SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	AB 2717	**Hearing Date:**	June 26, 2018
Author:	Lackey		
Version:	June 13, 2018		
Urgency:	No	**Fiscal:**	No
Consultant:	MK		

Subject: ***Driving Under the Influence: Blood Tests***

HISTORY

Source: California District Attorneys Association

Prior Legislation: AB 702 (Lackey) failed Senate Appropriations 2017

Support: Unknown

Opposition: None known

Assembly Floor Vote: votes not relevant

PURPOSE

The purpose of this bill is to bring California implied consent laws into conformity with the U.S. Supreme Court case of Birchfield v. North Dakota.

Existing law states that if any person is convicted of a violation of driving under the influence (DUI), and at the time of the arrest leading to that conviction that person willfully refused a peace officer's request to submit to, or willfully failed to complete, the chemical test or tests, the court shall impose the following penalties: (Vehicle Code, § 23577 (a).)

1) If the person is convicted of a first violation of a DUI as specified, the punishment proscribed for a first-offense DUI shall be imposed;

2) If the person is convicted of a second violation of a DUI, the punishment shall be enhanced by an imprisonment of 96 hours in the county jail, whether or not probation is granted and no part of which may be stayed, unless the person is sentenced to, and incarcerated in, the state prison and execution of that sentence is not stayed;

3) If the person is convicted of a third violation of a DUI, the punishment shall be enhanced by an imprisonment of 10 days in the county jail, whether or not probation is granted and no part of which may be stayed; and

4) If the person is convicted of a fourth or subsequent DUI violation, the punishment shall be enhanced by imprisonment of 18 days in the county jail, whether or not probation is granted and no part of which may be stayed.

Existing law provides that person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of specified DUI offenses. If a blood or breath test, or both, are unavailable, then a urine test is required as specified. (Vehicle Code § 23612 (a)(1)(A).)

Existing law states that a person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood for the purpose of determining the drug content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section specified DUI offenses. If a blood test is unavailable, the person shall be deemed to have given his or her consent to chemical testing of his or her urine and shall submit to a urine test. (Vehicle Code, § 23612 (a)(1)(B).)

Existing law provides that the testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of specified DUI offenses. (Vehicle Code, § 23612 (a)(1)(C).)

Existing law specifies that the person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a DUI, and:

1) The suspension of the person's privilege to operate a motor vehicle for a period of one year,

2) The revocation of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within 10 years of a separate violation DUI offense; or

3) The revocation of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within 10 years of two or more separate DUI violations, as specified. (Vehicle Code § 23612 (a)(1)(D).)

Existing law provides that if the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her blood or breath and the officer shall advise the person that he or she has that choice. If the person arrested either is incapable, or states that he or she is incapable, of completing the chosen test, the person shall submit to the remaining test. If a blood or breath test, or both, are unavailable, the person shall submit to the remaining test in order to determine the percent, by weight, of alcohol in the person's blood. If both the blood and breath tests are unavailable, the person shall be deemed to have given his or her consent to chemical testing of his or her urine and shall submit to a urine test. (Vehicle Code, § 23612 (a)(2)(A).)

Existing law states that if the person is lawfully arrested for driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug, the person has the choice of whether the test shall be of his or her blood or breath, and the officer shall advise the person that he or she has that choice. (Vehicle Code § 23612 (a)(2)(B).)

Existing law states that a person who chooses to submit to a breath test may also be requested to submit to a blood test if the officer has reasonable cause to believe that the person was driving under the influence of a drug or the combined influence of an alcoholic beverage and a drug and

if the officer has a clear indication that a blood test will reveal evidence of the person being under the influence. The officer shall state in his or her report the facts upon which that belief and that clear indication are based. The officer shall advise the person that he or she is required to submit to an additional test. The person shall submit to and complete a blood test. If the person arrested is incapable of completing the blood test, the person shall submit to and complete a urine test. (Vehicle Code § 23612 (a)(2)(C).)

Existing law provides that if the person is lawfully arrested for an offense allegedly committed in violation of a specified DUI offense, and, because of the need for medical treatment, the person is first transported to a medical facility where it is not feasible to administer a particular test of, or to obtain a particular sample of, the person's blood or breath, the person has the choice of those tests, including a urine test, that are available at the facility to which that person has been transported. In that case, the officer shall advise the person of those tests that are available at the medical facility and that the person's choice is limited to those tests that are available. (Vehicle Code § 23612 (a)(3).)

Existing law provides that an officer shall also advise the person that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law. (Vehicle Code § 23612 (a)(4).)

Existing law states that a person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the noncompletion of, the test or tests will result in the suspension or revocation of his or her privilege to operate a motor vehicle. A person who is dead is deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer. (Vehicle Code, § 23612 (a)(5).)

Existing law specifies that a person who is afflicted with hemophilia is exempt from the blood test required by this section, but shall submit to, and complete, a urine test. (Vehicle Code, § 23612 (b).)

Existing law provides that a person who is afflicted with a heart condition and is using an anticoagulant under the direction of a licensed physician and surgeon is exempt from the blood test required by this section, but shall submit to, and complete, a urine test. (Vehicle Code, § 23612 (c).)

Existing law states that a person lawfully arrested for an offense allegedly committed while the person was driving a motor vehicle in violation of specified DUI offenses may request the arresting officer to have a chemical test made of the arrested person's blood or breath for the purpose of determining the alcoholic content of that person's blood, and, if so requested, the arresting officer shall have the test performed. (Vehicle Code, § 23612(d))

This bill clarifies that the penalties for refusal to submit to a DUI test do not apply to a person who refused to submit to or complete a blood test.

This bill provides that in addition to informing a person suspected of a DUI who refuses to take a breath or urine test that they may be subject to criminal and administrative penalties, a person

shall also be told that his or her failure to submit to a blood test will result in administrative penalties.

This bill changes the standard for requesting a blood test in a DUI from if the officer has "a clear indication that the blood test will reveal evidence of the person being under the influence" to "if the officer has reasonable cause to believe that a blood test will reveal evidence of the person being under the influence."

COMMENTS

1. Need for this Bill

According to the author:

> Recent rulings by the Supreme Court of the United States (SCOTUS) require California to update its Driving Under the Influence (DUI) laws.
>
> Current law - Vehicle Code sections 23612, 23577, and 23578 - establishes an "implied consent," which essentially means that a person who drives a motor vehicle is deemed to have given his consent to chemical testing of his blood or breath when lawfully arrested for driving under the influence of alcohol or drugs .
>
> Current law also provides for criminal sanctions for failure to comply with a lawful request to have a biological sample (breath or blood) tested for substances that could impair a person's ability to safely operate a vehicle.
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> However, these laws are not in compliance with the due process requirements set forth by the Supreme Court of the United States in *Birchfield v. North Dakota* (2016) 136 S.Ct. 2160 [195 L.Ed.2d 560].
>
> In Birchfield, and the two companion cases, the SCOTUS ruled that breath testing was not a violation of the Fourth Amendment as it was incident to an arrest, but obtaining a blood sample would require a warrant. This means that "implied consent" does not exist in the case of the blood testing.
>
> Furthermore, according to one of the holdings in *Birchfield, supra*., a state cannot burden the invocation of the Fourth Amendment protection by a lawfully arrested driver by imposing criminal sanctions on said driver. Such sanctions made the consent or waiver of that protection coerced. However, the justices did approve the use of administrative remedies as a reasonable invocation of the State interest in regulating safety on the roads.

2. Fourth Amendment as Applied to DUI Chemical Tests

The Fourth Amendment protects people from unreasonable searches by the government. A search occurs when the police intrude into a place where a person has a reasonable expectation of privacy, such as a person's house or even a person's body. For a search to be reasonable, police are usually required to meet the standard of "probable cause" (having a good reason to search). In most cases, an officer will get a search warrant by providing some information to a judicial official that a crime was committed at the place to be searched or that particular evidence of a crime exists at the location to be searched. This process can go quickly, especially when done over the phone or electronically. If the judicial official agrees that probable cause exists, he or she will issue the warrant.

However, the following examples are instances when police can search without a warrant:

1) In a consent search. This is when the person gives permission for the search.

2) In a search incident to lawful arrest. This is when a person is lawfully arrested and police can search the person and the area within that person's immediate control for the officers' safety.

3) When evidence of a crime is in plain view because there is no expectation of privacy in this situation.

4) In an exigent circumstances search. This is when there is an emergency or pressing need and not enough time for a police officer to secure a search warrant.

Taking a blood or breath test is referred to as a BAC test (blood alcohol content). A BAC test is considered a search. Having a driver take a breath or blood test is one of the most common ways to gather evidence in a DUI case (driving under the influence). In a breath test, which may occur on the road or at the police station, the driver breathes into a breathalyzer. The purpose is to detect the amount of alcohol in the driver's body. A blood test that detects alcohol or drugs in the body is usually a more accurate method than the breath test. It is taken by a certified professional, usually at a hospital, who uses a syringe to take blood.

All 50 states have "implied consent laws." These laws say that drivers automatically give permission to police officers to test for BAC if an officer has reason to believe that a driver is under the influence. If drivers refuse, they can lose their license. However, 12 states, including

North Dakota, go further and make it a separate crime (arrest and potential jail time), apart from how the DUI turns out, for drivers to refuse to let officers test their BAC.[1]

3. *Birchfield v. North Dakota*

The 2013 case of Danny Birchfield involved a driver in a DUI case who refused to consent to a blood test when requested by an officer. Mr. Birchfield had submitted to a breath test prior to the request, which showed that he was intoxicated. Mr. Birchfield was charged with breaking the implied consent law of North Dakota.

[1] According to Street Law, Inc. 2016.

At trial, Mr. Birchfield argued that his Fourth Amendment rights were violated by criminalizing his refusal to be searched when he failed to consent to the blood test. The trial court, and subsequently the Supreme Court of North Dakota ruled that Mr. Birchfield's constitutional rights were not violated when the state of North Dakota criminalized the refusal to take a blood test. The basis of this determination was that the officers only administered the test when they established probable cause to believe that the driver was impaired. Thus, the state courts deemed the search reasonable.

The United States Supreme Court reviewed the decision of the South Dakota Supreme Court because it was based on an interpretation of federal constitutional law. The Supreme Court asked, whether a state can criminalize a refusal to take a blood test, absent a warrant, through an implied consent law. *Birchfield v. North Dakota, (2016) 136 S. Ct. 2160, at 2173.* The court ruled that the Fourth Amendment permits warrantless breath tests for drunk driving, but does not permit warrantless blood tests. The court determined that breath tests are barely a physical intrusion, as opposed to the blood test which can even leave DNA samples with the government.

4. Refusal

Under California's implied consent laws, a person convicted of a DUI can have additional criminal and administrative penalties for refusing a peace officer's request to submit to, or willfully complete a blood test. These additional sanctions raise constitutional questions following the *Birchfield* case.

This bill instead imposes the administrative sanction of a license suspension or revocation if a person refuses a blood test and states law enforcement shall inform a person of the person of these possible sanctions if he or she refuses a blood test when suspected of a DUI.

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