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Drugged Driving: Substance Abuse Assessment or Treatment, Ignition Interlock Devices, and Marijuana Ballot Measures - Part 4 of 4

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Specialties: *Drugged Driving Laws, Controlled Substances Laws, Novel Psychoactive Substances/Synthetics Laws*

This issue of *NAMSDL News- Subject Matter Analysis* is the National Alliance for Model State Drug Laws' ("NAMSDL") fourth and final article in its multi-part series covering key provisions of state laws that address driving under the influence of drugs other than alcohol, commonly referred to as "drugged driving." Prior issues in this series have addressed the state standards for drugged driving violations, constitutional questions associated with implied consent laws, and criminal and administrative penalties for violations.[1]

In this installment, NAMSDL analyzes three aspects of state drugged driving law: (1) substance abuse assessment and treatment requirements for offenders; (2) a brief discussion of ignition interlock device ("IID") requirements; and (3) what (if anything) the recently enacted marijuana-related state ballot measures contain in regards to drugged driving. With respect to the substance abuse assessment and treatment topic, NAMSDL will compare state laws to the relevant provisions of the Model Driving While Under the Influence of Alcohol and Other Drugs Act (hereinafter, the "Model Law") prepared in 1993 by NAMSDL's predecessor, the President's Commission on Model State Drug Laws (the "Commission").[2] More details about the state-specific provisions discussed in this article can be found in NAMSDL's recently published document *Drugged Driving: 2016 Summary of Key Provisions of State Laws*.[3]

Substance Abuse Assessment and Treatment Requirements

In Section 21 of the Model Law, the Commission recommends that all offenders convicted of a drugged driving violation, including first-time offenders, be given an assessment to determine whether or not the person has a substance abuse problem and what type of treatment is appropriate.[4] In states that have adopted the Commission's proposed Model Criminal Justice Treatment Act, the Model Law proposes that the assessment and any subsequently ordered treatment be conducted in accordance with that Act.[5] Under that Act, the assessment is to be conducted by an "assessment program," which means "a not for profit corporation, government agency or other entity which is

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licensed by [single state authority on alcohol and other drugs] to conduct an assessment" under the law.[6] In those states where that Act has not been adopted, the Model Law provides that the assessment be conducted by "an assessment program as defined by the [single state authority on alcohol and other drugs]."[7] Moreover, comments to Section 21 indicate that the assessment and any required treatment should take place in addition to other criminal and administrative penalties.

As part of the development of our *2016 Summary of Key Provisions of State Laws*, NAMSDL located statutory provisions in all 50 states and the District of Columbia that address the requirements placed on drunk or drugged driving offenders to obtain substance abuse evaluation, assessment, and treatment. In 30 states, state statutory provisions indicate that first-time offenders are required to undergo a substance abuse evaluation or assessment and complete any treatment required by that assessment. In addition, in North Carolina, such assessments are required if the first-time offender refused a chemical test. It should be noted, however, that the substance abuse evaluation or assessment that these states require may not satisfy the requirements or standard for such evaluation or assessment in the Model Law.

In addition to these 31 states, in West Virginia it appears that first-time drugged driving offenders are required to enter a treatment program whether or not an assessment is performed. In six other states—Arkansas, California, Delaware, Nevada, Rhode Island, and Virginia—first-time offenders must either participate in a substance abuse education program/course or treatment. Interestingly, in six of the 38 states mentioned above—Alaska, Arkansas, Idaho, Nebraska, Virginia, and Washington—the statutory language refers only to alcohol assessment, education, or treatment, and not substance abuse in general.

In contrast to these states, in the other 12 states plus the District of Columbia, it appears that first-time drugged driving offenders are not required to undergo any substance abuse assessment, evaluation, education, or treatment. In many of these jurisdictions, multiple-time offenders do have such requirements. The table below summarizes the substance abuse assessment and treatment requirements for first-time drugged driving offenders.

Substance Abuse Assessment and/or Treatment for First-Time Drugged Driving Violators	**State**
Assessment or evaluation required for all violators	Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Washington, Wisconsin, Wyoming
Assessment required if chemical test refused	North Carolina
Treatment required for all violators	Hawaii, West Virginia
Treatment required if chemical test refused	Colorado
Statute unclear about assessment, but treatment or educational program required	Arkansas (alcohol education or treatment program), California (program), Delaware (course of instruction and rehabilitation program), Nevada (educational course), Rhode Island (course), Virginia (safety action program)
Assessment, evaluation, or educational program not required for first-time offenders	Connecticut, District of Columbia, Indiana, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New York, Ohio, South Dakota, Tennessee, Texas

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Drugged Driving and Ignition Interlock Devices

One component of many states' drunk or drugged driving laws is the requirement that some or all violators use an ignition interlock device ("IID"). An IID is a device which is hooked to a vehicle's ignition system and will not allow the vehicle to be started if the driver's blood alcohol level (as measured by the device similar to a breathalyzer) is above a set level. Many IID systems also require the driver to re-check their alcohol level at certain intervals while the vehicle is in operation. If the driver fails a "rolling" check, the device will turn on an alarm and flashing lights, making operation very difficult, until the vehicle is turned off. According to the Governors Highway Safety Association, all 50 states and the District of Columbia have some form of an IID law, with 22 states and four California counties requiring the use of IID by all first-time offenders.[8] Mothers Against Drunk Driving reports that 25 states plus the four California counties have mandatory IID laws for all offenders.[9]

As IIDs, at least as of today, only measure a driver's blood alcohol content, it seems reasonable to wonder if IIDs are required for drugged driving offenders, particularly in cases of a first-offender with no history of drunk driving. Based on NAMSDL's review of state drugged driving laws, it appears that the answer is yes. Generally speaking, state law penalty provisions for drunk and drugged driving are the same, and thus a state's requirements that all (or only certain) offenders use IIDs applies regardless of whether the drug at issue was alcohol or something else. In fact, in the 20-some states that require IID use by first-time offenders, NAMSDL located only two states—Arizona and Arkansas— where exceptions from the IID requirement are granted if the violation involved controlled substances rather than alcohol. In Arizona, a person convicted of violation must use an IID for 12 months, except in cases where the driver violated the "zero tolerance" standard for drugged driving, he or she completes required drug/alcohol screening, and the court determines that no alcohol treatment is required.[10] In Arkansas, state IID provisions do not apply if the violation was based on use of a controlled substance.[11]

November 2016 Marijuana-Related Ballot Measures

The legalization of marijuana for either medicinal use or personal, non-medical (recreational) use was on the November 2016 ballot in nine states. As of the drafting of this article, eight of the nine ballot measures appear to have passed. In terms of the personal, non-medical use of marijuana, ballot measures passed in California, Maine, Massachusetts, and Nevada. In Maine, however, the measure passed by so few votes (approximately 3,600 out of more than 750,000 votes cast) that a formal recount was requested before the results become official. The recount was certified by the Maine Secretary of State on November 21 and will begin in the near future. The only marijuana proposal that did not pass was in Arizona. With respect to medicinal use, ballot measures passed in Arkansas, Florida, Montana, and North Dakota. Only three of these medicinal use measures open up new uses within the state. In Montana, the medicinal use of marijuana has been allowed since 2004, as the 2016 measure only amends some of the changes to the law that were enacted through legislation in 2011. In Florida, the limited use of low-THC (cannabidiol) oil by some patients has been allowed since 2015, but the 2016 measure greatly expands the potential uses.

Below, NAMSDL will detail what, if anything, the enacted measures spell out regarding the use of marijuana before or while driving and how those measures fit in with current state drugged driving law. Interestingly, of the eight states involved, none of them currently employs a zero-tolerance provision to marijuana specifically or drugged driving

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generally. Two of the states, Montana and Nevada, have specified concentration limits that apply to marijuana in addition to "under the influence" provisions. The other six states employ only "under the influence" provisions.

Under California law, it is "unlawful for a person who is under the influence of any drug to drive a vehicle."[12] There is no zero-tolerance or specified concentration limit with respect to marijuana in the state, other than it being unlawful for a person who is addicted to the use of any drug to drive a vehicle.[13] A patient in the California Medical Marijuana Program may not smoke marijuana "while in a motor vehicle that is being operated."[14] The enacted California ballot measure (Proposition 64) speaks to the issue of drugged driving in several areas, including the addition of an "open-container" provision and earmarking funds to the state highway patrol for three years to establish protocols and best practices concerning driving under the influence of marijuana. Specifically, these areas are:

- Section 3 of the measure notes that part of the purpose and intent of the new law allowing the personal, non-medical use of marijuana [to be codified at Section 11362.1 of the California Health & Safety Code] is to "maintain existing laws making it unlawful to operate a car or other vehicle used for transportation while impaired by marijuana."[15]
- Section 4 of the measure provides that nothing in Cal. Health & Safety Code § 11362.1 "shall be construed or interpreted to amend, repeal, affect, restrict, or preempt: (a) Laws making it unlawful to drive or operate a vehicle, boat, vessel, or aircraft, while smoking, ingesting, or impaired by, marijuana or marijuana products, including, but not limited to, subdivision (e) of Section 23152 of the Vehicle Code, or the penalties prescribed for violating those laws."[16]
- Section 4 of the measure also provides that nothing in Cal. Health & Safety Code § 11362.1 should be read to allow "any person to: . . . (4) Possess an open container or open package of marijuana or marijuana products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation. . . .(7) Smoke or ingest marijuana or marijuana products while driving, operating a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation. . . [or] (8) Smoke or ingest marijuana or marijuana products while riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation except as permitted on a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation that is operated in accordance with Section 26200 of the Business and Professions Code and while no persons under the age of 21 years are present."[17]
- Section 7 of the measure provides that the California State Controller's Office is to "disburse the sum of three million dollars ($3,000,000) annually to the Department of the California Highway Patrol beginning fiscal year 2018-2019 until fiscal year 2022-2023 to establish and adopt protocols to determine whether a driver is operating a vehicle while impaired, including impairment by the use of marijuana or marijuana products, and to establish and adopt protocols setting forth best practices to assist law enforcement agencies."[18]

Under Maine law, a person commits "operating under the influence" if they operate a vehicle "while under the influence of intoxicants," which includes "alcohol, a drug other than alcohol, a combination of drugs or a combination of alcohol and drugs."[19] There is no zero-tolerance or specified concentration limit with respect to marijuana in the state. Although the state has allowed patients with certain debilitating medical conditions to use marijuana for medicinal purposes since 1999, Maine law does not specifically address the use of marijuana while in a vehicle. The

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newly enacted law to allow the personal, non-medical use of marijuana (Question 1) likewise does not address drugged driving or the use of marijuana in a vehicle.

Under Massachusetts law, it is illegal to operate a motor vehicle "while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances," as those substances are defined in Massachusetts law."[20] There is no zero-tolerance or specified concentration limit with respect to marijuana in the state. The enacted Massachusetts ballot measure (Question 4) speaks to the issue of drugged driving in several areas, including the addition of an "open-container" provision. Specifically, these areas are:

- Section 2 of the measure provides that the new law "does not amend existing penalties for operating, navigating or being in actual physical control of any motor vehicle, train, aircraft, motorboat or other motorized form of transport or machinery while impaired by marijuana or a marijuana product or for consuming marijuana while operating, navigating or being in actual physical control of any motor vehicle, train, aircraft, motorboat or other motorized form of transport or machinery."[21]
- Section 13 of the measure provides that no person may "possess an open container of marijuana or marijuana products in the passenger area of any motor vehicle" which is in a public place or a place where the public has access as invitees or licenses.[22] A violator of the provision is subject to a civil penalty of not more than $500.

Under Nevada law, it is unlawful "for any person who: . . . [i]s under the influence of a controlled substance . . . to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access."[23] In addition, it is unlawful to drive with more than the following amounts of marijuana or marijuana metabolite in the driver's blood or urine: (1) for marijuana, 10 ng/ml urine or 2 ng/ml blood; and (2) for marijuana metabolite, 15 ng/ml urine or 5 ng/ml blood.[24] The enacted Nevada ballot measure (Question 2) does not address (or change) the specified concentration limit for marijuana. Drugged driving is addressed in Question 2 in two areas, however:

- Section 4 of the measure provides that the new law does not prevent "the imposition of any civil, criminal, or other penalty for: (a) Driving, operating, or being in actual physical control of a vehicle, aircraft, or vessel under power or sail while under the influence of marijuana or while impaired by marijuana."[25]
- Section 14 of the measure makes it illegal to "smoke[], or otherwise consume[] marijuana . . . in a moving vehicle." A violation is a misdemeanor punishable by a fine up to $600.[26]

As for the ballot measures allowing the medicinal use of marijuana in the first instance in Arkansas, Florida, and North Dakota, each addresses the potential for drugged driving in a fairly similar manner. The measures in both Arkansas and Florida provide that the changes to the law do not allow anyone to operate a motor vehicle while under the influence of marijuana.[27] In North Dakota, the measure provides that participating in the authorized medical marijuana program by a qualified patient or primary caregiver does not relieve those persons from liability or criminal prosecution arising out of driving while under the influence of marijuana.[28]

Conclusion

As the use of controlled substances, including both prescription drugs and marijuana, continues to garner extensive attention, NAMSDL expects state legislators to remain active in dealing with the question of the proper standards, penalties, and treatment options for drugged driving offenders. NAMSDL will continue to monitor legislative activities and keep stakeholders abreast of any changes.

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[1]These documents are available at: http://www.namsdl.org/namsdl-news.cfm.
[2]The Model Law can be found on the NAMSDL website at http://www.namsdl.org/library/Section_F__Model_Driving_Under_the_Influence_of_Alcohol_and_Other_Drugs_Act/.
[3]http://www.namsdl.org/library/69E90627-FF72-B4ED-6F552DD0E047972C/
[4]Model Law, § 21.
[5]*Id.* (Option 1). The Model Criminal Justice Treatment Act is located at: http://www.namsdl.org/library/Section_G__Model_Criminal_Justice_Treatment_Act/.
[6]Model Criminal Justice Treatment Act, § 3(b), (c).
[7]Model Law, § 21 (Option 2).
[8]Governors Highway Safety Association, Drunk Driving Laws (as of November 2016), available at http://ghsa.org/html/stateinfo/laws/impaired_laws.html.
[9]MADD, Status of State Ignition Interlock Laws, available at http://www.madd.org/drunk-driving/ignition-interlocks/status-of-state-ignition.html
[10]A.R.S. § 28-3319(D),(G).
[11]A.C.A. § 5-65-104(a).
[12]Cal. Vehicle Code § 23152(e).
[13]Cal. Vehicle Code § 23152(c).
[14]Cal. Health & Safety Code § 11362.79(d).
[15]California Proposition 64, § 3(p).
[16]California Proposition 64, § 4 (to be codified at Cal. Health & Safety Code § 11362.45(a)).
[17]California Proposition 64, § 4 (to be codified at Cal. Health & Safety Code § 11362.3(a)).
[18]California Proposition 64, § 7 (to be codified at Cal. Revenue & Taxation Code § 34019).
[19]29-A M.R.S.A. § 2411(1-A); 29-A M.R.S.A. § 2401(13).
[20]M.G.L.A. 90 § 24(1)(a)(1).
[21]Massachusetts Question 4, § 2(a).
[22]Massachusetts Question 4, § 13(d).
[23]N.R.S. 484C.110(2)(a).
[24]N.R.S. 484C.110(3).
[25]Nevada Question 2, § 4(1)(a).
[26]Nevada Question 2, §14(2).
[27]Arkansas Issue 6, § 6(a)(3); Florida Amendment 2, Art. X, § 29(c)(4).
[28]North Dakota Initiated Statutory Measure 5 (to be codified at NDCC § 19-24-09(7)(a)(2)).

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Research is current as of November 17, 2016. In order to ensure that the information contained herein is as current as possible, research is conducted using nationwide legal database software and individual state legislative websites. This document is intended for educational purposes only and does not constitute legal advice or opinion.

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