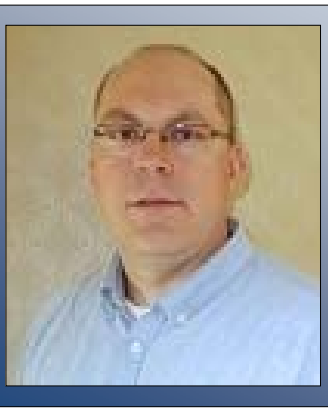
NAMSDL News
Subject Matter Analysis
November 1, 2016

Drugged Driving: Administrative and Criminal Penalties for Violations - *Part 3 of 4*

By Jonathan Woodruff



Jonathan Woodruff
NAMSDL Legislative Attorney
703.836.6100, Ext. 100
jwoodruff@namsdl.org

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

This issue of *NAMSDL News- Subject Matter Analysis* presents the National Alliance for Model State Drug Laws' ("NAMSDL") third 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 state standards for drugged driving violations and constitutional questions associated with implied consent laws.[1] In this installment, NAMSDL analyzes some of the administrative and criminal penalties faced by drivers who either refuse a chemical test or are convicted of drugged driving. More details about the state-specific penalty provisions discussed in this article can be found in NAMSDL's recently published document *Drugged Driving: 2016 Summary of Key Provisions of State Laws*.[2]

As a starting point for the analysis, NAMSDL will review the relevant penalty provisions of the model drugged driving law prepared in 1993 by NAMSDL's predecessor, the President's Commission on Model State Drug Laws (the "Commission"). From there, we will detail certain aspects of state drugged driving penalties and will compare those to the proposals in the model law.

Penalty Provisions in the Model Drugged Driving Law

As discussed in the first *NAMSDL News - Subject Matter Analysis* covering drugged driving, throughout 1993, NAMSDL's predecessor, the Commission, developed 44 model state drug laws and recommendations covering five distinct topical areas. Included as one of the Commission's model laws is the Model Driving While Under the Influence of Alcohol and Other Drugs Act (hereinafter, the "Model Law").[3] Within the Model Law, the Commission proposes two types of penalties: administrative and criminal. These penalties are the same regardless of whether the driver is accused of drunk driving or drugged driving.

The Model Law's proposed administrative penalty is the mandatory revocation of an offender's license by his or her state department of motor vehicles ("DMV"). Under the law, this penalty can be assessed if one of four things

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happen, three of which are germane to this discussion of drugged driving violations. These three events are: (1) the driver refuses to submit to a chemical test validly requested by a law enforcement officer; (2) the driver is convicted of a drugged driving violation; or (3) the driver is convicted of an offense that occurred out of state.[4] After receiving a penalty, a driver may request an administrative review and/or administrative hearing of the decision with the DMV.[5] The driver may also file a petition for court review within 30 days of receiving the penalty, except in cases where the chemical test was refused.[6]

In terms of the length of the license revocation period, the Model Law suggests that it be "six months, one year, or other appropriate time" in cases where a driver refuses to submit to test, and one year in cases where the driver is convicted of a violation.[7] In an appendix to the Model Law, the Commission expands upon the proposed penalties by stating that the administrative penalty for refusing a test should be "a full 90 days, with no restricted driving privileges."[8] This is a stiffer proposed penalty than what is proposed for failing a chemical test due to alcohol level, which is 30 days of full license revocation followed by 60 days of restricted driving.[9] Comments to the Model Law explain that the reason for proposing more severe penalties for chemical test refusal is "to encourage suspected impaired drivers to take the chemical test so that a precise determination of alcohol or other drug level can be made."[10] The comments also indicate that the Commission chose license revocation over license suspension because revocation implies that a driver's license will not automatically be returned after the penalty period is served. As a result, the DMV has a chance to determine if it is reasonably safe to allow the driver to have an unrestricted license when the revocation period ends.[11]

In terms of criminal penalties for a conviction, the Model Law recommends a jail sentence of 10 days to one year and a fine of $100-$1,000 for a driver convicted for the first time. If a driver is convicted for a second or subsequent time, the Model Law proposes a jail sentence of 90 days to one year and a $1,000 fine. These offenses are not labeled as either misdemeanors or felonies. The Model Law also does not specify a particular "lookback" period for calculating the number of prior offenses. As a result, it appears that any prior conviction in the driver's lifetime can subject the driver to multiple offense penalties. In addition to the fine and jail sentence, the Commission recommends that a convicted driver be subject to the terms of the Model Demand Reduction Assessment Act ("MDRA"), which proposes to impose a state-collected fee on all individuals convicted of offenses involving controlled substances, precursor chemicals, and driving under the influence. The fee is to be used for substance abuse education, prevention, and treatment services. In cases of drugged driving violations, the MDRA proposes a fee of $500 for misdemeanors and $750-$3,000 for felonies.

State Administrative and Criminal Penalties for Drugged Driving Violations

In this section, NAMSDL first will review state administrative and criminal penalties associated with a driver's refusal to undergo implied consent chemical tests. Next, NAMSDL will review certain state administrative penalties for convictions. Finally, NAMSDL will detail certain state criminal penalties for convictions. In each case, the range of penalties employed by states will be compared to the Model Law for perspective. As will be shown below, there are striking differences amongst states in the potential penalties faced by violators.

Although a number of important penalty provisions will be considered in this analysis, it should be noted that this article does not cover all possible aspects of punishment. As can be observed in NAMSDL's detailed *Drugged*

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Driving: 2016 Summary of Key Provisions of State Laws, state laws governing administrative and criminal penalties for drugged driving violations are complex. Possible penalties include license suspension/revocation, fines, monetary assessments, jail, community service, and use of ignition interlock devices. Generally speaking, for each level of offender (*i.e.,* first conviction, second conviction, third conviction, etc.) state laws provide ranges of allowable penalties which give prosecutors and judges wide latitude in seeking and issuing punishment. These penalty ranges become harsher as the number of prior convictions increases. In addition, in most states, drivers who cause accidents that cause serious bodily injury or death face higher penalties, regardless of the number of prior convictions. As a result, there are numerous possible penalty outcomes for any particular driver convicted of a drugged driving offense in any particular state. In order to keep things reasonably straightforward, this analysis will focus on minimum and maximum penalties as they relate to first-time offenders, in cases where the driver did not cause an accident with serious bodily injury. In addition, the analysis also focuses on the following types of penalties: (1) suspension/ revocation of driver's license; (2) amount of fine; (3) length of jail sentence; and (4) level of offense.

Implied Consent Test Refusals: Administrative and Criminal Penalties

The text of the Model Law indicates that the administrative penalty for refusing a validly requested chemical test should be "six months, one year, or other appropriate time." An appendix to the Model Law further details that the penalty should be at least a 90-day license revocation. As of September 2016, only five states—Alaska, Connecticut, Maryland, Mississippi, and Wyoming—have a license suspension/revocation period for a first test refusal that is less than six months. In 2011, Wyoming became (and remains) the only state that does not penalize a driver for refusing a chemical test. Rather, in cases where a driver refuses a chemical test, Wyoming law provides a means for a search warrant to be remotely transmitted to the law enforcement officer so that a chemical test can be compelled.[14]

Among the states, the most common suspension/revocation period for a first-time chemical test refusal—shared by 28 states and the District of Columbia— is 12 months. There are only three states where a driver who refuses for the first time can have his or her license suspended or revoked for longer than 12 months—Utah (18 months), Alabama (24 months), and Hawaii (24 months). In Alabama, however, a driver is required to consent to a chemical test for drugs other than alcohol only if they are involved in an accident that results in serious physical injury or death. Kentucky's suspension period is not fixed, but rather is for the length of the criminal action arising out of the violation. The table below summarizes the minimum length of time that a driver's license will be suspended or revoked for refusing a chemical test for the first time:

Length of License Suspension or Revocation for First Refusal of Chemical Test	State(s)
No suspension or revocation period	Wyoming
45 days	Connecticut
90 days	Alaska, Mississippi
120 days	Maryland
180 days (or six months)	Arkansas, Montana, New Hampshire, North Dakota, Oklahoma, Rhode Island, South Carolina, Texas, Vermont
275 days	Maine

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Length of License Suspension or Revocation for First Refusal of Chemical Test	State(s)
12 months (or one year)	Arizona, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin
18 months	Utah
24 months	Alabama, Hawaii
Indeterminate length	Kentucky

The Model Law does not propose a criminal penalty for a driver's refusal to undergo a validly-requested implied consent chemical test. As is discussed in detail in Part 2 of the *NAMSDL News- Subject Matter Analysis* on drugged driving, the U.S. Supreme Court's recent decision in *Birchfield vs. North Dakota*[15] casts considerable doubt over the constitutionality of any state law that criminalizes a driver's refusal to undergo a warrantless blood test. As of September 2016, however, implied consent laws in 19 states still contain some form of criminal penalty for refusal, although these provisions are not all the same.

In eight states— Alaska, Indiana, Kansas, Maryland, Minnesota, North Dakota, Oregon, and Rhode Island—there is statutory language that criminalizes a driver's refusal to submit to a chemical test that appears to apply in all circumstances. However, in three of these states— Kansas, Minnesota, and North Dakota—the state law has been declared unconstitutional within the past year by either a state court[16] or the U.S. Supreme Court.[17] In Oregon, the refusal to take a chemical test carries no possibility of jail, but rather is a "specific fine traffic violation" with a presumptive fine of $650.[18] Arkansas law provides for a monetary fine if a driver under age 21 refuses a chemical test. Prior to this year, it was a crime to refuse a chemical test in Hawaii, but the state law was repealed in April 2016 after the Hawaii Supreme Court found it unconstitutional in 2015.[20]

In four states—Florida, Louisiana, Vermont, and Virginia—it is repeat offenders who face criminal penalties. In Florida, a second or subsequent refusal constitutes a criminal offense, while in Louisiana, a third or subsequent refusal is a crime. In Vermont and Virginia, the refusal to take a test is a crime for drivers who have been previously convicted of drunk or drugged driving. Vermont drivers also face criminal penalty if they refuse a test (regardless of prior conviction) after having been involved in an accident that caused serious injury or death.

In the remaining six states—California, Kentucky, Maine, Nebraska, Ohio, and Pennsylvania—refusing a chemical test serves as an aggravating factor that can enhance criminal penalties if the driver subsequently is convicted of violating drugged driving laws. The table below summarizes these state provisions, at least prior to any consideration of the future effects of the *Birchfield* decision:

Criminal Penalty for Refusing Implied Consent Chemical Test	State(s)
Applies to all drivers, starting with first offense	Alaska, Indiana, Kansas*, Maryland, Minnesota*, North Dakota*, Oregon, Rhode Island

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Criminal Penalty for Refusing Implied Consent Chemical Test	State(s)
Applies to a driver under age 21 only, starting with first offense	Arkansas
Applies only to driver's second or subsequent refusal	Florida
Applies only to driver's third or subsequent refusal	Louisiana
Applies only if driver has been convicted previously	Virginia
Applies only if driver has been convicted previously or involved in accident causing serious injury or death	Vermont
Applies as aggravating factor that can increase criminal penalty if convicted of offense	California, Kentucky, Maine, Nebraska, Ohio, Pennsylvania
	* Has been found unconstitutional by U.S. Supreme Court or state court.

Drugged Driving Convictions: Lookback Periods

As briefly mentioned above, it is common for states to penalize repeat offenders more severely than first-time offenders. Whether or not a driver is treated as a repeat offender depends on how many convictions have occurred in the driver's legally-prescribed "lookback" period prior to the current offense. For example, if a driver was convicted of drugged driving in 2001, he or she would only be considered a second-time offender for an offense in 2016 if the lookback period is 15 years or longer. The Model Law does not contain a lookback period and, as a result, it appears that the Commissioners intended the lookback period to be the driver's entire lifetime. As compared to a lookback period of a specified length, a lifetime lookback period is more punitive because any prior conviction, regardless of how old, can result in a driver facing repeat offender penalties. Amongst state laws, lookback periods vary in length from five years to the driver's lifetime. As shown below, it is relatively common for states to apply differing lookback periods as a driver's total number of offenses increases.

Seven states—Alaska, Colorado, Kansas, Massachusetts, New Mexico, Texas, and Vermont— appear to have lifetime lookback periods in all cases, for both administrative and criminal penalties. In 10 other states, the lookback period eventually shifts to lifetime after starting at a lower level for certain administrative or criminal penalties. The shortest lookback period in any state is five years, which is the case in three states for all cases—Arkansas, Maryland, and Rhode Island— and in nine states for at least one or more sets of administrative or criminal penalties—Alabama, Delaware, Florida, Georgia, Hawaii, Indiana, Mississippi, Missouri and Oregon. The most common lookback period amongst state laws is 10 years, with 26 states employing this period for some or all prior offenses. The table below summaries the lookback periods by state:

Length of Lookback Period	State(s)
5 years	Alabama (2nd offense), Arkansas, Delaware (administrative penalties), Florida (administrative penalty for 2nd offense), Georgia (administrative penalties), Hawaii (2nd and 3rd offenses), Indiana (some criminal penalties), Maryland, Mississippi (2nd and 3rd offenses), Missouri (criminal penalties for 2nd offense), Oregon (administrative penalties), Rhode Island
6 years	Ohio (2nd to 5th offense)
7 years	Arizona, Michigan (2nd offense), Nevada, North Carolina, North Dakota (all other penalties), Washington (all other offenses)

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Length of Lookback Period	State(s)
10 years	California, Connecticut, Delaware (criminal penalty for 2nd offense), Georgia (criminal penalties), Hawaii (4th or subsequent offense), Idaho, Kentucky, Louisiana, Maine, Minnesota, Montana (2nd offense), New Hampshire, New Jersey, New York (2nd and 3rd offenses), Oklahoma, Oregon (criminal penalties), Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington (criminal penalties for 5th or subsequent offense), West Virginia, Wisconsin (2nd offense), Wyoming
12 years	Iowa
15 years	D.C., Nebraska, New York (4th or subsequent offense), North Dakota (criminal penalties for 4th or subsequent offense)
20 years	Illinois (administrative penalty for 2nd offense), Ohio (6th or subsequent offense)
Lifetime	Alaska, Alabama (3rd or subsequent offense), Colorado, Delaware (criminal penalties for 3rd or subsequent offense), Florida (criminal penalties), Illinois (all other offenses), Indiana (certain criminal penalties), Kansas, Massachusetts, Michigan (3rd or subsequent offense), Mississippi (4th or subsequent offense), Missouri (all other penalties), Montana (3rd or subsequent offense), New Mexico, Texas, Vermont, Wisconsin (3rd or subsequent offense)

Drugged Driving Convictions: Administrative Penalties

In the Model Law, the Commissioners chose to make license revocation the administrative penalty for conviction or failure to submit to a requested chemical test. This was done to allow a state's DMV a chance to determine if it would be safe to allow a previously convicted driver to have an unrestricted license when the administrative penalty period ends. As it relates to conviction penalties, state laws are roughly equally split on this issue. In 18 states plus the District of Columbia, the statutory language refers to license revocation in cases of conviction, similar to the Model Law. Conversely, in 17 other states, the statutory language refers only to license suspension upon conviction. In the remaining 15 states, the statutory language changes from license suspension for the first (or first few) convictions to license revocation when a set number of prior convictions is reached. The table below summarizes the differences amongst the state laws in regards to type of administrative penalty for a drugged driving conviction:

Type of Administrative Penalty for Conviction	State(s)
License suspension only	California, Colorado, Idaho, Indiana, Kansas, Louisiana, Maine, Mississippi, Montana, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas
License revocation only	Alaska, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, South Dakota, West Virginia, Wisconsin
Initial penalty is license suspension but license can be revoked after multiple convictions	Alabama, Arizona, Arkansas, Connecticut, Georgia, Maryland, Michigan, Missouri, Oklahoma, South Carolina, Utah, Vermont, Virginia, Washington, Wyoming

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Another aspect about the Model Law is that it proposes a slightly more severe administrative penalty for refusing a chemical test than for failing a chemical test. According to the Law, this was done to encourage drivers to submit to requested tests. Going one step further, in at least 30 states and the District of Columbia (and perhaps Kentucky, depending on the length of the suspension for a test refusal), the administrative penalty for refusing a chemical test for the first time may be longer than that for a first conviction of drugged driving laws. This is different from the Model Law, where the administrative penalty for a conviction, a one-year license revocation, is greater than the penalty for a test refusal. The table below lists the jurisdictions where the administrative penalty for refusing a chemical test may be stiffer than for a first conviction of drugged driving:

Administrative Penalty Comparison	State(s)
Suspension/revocation of license for first refusal of chemical test is longer than for first conviction of drugged driving	Alabama*, Arizona, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Dakota, Ohio, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin (*Chemical test required only where driver involved in accident resulting in death or serious physical injury)

The Model Law proposes that a driver's license be revoked for one year upon a conviction for a drugged driving violation. As compared to state laws, the Model Law's one-year period is towards the longer end of minimum suspension/revocation periods. Of the 48 states and the District of Columbia that specify license suspension or revocation periods for first-offenders, only 10 states have at least a one-year minimum suspension/revocation period. Only one of those states—Utah—has a longer minimum, and that is only if the offender is under age 19, in which case the suspension lasts until the driver turns 21. Three states— Maryland, Pennsylvania and Rhode Island— do not provide for any license suspension or revocation until a driver's second drugged driving offense. In Maryland, it appears that a driver's license may be revoked or suspended upon a second conviction. Among all state laws, the range of minimum suspension/revocation periods for first offenses goes from 30 days to one year. The table below summarizes the minimum suspension/revocation periods by state for a first conviction:

Minimum Length of License Suspension/ Revocation for First Conviction	State(s)
None	Maryland, Pennsylvania, Rhode Island
30 days	Idaho, Kansas, Kentucky, Minnesota, South Dakota
45 days	Connecticut
90 days (or three months)	Alabama, Alaska, Arizona, Delaware, Missouri, Nevada, North Dakota (91 days), Texas, Vermont, Washington, Wyoming
120 days	Mississippi, Utah (drivers age 21+)
150 days	Maine
180 days (or six months)	Arkansas, California, District of Columbia, Florida, Georgia, Indiana, Iowa, Michigan, Montana, Nebraska, New York, Ohio, Oklahoma, South Carolina, West Virginia, Wisconsin
7 months	New Jersey
9 months	Colorado, New Hampshire

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Minimum Length of License Suspension/ Revocation for First Conviction	State(s)
12 months	Hawaii, Illinois, Louisiana, Massachusetts, New Mexico, North Carolina, Oregon, Tennessee, Virginia
Until age 21 or 12 months, whichever is longer	Utah (drivers under 21)

The Model Law does not appear to provide increased administrative penalties to a driver with multiple drunk or drugged driving convictions. This is in contrast to state laws, which almost universally do increase license suspension/revocation periods for repeat offenders. Interestingly, although it is common for suspension/revocation periods to increase as the number of convictions increase, the laws of only 15 states allow the lifetime suspension or revocation of driver's license for multiple convictions. In eight states, lifetime revocation is possible upon the third conviction within the respective lookback period. In six other states, it takes four convictions within the period. In one state, Massachusetts, the lifetime revocation occurs after the fifth conviction in the period. The table below summarizes the states where a driver may face the lifetime suspension/revocation of his or her driver's license for multiple drugged driving convictions:

Number of Total Convictions in Lookback Period Which May Result in Lifetime License Suspension/Revocation	State(s)
Three	Alaska*, Connecticut, Michigan, New Hampshire, North Carolina, Vermont, Virginia, West Virginia (*state has lifetime lookback period, but lifetime revocation can occur if three convictions in 10 years)
Four	Arkansas, Florida, Illinois, New Mexico, Ohio, South Carolina
Five	Massachusetts

Drugged Driving Convictions: Criminal Penalties

For a first-time offender, the Model Law provides for a criminal fine with a $100 minimum. The laws of 37 states and the District of Columbia similarly contain a minimum fine for a first conviction. At $100, the Model Law's proposed minimum is the lower than all but three states— Michigan, Rhode Island, and West Virginia. Half of the 38 jurisdictions, 19 states, have a minimum fine for a first conviction that is below $500. The most common minimum fine amount among the states is $500, which is the case in 10 states. In Rhode Island, the minimum fine depends on which of the two drugged driving standards is violated. The minimum fine is $100 if the driver violates the "per se" standard but the minimum fine is $500 if the state's "under the influence" standard is violated. At the high end of fine amounts, there are four states—Alaska, Iowa, Oregon, Pennsylvania—plus the District of Columbia that have minimum fines of $1,000 or above. The highest minimum fine for a first-time conviction is $1,500 in Alaska. The table below summarizes state minimum criminal fines for a first conviction of a drugged driving offense:

Minimum Criminal Fine for a First Conviction	State(s)
$100	Michigan, Rhode Island ("per se" violation), West Virginia
$150-$299	Arizona, Arkansas, Hawaii, Kentucky, Mississippi, Virginia, Wisconsin
$300-$399	California, Georgia, Louisiana, New Jersey, Ohio, Tennessee, Washington

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Minimum Criminal Fine for a First Conviction	State(s)
$400	Nevada, South Carolina
$500	Connecticut, Delaware, Florida, Maine, Massachusetts, Nebraska, New Hampshire, New York, North Dakota, Rhode Island (DUI violation)
$600-$750	Alabama, Colorado, Kansas, Montana, Utah
$1,000	District of Columbia, Oregon, Pennsylvania,
$1,250-$1,500	Alaska, Iowa

The laws of 47 states plus the District of Columbia contain specific maximum criminal fines for a first drugged driving violation. At $1,000, the maximum proposed in the Model Law is at the level that is most common amongst states, with 18 states and the District of Columbia having the same $1,000 limit. Fifteen states have maximum criminal fines for first violations below $1,000, with the smallest being $200 in North Carolina. The highest maximum fine for a first violation is $5,000, which is the case in three states— Massachusetts, Pennsylvania, and Washington. Two states, Maryland and Rhode Island, have different maximum criminal fines that depend on the nature of the offense. The table below summarizes the state maximum criminal fines for a first conviction of a drugged driving offense:

Maximum Criminal Fine for a First Conviction	State(s)
$200	North Carolina
$300-400	Rhode Island ("per se" violation), South Carolina, Wisconsin
$500	Indiana, Kentucky, Maryland ("so far impaired" violation), Michigan, Missouri, Nebraska, New Jersey, New Mexico, Rhode Island (DUI violation), West Virginia
$750	Vermont, Wyoming
$1,000	Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maryland ("impaired" violation), Minnesota, Mississippi, Montana, Nevada, New York, Oklahoma, Utah
$1,075-$1,250	Iowa, Ohio
$1,500	Delaware, North Dakota, Tennessee
$2,000-$2,500	Alabama, Arizona, California, Illinois, South Dakota, Texas, Virginia
$5,000	Massachusetts, Pennsylvania, Washington

For a first-time offender, the Model Law proposes a jail sentence between 10 days and one year. Only 24 states plus the District of Columbia have laws that specify minimum jail sentences for drivers convicted of drugged driving the first time. At 10 days, the Model Law's proposed minimum is lengthier than all but four of these 24 states. Thirteen of the 24 states have minimum jail sentences of either 24 or 48 hours. The longest minimum jail sentence for a first time offender is 15 days, in the District of Columbia. In fact, the drugged driving penalty provisions in the District of Columbia law are somewhat different than other states. In D.C., there are enhanced criminal penalties for certain drugged driving violations, both in terms of longer minimum and maximum jail sentences, if the driver's "blood or urine contains a Schedule I chemical or controlled substance . . . Phencyclidine, Cocaine, Methadone, Morphine, or one of its active metabolites or Analogs."[21] This is similar to the fairly common practice in states of having stiffer

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criminal penalties for drunk driving if a driver's blood alcohol content is excessively high. The table below summarizes the minimum jail sentences by state for a first conviction:

Minimum Jail Sentence for a First Conviction	State(s)
24 hours	Arkansas, Montana, North Carolina, Washington
48 hours	Connecticut, Hawaii, Iowa, Kansas, Kentucky, Nevada, South Carolina, Tennessee, Utah
3 days	Alaska, Ohio, Pennsylvania, Texas
4-5 days	California, Colorado
7 days	Nebraska
10 days	Arizona, Georgia, Louisiana, Oklahoma
15 days	District of Columbia

In contrast to minimum jail sentences, the laws of 47 states plus the District of Columbia provide for maximum jail sentences in cases of a first conviction. From NAMSDL's review of the laws, it appears that a driver will not face possible jail time for a first drugged driving conviction only in two states—New Hampshire and Wisconsin. Of the remaining states, the shortest maximum sentences are two days, in Mississippi, and five days, in Hawaii. All other maximum jail sentences are at least 30 days. At one year, the Model Law's proposed maximum is at the higher end of state laws, although there are 16 states with the same one-year maximum and two states—Massachusetts and Vermont—with longer potential maximums. The table below summarizes the maximum jail sentences by state for a first conviction:

Maximum Jail Sentence for a First Conviction	State(s)
No jail time	New Hampshire, Wisconsin
48 hours	Mississippi
5 days	Hawaii
30 days	Kansas, Kentucky, New Jersey, North Dakota, South Carolina
60 days	Indiana, Maryland ("so far impaired" offense), Nebraska, North Carolina
90 days	Michigan (93 days), Minnesota, New Mexico
180 days (or six months)	Arizona, California, Connecticut, District of Columbia, Florida, Idaho, Kansas, Louisiana, Missouri, Montana, Nevada, Ohio, Pennsylvania, Texas, Utah, West Virginia, Wyoming
12 months	Alabama, Arkansas, Colorado, Delaware, Georgia, Illinois, Iowa, Maryland ("impaired" offense), New York, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Virginia, Washington
Two years or over	Massachusetts, Vermont

As noted above, the language of the Model Law does not specify whether a drugged driving offense is a misdemeanor or a felony, or can become a felony if a driver has a sufficient number of prior convictions. In contrast, the laws of 47 states provide that a simple drugged driving offense (*i.e.*, one that does not cause serious bodily injury) can be a felony based solely on the number of prior convictions. Generally speaking, among state laws, the number of convictions

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within the respective lookback period to reach felony status (counting the current offense) is either three or four, as a total of 43 states fit within that range. In three states—Indiana, New York, and Oklahoma—an offense can be a felony upon only the second conviction within the lookback period. In Washington, a felony can result upon the fifth conviction within the lookback period. Maryland, New Jersey, Pennsylvania, and the District of Columbia are the four jurisdictions where it does not appear that a drugged driving offense (without bodily injury) can rise to felony status, even with multiple prior convictions. The table below summarizes the number of convictions necessary to reach felony status:

Number of Convictions in Lookback Period that Will Result in Felony	State(s)
Two	Indiana, New York, Oklahoma
Three	Alaska, Arizona, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Maine ("Class C" crime), Massachusetts, Michigan, Mississippi, Missouri, Nevada, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia
Four	Alabama, Arkansas, California, Colorado, Georgia, Hawaii, Kentucky, Louisiana, Minnesota, Montana, Nebraska (only three prior convictions are necessary if chemical test refused), New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Wisconsin, Wyoming
Five	Washington
Not addressed	District of Columbia, Maryland, New Jersey (violation is a traffic offense, not a crime), Pennsylvania

Another element of most state drugged driving laws that is not contained in the Model Law are enhanced criminal penalties if the drugged driving offense is committed with a person under a certain age in the vehicle. Based upon NAMSDL's review of state laws, it appears that 44 states plus the District of Columbia have such child endangerment laws applicable to drugged driving. As could be expected, the cut-off ages for the enhancement provisions differ by state. In addition, in some states, the driver must be a specified number of years older than the passenger for the provision to apply.

The most encompassing law is in Maine, where enhanced penalties are possible if the drugged driving offense is committed with anyone under age 21 in the vehicle. The least encompassing of these provisions is in Kentucky, where the passenger must be under age 12. Most of, but not all of, the remainder of the states have cut-off ages between 16 and 18. Based on NAMSDL's review, it appears that six states do not have such provisions— Colorado, Connecticut, Iowa, New Mexico, South Dakota, and Vermont. The table below summarizes the required ages of the child passengers in order for these child endangerment statutes to apply:

Age of Passenger in Order for Child Endangerment Provision to Apply	State(s)
Under 12	Kentucky
Under 13	Louisiana, Rhode Island (driver must be 18)
Under 14	Alabama (driver must be 21), California, Georgia, Kansas, Massachusetts
Under 15	Arizona, Hawaii (driver must be 18), Nevada, Texas

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Age of Passenger in Order for Child Endangerment Provision to Apply	State(s)
Under 16	Alaska, Arkansas (affirmative defense if driver is less than two years older), Illinois, Michigan, Minnesota (driver must be three years older), Mississippi (driver must be 21), Montana, Nebraska, New Hampshire, New York, South Carolina (driver must be 18), Utah (driver's age does not matter), Washington, West Virginia, Wisconsin
Under 17	Delaware, Missouri
Under 18 or passenger must be a "minor"	District of Columbia, Florida, Idaho ("minor"; driver must be 18), Indiana (driver must be 21), Maryland ("minor"), New Jersey (driver must be parent/guardian), North Carolina, North Dakota ("minor" and driver must be 21), Ohio, Oklahoma (driver must be 18), Oregon (driver must be three years older), Pennsylvania, Tennessee, Utah (if driver 21), Virginia, Wyoming ("child"; driver must be 18)
Under 21	Maine
No provision	Colorado, Connecticut, Iowa, New Mexico, South Dakota, Vermont

Finally, it is interesting to note that in at least seven states—Alaska, Arizona, California, Indiana, Iowa, Michigan, and Virginia—the laws provide that convicted drivers must reimburse emergency medical services costs (at least up to a specified dollar limit) if emergency medical services were necessary as a result of events that were caused by the driver's violation.

Conclusion

As this analysis shows, state laws governing administrative and criminal penalties for drivers who refuse chemical tests or are convicted of drugged driving vary widely. NAMSDL will continue to monitor legislative activities and court decisions that address and change the scope and meaning of these laws and will keep stakeholders abreast of any changes.

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[1]These documents are available at: http://www.namsdl.org/namsdl-news.cfm.
[2]http://www.namsdl.org/library/69E90627-FF72-B4ED-6F552DD0E047972C/
[3]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/.
[4]Model Law, §§ 7(b), 8, 9. The fourth basis for an administrative penalty in the Model Law is if the driver submits to a requested chemical test and the results show a blood-alcohol level above the legal limit. Model Law, §§ 8, 9.
[5]Model Law, § 12.
[6]Model Law, § 17.
[7]Model Law, § 13.
[8]Model Law, Appendix F, p. F-158.
[9]Model Law, Appendix F, p. F-158. The proposed penalty for a test failure is 30 days of full license revocation and at least 60 days of restricted driving.
[10]Model Law, § 13 (comments).
[11]Model Law, § 8 (comments).
[12]Model Law, § 19(c).

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[13]Model Demand Reduction Assessment Act, § 4(a). The Act can be found here: http://www.namsdl.org/library/v1b_model_demand_reduction_assessment_actSection_B__Model_Demand_Reduction_Assessment_Act/.
[14]W.S. § 31-6-102(d).
[15]579 U.S. ---, 136 S.Ct. 2160 (2016).
[16]*State v. Ryce,* 303 Kan. 899, 368 P.3d 342 (2016); *State v. Thompson*, 873 N.W.2d 873 (Minn. Ct. App. 2015), *review granted*; *State v. Trahan*, 870 N.W.2d 396 (Minn. Ct. App. 2015), *review granted*.
[17]North Dakota's provision was held unconstitutional in *Birchfield*.
[18]O.R.S. § 813.130(f).
[19]A.C.A. § 5-65-305.
[20]*State v. Won*, 137 Hawai'i 330, 372 P.3d 1065 (2015).
[21]DC ST § 50-2206.13.

This project was supported by Grant No. G1599ONDCP03A, awarded by the Office of National Drug Control Policy.
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