

Legislative Analysis



PRELIMINARY ORAL FLUID ANALYSIS

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<http://www.house.mi.gov/hfa>

House Bill 4390 as introduced
Sponsor: Rep. Brian BeGole

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4391 as introduced
Sponsor: Rep. Julie M. Rogers

Committee: Government Operations
Complete to 5-21-25

SUMMARY:

House Bills 4390 and 4391 would amend the Michigan Vehicle Code to allow for roadside oral fluid (i.e., saliva) tests to screen drivers for the presence of controlled substances, including marijuana. These tests, referred to in the bills as *preliminary oral fluid analysis*, would be added to several provisions that now apply to preliminary chemical breath tests used to screen for alcohol. The term *other bodily fluid* (which includes saliva) would be added to several provisions that now refer to the testing of, or to test results for, an individual's blood, breath, or urine. The bills are described together below.

Other bodily fluid would mean fluid from the human body capable of revealing the presence of controlled substances or their metabolites, including oral fluid.

Preliminary oral fluid analysis would mean the on-site taking of a preliminary oral fluid test, performed by a peace officer, from the oral fluid of a person for the purpose of detecting the presence of a controlled substance, as that term is defined in section 7104 of the Public Health Code.¹ [This definition is currently in the law, except that current law requires the tests to be performed by a *certified drug recognition expert*, a restriction that applied to a roadside drug testing pilot program conducted in five counties in 2017 and 2018 (Phase 1)² and more broadly in 2019 and 2020 (Phase 2).³]

Currently, a peace officer may require a person to submit to a preliminary breath test if, among other things, the officer has reasonable cause to believe that the person was operating a vehicle while their ability to do so was affected by the consumption of alcohol or a controlled substance or that the person was operating a commercial motor vehicle while their blood, breath, or urine contained any measurable amount of alcohol or a controlled substance. The bills would amend the provision concerning operating a commercial motor vehicle to also apply to any measurable

¹ Controlled substances are listed under state and federal law on five numbered schedules, ranging from Schedule 1 (substances that have no accepted medical use and a high potential for abuse) to Schedule 5 (substances that have a low potential for abuse). Marijuana is listed as a controlled substance under both state and federal law. See <https://www.legislature.mi.gov/documents/mcl/pdf/MCL-368-1978-7-72.pdf> (state) and <https://www.dea.gov/drug-information/drug-scheduling> (federal).

² Enabling legislation: <https://www.legislature.mi.gov/Bills/Bill?ObjectName=2015-SB-0207> Project report: https://www.michigan.gov/-/media/Project/Websites/msp/reports/Oral_Fluid_Report.pdf

³ Enabling legislation: <https://www.legislature.mi.gov/Bills/Bill?ObjectName=2020-SB-0718> Project report: https://www.michigan.gov/-/media/Project/Websites/msp/reports/phase_ii_oral_fluid_report.pdf

amount of alcohol or controlled substances contained in other bodily fluid. Similarly, provisions that currently apply to a request by a peace officer to submit to a preliminary breath test or to penalties for refusing a preliminary breath test also would apply to a request or refusal to submit to a preliminary oral fluid analysis. The following would apply to a preliminary oral fluid analysis administered under the bills:

- It could lead to an arrest based on its results.
- The results would be admissible in a criminal prosecution for certain drunk or drugged driving violations or in an administrative hearing for one or more of the following purposes:
 - To assist the court or hearing officer in determining a challenge to the validity of an arrest.
 - As evidence of the presence or nonpresence of a controlled substance in the defendant's oral fluid if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that a preliminary oral fluid analysis showed the presence of a controlled substance that was not found to be present when a chemical test of the defendant's blood or urine was administered under the act.
 - As evidence of the presence or nonpresence of a controlled substance in the defendant's oral fluid if offered by the prosecution to rebut testimony elicited on cross-examination of a prosecution witness that a preliminary oral fluid analysis showed no presence of a controlled substance that was found to be present when a chemical test of the defendant's blood or urine was administered under the act.
- The person would remain subject to provisions of the act pertaining to chemical tests and administrative hearings regarding chemical tests.
- A person who refuses to submit to a preliminary oral fluid analysis would be responsible for a civil infraction.

Each bill would take effect 90 days after its enactment, and neither could take effect unless both were enacted.

MCL 257.43b and 257.625a and proposed MCL 257.36d

FISCAL IMPACT:

The bills would have an indeterminate fiscal impact on the Department of State Police (MSP) and local law enforcement agencies. The bills would allow, but not require, MSP and other law enforcement agencies to conduct preliminary oral fluid analysis, which could result in new costs related to the procurement of equipment necessary to comply with the provisions of the bills. MSP could also incur nominal costs in the course of promulgating new rules and policies to regulate preliminary oral fluid analysis that would likely be absorbed by existing appropriations.

The bills would likely result in an increase in the number of individuals found to be in violation and subsequently convicted. Depending on the number of additional convictions and the specific charges, the bills would have an indeterminate fiscal impact on the state and on local units of government. Violations could be either civil infractions, misdemeanors, or felonies, depending on the circumstances. The majority of revenue received from payment of fines for civil infractions would increase funding for public and county law libraries. A small portion of

the revenue would be deposited into the state Justice System Fund, which supports various justice-related endeavors in the judicial and legislative branches of government and the Departments of State Police, Corrections, Health and Human Services, and Treasury. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2024, the average cost of prison incarceration in a state facility was roughly \$46,200 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$5,500 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. The fiscal impact on local court systems would depend on how provisions of the bills affected court caseloads and related administrative costs. Any increase in penal fine revenue from misdemeanor and felony convictions would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.