

The Impact of Refusing the Breath Test under the New DWI Laws

Several changes to the New York State's DWI laws effective November 1, 2006 greatly enhanced the potential penalties for alcohol-related driving offenses. These included adding the offense of Aggravated Driving While Intoxicated for drivers found to have a blood alcohol content of greater than .18% and increased fines and driver license penalties for individuals who refuse to submit to a chemical test. This issues examines the different results that may arise if the defendant does or does not refuse the breath test under the new laws.

All of these scenarios assume that the defendant is convicted of some offense, either Driving While Ability Impaired by Alcohol (DWAI), Driving While Intoxicated (DWI) or Aggravated Driving While Intoxicated (ADWI), in criminal court. They do not address any situations involving drivers arrested a third (or more) time for a VTL § 1192 violation, as the licensing issues become very complicated. These scenarios deal strictly with fines and driver license suspensions or revocations. Obviously, if you are a defense attorney and are asked by a defendant if he or she should take the test, there are other factors that need to be considered before advising the client. The listed fines do *not* include the Driver Responsibility Assessment of \$250/year for three years that arises from *any* conviction or finding of refusing a chemical test.

Scenario One: First Time arrest for a violation of VTL § 1192

	Min. Possible Fine	Max. Possible Fine	Min. License Penalty	Max. License Penalty
Took Breath Test	\$300 (DWAI conviction)	\$2,500 (ADWI conviction)	90 day suspension (DWAI conviction)	One year revocation (ADWI conviction)
Refused Breath Test	\$800 (DWAI + DMV refusal civil penalty)	\$1,500 (DWI + DMV refusal civil penalty)	One year revocation (refusal)	One year revocation (refusal)

Scenario Two: VTL § 1192 arrest with prior DWAI within five years

	Min. Possible Fine	Max. Possible Fine	Min. License Penalty	Max. License Penalty
Took Breath Test	\$500 (DWAI conviction)	\$2,500 (ADWI conviction)	Six month revocation (DWAI or DWI conviction)	One year revocation (ADWI conviction)
Refused Breath Test	\$1,250 (DWAI + DMV refusal civil penalty)	\$1,750 (DWI + DMV refusal civil penalty)	Eighteen month revocation (Refusal)	Eighteen month revocation (Refusal)

Scenario Three: VTL § 1192 arrest with prior DWAI conviction over five years ago

Same as Scenario One, above.



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Scenario Four: VTL § 1192 arrest with prior DWI or ADWI within five years

	Min. Possible Fine	Max. Possible Fine	Min. License Penalty	Max. License Penalty
Took Breath Test	\$500 (DWAI conviction)	\$5,000 (Felony DWI or ADWI conviction)	Six month revocation (DWAI conviction)	Eighteen month revocation (Felony conviction with current or prior conviction for ADWI)
Refused Breath Test	\$1,250 (DWAI + DMV refusal civil penalty)	\$5,750 (Felony DWI + DMV refusal civil penalty)	Eighteen month revocation (Refusal)	Eighteen month revocation (Refusal or Felony DWI conviction with prior conviction for ADWI)

Scenario Five: VTL § 1192 arrest with prior DWI or ADWI between five and ten years ago

	Min. Possible Fine	Max. Possible Fine	Min. License Penalty	Max. License Penalty
Took Breath Test	\$300 (DWAI conviction)	\$5,000 (Felony DWI or ADWI conviction)	90 day suspension (DWAI conviction)	Eighteen month revocation (Felony conviction with current or prior conviction for ADWI)
Refused Breath Test	\$800 (DWAI + DMV refusal civil penalty)	\$5,500 (Felony DWI + DMV refusal civil penalty)	One year revocation (refusal)	Eighteen month revocation (Felony conviction with prior conviction for ADWI)

Analysis

Presumably, New York State enhanced the penalties for refusing a chemical test in an effort to discourage drivers from refusing. This strategy has been complicated, however, by two factors. One, the creation of the offense of Aggravated Driving While Intoxicated, which *requires* a chemical test to prosecute and carries even higher potential fines and similar licensing penalties as refusing the breath test. Two, the fact that the enhanced penalties for both refusing a chemical test with a prior conviction or refusal and for a Driving While Ability Impaired by Alcohol conviction with one prior VTL § 1192 offense only remain in effect for *five years*, while a conviction for Driving While Intoxicated or Aggravated Driving While Intoxicated may result in a second arrest being raised to a felony level for the next *ten years*.

Based solely on the fines and licensing penalties, in many cases it is often to the benefit of extremely intoxicated drivers to refuse to submit to a test under the new law. By doing so, they completely avoid the possibility of a conviction for Aggravated Driving While Intoxicated and may, depending on their driving, field tests, and other evidence, increase the likelihood of their only being convicted of Driving While Ability Impaired by Alcohol.

Oddly, the one scenario where there may be a benefit to heavy drinkers in taking the breath test is if they are re-arrested within five years of having been convicted of Driving While Ability Impaired by Alcohol. While the potential fine is greater if they submit to the test, the possible licensing penalties are much lower. Submitting to the test, however, may have a negative impact on future cases if they again re-offend.

For first time offenders who are not extremely intoxicated, submitting to the test is likely to result in lower fines and a lesser penalty on their license.