

A newsletter by Taheri & Todoro, P.C., devoted to Driving While Intoxicated law in New York State
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On July 1, 2003, the blood alcohol level a driver may have before being considered legally intoxicated will be lowered from .10% to .08%. This date was moved up from November of 2003 to July so that New York State was ensured receipt of several million dollars in highways funds from the federal government. Details regarding the changes made to the Vehicle and Traffic law to effectuate this lower blood alcohol level are set forth below.

Changes to VTL § 1192

The new law makes two changes to Vehicle and Traffic Law section 1192. VTL § 1192[2] (Driving While Intoxicated; per se) has been amended to read:

No person shall operate a motor vehicle while such person has .08 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article.

Aside from substituting the value .08 for .10, this statute reads exactly the same as the previous version.

In addition to reducing the legal BAC from .10% to .08%, the New York State legislature has also opted to adjust the legal blood alcohol levels for drivers of commercial motor vehicles. Previously, VTL § 1192[6] (Commercial Motor Vehicles; per se— Level II) made it an unclassified misdemeanor to operate a commercial motor vehicle with a BAC greater than .07% but less than .10%. The BAC scores

under which this offense may be charged have been changed. It may now only be charged when a commercial motor vehicle driver's BAC is more than .07% but less than .08%.

Given that Part 59.5(e) of the New York Code, Rules and Regulations provides that breath test results are to be expressed to the second decimal place (e.g., a score of .077% would be reported as .07%), the modifications made to VTL § 1192[6] (Commercial Motor Vehicles; per se— Level II) may have made it effectively impossible to charge a driver under this statute. Any breath test scores falling between .07% and .08% would be rounded down to .07%, and the statute requires that the BAC score be *more* than .07%. Any score of .08% or higher would be charged under VTL § 1192[2] (Driving While Intoxicated; per se).

Changes to VTL § 1193

The legislature has made two changes to VTL § 1193, both of which simply involved substituting the value .08% for .10%. VTL § 1193(e)7a now states:

A court shall suspend a driver's license, pending prosecution, of any person charged with a violation of subdivision two or three of section eleven hundred ninety-two of this article who, at the time of arrest, is alleged to have had .08 of one percent or more by weight of alcohol in such driver's blood as shown by a chemical analysis of blood, breath, urine or saliva, made pursuant to subdivision two or three of section eleven hundred ninety-four of this article.

VTL § 1193(e)7b now provides that for such

a suspension to occur, there must exist reasonable cause to believe that the holder of the license "operated a motor vehicle while such holder had .08 of one percent or more by weight of alcohol in his or her blood..." Thus, **.08% now applies to suspensions pending prosecution.**

Changes to VTL § 1195

VTL § 1195[2] sets forth the probative value to be given to chemical test scores. VTL § 1195[2](c) has been modified to read:

Evidence that there was more than .07 of one per centum but less than .08 of one per centum by weight of alcohol in such person's blood shall be prima facie evidence that such person was not in an intoxicated condition, but such evidence shall be given prima facie effect in determining whether the ability of such person to operate a motor vehicle was impaired by the consumption of alcohol.

As discussed above, Part 59.5(e) of the New York Code, Rules and Regulations provides that breath test results are to be expressed to the second decimal place. As a result, a defendant cannot be found to have a breath test score greater than .07% but less than .08%. Based on this analysis, it appears that this change has made it impossible for a driver to have a breath test score that would be considered prima facie evidence that the driver was not intoxicated but would be prima facie evidence of impairment.

This newsletter does not offer specific legal advice. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. If you have any questions or would like a specific topic covered in the newsletter, please contact Michael S. Taheri, Esq., or Peter J. Todoro, Esq., at Taheri & Todoro, PC, 388 Evans Street, Williamsville, NY 14221, telephone no. (716) 633-0374, e-mail: taheri@localnet.com.

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