a suspension to the more severe revocation; (c) established increased waiting periods for obtaining occupational licenses; and (d) required 24 hours of community service with a public agency or nonprofit charitable organization for first-time offenders.

2. 1987 Wisconsin Act 3 which, among other things: (a) created an administrative suspension procedure applicable to drivers with a BAC of 0.1% or more; (b) deleted the "aggravated drunk driving" penalties and license sanctions created in 1985 Act 337; (c) made the license sanction for first offense drunk driving a suspension instead of a revocation; (d) increased the license sanctions and occupational license waiting periods for drunk drivers and for persons refusing to take a chemical test; (e) made the community service provision created in Act 337 optional instead of mandatory; and (f) permitted the court to order the drunk driver to pay restitution to the victim.

3. 1989 Wisconsin Act 7, which revised various procedures in the administrative suspension law to conform to constitutional due process concerns.

4. Various acts which have created provisions similar to the drunk driving laws and the implied consent law for boats (1985 Wisconsin Act

331), ATV's (1987 Wisconsin Act 399) and snowmobiles (1987 Wisconsin Act 399).

5. 1989 Wisconsin Act 105, which implements the requirements of the federal commercial driver's license law, including prohibitions relating to the operation of a CMV (e.g., a truck or a bus) while having a BAC of 0.04% or more but less than 0.1%. The provisions in Act 105 referred to in this Memorandum take effect on January 1, 1991.

PART II

OWI AND OWI-RELATED OFFENSES

This Part of the Memorandum (a) describes the basic elements of and penalties for the various violations involving operating a motor vehicle while under the influence of an intoxicant, drugs, or both and (b) briefly describes violations involving operating an ATV, boat or snowmobile while under the influence of an intoxicant, drugs, or both.

In this Part and throughout the remainder of this Memorandum:

a. "OWI" refers to the basic offense of operating a motor vehicle while under the influence of an intoxicant, drugs, or both, or with a BAC of 0.1% or more, as described in Section A, below.

b. "OWI-related" offense refers to:

(1) Causing injury by OWI [s. 346.63 (2), Stats.], as described in Section B, 1, below.

(2) Causing great bodily harm by OWI [s. 940.25, Stats.], as described in Section B, 2, below.

(3) Causing death by OWI [s. 940.09, Stats.], as described in Section B, 3, below.

c. A person whose license is referred to as "revoked" must, in order to drive in this state, reapply for a license (with the required fee), submit to the Department of Transportation (DOT) proof of financial responsibility (e.g., insurance) and pass all written and road motor vehicle operator's tests, as well as a vision screening. The reapplication and testing may occur only after the driver's revocation period has expired. A person whose license is referred to as "suspended" must, in order to drive in this state, have his or her license reinstated by the DOT, upon payment of a fee, once the suspension period has expired.

A. OWI: THE BASIC OFFENSE [s. 346.63 (1), Stats.]

1. Definitions; Where Law Enforceable

For purposes of the current OWI statute [and s. 346.63 (2), Stats., causing injury by OWI, discussed in Section B, below]:

a. "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.

b. "Motor vehicle" refers to self-propelled devices in, upon or by which persons or property may be transported or drawn upon a highway, but excludes snowmobiles, railroad trains and conveyances that are not self-propelled, such as bicycles and animal-drawn vehicles [s. 340.01 (35) and (74), Stats.; Hammer, supra, pp. 4-21 and 4-22].

c. "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion [s. 346.63 (3), Stats.]. A number of court decisions have held that an intoxicated driver seated behind the wheel of a parked vehicle with the engine running is an "operator" for purposes of the basic OWI statute [see, e.g., Village of Elkhart Lake v. Borzyskowski, 123 Wis. 2d 185, 366 N.W. 2d 506 (Ct. App. 1985)].

Enforcement of the OWI statute is limited to driving or operation on "highways" or upon "premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for use thereof" [s. 346.61, Stats.]. In City of Kenosha v. Phillips, 142 Wis. 2d 549, 419 N.W. 2d 236 (1988), the Wisconsin Supreme Court held that a privately owned parking lot for a company's employes was not within the purview of this statute just because the employes were members of the public; in order to come within the statute, the company would have had to intend to permit the public as a whole to use the premises for parking.

2. Elements of the Offense

Under current law, no person may drive or operate a motor vehicle:

a. While under the influence of an intoxicant or a controlled substance, or both, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving (hereafter, referred to as "under the influence of an intoxicant or drugs, or both"); or

b. While the person has a BAC of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more of alcohol in 210 liters of that person's breath (hereafter, referred to as "a BAC of 0.1% or more"). In State v. Muehlenberg, 118 Wis. 2d 502, 508, 347 N.W. 2d 914, 917 (Ct. App. 1984), the Wisconsin Court of Appeals held that this provision, establishing a per se violation for driving with a BAC of 0.1% or more, was not unconstitutionally void for vagueness since persons of common intelligence could, with a fair degree of definiteness, know when they are in danger of violating that provision.

3. Single Conviction if Person Guilty of Both Violations

A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of item 2, a or b, above, or both for acts arising out of the same incident or occurrence. If the person is charged with violating both, the offenses must be joined. If the person is found guilty of both for acts arising out of the same incident or occurrence, there can be only a single conviction for purposes of (a) sentencing and (b) counting convictions under ss. 343.30 (1q) and 343.305, Stats (see item 7, b, below for a discussion of "counting convictions for purposes OWI").

In State v. Bohacheff, 114 Wis. 2d, 338 N.W. 2d 466, 471-72 (1983), the Wisconsin Supreme Court held that this provision, permitting an OWI defendant to be charged with both driving under the influence and for having a BAC of 0.1% or more, did not violate the federal or state constitutional guarantees against double jeopardy because the Legislature intended prosecution for both offenses to terminate in one conviction for both charges.

This item (i.e., item 3) also applies to OWI-related offenses discussed in Section B, below.

4. Limits on Plea Bargaining

Under current law, if the prosecutor seeks to dismiss or amend an OWI or OWI-related charge, the prosecutor must apply to the court. The application must state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring OWI [s. 967.055 (2) (a), Stats.].

5. Deferred Prosecution Not Permitted

Current law specifies that a prosecutor may not place a person in a deferred prosecution program if the person is accused of or charged with an OWI or OWI-related violation [s. 967.055 (3), Stats.].

6. Consideration of Level of BAC in Sentencing

Under current law, in imposing a sentence for a violation based on the person's BAC, the court is required to review the record and consider the aggravating and mitigating factors in the matter. If the level of the person's blood alcohol level is known, the court is required to consider that level as a factor in sentencing. The chief judge of each judicial

administrative district must adopt guidelines for the consideration of aggravating and mitigating factors [s. 346.65 (2m), Stats.].

7. Penalties and License Sanctions

a. Table I

Table I attached to this Information Memorandum summarizes the various penalties and license sanctions, including the waiting period for obtaining an occupational license, applicable to OWI and OWI-related offenses (discussed in Section B, below). Table I also includes the penalties for driving after license suspension or revocation since these offenses are frequently committed after a person has had his or her driver's license suspended or revoked for an OWI or OWI-related violation.

b. Counting Offenses; Use of Date of Offense

With reference to OWI penalties, it must be noted that, in addition to prior OWI offenses, prior refusals to take chemical tests under the implied consent law (see Part III, below) and prior OWI-related offenses (i.e., causing injury, great bodily harm or death by OWI) are counted in determining whether an OWI offense is a first, second or third or subsequent offense in a five-year period. Examples are:

(1) Driver X is arrested for OWI. He has, within the past five years, been convicted (in a separate incident) of causing injury by OWI and has one prior improper refusal to take a chemical test. Driver X is subject to the penalties applicable to third offense OWI within a five-year period.

(2) Driver Y is arrested for OWI. She has, within the past five years, been found (in a separate incident) to have improperly refused to take a chemical test. Driver Y is subject to the penalties applicable to second offense OWI within a five-year period.

Also:

(1) A prior OWI conviction is counted in this determination of penalty level whether it was a conviction under the OWI statute or under a municipal ordinance in strict conformity with the OWI statute.

(2) Prior convictions under the OWI statutes of another state or under local ordinances of a municipality in another state are also counted if the statute or municipal ordinance conforms with the Wisconsin OWI statute (i.e., has the same elements). Act 105 (effective January 1, 1991) changes this provision to read:

> If a person has a conviction for any offense under a local ordinance in substantial conformity with s. 346.63 (1) (a) or (b) or both, or s. 346.63 (1) (a) or (5) (a), or both, or under the law of another jurisdiction that is in conformity with 49 C.F.R. s. 383.51 (b) (2) (i) or (ii), or both, or that prohibits refusal of chemical testing or use of a motor vehicle while intoxicated or under the influence of a controlled substance, or a combination thereof, or with an excess or specified range of alcohol concentration, or under the influence of any drug to a degree that renders the person incapable of safely driving, as those or substantially similar terms are used in that jurisdiction's laws, that conviction shall count as a prior conviction under this subdivision [s. 343.305 (10) (b) 1, Stats.].

With reference to identifying prior relevant convictions within a five-year period (the period used in the OWI statute for counting offenses), time is calculated with reference to date of offense and not date of conviction. For example, if Driver X committed an OWI offense on January 1, 1990 and then committed another OWI offense on January 5, 1995, the latter offense would not be considered Driver X's second OWI offense (subjecting Driver X to the criminal penalties applicable to such an offense), but a first OWI offense (a civil forfeiture offense).

c. Community Service

Under current law, in addition to the authority of the court under s. 973.05 (3) (a), Stats., to provide that a defendant perform community service work for a public agency or a nonprofit charitable organization in lieu of part or all of a criminal fine imposed for an OWI violation, the court may:

(1) Provide that an OWI violator perform community service work for a public agency or a nonprofit charitable organization in lieu of part or all of a forfeiture (i.e., penalty for first offense OWI); or

(2) Require an OWI violator to perform community service work for a public agency or a nonprofit charitable organization in addition to the penalties specified for OWI.

Current law specifies that:

(1) An order may only apply if agreed to by the organization or agency.

(2) The court must ensure that the violator is provided a written statement of the terms of the community service order and that the community service order is monitored.

(3) Any organization or agency acting in good faith to which a violator is assigned has immunity from any civil liability in excess of $25,000 for acts or omissions by or impacting on the defendant [s. 346.65 (2) (g), Stats.].

d. Restitution

In addition to the other penalties for an OWI violation, current law permits a judge to order a violator to pay restitution under s. 973.20, Stats., which sets forth the requirements and procedures applicable to restitution orders under the Criminal Code. However, for purposes of OWI, s. 973.20, Stats., also applies to first offense OWI, whether a statutory violation or a violation of an ordinance in conformity with the statute [s. 346.65 (2r), Stats.].

e. Driver Improvement Surcharge

Current law specifies that if a court imposes a fine or a forfeiture for an OWI or OWI-related violation, it must impose a driver improvement surcharge in an amount of $250. This surcharge is in addition to the fine or forfeiture, penalty assessment and jail assessment. Moneys collected from the driver improvement surcharge are used, as prescribed in the statutes:

(1) By county "51.42 boards" for drivers referred through drug or alcohol assessment (see item 8, below) to such boards.

(2) By the Department of Health and Social Services (DHSS) to finance state operations associated with administrative costs for services to drivers.

(3) By the Department of Public Instruction and the State Laboratory of Hygiene for services they provide to drivers.

(4) By the Department of Justice to provide crime victim compensation services [ss. 20.435 (6) (hx) and 346.655, Stats.].

As with other statutory assessments and surcharges, a person who fails to pay the driver improvement surcharge may be committed to county jail until the surcharge is paid, for a period fixed by the court not to exceed six months [s. 973.07, Stats.].

f. Other Surcharges and Special Assessments

In addition to the items set forth in Table I (which includes the driver improvement surcharge discussed in item e, above), the following other surcharges and special assessments may also be applicable depending on the OWI or OWI-related offense involved:

(1) Penalty Assessment. Whenever a court imposes a fine or forfeiture for any violation of state or municipal law, except nonmoving traffic violations or safety belt use violations, it must impose a penalty assessment equal to 20% of the fine or forfeiture [s. 165.87 (2) (a), Stats.].

(2) Crime Victim and Witness Surcharge. Whenever the court imposes a sentence or places a person on probation for any felony or misdemeanor violation, it must also impose a crime victim and witness surcharge of $30 for each misdemeanor count and $50 for each felony count [s. 973.045, Stats.].

(3) Restitution Surcharge. If the court orders restitution as part of a sentence or as a condition of probation, an amount equal to 10% of the restitution ordered is a statutory cost taxable against the defendant [s. 973.06 (1) (g), Stats.].

(4) Jail Assessment. Whenever a court imposes a fine or forfeiture for any violation of state or municipal law, except nonmoving traffic violations or safety belt use violations, it must impose a jail assessment of 1% of the fine or forfeiture, or $10, whichever is greater [s. 53.46 (1) (a), Stats.].

(5) Court Automation Fee. Except for a safety belt use violation, the clerk of circuit court must charge and collect a $1 court automation fee on forfeiture actions that are filed in circuit court (i.e., not applicable to municipal costs) [s. 814.635, Stats.].

8. Assessment for Alcohol or Drug Use and Driver Safety Plan

a. Assessment

Under current law, except as otherwise provided in item (1) or (2), below, the court is required to order a person convicted of OWI or an OWI-related offense to submit to and comply with an assessment by an "approved public treatment facility" [defined in s. 51.45 (2) (c), Stats.] for examination of a person's use of alcohol or controlled substances and development of a driver safety plan for the person. The court must notify the DOT of the assessment order. The assessment order must:

(1) If the person is a resident, refer the person to an approved public treatment facility in the county in which the person resides. The facility named in the order may provide for assessment of the person in another approved public treatment facility. The order must provide that if the person is temporarily residing in another state, the facility named in the order may refer the person to an appropriate treatment facility in that state for assessment and development of a driver safety plan for the person satisfying the requirements of that state.

(2) If the person is a nonresident, refer the person to an approved public treatment facility in this state. The order must provide that the facility named in the order may refer the person to an appropriate treatment facility in the state in which the person resides for assessment and development of a driver safety plan for the person satisfying the requirements of that state.

(3) Require a person who is referred to a treatment facility in another state under item (1) or (2), above, to furnish the DOT written verification of his or her compliance from the agency which administers the assessment and driver safety plan program. The person must provide initial verification of compliance within 60 days after the date of his or her conviction.

b. Assessment Facility's Report and Driver Safety Plan

Prior to developing a plan which specifies treatment, the facility must make a finding that (1) treatment is necessary and (2) appropriate services are available. The facility must submit a report of the assessment and the driver safety plan within 14 days to the county 51.42 board, the plan provider, the DOT and the person. However, upon request by the facility and the person, the 51.42 board may extend the period for assessment for not more than 20 additional workdays.

The assessment report must order compliance with a driver safety plan which may include: (1) treatment for the person's misuse, abuse or dependence on alcohol or controlled substances; (2) attendance at a driver's school under s. 345.60, Stats.; or (3) both. If the plan requires inpatient treatment, the treatment may not exceed 30 days. The plan must include a termination date consistent with the plan which may not extend beyond one year.

c. Notification of Compliance or Noncompliance with Plan

The 51.42 board is required to assure notification of the DOT and the person of the person's compliance or noncompliance with assessment and with treatment. The driver's school is required to notify the DOT, the 51.42 board and the person of the person's compliance or noncompliance with the requirements of the school. If the DOT is notified of any noncompliance, it must suspend the person's license until the 51.42 board

or the driver's school notifies the DOT that the person is in compliance with the assessment or the driver safety plan. The DOT must notify the person of the suspension, the reason for the suspension and the person's right to a review.

d. Review of Suspension for Inappropriateness of or Noncompliance with Plan

A person may request a review, by the DOT, of a suspension based upon failure to comply with a driver safety plan within 10 days of notification of suspension by the DOT. The issues at the review are limited to (1) whether the driver safety plan, if challenged, is appropriate and (2) whether the person is in compliance with the assessment order or the driver safety plan. The review must be conducted within 10 days after a request is received.

If the driver safety plan is determined to be inappropriate, the DOT must order a reassessment and if the person is otherwise eligible, the DOT must reinstate the person's operating privilege. If the person is determined to be in compliance with the assessment or driver safety plan, and if the person is otherwise eligible, the DOT must reinstate the person's operating privilege.

e. When Order for Assessment and Plan Not Required

Notwithstanding the above, if the court finds that the person is already covered by an assessment or is participating in a driver safety plan or has had evidence presented to it by a 51.42 board that the person has recently completed an assessment, a driver safety plan, or both, the court is not required to make an order as described above [s. 343.30 (1a) (c) to (e), Stats.].

B. OWI-RELATED OFFENSES

1. Injury by OWI [s. 346.63 (2), Stats.]

a. Elements of the Offense

Under current law, it is unlawful for any person to cause "injury" (which is not defined in the Motor Vehicle Code) to another person by the operation of a vehicle:

(1) While under the influence of an intoxicant or drugs, or both; or

(2) While the person has a BAC of 0.1% or more.

b. Affirmative Defense

Current law specifies that the defendant has a defense if it appears by a preponderance of the evidence that the injury would have occurred even if (1) he or she had been exercising due care and (2) he or she had not been under the influence of an intoxicant or drugs, or both, or did not have a BAC of 0.1% or more. For example, this defense might be used by Driver X who, with a BAC of 0.17%, is stopped at a red light and is rear-ended by Driver Y, resulting in injury to a passenger in Driver Y's vehicle.

c. Penalties and License Sanctions

Table I attached to this Memorandum summarizes the various penalties and license sanctions, including the waiting period for obtaining an occupational license, applicable to causing injury by OWI.

2. Causing Great Bodily Harm by OWI [s. 940.25, Stats.]

a. Elements of the Offense

Under current law, it is unlawful for any person to do either of the following:

(1) Cause great bodily harm to another human being by the operation of a vehicle while under the influence of an intoxicant. For purposes of s. 940.25, Stats.:

(a) "Great bodily harm" is defined to mean "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury" [s. 939.22 (14), Stats.].

(b) "Vehicle" is defined to mean any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air [s. 939.22 (44), Stats.]; this is broader than the "motor vehicle" definition applicable to OWI and injury by OWI under s. 346.63, Stats. This definition also applies to s. 940.09, Stats., discussed in item 3, below.

(2) Cause great bodily harm to another human being by the operation of a vehicle while the person has a BAC of 0.1% or more.

b. Affirmative Defense

Current law specifies that the defendant has a defense if it appears by a preponderance of the evidence that the great bodily harm would have occurred even if (1) he or she had been exercising due care and (2) he or she had not been under the influence of an intoxicant or did not have a BAC of 0.1% or more.

c. Penalties and License Sanctions

Table I attached to this Information Memorandum summarizes the various penalties and license sanctions including the waiting period for obtaining an occupational license, applicable to causing great bodily harm by OWI.

3. Causing Death by OWI [s. 940.09, Stats.]

a. Elements of the Offense

Under current law, any person who does either of the following is guilty of a Class D felony (punishable by a fine of not more than $10,000, imprisonment for not more than five years, or both):

(1) Causes the death of another by the operation or handling of a vehicle, firearm or airgun and while under the influence of an intoxicant; or

(2) Causes the death of another by the operation or handling of a vehicle, firearm or airgun while the person has a BAC of 0.1% or more.

b. Affirmative Defense

The defendant has a defense if it appears by a preponderance of the evidence that the death would have occurred even if (1) he or she had been exercising due care and (2) he or she had not been under the influence of an intoxicant or did not have a BAC of 0.1% or more.

c. Penalties and License Sanctions

Table I attached to this Memorandum summarizes the various penalties and license sanctions, including the waiting period for obtaining an occupational license, applicable to death by OWI.

4. Absolute Sobriety for Drivers Under Age 19 [s. 346.63 (2m), Stats.]

a. Elements of the Offense

Under current law, if a person has not attained the age of 19, the person may not drive or operate a motor vehicle while he or she has a BAC of more than 0.0% but not more than 0.1%. That is, the person may not drive or operate a motor vehicle with even a trace of alcohol in his or her system.

b. Penalties and License Sanctions

Table I attached to this Memorandum summarizes the various penalties and license sanctions applicable to violation of the "absolute sobriety" law.

C. OWI LAWS RELATING TO ALL-TERRAIN VEHICLES, BOATING AND SNOWMOBILING

1. Elements of the Offense

Current law contains provisions relating to the operation of an ATV [s. 23.33, Stats.], a boat [s. 30.681, Stats.] or a snowmobile [s. 350.101, Stats.] while under the influence of an intoxicant or drugs, or both, or while having a BAC of 0.1% or more. In general, these provisions parallel the provisions described in Sections A and B, above, and include prohibitions against operating or causing injury by operating an ATV, boat or snowmobile while under the influence of an intoxicant or with a BAC of 0.1% or more. Causing great bodily harm or death by OWI is not included in these statutes because the term "vehicle" [as defined in s. 939.22 (44), Stats., for purposes of the Criminal Code] in ss. 940.09 and 940.25, Stats., is broad enough to include ATV's, boats and snowmobiles.

2. Penalties

Table II attached to this Memorandum summarizes the various penalties applicable to ATV, boat and snowmobile OWI and causing injury by OWI.

D. SPECIAL OWI PROVISIONS APPLICABLE TO CMV DRIVERS

1989 Wisconsin Act 105 implemented the requirements of the Federal Commercial Motor Vehicle Safety Act of 1986 [P.L. 99-570] in Wisconsin. The Federal Act was enacted to, among other things, improve the quality of CMV drivers and to remove problem CMV drivers from the highways. As noted in Part I, C, above, the provisions in Act 105 referred to in this Memorandum take effect on January 1, 1991. Among other things, the Act contains the following provisions relating to OWI:

1. Prohibitions Against Operating CMV's with a BAC of .04% to 0.1%

Act 105 prohibits persons from: (a) driving or operating a CMV with a BAC between .04% and 0.1%; and (b) causing injury by driving or operating a CMV with a BAC between .04% and 0.1%. The penalties for these violations are the current fines and forfeitures and terms of imprisonment applicable to a person who operates, or causes injury by operation of, any vehicle while the person has a BAC of 0.1% or greater (see Table I attached). However, there is no administrative suspension or assessment for alcohol or drug problems for these offenders. In addition, offenders are subject to disqualification from operating CMV's for a specified period of time, depending on the offense. Any CMV operator found to have a BAC of 0.1% or greater is subject to all the current OWI laws, including administrative suspension and assessment [s. 346.63 (5) and (6), Stats.; effective January 1, 1991].

2. Absolute Sobriety Provision

Act 105 creates an offense for driving or operating or being on duty time with respect to a CMV:

(a) With a BAC above 0.0%;

(b) Within four hours of having consumed or having been under the influence of an intoxicating beverage, regardless of its alcohol content; or

(c) While possessing an intoxicating beverage (unless the beverage is unopened and is transported as part of a shipment).

If a law enforcement officer administers a BAC test which indicates a BAC above 0.0%, the officer must take possession of the license and retain it for 24 hours, during which time period the operator would be considered "out of service." In addition, the CMV operator is subject to a $10 forfeiture [s. 346.63 (7) (a), Stats.; effective January 1, 1991].

3. Requests for Breath, Blood and Urine Samples

Act 105 permits a law enforcement officer to request, under specified conditions, one or more samples of breath, blood or urine from a CMV operator for purposes of chemical testing prior to his or her arrest. In addition, the Act provides that a person operating or "on duty time" with respect to a CMV is considered to have given his or her implied consent for chemical testing. "On duty time" is defined as the period the operator begins to work or is required to be in readiness to work until the time the operator is relieved from work and all responsibility for performing work.

4. Occupational Licenses

Act 105 prohibits disqualified CMV drivers from operating CMV's under the authority of an occupational license. However, if a person's commercial driver's license is suspended or revoked due to an OWI violation in a noncommercial motor vehicle and the person was not operating a CMV at the time of the violation, the person may petition the DOT for an occupational license that would authorize the operation of certain CMV's. There is no minimum waiting period for the petition to be considered, and the license may contain limitations and restrictions imposed by DOT.

E. OTHER PROVISIONS APPLICABLE TO OWI AND OWI-RELATED OFFENSES

1. Time Period Prior to Release of Person Arrested for OWI or an OWI-Related Offense

A person arrested for OWI or an OWI-related offense may not be released (a) until 12 hours have elapsed from the time of his or her arrest or (b) unless a chemical test administered in accordance with s. 343.305, Stats. (the implied consent law), shows that the person has a BAC of .05% (changed by Act 105 to .04%, effective January 1, 1991) or less. However, the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest. Under Act 105 (effective January 1, 1991), if the person is a CMV operator who was issued an "out-of-service" order, the person may be released under the same conditions, but his or her license may be retained until the out-of-service order has expired [s. 345.24, Stats.].

2. Occupational Licenses

The waiting periods for occupational licenses applicable to persons convicted of OWI, OWI-related and other pertinent violations are set forth in Table I attached to this Memorandum.

a. Procedures and Requirements for Issuance of License

The current law relating to issuance of occupational licenses to persons whose licenses are revoked or suspended is set forth, for the most part, in s. 343.10, Stats. In general, provisions in that section applicable to OWI and OWI-related offenses specify that:

(1) If a person's license is revoked or suspended and if the person is engaged in an occupation (including homemaking, full-time or part-time study, or a trade) making it essential that he or she operate a motor vehicle, the person, if he or she complies with the conditions in item (2), below, may file with a court in the county of his or her residence a

petition setting forth in detail the need for operating a motor vehicle. Under Act 105 (effective January 1, 1991), there are special provisions permitting a CMV driver to file his or her petition directly with the DOT and to have the occupational license issued administratively by the DOT.

(2) Upon receipt of the petition, the judge may order the DOT to issue an occupational license to the person if both of the following apply:

> (a) The person's license or operating privilege was not revoked or suspended within the one-year period immediately preceding the present revocation or suspension; and
>
> (b) The person files proof of financial responsibility (e.g., insurance) covering all vehicles for which the person seeks permission to operate.

(3) Upon receipt of a petition, the judge may issue a 30-day temporary occupational license to the person if the conditions under item (2) are satisfied and after 15 days have elapsed since the date of revocation or suspension.

(4) The order for issuance of an occupational license must contain definite restrictions as to hours of the day, not to exceed 12; hours per week, not to exceed 60; type of occupation; and areas or routes of travel which are permitted under the license.

(5) The judge must consider the number and seriousness of prior traffic convictions in determining whether to order the issuance of an occupational license and what restrictions to specify. A copy of the petition and the order for the occupational license must be forwarded to the DOT.

(6) Occupational licenses are subject to the waiting periods set forth in Table I attached to this Memorandum.

(7) An occupational license is valid from the date of issuance by the DOT until termination of the period of revocation or suspension, unless the occupational license is revoked, suspended or canceled prior to termination of that period.

b. Penalty and License Sanction for Violation of Restriction

Any person who violates any restriction of an occupational license is subject to immediate revocation of the license and:

(1) Except under item (2), below, forfeiture of not less than $150 nor more than $600.

(2) A fine of not less than $300 nor more than $1,000 and imprisonment for not more than six months, if the number of convictions for violating occupational license restrictions equals <u>two or more in a five-year period</u>.

PART III

IMPLIED CONSENT LAW

This Part of the Memorandum discusses the implied consent law applicable to motor vehicles. However, very similar implied consent laws are to be found in the statutes relating to OWI boating [ss. 30.682 and 30.684, Stats.], snowmobiling [ss. 350.102 and 350.104, Stats.] and operation of an ATV [s. 23.33 (4L) and (4p), Stats.].

A. IMPLIED CONSENT LAW IN GENERAL [s. 343.305 (2), Stats.]

Under current law, any person who drives or operates a motor vehicle upon the public highways of this state is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, a combination of alcohol and controlled substances, other drugs or a combination of alcohol and other drugs when requested to do so by a law enforcement officer or when required to do so. Any such tests must be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed must be prepared to administer, either at its agency or any other agency or facility, two of the three tests and may designate which of the tests shall be administered first.

B. PRELIMINARY BREATH SCREENING TEST [s. 343.303, Stats.]

Under current law, if a law enforcement officer has probable cause to believe that the person is violating or has violated an OWI or OWI-related offense, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test (PBT) using a device approved by the DOT for this purpose. The result of the PBT may be used by the officer for the purpose of deciding (1) whether or not the person should be arrested for an OWI violation and (2) whether or not to require or request chemical tests as authorized under the implied consent law. The result of the PBT is not admissible in any action or proceeding except (1) to show probable cause for an arrest, if the arrest is challenged, or (2) to prove that a chemical test was properly required or requested of a person. Following the screening test, additional tests may be required or requested of the driver under the implied consent law.

There is no penalty applicable to refusal to take a PBT.

C. LAW AND PROCEDURES RELATING TO INVOKING THE LAW [s. 343.305 (3) to (6), Stats.]

1. When Test Requested or Required

Current law specifies that upon arrest of a person for an OWI or OWI-related violation, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified in Section A, above. Act 105 (effective January 1, 1991) specifies that compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent, and if an officer has probable cause to believe that the person has committed a violation, one or more tests may be administered to the person.

Current law specifies that these provisions do not limit the right of a law enforcement officer to obtain evidence by any other lawful means (e.g., by a search incident to lawful arrest or pursuant to a search warrant; by an emergency search supported by probable cause for arrest).

2. Information to be Provided at Time Test Requested

At the time a chemical test specimen is requested, the person must be orally informed by the law enforcement officer that:

a. He or she is deemed to have consented to tests under the implied consent law;

b. If testing is refused, the person's operating privilege will be revoked;

c. If one or more tests are taken and the results of any test indicate that the person has a BAC of 0.1% or more, the person will be subject to penalties and the person's operating privilege will be suspended under the administrative suspension law (discussed in Part IV, below); and

d. After submitting to testing, the person tested has the right to have an additional test made by a person of his or her own choosing.

D. CHEMICAL TEST PROCEDURES AND REQUIREMENTS

1. Alternative Test

A person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test.

2. Persons Permitted to Withdraw Blood; Immunity

Blood may be withdrawn from the person arrested for an OWI or OWI-related offense only by a physician, registered nurse, medical technologist, physician's assistant or person acting under the direction of a physician. A person so acting, the employer of any such person and any hospital where blood is withdrawn by any such person have immunity from civil or criminal liability under s. 895.53, Stats.

3. Admissibility of Tests at Trial

At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have committed an OWI violation, the results of a properly administered chemical test are admissible on: (a) the issue of whether the person was under the influence of an intoxicant or drugs, or both; or (b) any issue relating to the person's BAC. The test results are admissible (i.e., no other proof is required for admissibility) on the issue of intoxication or BAC of 0.1% or more if the test sample is taken within three hours after the event to be proved. If the sample is not taken within the three-hour limit, expert testimony is required to establish the probative value of the analysis. Test results must be given the effect required under s. 885.235, Stats. (a copy of which is attached).

4. Requirements Applicable to Analysis

To be considered valid, chemical analyses of blood or urine must have been performed substantially according to methods approved by the State Laboratory of Hygiene and by an individual possessing a valid permit to perform the analyses issued by the DHSS.

The DOT is required to approve techniques or methods of performing chemical analysis of the breath and must:

a. Approve training manuals and courses throughout the state for the training of officers in the chemical analysis of a person's breath;

b. Certify the qualifications and competence of individuals to conduct the analysis;

c. Have trained technicians, approved by the DOT Secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath before regular use of the equipment and periodically thereafter at intervals of not more than 120 days; and

d. Issue permits to individuals according to their qualifications.

5. Separate Adequate Breath Sample Requirement

Current law specifies that if a breath test is administered using an infrared breath-testing instrument:

a. The test must consist of analyses in the following sequence: one adequate breath sample analysis, one calibration standard analysis, and a second, adequate breath sample analysis.

b. A sample is adequate if the instrument analyzes the sample and does not indicate the sample is deficient.

c. Failure of a person to provide two separate adequate breath samples in the proper sequence constitutes a refusal.

E. EFFECTS OF SUBMITTING TO THE TEST

See the discussion of administrative suspension of license in Part IV of this Memorandum and the penalties for having a BAC of 0.1% or more set forth in Table I attached to this Memorandum.

F. REFUSAL TO SUBMIT TO CHEMICAL TEST [s. 343.305 (9) and (10), Stats.]

1. Procedures Prior to Hearing on Refusal

Current law specifies that if a person refuses to take a chemical test, the officer must immediately prepare a notice of intent to revoke the person's operating privilege. The officer must issue a copy of the notice to the person and submit or mail a copy to the circuit court for the county in which the refusal is made, the district attorney for that county and the DOT. The notice of the person's operating privilege must contain substantially the following information:

a. That prior to a request for a chemical test, the officer had placed the person under arrest and issued a citation, if appropriate, for an OWI or OWI-related violation.

b. That the officer complied with the oral information requirements set forth in Section B, 2, above.

c. That the person refused a request for a chemical test.

d. That the person may request a hearing on the revocation within 10 days by mailing or delivering a written request to the court whose address is specified in the notice. If no request for a hearing is received within the 10-day period, the revocation period commences 30 days after the notice is issued.

e. That the issues of the hearing are limited to:

(1) Whether the officer had probable cause to believe the person was driving or operating a motor vehicle: (a) while under the influence of alcohol, a controlled substance, or both; (b) while under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders him or her incapable of safely driving; or (c) while having a BAC of 0.1% or more.

(2) Whether the person was lawfully placed under arrest for an OWI or OWI-related violation.

(3) Whether the officer complied with the oral information requirements set forth in Section B, 2, above.

(4) Whether the person refused to permit the test. The person must be deemed not to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances or other drugs.

f. That, if it is determined that the person refused the test, there will be an order for the person to comply with assessment and a driver safety plan.

The use of this notice by an officer is adequate process to give the appropriate court jurisdiction over the person.

2. Hearing on Refusal

If a law enforcement officer informs the circuit court that a person has refused to submit to a test, the court must be prepared to hold any requested hearing to determine if the refusal was proper. The scope of the hearing is limited to the issues outlined in item 1, e, above.

At the close of the hearing, or within five days thereafter, the court must determine the issues under item 1, e, above. If all issues are determined adversely to the person, the court must proceed under items 3 and 4, below, relating to revocation and assessment. If one or more of the issues is determined favorably to the person, the court must order that no action be taken on the operating privilege on account of the person's refusal to take the test in question. However, this does not preclude the prosecution of the person for an OWI or OWI-related violation.

3. Court-Ordered Revocation

If the court determines that a person improperly refused to take a test or if the person does not request a hearing within 10 days after the person has been served with the notice of intent to revoke the person's operating privilege, the court is required to proceed as follows:

a. No hearing requested. If no hearing was requested, the revocation period must begin 30 days after the date of the refusal.

b. Hearing requested. If a hearing was requested, the revocation period must commence 30 days after the date of refusal or immediately upon a final determination that the refusal was improper, whichever is later.

The period of revocation, which depends on the number of prior refusals or OWI or OWI-related violations in a five-year period, are set forth in Table I attached to this Information Memorandum. An example of how this counting of prior refusals and OWI or OWI-related violations operates follows:

> Driver Z improperly refuses to take a chemical test under the implied consent law. He has, within the past five years, been convicted, in separate incidents, of OWI and causing great bodily harm by OWI. Driver Z is subject to the license revocation periods and related provisions applicable to a third improper refusal within a five-year period.

Provisions discussed in Part II, A, 7, b, relating to counting offenses for OWI violations are applicable to counting offenses for refusals.

4. Assessment and Treatment

If a person unlawfully refuses to take a chemical test, he or she is subject to assessment and treatment provisions similar to those discussed in Part II, A, 6, b, above, for persons convicted of OWI or OWI-related offenses.

PART IV

ADMINISTRATIVE SUSPENSION FOR HIGH LEVEL CHEMICAL TEST

A. ADMINISTRATIVE SUSPENSION BY DOT [s. 343.305 (7) and (8), Stats.]

1. Action by Officer if High Test; Period of Suspension

If a person submits to chemical testing administered in accordance with the implied consent law and any test results indicate a BAC of 0.1% or more, the officer must: (a) report the results to the DOT; and (b) take possession of the person's license and forward it to the DOT. The person's operating privilege is then administratively suspended for six months.

2. Request for Administrative Review of Suspension

Within 10 days after the notification or, if the notification is by mail, within 13 days, excluding Saturdays, Sundays and holidays, after the date of the mailing, the person may request, in writing, that the DOT review the administrative suspension. The review procedure is not subject to ch. 227, Stats. (the Administrative Procedures Act).

The officer must provide the person with a separate form for the person to use to request the administrative review. The form must clearly indicate how to request an administrative review and must clearly notify the person that this form must be submitted within 10 days from the notice date indicated on the form.

3. Administrative Hearing

If the offense allegedly occurred in the County of Milwaukee, Waukesha or Dane, the DOT must refer the matter to the Office of the Commissioner of Transportation (OCT) and the OCT must hold the hearing on the matter. The DOT must hold the hearing on the matter if the offense allegedly occurred in any other county. Hearings by the DOT must be held in the county in which the offense allegedly occurred or at the nearest office of the DOT if the offense allegedly occurred in a county in which the DOT does not maintain an office.

The DOT or the OCT, respectively, must hold a hearing regarding the administrative suspension within 30 days after the date of notification. The person may present evidence and may be represented by counsel. The arresting officer need not appear at the administrative hearing unless subpoenaed under s. 805.07, Stats., but he or she must submit a copy of

his or her report and the results of the chemical test to the hearing examiner. The hearing is limited to the following issues:

a. The correct identity of the person.

b. Whether the person was informed of the options regarding tests.

c. Whether the person had a BAC of 0.1% or more at the time the offense allegedly occurred.

d. Whether one or more tests were administered in accordance with the implied consent law.

e. If one or more tests were administered, whether each of the test results for those tests indicates the person had a BAC of 0.1% or more.

f. Whether probable cause existed for the arrest.

The hearing examiner must conduct the administrative hearing in an informal manner. No testimony given by any witness may be used in any subsequent action or proceeding. The hearing examiner may permit testimony by telephone if the site of the administrative hearing is equipped with telephone facilities to allow multiple-party conversations.

4. Findings of Hearing Examiner

If the hearing examiner finds that the criteria for administrative suspension have not been satisfied or that the person did not have a BAC of 0.1% or more at the time the offense allegedly occurred, the examiner must order that the administrative suspension of the person's operating privilege be rescinded. If the hearing examiner finds that the criteria for administrative suspension have been satisfied and that the person had a BAC of 0.1% or more at the time the offense allegedly occurred, the administrative suspension must continue.

5. Notice of Decision, Right to Judicial Review and Possible Stay of Suspension

The hearing examiner must notify the person in writing of the hearing decision, of the right to judicial review and of the court's authority to issue a stay of the suspension under Section B, 3, below. The administrative suspension is vacated and the person's operating privilege must be automatically reinstated if the hearing examiner fails to mail this notice to the person within 30 days after the date of the notification.

B. JUDICIAL REVIEW [s. 343.305 (8) (c), Stats.]

1. Request for Review; Request Does Not Stay Suspension

An individual aggrieved by the determination of the hearing examiner may have the determination reviewed by the court hearing the action relating to the OWI or OWI-related violation applicable to the individual. If the individual seeks judicial review, he or she must file the request for judicial review with the court within 20 days of the issuance of the hearing examiner's decision. The court must send a copy of that request to the DOT.

A request for judicial review does not stay any administrative suspension order.

2. Judicial Review

The judicial review must be conducted at the time of the trial of the underlying offense. The prosecutor of the underlying offense is required to represent the interests of the DOT.

3. Court Order

The court must order that the administrative suspension be either rescinded or sustained and forward its order to the DOT. The DOT must vacate the administrative suspension unless, within 60 days of the date of the request for judicial review of the administrative hearing decision, the DOT has been notified of the result of the judicial review or of an order of the court entering a stay of the hearing examiner's order continuing the suspension.

4. Appeal of Lower Court Order

Any party aggrieved by the order of a circuit court may appeal to the court of appeals. Any party aggrieved by the order of a municipal court may appeal to the circuit court for the county where the offense allegedly occurred.

C. ELIGIBILITY FOR OCCUPATIONAL LICENSE [s. 343.305 (8) (d), Stats.]

A person who has his or her operating privilege administratively suspended is eligible for an occupational license under s. 343.10, Stats., at any time.

PART V

INTOXICANTS IN MOTOR VEHICLES

A. POSSESSION OR TRANSPORTATION OF INTOXICANTS IN MOTOR VEHICLES BY PERSONS UNDER THE LEGAL DRINKING AGE [s. 346.93, Stats.]

1. Elements of the Offense

Current law specifies that no person under the legal drinking age (i.e., under 21 years of age) may knowingly possess, transport or have under his or her control any alcohol beverage in any motor vehicle unless:

a. The person is employed by a brewer, an alcohol beverage licensee, wholesaler, retailer, distributor, manufacturer or rectifier; and

b. The person is possessing, transporting or having such a beverage in a motor vehicle under his or her control during his or her working hours and in the course of employment, as provided under s. 125.07 (4) (bm), Stats.

2. Penalty

An underage person violating this prohibition may be required to forfeit not less than $20 nor more than $400 [s. 346.95 (2), Stats.]. However, under Act 105 (effective January 1, 1991), if the underage person is driving or operating or on duty time with respect to a CMV, the underage person will also be issued an "out-of-service" order for a 24-hour period [ss. 346.65 (2u) and 346.93, Stats.].

B. DRINKING OR POSSESSION OF INTOXICANTS IN MOTOR VEHICLES; GENERAL PROHIBITION [s. 346.935, Stats.]

1. Elements of the Offense

Under current law:

a. Drinking in motor vehicle. No person may drink alcohol beverages in any motor vehicle when the vehicle is upon a highway.

b. Possession on person in motor vehicle. No person may possess on his or her person, in a privately owned motor vehicle upon a public highway, any bottle or receptacle containing alcohol beverages if: (1) the bottle or receptacle has been opened; (2) the seal has been broken; or (3) the contents of the bottle or receptacle have been partially removed.

c. Kept in motor vehicle. The owner of a privately owned motor vehicle, or the driver of the vehicle if the owner is not present in the vehicle, may not keep, or allow to be kept, in the motor vehicle when it is upon a highway any bottle or receptacle containing alcohol beverages if: (1) the bottle or receptacle has been opened; (2) the seal has been broken; or (3) the contents of the bottle or receptacle have been partially removed. This prohibition does not apply if the bottle or receptacle is kept in the trunk of the vehicle or, if the vehicle has no trunk, in some other area of the vehicle not normally occupied by the driver or passengers. A utility compartment or glove compartment is considered to be within the area normally occupied by the driver and passengers.

Current law specifies that these prohibitions do not apply to passengers in a limousine or in a motor bus [s. 346.935, Stats.]. Under Act 105 (effective January 1, 1991), these prohibitions will not apply to passengers in a limousine if the vehicle is operated by a chauffeur holding a valid license and endorsements authorizing operation of the vehicle as provided in ch. 343, Stats. [the motor vehicle licensing chapter], and is in compliance with any local ordinance or regulation adopted under s. 349.24, Stats. [authority to license taxicab operators and taxicabs].

2. Penalty

A person violating any of these prohibitions may be required to forfeit not more than $100 [s. 346.95 (2m), Stats.]. However, under Act 105, if the violation is committed by a CMV operator, he or she will also be issued an "out-of-service" order for a 24-hour period [ss. 346.65 (2u) and 346.93, Stats.].

PART VI

SELECTED LAWS RELATING TO OWI IN OTHER STATES

A number of other states have enacted penalties for and procedures applicable to OWI and OWI-related offenses which are not found in current Wisconsin law. Examples of these are:

A. YOUTHFUL DRUNK DRIVER VISITATION PROGRAM [California Vehicle Code, s. 23145 et seq.]

California law permits a court, to the extent that personnel and facilities are made available to the court, to include a requirement for supervised visitation by a youthful drunk driver (i.e., in general, a person less than 21 years of age) to all, or any of the following:

1. A trauma facility or a general acute care hospital which regularly receives victims of vehicle accidents, between the hours of 10:00 p.m. and 2:00 a.m. on a Friday or Saturday night to observe appropriate victims of vehicle accidents involving drinking drivers.

2. A facility which cares for advanced alcoholics, such as a chemical dependency recovery hospital, to observe persons in the terminal stages of alcoholism or drug abuse.

3. If approved by the county coroner, the county coroner's office or the county morgue to observe appropriate victims of vehicle accidents involving drinking drivers.

1989 Senate Bill 172 (introduced by Senator Cowles and others; cosponsored by Representative Krusick and others), which failed to pass, would have created a similar law in Wisconsin.

B. COST OF EMERGENCY RESPONSE [s. 53150 et seq., California Government Code]

California law makes a drunk driver responsible for the cost of an "emergency response" to an OWI "incident," including the cost of providing police, firefighting, rescue and emergency and medical services at the scene of the incident.

1989 Senate Bill 306 (introduced by Senator Cowles and others; cosponsored by Representative Huelsman and others), which failed to pass, would have created a similar law in Wisconsin.

C. VEHICLE IMPOUNDMENT FOR OWI OFFENDERS [s. 809.700, Oregon Vehicle Code]

Oregon law permits a court to order a motor vehicle impounded upon conviction for certain specified traffic offenses, including a second or subsequent conviction for OWI. The vehicle may be impounded for not more than 120 days from the conviction.

1989 Senate Bill 370 (introduced by Senator Lorman and others; cosponsored by Representative Vergeront and others), which failed to pass, would have created a similar law in Wisconsin.

Current Wisconsin law permits impoundment of a person's motor vehicle if the person is convicted of driving after suspension or revocation of his or her driver's license [s. 343.44, Stats.] or if the person fails to post security for past accidents under the financial responsibility law [s. 344.14 (1m), Stats.].

D. VEHICLE FORFEITURE AND SALE FOR CERTAIN OWI OFFENDERS [s. 20-28.2 Gen. Stats. of North Carolina]

North Carolina law provides for the forfeiture of a motor vehicle to the state under circumstances where the person driving the vehicle: (1) is convicted of OWI (referred to as "impaired driving"); and (2) has, at the time of the OWI offense, had his or her license revoked for a previous OWI violation. The judge at sentencing must hold a hearing to determine if the vehicle should be forfeited. At the hearing, the judge may order the forfeiture if he or she finds that: (1) the vehicle is subject to forfeiture; (2) the vehicle is not primarily used by a member of the defendant's family or household for a business purpose or for driving to and from work or school; and (3) all potential innocent parties (e.g., persons with security interests in the vehicle) have been notified no party has shown that he or she is an innocent party.

In any case in which a judge does not order the forfeiture or a vehicle subject to forfeiture, he or she must enter into the record detailed, written reasons for his or her decision.

If the judge orders forfeiture of the vehicle, he or she must order the sale of the vehicle. Proceeds of the sale must be paid to the school fund of the county in which the property was seized.

1989 Senate Bill 466 (introduced by Senators Risser and Chilsen), which failed to pass, would have created a similar law in the Wisconsin.

E. IGNITION INTERLOCK DEVICES [s. 257.625 et seq., Michigan Code of Laws Annotated; ch. 746, Oregon Revised Statutes]

Laws in Michigan, Oregon and a number of other states permit the court to order that a convicted drunk driver's restricted license (i.e., occupational license) include the requirement that the driver not operate a motor vehicle unless the vehicle is equipped with a functioning certified ignition interlock device. These devices are set to render the motor vehicle inoperable if the device detects a certain percentage by weight of alcohol in the blood of the person who offers a breath sample into the device. The court may order installation of an ignition interlock device on any motor vehicle that the person owns or operates, with the cost of installation to be borne by the person whose license is restricted.

1989 Assembly Bill 559 (introduced by Representative Foti and others), which failed to pass, would have created a similar law in Wisconsin.

F. STRICT OCCUPATIONAL LICENSE LIMITS [s. 28.15.181, Alaska Stats.]

Under Alaska law, the court may grant "limited license privileges" (i.e., occupational licenses) as follows:

1. First offense OWI within 10-year period: The court must revoke the offender's license for "not less than 90 days" (no maximum is specified) and may grant limited license privileges for the "final 60 days during which the license is revoked" (i.e., except where the court imposes a revocation longer than 90 days, after the first 30 days).

2. First offense refusal to take a chemical test under the implied consent law within 10-year period: The court must revoke the offender's license for "not less than 90 days" (no maximum is specified) and may not grant limited license privileges.

3. Second offense OWI or refusal within 10-year period: The court must revoke the offender's license for not less than one year and may not grant limited license privileges.

4. Third or subsequent OWI or refusal within 10-year period: The court must revoke the offender's license for not less than 10 years and may not grant limited license privileges.

The waiting periods for occupational licenses for OWI and OWI-related offenses in Wisconsin are set forth in Tables I and II, attached.

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ATTACHMENT

TABLE I

PENALTIES AND LICENSE SANCTIONS FOR MOTOR VEHICLE OWI AND OWI-RELATED OFFENSES AND FOR DRIVING AFTER REVOCATION OR SUSPENSION

CONVICTION	FINE OR FORFEITURE	JAIL	SUSPENSION OR REVOCATION OF LICENSE	OCCUPATIONAL LICENSE	ASSESSMENT FOR ALCOHOL OR DRUG PROBLEMS	POINTS ON DRIVER'S RECORD
OWI, first offense*	**$150 to $300 forfeiture (plus $250 surcharge)		*6 to 9 months suspension	Immediately	Yes	6
OWI, second offense* within 5-year period	**$300 to $1,000 fine (plus $250 surcharge)	5 days to 6 months jail	12 to 18 months revocation	After 60 days	Yes	6
OWI, third offense* within 5-year period	**$600 to $2,000 fine (plus $250 surcharge)	30 days to 1 year jail	24 to 36 months revocation	After 90 days	Yes	6
OWI, fourth offense within 5-year period	**$600 to $2,000 fine (plus $250 surcharge)	60 days to 1 year jail	24 to 36 months revocation	After 90 days	Yes	6
OWI, fifth offense within 5-year period	**$600 to $2,000 fine (plus $250 surchage)	6 months to 1 year jail	24 to 36 months revocation	After 90 days	Yes	6
Causing injury while OWI	**$300 to $2,000 fine (plus $250 surcharge)	30 days to 1 year jail	1 to 2 years revocation	After 60 days	Yes	6
Causing great bodily harm while OWI	Up to $10,000 fine (plus $250 surcharge)	Up to 2 years imprisonment	2 years revocation	After 120 days	Yes	0
Homicide while OWI	Up to $10,000 fine (plus $250 surcharge)	Up to 5 years imprisonment	5 years revocation	After 120 days	Yes	0
Absolute sobriety for drivers under age 19						
--First offense	$10 forfeiture		30 to 90 days suspension	Immediately	No	0
--Second offense within 12 months	$10 forfeiture		12 months suspension	Immediately	No	0
--Third or subsequent offense within 12 months	$10 forfeiture		24 months revocation	Immediately	No	0
Driving after revocation or suspension, first offense	**$150 to $600 forfeiture		6 months revocation	After 15 days		6
Driving after revocation or suspension, second offense within 5-year period	**$300 to $1,000 fine	10 days to 6 months jail	6 months revocation	After 15 days		6
Driving after revocation or suspension, third offense within 5-year period	**$1,000 to $2,000 fine	30 days to 9 months jail	6 months revocation	After 15 days		6
Driving after revocation or suspension, fourth offense within 5-year period	**$1,500 to $2,000 fine	60 days to 1 year jail	6 months revocation	After 15 days		6
Driving after revocation or suspension, fifth offense within 5-year period	**$2,000 to $2,500 fine	6 months to 1 year jail	6 months revocation	After 15 days		6

CONVICTION	FINE OR FORFEITURE	JAIL	SUSPENSION OR REVOCATION OF LICENSE	OCCUPATIONAL LICENSE	ASSESSMENT FOR ALCOHOL OR DRUG PROBLEMS	POINTS ON DRIVER'S RECORD
Chemical test refusal, first offense			12 months revocation	After 30 days	Yes	
Chemical test refusal, second offense within 5-year period			24 months revocation	After 90 days	Yes	
Chemical test refusal, third offense within 5-year period			36 months revocation	After 120 days	Yes	
BAC at or over .10% (Administrative Suspension Law)			6 months suspension (administrative)	Immediately		

*Court may order community service to reduce the amount of a fine or forfeiture. May also order restitution as part of penalty.

**Violator also subject, if applicable, to penalty assessment, crime victim and witness surcharge, restitution surcharge, jail assessment and court automation fee. [See Part II, A, 7 in this Memorandum.]

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TABLE II

PENALTIES FOR
ATV, BOAT AND SNOWMOBILE OWI VIOLATIONS

CONVICTION	FINE OR FORFEITURE	JAIL	ASSESSMENT FOR ALCOHOL OR DRUG PROBLEMS
ATV, boat or snowmobile OWI, first offense or refusal	*$150 to $300 forfeiture		Yes
ATV, boat or snowmobile OWI, second offense or refusal within 5-year period	*$300 to $1,000 fine	5 days to 6 months jail	Yes
ATV, boat or snowmobile OWI, third or subsequent offense or refusal within 5-year period	*$600 to $2,000 fine	30 days to 1 year	Yes
Causing injury while OWI (ATV, boat or snowmobile)	*$300 to $2,000 fine	30 days to 1 year in county jail	Yes
Homicide or causing great bodily harm while OWI*	See ** below	See ** below	See ** below
Absolute sobriety for operators under age 19 (snowmobiles only)	Forfeiture of not more than $50		

*Violator also subject, if applicable, to penalty assessment, crime victim and witness surcharge, restitution surcharge, jail assessment and court automation fee [see Part II, A, 7 in this Memorandum.]

**Provisions for causing great bodily harm or death by ATV/boat/snowmobile OWI are not included in this Table, because the term "vehicle" in ss. 940.09 and 940.25, Stats., includes ATV's, boats and snowmobiles and the penalties in those statutes, as set forth in Table I, apply to those offenses.

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Section 885.235, Stats.

885.235 CHEMICAL TESTS FOR INTOXICATION. (1) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a blood alcohol concentration of 0.1% or more while operating or driving a motor vehicle, while operating a motorboat, except a sailboat operating under sail alone, while operating a snowmobile, while operating an all-terrain vehicle or while handling a firearm, evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a blood alcohol concentration of 0.1% or more if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

(a) 1. Except as provided in subd. 2, the fact that the analysis shows that there was 0.05% or less by weight of alcohol in the person's blood or 0.05 grams of alcohol or less in 210 liters of the person's breath is prima facie evidence that the person was not under the influence of an intoxicant and did not have a blood alcohol concentration of 0.1% or more.

2. The fact that the analysis shows that there was more than 0.0% but less than 0.1% by weight of alcohol in the person's blood or more than 0.0 grams but less than 0.1 grams of alcohol in 210 liters of the person's breath is relevant evidence on the issue of being under the combined influence of alcohol and a controlled substance or any other drug but is not to be given any prima facie effect.

(b) The fact that the analysis shows that there was more than 0.05% but less than 0.1% by weight of alcohol in the person's blood or more than 0.05 grams but less than 0.1 grams of alcohol in 210 liters of the person's breath is relevant evidence on the issue of intoxication or blood alcohol concentration of 0.1% or more but is not to be given any prima facie effect.

(c) The fact that the analysis shows that there was 0.1% or more by weight of alcohol in the person's blood or 0.1 grams or more of alcohol in 210 liters of the person's breath is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had a blood alcohol concentration of 0.1% or more.

(1m) In any action under s. 23.33 (4c) (a) 3, 346.63 (2m) or 350.101 (1) (c), evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the

person's breath, is admissible on the issue of whether he or she had a blood alcohol concentration in the range specified in s. 23.33 (4c) (a) 3, 346.63 (2m) or 350.101 (1) (c) if the sample was taken within 3 hours after the event to be proved. The fact that the analysis shows that there was more than 0.0% but not more than 0.1% by weight of alcohol in the person's blood or more than 0.0 grams but not more than 0.1 grams of alcohol in 210 liters of the person's breath is prima facie evidence that the person had a blood alcohol concentration in the range specified in s. 23.33 (4c) (a) 3, 346.63 (2m) or 350.101 (1) (c).

(2) The concentration of alcohol in the blood shall be taken prima facie to be three-fourths of the concentration of alcohol in the urine.

(3) If the sample of breath, blood or urine was not taken within 3 hours after the event to be proved, evidence of the amount of alcohol in the person's blood or breath as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony.

(4) The provisions of this section relating to the admissibility of chemical tests for intoxication or blood alcohol concentration shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant, had a blood alcohol concentration of 0.1% or more or had a blood alcohol concentration in the range specified in s. 346.63 (2m).

(5) In this section:

(a) "Blood alcohol concentration of 0.1% or more" means a blood alcohol concentration of 0.1% or more by weight of alcohol in a person's blood or 0.1 grams or more of alcohol in 210 liters of a person's breath.

(b) "Controlled substance" has the meaning specified in s. 161.01 (4).

(c) "Drug" has the meaning specified in s. 450.01 (10).