

Chapter MVD 25

**BREATH ALCOHOL TESTING, APPROVAL AND PERMIT PROGRAM**

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**MVD 25.01 Definitions.** As used in this chapter:

(1) "Administrator" means the administrator of the division of motor vehicles in the Wisconsin department of transportation.

(2) "Alveolar" means that portion of expired breath which is in equilibrium with respect to alcohol, with the immediately adjacent pulmonary blood in the alveoli or smallest air sacs of the lungs.

(3) "Ampoule" or "ampul" means a glass vial which contains a chemical solution compounded specifically for use in the breathalyzer.

(4) "Batch" means the entire quantity of a chemical compound or solution prepared at one time and with which a large quantity of ampoules, identified with the same control number are filled.

(5) "Breath alcohol analysis" means the analysis of a sample of a person's alveolar breath, using an instrument designed for this purpose, to determine indirectly, the concentration of ethyl alcohol in the person's blood.

(6) "Concentration" means the weight of alcohol contained in a given volume of blood, expressed as grams of alcohol per 100 milliliters of blood or percent blood alcohol by weight.

(7) "Division" means the division of motor vehicles in the department of transportation or its duly authorized representatives.

(8) "Equilibrium" means a state of balance which is achieved at the time all the alcohol ingested has been absorbed into the body and has been distributed in direct proportion to the water content.

(9) "Instrument" or "device" means any item or combination of items of equipment used to make a measurement of alcohol concentration; simple and complex devices are included in the meaning.

(10) "Method" means the steps followed by a trained person to make a measurement of alcohol concentration.

(11) "Permit" means a document issued by the division of motor vehicles to individuals to perform breath alcohol analyses.

(12) "Program director" means that person charged with directing the breath alcohol testing, approval and permit program.

(13) "Regional supervisor" means a person who is responsible for the supervision of the breath alcohol testing, approval and permit program in an assigned area of the state.

(14) "Sample" or "specimen" means a representative portion of breath or of an artificially constituted material taken for the purpose of measuring its alcohol content.

(15) "Senior breathalyzer operator" means a person who holds a valid permit to perform breath alcohol analysis and has been assigned to perform specific duties in the program.

(16) "Simulator" means an instrument used to equilibrate air with a reference solution of known alcohol content at a known temperature.

(17) "Technique" means the manner in which a trained person completes the steps that are performed in administering a chemical test of the breath.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

**MVD 25.02 Breath test instrument approval.** (1) All organizations selling or offering for sale instruments for breath alcohol analysis in this state shall register such instruments with the division. Only such instruments as have been approved by the division shall be used for breath alcohol analyses in this state. Approval or disapproval shall be based on laboratory evaluation by the division of the ability of the instrument to meet the standards of performance set forth in section MVD 25.03. ✓

(a) It shall be the responsibility of the manufacturer of such instrument or the person requesting the evaluation to make arrangements with the division to have the instrument evaluated. The manufacturer or the person requesting the evaluation shall provide the division with the instrument, related accessories, chemical reagents, full directions and any other materials needed for the evaluation, and shall provide the program director with such technical consultation as is necessary during the evaluation.

(b) Upon receiving a request from the manufacturer or other person, and if the provisions of this section have been complied with, the division shall evaluate the instrument against the standards of performance set forth in section MVD 25.03. ✓

(c) The division shall report the result of the evaluation to the manufacturer or the person requesting the evaluation and shall have the right to promulgate the results.

(d) The division shall not accept for evaluation any instrument or procedure for which analysis is made esoteric by reason of secrecy, commercial unavailability or incomplete directions.

(e) The division shall provide upon request a list of instruments and related accessories approved for breath alcohol analyses in this state.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

**MVD 25.03 Standards of performance.** (1) Instruments for breath alcohol analyses, to be used in this state, shall meet the following performance standards:

(a) The instrument or related accessories shall be capable of the collection and analysis of breath specimens which are essentially alveolar in composition.

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(b) The instrument and related accessories shall be capable of measuring the volume of breath used volumetrically at a constant known temperature.

(c) The instrument or related accessories shall be capable of preventing the loss of alcohol through condensation by maintaining the breath specimen at a temperature sufficiently above body temperature or by other satisfactory means.

(d) The instrument shall be capable of analysis of a blank specimen and a reference sample such as air equilibrated with a reference solution of known alcohol concentration at a known temperature.

(e) The instrument shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits established by the division.

(f) The instrument shall be capable, in controlled experiment, of breath alcohol analysis which results in a determination of a person's blood alcohol concentration which has correlation with his actual blood alcohol concentration as measured on a blood specimen taken at the same time as the breath specimen.

(g) The instrument shall be capable of breath alcohol analysis which results in a concentration less than 0.01 grams of alcohol per 100 milliliters of blood when alcohol free persons are tested.

(2) The ability of the instrument and any related accessories to meet the standards of performance set forth in this section shall be subject to evaluation by the program director.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

**MVD 25.04 Instruments approved for use in Wisconsin.** (1) The following breath test instruments have been approved by the division for use in Wisconsin:

(a) *Breathalyzer*—All models except models 300 and 400 (Stephenson Corporation)

(b) *Alco-Analyzer Gas Chromatograph* (Luckey Laboratories)

(2) Other instruments or devices may be approved by letter as they are demonstrated to the satisfaction of the division that they meet the requisite standards.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

**MVD 25.05 Approved techniques and methods of performing chemical analysis of the breath.** (1) Methods of performing chemical analysis of the breath shall be as prescribed on forms approved by the division.

(**Note:** Breathalyzer test report, MVD 4036. This form is available from the office of the Chemical Test Supervisor, Motor Vehicle Division, Hill Farms State Office Building, Madison, Wisconsin, or the Regional Supervisor of the chemical test program.)

(2) Techniques used in performing chemical analysis of the breath shall be those which are taught in the classroom and laboratory and which are designed to insure accuracy, detect malfunctions and safeguard personnel and equipment.

(3) Procedures for breath alcohol analysis for the indirect determination of blood alcohol concentration shall include the following controls in conjunction with the testing of each subject:

(a) Continuous observation of the subject for at least 20 minutes prior to collection of the breath specimen, during which period the

subject shall not have ingested alcohol, regurgitated, vomited or smoked.

(b) A system blank analysis.

(c) Analysis of a suitable reference or control sample of known alcohol concentration such as air equilibrated with a reference solution of known alcohol content at a known temperature. The result of this analysis must coincide with the predicted blood alcohol value of the reference solution within tolerances as established by the division.

(d) Results of analyses of breath for alcohol shall be expressed in terms of percent blood alcohol by weight, that is, grams of alcohol per 100 milliliters of blood and shall be reported to the second decimal place. For example, 0.178% W/V should be reported as 0.17% W/V or may be reported as 0.17+ % W/V.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

**MVD 25.06 Technicians approved by the administrator.** (1) The administrator of the division of motor vehicles, as required by section 343.305 (9) (b), Wis. Stats., shall approve trained technicians by letter.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

**MVD 25.07 Approved training courses.** (1) Training programs for the training of traffic officers in the chemical analysis of a person's breath shall be under the supervision of the program director.

(2) Training programs for the training of traffic officers in the chemical analysis of a person's breath shall be conducted at the Wisconsin state patrol academy.

(a) Costs incurred for this training will be the responsibility of each respective law enforcement agency and shall be determined as authorized by section 110.065, Wis. Stats.

(b) The division may apply for federal grants, when such grants are available, with which to reimburse local law enforcement agencies for expenses actually incurred within guidelines as established by the division of highway safety coordination.

(3) Applicants to attend an approved training course must meet the following minimum qualifications:

(a) Applicants must be high school graduates or equivalent, or must successfully complete a screening examination developed and administered by the division.

(b) Applicants must be full time permanent employees of a law enforcement agency.

(c) Applicants must have the recommendation of the head of their respective law enforcement agency

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

**MVD 25.08 Quality control program; standards of procedure for testing and certifying the accuracy of breath test instruments and appurtenances.** (1) All breath test instruments approved for use in this state shall be tested and certified for accuracy in accordance with the following standards:

(a) The instrument shall be maintained and the calibration checked periodically at intervals of not more than 60 days by technicians approved by the administrator.

(b) The procedure to be followed when maintaining and checking the calibration of the breath test instrument shall be specified by the division.

(c) Each maintenance and calibration check shall include, but is not limited to, a system blank analysis and analysis of air equilibrated with a reference solution of known alcohol content at a known temperature prior to the time any maintenance or calibration procedures are completed. A system blank analysis and an analysis of air equilibrated with a reference solution of known alcohol content at a known temperature shall be completed immediately following the performance of any maintenance procedures or calibrations adjustments.

(d) A senior breathalyzer operator or, in his absence, any other permitted operator of the instrument shall conduct a system blank analysis and an analysis of air equilibrated with a reference solution of known alcohol content at a known temperature each week. The results of these analyses shall be reported to the regional supervisor on forms as specified by the division.

(Note: Breathalyzer Test Report, Form MVD 4036. This form is available from the office of the Chemical Test Supervisor, Motor Vehicle Division, Hill Farms State Office Building, Madison, Wisconsin, or the Regional Supervisor of the chemical test program.)

(2) It shall be the responsibility of the manufacturer or distributor of breathalyzer ampoules sold in this state to provide the division with a copy of an assay report which verifies the amount and composition of the chemicals in a random selection of each batch of ampoules.

(a) The assay shall be performed by an independent research laboratory and shall include a statement, based on their findings, that the ampoules are suitable for use in the breathalyzer.

(b) Each ampoule filled from a particular batch shall bear a control number which distinguishes that batch from any other.

(c) Copies of breathalyzer ampoule assays shall be placed on file with the division.

(3) The state patrol chemist or other person approved by the division shall conduct an independent assay on each batch of ampoules accepted for use in this state. The result of this assay shall be placed on file with the division.

(4) Reference solutions for use in simulators shall be prepared by the state patrol chemist or other person approved by the division. Solutions so compounded shall be identified with a control number and a report of the predicted result when used with a breath test instrument shall be placed on file with the division.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

**MVD 25.09 Qualifications for and issuance of permits.** (1) Permits to conduct chemical analysis of a person's breath shall be issued only to persons who have fulfilled the following requirements:

(a) Successful completion of the approved training course as evidenced by the achievement of a minimum grade of 70% on the final written examination and accurate analysis of 5 reference solutions, the concentrations of which are unknown to the student, within established tolerances, following the method and utilizing the techniques taught in the classroom and laboratory

(2) Permits shall be issued for a period of not to exceed 2 years except that permits may be issued for an extended period of time to provide for uniform expiration dates in an agency.

(a) The permit shall bear an expiration date and shall specify the type of instrument for which it is valid.

(b) Permits shall be valid for the period of time issued except as provided in sections MVD 25.10 and 25.11.

(c) Permits shall bear the signatures (original or facsimile) of the administrator and the program director. The original permit shall be posted or maintained on file at the location at which the permittee regularly conducts breath alcohol analyses, or at the permittee's headquarters, station or precinct. A photostat or other copy of the permit shall be retained by the permittee and a copy shall remain on file with the division.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

**MVD 25.10 Renewal of permits.** (1) Permits shall be subject to renewal at expiration or at such time prior to expiration as is convenient for the division upon demonstration by the permittee of continuing:

(a) Ability to perform accurate and reliable chemical analyses of the breath and to follow the established method while utilizing proper techniques.

(b) Ability to satisfactorily explain the method of operation of the breath testing device for which he is applying for a renewal permit to operate.

(c) Knowledge of this state's chemical test law, implied consent law and the requirements and restrictions imposed by them.

(2) The permittee's ability and knowledge as it pertains to (a) through (c) shall be determined by a laboratory or written examination or both at the discretion of the program director.

(3) Examinations for the renewal of breath test instrument operator permits shall be developed and/or approved by the division and shall be held in regional areas of the state established by the division.

(4) The program director or regional supervisor may at any time examine permittees to determine their continuing ability to perform accurate and reliable chemical analyses of the breath.

(5) The permits of permittees who are successful in completing examinations for the renewal of their permits shall be renewed for a period not to exceed 2 years.

(6) The permits of permittees who are not successful in the examinations for renewal of their permits shall be suspended as of that date.

(a) Unsuccessful applicants for permit renewal shall, after a period of 30 days, become eligible to be re-examined for renewal and reinstatement of their suspended permits. The division shall establish regional renewal examination centers for this purpose.

(7) The renewal of permits, in addition to the requirements of this section, shall be subject to all requirements set forth in section MVD 25.11.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

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**MVD 25.11 Suspension, cancellation and revocation of permits.**

(1) Permits shall become invalid after the expiration date unless renewed as provided in section MVD 25.10, except for those permits suspended, cancelled or revoked as provided in sections MVD 25.10 and MVD 25.11.

(2) Permits which have been expired for more than one year shall not be renewed until the permittee again fulfills the requirements of section MVD 25.09.

(3) If the program director receives unfavorable information regarding the ability of any permittee to conduct accurate and reliable chemical analyses of the breath, he shall direct the regional supervisor to re-examine the permittee's ability.

(a) The permittee's ability shall be evaluated on the basis of the provisions of section 25.10 (1) (a) through (c).

(b) Permittees who fail to appear for re-examination as scheduled shall, in the absence of a valid excuse, have their permits suspended.

(c) Permittees who successfully complete the re-examination shall retain their permits in good standing.

(d) Permits of permittees who are unsuccessful in the re-examination shall be revoked and not become eligible for the issuance of a new permit until complying with the requirements of section MVD 25.09.

(4) Permittees shall, during the period of time for which their permits are valid, maintain their proficiency and competency in the accurate and reliable chemical analysis of the breath by complying with the following standards of performance:

(a) Each permittee shall perform a minimum of one chemical analysis of a person's breath or chemical analysis of a reference solution of known alcohol concentration each 2-month period subsequent to the issuance or renewal of his permit.

(b) Permittees who fail to maintain their proficiency and competency as set forth in this section shall have their permits suspended at the end of any 12-month period in which they have failed to meet the minimum standards of performance.

(c) Permits which have been suspended for failure to maintain proficiency and competency shall remain suspended until such time as the permittee presents himself for re-examination as provided in section MVD 25.10 (1) (a) through (c).

(d) Chemical analyses performed in compliance with the provisions of sections MVD 25.10 (1) (a) shall not be applicable to the provisions for maintaining proficiency and competency established in sections MVD 25.11 (4) (a).

(5) The program director, upon receiving proper notice, shall notify the permittee in writing that his permit has been suspended, cancelled or revoked.

(a) Upon the receipt of the written notice, the permittee or the head of his agency shall promptly return the suspended, cancelled or revoked permit to the division.

(6) The following action shall be taken when the employment of a permittee with a law enforcement agency is terminated:

(a) The permit shall be cancelled and returned to the division unless the head of another such agency employing the permittee requests that the permittee's records be transferred to that agency and that the permit be retained in good standing.

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.

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**MVD 25.12 Records and reports.** (1) All law enforcement agencies subject to the provisions of this section of the administrative code shall maintain the following records and reports and make them available to the division on request:

(a) Copies of records of all analyses performed, which shall include chemical analyses of a person's breath, senior breathalyzer operator weekly tests and chemical analyses performed in compliance with the requirements of section MVD 25.11 (4) (a).

(b) In those locations at which more than one law enforcement agency utilizes the breath test instrument, the agency in which the instrument is domiciled shall be responsible for maintaining the records and reports as required by this section.

(2) All law enforcement agencies subject to the provisions of this section of the administrative code shall submit copies of the following records and reports to the regional supervisor:

(a) Copies of records and reports of all analyses performed which shall include chemical analysis of a person's breath, chemical analyses performed in compliance with the requirements of section MVD 25.11 (4) (a) and senior breathalyzer operator weekly tests.

(Note: Breathalyzer Test Report, MVD 4036).

(b) Copies of alcoholic influence reports completed in conjunction with drinking driver investigations.

(c) Copies of reports completed in compliance with the provisions of the implied consent law, section 343.305.

(Note: Informing The Accused, Form MVD 4197)

(3) The division shall compile such information from the reports submitted in compliance with this section to provide for factual evaluation of the permittee's ability and the effectiveness of the breath alcohol testing, approval and permit program.

(4) The following records and reports shall be considered to be matters of public record:

(a) Records and reports of instrument maintenance and calibration.

(Note: Breathalyzer Maintenance Report, MVD 4068).

(b) Records and reports of breathalyzer ampoule assays.

(c) Records and reports of breathalyzer operator permits.

(d) Records and reports of simulator solution assays.

(Note: All forms referred to in this rule are available from the office of the Chemical Test Supervisor, Motor Vehicle Division, Hill Farms State Office Building, Madison, or the Regional Supervisor of the chemical test program.)

**History:** Cr. Register, September, 1972, No. 201, eff. 10-1-72.