is restricted under sub. (1g) (am) 2. begins on the date the department issues any license granted under this chapter. The court may order the person to install an ignition interlock device under sub. (1g) (am) 2. immediately after his or her participation in the program ends or while the person completes the program and for the additional period of time required under this paragraph, and shall notify the department of the date the person's participation ended and the duration of the order restricting the operating privilege. A person subject to an order requiring installation of an ignition interlock device shall, within 2 weeks after the date on which installation of the ignition interlock device is required under the order, submit proof to the sheriff in his or her county of residence that an ignition interlock device has been installed in each motor vehicle to which the order applies.

(3) (a) Except as provided in par. (b), if the court enters an order under sub. (1g), the person shall be liable for the reasonable cost of equipping and maintaining any ignition interlock device installed on his or her motor vehicle.

(b) If the court finds that the person who is subject to an order under sub. (1g) has a household income that is at or below 150 percent of the nonfarm federal poverty line for the continental United States, as defined by the federal department of labor under 42 USC 9902 (2), the court shall limit the person's liability under par. (a) to one−half of the cost of equipping each motor vehicle with an ignition interlock device and one−half of the cost per day per vehicle of maintaining the ignition interlock device.

(4) A person to whom an order under sub. (1g) applies violates that order if he or she fails to have an ignition interlock device installed as ordered, removes or disconnects an ignition interlock device, requests or permits another to blow into an ignition interlock device or to start a motor vehicle equipped with an ignition interlock device for the purpose of providing the person an operable motor vehicle without the necessity of first submitting a sample of his or her breath to analysis by the ignition interlock device, or otherwise tampers with or circumvents the operation of the ignition interlock device.

(5) If the court enters an order under sub. (1g), the court shall impose and the person shall pay to the clerk of court an ignition interlock surcharge of $50. The clerk of court shall transmit the amount to the county treasurer.

History: 1999 a. 109; 2001 a. 16 ss. 3417m to 3420t, 4060gj, 4060hw, 4060hy; 2001 a. 104; 2009 a. 100; 2013 a. 168; 2015 a. 389; 2017 a. 124.

Sub. (1g) (b) 2. requires an order for ignition interlock devices when a person violates s. 346.63 (1) and has one or more prior OWI convictions. Sub. (1g) (b) 2. provides no restrictions on how to count prior convictions for purposes of ordering ignition interlock devices. The ten−year look−back provision in s. 346.65 (2) (am) 2. for purposes of determining whether to charge or penalize a repeat OWI offender civilly or criminally is independent of and has no effect on orders for ignition interlock devices under this section. Village of Grafton v. Seatz, 2014 WI App 23, 352 Wis. 2d 747, 845 N.W.2d 672, 13−1414.

Wisconsin's New OWI Law. Mishlove & Stuckert. Wis. Law. June 2010.

343.303 Preliminary breath screening test. If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) or (2m) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63 (7) or a local ordinance in conformity therewith, 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 using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63 (1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6), 940.09 (1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305 (3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305 (3). Following the screening test, additional tests may be required or requested of the driver under s. 343.305 (3). The general penalty provision under s. 939.61 (1) does not apply to a refusal to take a preliminary breath screening test.

History: 1981 c. 20; 1985 a. 32 s. 3; 1985 a. 337; 1987 a. 3; 1989 a. 105; 1991 a. 277; 1995 a. 448.

A prosecutor's statement that the defendant failed a preliminary breath test was improper, but evidence that the defendant refused to take a breathalyzer test was relevant and constitutionally admissible. State v. Albright, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980).

A preliminary breath test result is not determinative of probable cause to arrest for driving while intoxicated. A low test result does not void the grounds for arrest. Dane County v. Sharpee, 154 Wis. 2d 515, 453 N.W.2d 508 (Ct. App. 1990).

The bar of preliminary breath tests under this section is limited to proceedings related to arrests for offenses contemplated under this statute including those related to motor vehicles and intoxication. State v. Beaver, 181 Wis. 2d 959, 512 N.W.2d 254 (Ct. App. 1994).

This section bars the evidentiary use of preliminary breath test results in motor vehicle violation cases, but not in other actions. Prosecutors who wish to rely on PBT results are required to present evidence of the device's scientific accuracy as a foundation for admission. State v. Doerr, 229 Wis. 2d 616, 599 N.W.2d 897 (Ct. App. 1999), 98−1047.

"Probable cause to believe" refers to a quantum of evidence greater than reasonable suspicion to make an investigative stop, but less than probable cause to make an arrest. County of Jefferson v. Renz, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), 97−3512.

Blood may be drawn in a search incident to an arrest for a non−drunk−driving offense if the police reasonably suspect that the defendant's blood contains evidence of a crime. This section does not prohibit the consideration of a suspect's refusal to submit to a PBT for purposes of determining whether a warrantless involuntary draw of the suspect's blood was supported by reasonable suspicion. State v. Repenshek, 2004 WI App 229, 277 Wis. 2d 780, 691 N.W.2d 369, 03−3089

A preliminary breath test may be requested when an officer has a basis to justify an investigative stop but has not established probable cause to justify an arrest. Under the facts of this case, the officer would have been justified in asking the defendant to take a preliminary breath test without asking him to perform any field−sobriety tests. That the defendant successfully completed all properly administered field−sobriety tests did not subtract from the common−sense view that the defendant may have had an impermissible blood−alcohol level. State v. Felton, 2012 WI App 114, 344 Wis. 2d 483, 824 N.W.2d 871, 11−2119.

Under *State v. St. George*, 2002 WI 50, for a defendant to establish a constitutional right to the admissibility of proffered expert testimony, the defendant must satisfy a two−part inquiry determining whether the evidence is clearly central to the defense and the exclusion of the evidence is arbitrary and disproportionate to the purpose of the rule of exclusion, so that exclusion undermines fundamental elements of the defendant's defense. In an OWI prosecution, even if a defendant establishes a constitutional right to present an expert opinion that is based in part on PBT results, the right to do so is outweighed by the state's compelling interest to exclude that evidence. State v. Fischer, 2010 WI 6, 322 Wis. 2d 265, 778 N.W.2d 629, 07−1898. But see Fischer v. Ozaukee County Circuit Court, 741 F. Supp. 2d 944 (2010).

Probable cause exists to request a preliminary breath test sample when the driver is known to be subject to a .02 prohibited alcohol content standard, the officer knows it would take very little alcohol for the driver to exceed that limit, and the officer smells alcohol on the driver. State v. Goss, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918, 10−1113.

The Wisconsin Supreme Court's decision in *Fischer* affirming the exclusion of the defendant's expert's testimony using PBT results involved an unreasonable application of federal law as determined by the United States Supreme Court. Fischer v. Ozaukee County Circuit Court, 741 F. Supp. 2d 944 (2010).

343.305 Tests for intoxication; administrative suspension and court−ordered revocation. (1) DEFINITIONS. In this section:

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

(c) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

(2) IMPLIED CONSENT. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, 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, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer

is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a), (am), or (ar), and may designate which of the tests shall be administered first.

(3) REQUESTED OR REQUIRED. (a) Upon arrest of a person for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or upon arrest subsequent to a refusal under par. (ar), 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 under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

(am) Prior to arrest, 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 under sub. (2) whenever a law enforcement officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person is violating or has violated s. 346.63 (7). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. For the purposes of this paragraph, "law enforcement officer" includes inspectors in the performance of duties under s. 110.07 (3).

(ar) 1. If a person is the operator of a vehicle that is involved in an accident that causes substantial bodily harm, as defined in s. 939.22 (38), to any person, and a law enforcement officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof, the law enforcement officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose specified under sub. (2). 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 under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person. If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).

2. If a person is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person and the law enforcement officer has reason to believe that the person violated any state or local traffic law, the officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose specified under sub. (2). 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 under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person. If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).

(b) A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or detects any presence of alcohol, controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person has violated s. 346.63 (7), one or more samples specified in par. (a) or (am) may be administered to the person.

(c) This section does not limit the right of a law enforcement officer to obtain evidence by any other lawful means.

(4) INFORMATION. At the time that a chemical test specimen is requested under sub. (3) (a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:

"You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified."

(5) ADMINISTERING THE TEST; ADDITIONAL TESTS. (a) If the person submits to a test under this section, the officer shall direct the administering of the test. A blood test is subject to par. (b). The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test for the purpose specified under sub. (2). If the person has not been requested to provide a sample for a test under sub. (3) (a), (am), or (ar), the person may request a breath test to be administered by the agency or, at his or her own expense, reasonable opportunity to have any qualified person administer any test specified under sub. (3) (a), (am), or (ar). The failure or inability of a person to obtain a test at his or her own expense does not preclude the admission of evidence of the results of any test administered under sub. (3) (a), (am), or (ar). If a person requests the agency to administer a breath test and if the agency is unable to perform that test, the person may request the agency to perform a test under sub. (3) (a), (am), or (ar) that it is able to perform. The agency shall comply with a request made in accordance with this paragraph.

(b) Blood may be withdrawn from the person arrested for violation of s. 346.63 (1), (2), (2m), (5), or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63 (1), (2m), or (5), or as provided in sub. (3) (am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog, or any other drug, or any combination of alcohol, controlled substance, controlled substance analog, and any other drug in the blood only by a physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician.

(c) A person acting under par. (b), 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.

(d) At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant, a controlled substance, a controlled substance ana-

log or any other drug, or under the influence of any combination of alcohol, a controlled substance, a controlled substance analog and 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, or having a prohibited alcohol concentration, or alleged to have been driving or operating or on duty time with respect to a commercial motor vehicle while having an alcohol concentration above 0.0 or possessing an intoxicating beverage, regardless of its alcohol content, or within 4 hours of having consumed or having been under the influence of an intoxicating beverage, regardless of its alcohol content, or of having an alcohol concentration of 0.04 or more, the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant, a controlled substance, a controlled substance analog or any other drug, or under the influence of any combination of alcohol, a controlled substance, a controlled substance analog and 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 or any issue relating to the person's alcohol concentration. Test results shall be given the effect required under s. 885.235.

(e) At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while having a detectable amount of a restricted controlled substance in his or her blood, the results of a blood test administered in accordance with this section are admissible on any issue relating to the presence of a detectable amount of a restricted controlled substance in the person's blood. Test results shall be given the effect required under s. 885.235.

(6) REQUIREMENTS FOR TESTS. (a) Chemical analyses of blood or urine to be considered valid under this section shall have been performed substantially according to methods approved by the laboratory of hygiene and by an individual possessing a valid permit to perform the analyses issued by the department of health services. The department of health services shall approve laboratories for the purpose of performing chemical analyses of blood or urine for alcohol, controlled substances or controlled substance analogs and shall develop and administer a program for regular monitoring of the laboratories. A list of approved laboratories shall be provided to all law enforcement agencies in the state. Urine specimens are to be collected by methods specified by the laboratory of hygiene. The laboratory of hygiene shall furnish an ample supply of urine and blood specimen containers to permit all law enforcement officers to comply with the requirements of this section.

(b) The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:

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

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

3. Have trained technicians, approved by the secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath under sub. (3) (a), (am), or (ar) before regular use of the equipment and periodically thereafter at intervals of not more than 120 days; and

4. Issue permits to individuals according to their qualifications.

Cross–reference: See also ch. Trans 311, Wis. adm. code.

(bm) Any relevant instruction, as defined in s. 440.075 (1), that an applicant for an approval, certification, or permit under par. (b) has obtained in connection with any military service, as defined in s. 111.32 (12g), counts toward satisfying any requirement for instruction for an approval, certification, or permit under par. (b) if the applicant demonstrates to the satisfaction of the department of transportation that the instruction obtained by the applicant is substantially equivalent to the instruction required for the approval, certificate, or permit under par. (b).

(c) For purposes of this section, if a breath test is administered using an infrared breath–testing instrument:

1. The test shall consist of analyses in the following sequence: one adequate breath sample analysis, one calibration standard analysis, and a 2nd, adequate breath sample analysis.

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

3. Failure of a person to provide 2 separate, adequate breath samples in the proper sequence constitutes a refusal.

(d) The department of transportation may promulgate rules pertaining to the calibration and testing of preliminary breath screening test devices.

(e) 1. In this paragraph, "licensor" means the department of health services or, with respect to permits issued under par. (b) 4., the department of transportation.

2. In addition to any other information required by the licensor, an application for a permit or laboratory approval under this subsection shall include the following:

a. Except as provided in subd. 2. am., in the case of an individual, the individual's social security number.

am. In the case of an individual who does not have a social security number, a statement made or subscribed under oath or affirmation that the applicant does not have a social security number. The form of the statement shall be prescribed by the department of children and families. A permit or approval that is issued or renewed under this section in reliance on a statement submitted under this subd. 2. am. is invalid if the statement is false.

b. In the case of a person who is not an individual, the person's federal employer identification number.

3. a. The licensor shall deny an application for the issuance or, if applicable, renewal of a permit or laboratory approval if the information required under subd. 2. a., am. or b. is not included in the application.

b. The licensor may not disclose any information received under subd. 2. a. or b. except to the department of children and families for purposes of administering s. 49.22, the department of revenue for the sole purpose of requesting certifications under s. 73.0301, and the department of workforce development for the sole purpose of requesting certifications under s. 108.227.

4. A permit under this subsection shall be denied, restricted, limited or suspended if the applicant or licensee is an individual who is delinquent in making court–ordered payments of child or family support, maintenance, birth expenses, medical expenses or other expenses related to the support of a child or former spouse, as provided in a memorandum of understanding entered into under s. 49.857.

5. If the licensor is the department of health services, the department of health services shall deny an application for the issuance or renewal of a permit or laboratory approval, or revoke a permit or laboratory approval already issued, if the department of revenue certifies under s. 73.0301 that the applicant or holder of the permit or laboratory approval is liable for delinquent taxes. An applicant for whom a permit or laboratory approval is not issued or renewed, or an individual or laboratory whose permit or laboratory approval is revoked, under this subdivision for delinquent taxes is entitled to a notice under s. 73.0301 (2) (b) 1. b. and a hearing under s. 73.0301 (5) (a) but is not entitled to any other notice or hearing under this subsection.

6. If the licensor is the department of health services, the department of health services shall deny an application for the issuance or renewal of a permit or laboratory approval, or revoke a permit or laboratory approval already issued, if the department of workforce development certifies under s. 108.227 that the applicant or holder of the permit or laboratory approval is liable

for delinquent unemployment insurance contributions. An applicant for whom a permit or laboratory approval is not issued or renewed, or an individual or laboratory whose permit or laboratory approval is revoked, under this subdivision for delinquent unemployment insurance contributions is entitled to a notice under s. 108.227 (2) (b) 1. b. and a hearing under s. 108.227 (5) (a) but is not entitled to any other notice or hearing under this subsection.

(7) CHEMICAL TEST; ADMINISTRATIVE SUSPENSION. (a) If a person submits to chemical testing administered in accordance with this section and any test results indicate the presence of a detectable amount of a restricted controlled substance in the person's blood or a prohibited alcohol concentration, the law enforcement officer shall report the results to the department. The person's operating privilege is administratively suspended for 6 months.

(b) If a person who was driving or operating or on duty time with respect to a commercial motor vehicle submits to chemical testing administered in accordance with this section and any test results indicate an alcohol concentration above 0.0, the law enforcement officer shall issue a citation for violation of s. 346.63 (7) (a) 1., issue citations for such other violations as may apply and issue an out–of–service order to the person for the 24 hours after the testing, and report both the out–of–service order and the test results to the department in the manner prescribed by the department. If the person is a nonresident, the department shall report issuance of the out–of–service order to the driver licensing agency in the person's home jurisdiction.

(8) CHEMICAL TEST; ADMINISTRATIVE SUSPENSION; ADMINISTRATIVE AND JUDICIAL REVIEW. (a) The law enforcement officer shall notify the person of the administrative suspension under sub. (7) (a). The notice shall advise the person that his or her operating privilege will be administratively suspended and that he or she has the right to obtain administrative and judicial review under this subsection. This notice of administrative suspension serves as a 30–day temporary license. An administrative suspension under sub. (7) (a) becomes effective at the time the 30–day temporary license expires. The officer shall submit or mail a copy of the notice to the department.

(am) The law enforcement officer shall provide the person with a separate form for the person to use to request the administrative review under this subsection. The form shall clearly indicate how to request an administrative review and shall clearly notify the person that this form must be submitted within 10 days from the notice date indicated on the form or the person's hearing rights will be deemed waived. The form shall, in no less than 16–point boldface type, be titled: IMPORTANT NOTICE — RESPOND WITHIN TEN (10) DAYS.

(b) 1. Within 10 days after the notification under par. (a), 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 department review the administrative suspension. The review procedure is not subject to ch. 227. Unless the hearing is by remote communication mechanism or record review, the department shall hold the hearing on the matter in the county in which the offense allegedly occurred or at the nearest office of the department if the offense allegedly occurred in a county in which the department does not maintain an office. The department, upon request of the person, may conduct a hearing under this paragraph by telephone, video conference, or other remote communication mechanism or by review of only the record submitted by the arresting officer and written arguments. The department shall hold a hearing regarding the administrative suspension within 30 days after the date of notification under par. (a). 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 and need not appear in person at a hearing conducted by remote communication mechanism or record review, but he or she must submit a copy of his or her report and the results of the chemical test to the hearing examiner.

2. The administrative hearing under this paragraph is limited to the following issues:

a. The correct identity of the person.

b. Whether the person was informed of the options regarding tests under this section as required under sub. (4).

bm. Whether the person had a prohibited alcohol concentration or a detectable amount of a restricted controlled substance in his or her blood at the time the offense allegedly occurred.

c. Whether one or more tests were administered in accordance with this section.

d. If one or more tests were administered in accordance with this section, whether each of the test results for those tests indicate the person had a prohibited alcohol concentration or a detectable amount of a restricted controlled substance in his or her blood.

e. If a test was requested under sub. (3) (a), whether probable cause existed for the arrest.

f. Whether the person was driving or operating a commercial motor vehicle when the offense allegedly occurred.

g. Whether the person had a valid prescription for methamphetamine or one of its metabolic precursors or gamma–hydroxybutyric acid or delta–9–tetrahydrocannabinol in a case in which subd. 4m. a. and b. apply.

3. The hearing examiner shall 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. The hearing examiner shall consider and determine the reliability of all of the evidence presented at the administrative hearing. Statements and reports of law enforcement officers are subject to the same standards of credibility applied to all other evidence presented.

4m. If, at the time the offense allegedly occurred, all of the following apply, the hearing officer shall determine whether the person had a valid prescription for methamphetamine or one of its metabolic precursors, gamma–hydroxybutyric acid, or delta–9–tetrahydrocannabinol:

a. A blood test administered in accordance with this section indicated that the person had a detectable amount of methamphetamine, gamma–hydroxybutyric acid, or delta–9–tetrahydrocannabinol but did not have a detectable amount of any other restricted controlled substance in his or her blood.

b. No test administered in accordance with this section indicated that the person had a prohibited alcohol concentration.

5. If the hearing examiner finds that any of the following applies, the examiner shall order that the administrative suspension of the person's operating privilege be rescinded without payment of any fee under s. 343.21 (1) (j), (jr), or (n):

a. The criteria for administrative suspension have not been satisfied.

b. The person did not have a prohibited alcohol concentration or a detectable amount of a restricted controlled substance in his or her blood at the time the offense allegedly occurred.

c. In a case in which subd. 4m. a. and b. apply, the person had a valid prescription for methamphetamine or one of its metabolic precursors, gamma–hydroxybutyric acid, or delta–9–tetrahydrocannabinol.

6. If the hearing examiner finds that all of the following apply, the administrative suspension shall continue regardless of the type of vehicle driven or operated at the time of the violation:

a. The criteria for administrative suspension have been satisfied.

b. The person had a prohibited alcohol concentration or a detectable amount of a restricted controlled substance in his or her blood at the time the offense allegedly occurred.

c. In a case in which subd. 4m. a. and b. apply, the person did not have a valid prescription for methamphetamine or one of its

metabolic precursors, gamma−hydroxybutyric acid, or delta−9−tetrahydrocannabinol.

7. The hearing examiner shall 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 par. (c). The administrative suspension is vacated and the person's operating privilege shall be automatically reinstated under s. 343.39 if the hearing examiner fails to mail this notice to the person within 30 days after the date of the notification under par. (a).

(c) 1. An individual aggrieved by the determination of the hearing examiner may have the determination reviewed by the court hearing the action relating to the applicable violation listed under sub. (3) (a), (am), or (ar). 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 shall send a copy of that request to the department. The judicial review shall be conducted at the time of the trial of the underlying offense under s. 346.63. The prosecutor of the underlying offense shall represent the interests of the department.

2. The court shall order that the administrative suspension be either rescinded or sustained and forward its order to the department. The department shall vacate the administrative suspension under sub. (7) unless, within 60 days of the date of the request for judicial review of the administrative hearing decision, the department 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.

3. Any party aggrieved by the order of a circuit court under subd. 2. may appeal to the court of appeals. Any party aggrieved by the order of a municipal court under subd. 2 may appeal to the circuit court for the county where the offense allegedly occurred.

4. A request for judicial review under this subsection does not stay any administrative suspension order.

5. If any court orders under this subsection that the administrative suspension of the person's operating privilege be rescinded, the person need not pay any fee under s. 343.21 (1) (j), (jr), or (n).

(d) A person who has his or her operating privilege administratively suspended under this subsection and sub. (7) (a) is eligible for an occupational license under s. 343.10 at any time.

(9) REFUSALS; NOTICE AND COURT HEARING. (a) If a person refuses to take a test under sub. (3) (a), the law enforcement officer shall immediately prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege. If the person was driving or operating a commercial motor vehicle, the officer shall issue an out−of−service order to the person for the 24 hours after the refusal and notify the department in the manner prescribed by the department. The officer shall issue a copy of the notice of intent to revoke the privilege to the person and submit or mail a copy to the circuit court for the county in which the arrest under sub. (3) (a) was made or to the municipal court in the municipality in which the arrest was made if the arrest was for a violation of a municipal ordinance under sub. (3) (a) and the municipality has a municipal court. The officer shall also mail a copy of the notice of intent to revoke to the attorney for that municipality or to the district attorney for that county, as appropriate, and to the department. Neither party is entitled to pretrial discovery in any refusal hearing, except that, if the defendant moves within 30 days after the initial appearance in person or by an attorney and shows cause therefor, the court may order that the defendant be allowed to inspect documents, including lists of names and addresses of witnesses, if available, and to test under s. 804.09, under such conditions as the court prescribes, any devices used by the plaintiff to determine whether a violation has been committed. The notice of intent to revoke the person's operating privilege shall contain substantially all of the following information:

1. That prior to a request under sub. (3) (a), the officer had placed the person under arrest for a violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09 (1) or 940.25 or had requested the person to take a test under sub. (3) (ar).

2. That the officer complied with sub. (4).

3. That the person refused a request under sub. (3) (a).

4. 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.

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

a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, a controlled substance or a controlled substance analog or any combination of alcohol, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders the person incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of safely driving, having a restricted controlled substance in his or her blood, or having a prohibited alcohol concentration or, if the person was driving or operating a commercial motor vehicle, an alcohol concentration of 0.04 or more and whether the person was lawfully placed under arrest for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09 (1) or 940.25.

b. Whether the officer complied with sub. (4).

c. Whether the person refused to permit the test. The person shall not be considered 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, controlled substance analogs or other drugs.

6. 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.

(am) If a person driving or operating or on duty time with respect to a commercial motor vehicle refuses a test under sub. (3) (am), the law enforcement officer shall immediately issue an out−of−service order to the person for the 24 hours after the refusal and notify the department in the manner prescribed by the department, and prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege. The officer shall issue a copy of the notice of intent to revoke the privilege to the person and submit or mail a copy to the circuit court for the county in which the refusal is made or to the municipal court in the municipality in which the refusal is made if the person's refusal was in violation of a municipal ordinance and the municipality has a municipal court. The officer shall also mail a copy of the notice of intent to revoke to the attorney for that municipality or to the district attorney for that county, as appropriate, and to the department. Neither party is entitled to pretrial discovery in any refusal hearing, except that, if the defendant moves within 30 days after the initial appearance in person or by an attorney and shows cause therefor, the court may order that the defendant be allowed to inspect documents, including lists of names and addresses of witnesses, if available, and to test under s. 804.09, under such conditions as the court prescribes, any devices used by the plaintiff to determine whether a violation has been committed. The notice of intent to revoke the person's operating privilege shall contain substantially all of the following information:

1. That the officer has issued an out−of−service order to the person for the 24 hours after the refusal, specifying the date and time of issuance.

2. That the officer complied with sub. (4).

3. That the person refused a request under sub. (3) (am).

4. 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.

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

a. Whether the officer detected any presence of alcohol, controlled substance, controlled substance analog or other drug, or a combination thereof, on the person or had reason to believe that the person was violating or had violated s. 346.63 (7).

b. Whether the officer complied with sub. (4).

c. Whether the person refused to permit the test. The person shall not be considered 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, controlled substance analogs or other drugs.

6. 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.

(b) The use of the notice under par. (a) or (am) by a law enforcement officer in connection with the enforcement of this section is adequate process to give the appropriate court jurisdiction over the person.

(c) If a law enforcement officer informs the circuit or municipal court that a person has refused to submit to a test under sub. (3) (a), (am), or (ar), the court shall be prepared to hold any requested hearing to determine if the refusal was proper. The scope of the hearing shall be limited to the issues outlined in par. (a) 5. or (am) 5. Section 967.055 applies to any hearing under this subsection.

(d) At the close of the hearing, or within 5 days thereafter, the court shall determine the issues under par. (a) 5. or (am) 5. If all issues are determined adversely to the person, the court shall proceed under sub. (10). If one or more of the issues is determined favorably to the person, the court shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question. This section does not preclude the prosecution of the person for violation of s. 346.63 (1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6), 940.09 (1) or 940.25.

(10) REFUSALS; COURT–ORDERED REVOCATION. (a) If the court determines under sub. (9) (d) 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 shall proceed under this subsection. If no hearing was requested, the revocation period shall begin 30 days after the date of the refusal. If a hearing was requested, the revocation period shall commence 30 days after the date of refusal or immediately upon a final determination that the refusal was improper, whichever is later.

(b) 1. Except as provided in subds. 3. and 4., the court shall revoke the person's operating privilege under this paragraph according to the number of previous suspensions, revocations or convictions that would be counted under s. 343.307 (2). Suspensions, revocations and convictions arising out of the same incident shall be counted as one. If a person has a conviction, suspension or revocation for any offense that is counted under s. 343.307 (2), that conviction, suspension or revocation shall count as a prior conviction, suspension or revocation under this subdivision.

2. Except as provided in subd. 3., 4. or 4m., for the first improper refusal, the court shall revoke the person's operating privilege for one year. After the first 30 days of the revocation period, the person is eligible for an occupational license under s. 343.10.

3. Except as provided in subd. 4m., if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of other convictions, suspensions, and revocations counted under s. 343.307 (2) within a 10–year period, equals 2, the court shall revoke the person's operating privilege for 2 years. After the first 90 days of the revocation period or, if the total number of convictions, suspensions, and revocations counted under this subdivision within any 5–year period equals 2 or more, after one year of the revocation period has elapsed, the person is eligible for an occupational license under s. 343.10 if he or she has completed the assessment and is complying with the driver safety plan.

4. Except as provided in subd. 4m., if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of other convictions, suspensions, and revocations counted under s. 343.307 (2), equals 3 or more, the court shall revoke the person's operating privilege for 3 years. After the first 120 days of the revocation period or, if the total number of convictions, suspensions, and revocations counted under this subdivision within any 5–year period equals 2 or more, after one year of the revocation period has elapsed, the person is eligible for an occupational license under s. 343.10 if he or she has completed the assessment and is complying with the driver safety plan.

4m. If there was a minor passenger under 16 years of age in the motor vehicle at the time of the incident that gave rise to the improper refusal, the applicable minimum and maximum revocation periods under subd. 2., 3. or 4. for the improper refusal are doubled.

5. The time period under this paragraph shall be measured from the dates of the refusals or violations which resulted in revocations or convictions.

(c) 1. Except as provided in subd. 1. a. or b., the court shall order the person to submit to and comply with an assessment by an approved public treatment facility as defined in s. 51.45 (2) (c) for examination of the person's use of alcohol, controlled substances or controlled substance analogs and development of a driver safety plan for the person. The court shall notify the person and the department of transportation of the assessment order. The court shall also notify the person that noncompliance with assessment or the driver safety plan will result in license suspension until the person is in compliance. The assessment order shall:

a. 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 shall 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.

b. If the person is a nonresident, refer the person to an approved public treatment facility in this state. The order shall 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.

c. Require a person who is referred to a treatment facility in another state under subd. 1. a. or b. to furnish the department written verification of his or her compliance from the agency which administers the assessment and driver safety plan program. The person shall provide initial verification of compliance within 60 days after the date of his or her conviction. The requirement to furnish verification of compliance may be satisfied by receipt by the department of such verification from the agency which administers the assessment and driver safety plan program.

2. The department of health services shall establish standards for assessment procedures and the driver safety plan programs by rule. The department of health services shall establish by rule conflict of interest guidelines for providers.

3. Prior to developing a plan which specifies treatment, the facility shall make a finding that treatment is necessary and appropriate services are available. The facility shall submit a report of the assessment and the driver safety plan within 14 days to the county department under s. 51.42, the plan provider, the department of transportation and the person, except that upon request by

the facility and the person, the county department may extend the period for assessment for not more than 20 additional workdays. The county department shall notify the department of transportation regarding any such extension.

(d) The assessment report shall order compliance with a driver safety plan. The report shall inform the person of the fee provisions under s. 46.03 (18) (f). The driver safety plan may include a component that makes the person aware of the effect of his or her offense on a victim and a victim's family. The driver safety plan may include treatment for the person's misuse, abuse or dependence on alcohol, controlled substances or controlled substance analogs, attendance at a school under s. 345.60, or both. If the plan requires inpatient treatment, the treatment shall not exceed 30 days. A driver safety plan under this paragraph shall include a termination date consistent with the plan which shall not extend beyond one year. The county department under s. 51.42 shall assure notification of the department of transportation and the person of the person's compliance or noncompliance with assessment and treatment. The school under s. 345.60 shall notify the department, the county department under s. 51.42 and the person of the person's compliance or noncompliance with the requirements of the school. Nonpayment of the assessment fee or, if the person has the ability to pay, nonpayment of the driver safety plan fee is noncompliance with the court order. If the department is notified of noncompliance, other than for nonpayment of the assessment fee or driver safety plan fee, it shall revoke the person's operating privilege until the county department under s. 51.42 or the school under s. 345.60 notifies the department that the person is in compliance with assessment or the driver safety plan. If the department is notified that a person has not paid the assessment fee, or that a person with the ability to pay has not paid the driver safety plan fee, the department shall suspend the person's operating privilege for a period of 2 years or until it receives notice that the person has paid the fee, whichever occurs first. The department shall notify the person of the suspension or revocation, the reason for the suspension or revocation and the person's right to a review. A person may request a review of a revocation based upon failure to comply with a driver safety plan within 10 days of notification. The review shall be handled by the subunit of the department of transportation designated by the secretary. The issues at the review are limited to whether the driver safety plan, if challenged, is appropriate and whether the person is in compliance with the assessment order or the driver safety plan. The review shall be conducted within 10 days after a request is received. If the driver safety plan is determined to be inappropriate, the department shall order a reassessment and if the person is otherwise eligible, the department shall 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 department shall reinstate the person's operating privilege. If there is no decision within the 10−day period, the department shall issue an order reinstating the person's operating privilege until the review is completed, unless the delay is at the request of the person seeking the review.

(e) Notwithstanding par. (c), 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 county department under s. 51.42 that the person has recently completed assessment, a driver safety plan or both, the court is not required to make an order under par. (c). This paragraph does not prohibit the court from making an order under par. (c), if it deems such an order advisable.

(em) One penalty for improperly refusing to submit to a test for intoxication regarding a person arrested for a violation of s. 346.63 (2m) or (7) or a local ordinance in conformity therewith is revocation of the person's operating privilege for 6 months. If there was a minor passenger under 16 years of age in the motor vehicle at the time of the incident that gave rise to the improper refusal, the revocation period is 12 months. After the first 15 days of the revocation period, the person is eligible for an occupational license under s. 343.10. Any such improper refusal or revocation for the refusal does not count as a prior refusal or a prior revocation under this section or ss. 343.30 (1q), 343.307 and 346.65 (2). The person shall not be required to submit to and comply with any assessment or driver safety plan under pars. (c) and (d).

(f) The department may make any order which the court is authorized or required to make under this subsection if the court fails to do so.

(g) The court or department shall provide that the period of suspension or revocation imposed under this subsection or under sub. (7) shall be reduced by any period of suspension or revocation previously served under s. 343.30 (1p) or (1q) if both suspensions or revocations arose out of the same incident or occurrence. The court or department shall order that the period of suspension or revocation imposed under this subsection or sub. (7) run concurrently with any time remaining on a suspension or revocation imposed under s. 343.30 (1p) or (1q) arising out of the same incident or occurrence.

(10g) SUSPENSIONS AND REVOCATIONS; EXTENSIONS. For any suspension or revocation the court orders under sub. (10), the court shall extend the suspension or revocation period by the number of days to which the court sentences the person to imprisonment in a jail or prison.

(10m) REFUSALS; IGNITION INTERLOCK OF A MOTOR VEHICLE. The requirements and procedures for installation of an ignition interlock device under s. 343.301 apply when an operating privilege is revoked under sub. (10).

(11) RULES. The department shall promulgate rules under ch. 227 necessary to administer this section. The rules shall include provisions relating to the expeditious exchange of information under this section between the department and law enforcement agencies, circuit courts, municipal courts, attorneys who represent municipalities, district attorneys, and driver licensing agencies of other jurisdictions. The rules may not affect any provisions relating to court procedure.

History: 1987 a. 3, 27, 399; 1989 a. 7, 31, 56, 105, 359; 1991 a. 39, 251, 277; 1993 a. 16, 105, 315, 317, 491; 1995 a. 27 ss. 6412cnL, 9126 (19); 1995 a. 113, 269, 425, 426, 436, 448; 1997 a. 35, 84, 107, 191, 237, 290; 1999 a. 9, 32, 109; 2001 a. 16 ss. 3421m to 3423j, 4060gk, 4060hw, 4060hy; 2001 a. 104; 2003 a. 97, 199; 2005 a. 332, 413; 2007 a. 20 ss. 3303 to 3315, 9121 (6) (a); 2007 a. 136; 2009 a. 100, 103, 163; 2011 a. 120, 242; 2013 a. 36, 224; 2017 a. 331.

Cross−reference: See also chs. DHS 62 and Trans 107 and 113, Wis. adm. code.

Administration of a blood or breathalyzer test does not violate a defendant's privilege against self−incrimination. State v. Driver, 59 Wis. 2d 35, 207 N.W.2d 850 (1973).

The implied consent law must be liberally construed to effectuate its policies since it was intended to facilitate the taking of tests for intoxication and not to inhibit the ability of the state to remove drunken drivers from the highway. Scales v. State, 64 Wis. 2d 485, 219 N.W.2d 286 (1974).

Miranda warnings are not required when an arrested driver is asked to submit to a test for intoxication under the implied consent statute. State v. Bunders, 68 Wis. 2d 129, 227 N.W.2d 727 (1975).

There is no right to counsel prior to submitting to an intoxication test. A driver is obliged to promptly take or refuse the test. State v. Neitzel, 95 Wis. 2d 191, 289 N.W.2d 828 (1980).

The state need not prove that notices were sent to state officers under sub. (3) (b), 1985 stats. [now sub. (9) (a)]. State v. Polinski, 96 Wis. 2d 43, 291 N.W.2d 465 (1980).

When an officer initially requested a breath test, it was not an irrevocable election preventing the officer from requesting a urine test instead. The driver's refusal to submit urine justified revocation of his driver's license. State v. Pawlow, 98 Wis. 2d 703, 298 N.W.2d 220 (Ct. App. 1980).

The state need not affirmatively prove compliance with administrative code procedures as a foundation for admission of a breathalyzer test. City of New Berlin v. Wertz, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981).

When a driver pled guilty to the underlying OWI charge, a charge of refusing a test under s. 343.305, 1979 stats., was properly dismissed as unnecessary. State v. Brooks, 113 Wis. 2d 347, 335 N.W.2d 354 (1983).

A breathalyzer approved in the administrative code has a prima facie presumption of accuracy. State v. Dwinell, 119 Wis. 2d 305, 349 N.W.2d 739 (Ct. App. 1984).

When blood alcohol content is tested under statutory procedures, the results of the test are mandatorily admissible. The physical sample tested is not evidence intended, required, or even susceptible of being produced by state under s. 971.23. State v. Ehlen, 119 Wis. 2d 451, 351 N.W.2d 503 (1984).

A judge's erroneous exclusion of a defendant's explanation for a refusal to take a blood test was not harmless error. State v. Bolstad, 124 Wis. 2d 576, 370 N.W.2d 257 (1985).

At a revocation hearing under sub. (3) (b) 5., 1985 stats. [now sub. (9) (a) 5.], the state need not establish to a reasonable certainty that the defendant was the actual