

TITLE 260 STATE DEPARTMENT OF TOXICOLOGY

Proposed Rule
LSA Document #13-344

DIGEST

Adds 260 IAC 2 to add definitions, to establish standards for selection of breath test operators, training of breath test operators, and certification and recertification of breath test operators, to authorize certified breath test operators to make replacements and adjustments to breath test instruments not related to calibration, to preserve breath test operator certifications issued under repealed rule, to establish standards for selection of breath test equipment, inspection of breath test instruments, and for certification of breath test instruments, to preserve breath test instrument certifications issued under repealed rule, to establish standards for selection and certification of chemicals, and to establish approved method for BAC DataMaster breath analysis and Intox EC/IR II breath analysis. Repeals 260 IAC 1.1-0.5, 260 IAC 1.1-1, 260 IAC 1.1-2, 260 IAC 1.1-3, 260 IAC 1.1-4-8, and 260 IAC 1.1-5. Effective 30 days after filing with the Publisher.

IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses

260 IAC 1.1-0.5; 260 IAC 1.1-1; 260 IAC 1.1-2; 260 IAC 1.1-3; 260 IAC 1.1-4-8; 260 IAC 1.1-5; 260 IAC 2

SECTION 1. 260 IAC 2 IS ADDED TO READ AS FOLLOWS:

ARTICLE 2. BREATH TEST OPERATORS AND INSTRUMENTS

Rule 1. Definitions

260 IAC 2-1-1 Applicability

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 1. The definitions in this rule apply throughout this article. (*State Department of Toxicology; 260 IAC 2-1-1*)

260 IAC 2-1-2 "Breath test instrument" defined

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 2. "Breath test instrument" means equipment selected by the department for performing evidentiary breath tests for ethanol. (*State Department of Toxicology; 260 IAC 2-1-2*)

260 IAC 2-1-3 "Department" defined

Authority: IC 9-30-6-5

Affected: IC 10-20-2-1

Sec. 3. "Department" means the state department of toxicology established by IC 10-20-2-1. (*State Department of Toxicology; 260 IAC 2-1-3*)

260 IAC 2-1-4 "Director" defined

Authority: IC 9-30-6-5

Affected: IC 10-20-2-2

Sec. 4. "Director" means the director of the department. (*State Department of Toxicology; 260 IAC 2-1-4*)

Rule 2. Selection, Training, and Certification of Breath Test Operators

260 IAC 2-2-1 Selection

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 1. Only those persons who are employed by a law enforcement agency may be certified as breath test operators. As used in this rule, "law enforcement agency" means an agency or department with authority to apprehend criminal offenders. (*State Department of Toxicology; 260 IAC 2-2-1*)

260 IAC 2-2-2 Training

Authority: IC 9-30-6-5

Affected: IC 10-20-2-5

Sec. 2. (a) The breath test operator training course for certification shall consist of training in the following:

- (1) The pharmacology and toxicology of ethanol.
- (2) The legal aspects of breath testing for ethanol.
- (3) The theory, operation, and care of breath test equipment.
- (4) The use of a breath test instrument using known ethanol-water or ethanol-gas standards.

(b) To successfully complete the training course, a person must pass all examinations and demonstrate competence in the administration of breath tests on a breath test instrument. (*State Department of Toxicology; 260 IAC 2-2-2*)

260 IAC 2-2-3 Certification and recertification of breath test operators

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 3. (a) Those persons who:

- (1) are employed by a law enforcement agency; and
- (2) successfully complete the breath test operator training course;

will be certified as breath test operators.

(b) Any person certified as a breath test operator must be recertified by examination at least every two (2) years from the month of certification or recertification. Reasonable deviations from this schedule may be approved by the director.

(c) The recertification procedure shall be established by the department.

(d) Any person seeking recertification as a breath test operator must demonstrate competence in the performance of evidentiary breath tests by passing an examination approved by the department.

(e) Any person who fails the recertification examination may be given a second recertification examination, provided that the previous certification has not been expired for more than thirty (30) days. During the time period between the first and second recertification examinations, the person is not certified as a breath test operator.

(f) The department shall issue identification cards to all certified and recertified breath test operators, which shall be valid for a period of two (2) years from the month of certification or recertification.

(g) Nothing in this rule shall prevent the director from suspending or revoking the certification of any breath test operator at any time the director determines such suspension or revocation to be in the best interest of the breath test for ethanol program. (*State Department of Toxicology; 260 IAC 2-2-3*)

260 IAC 2-2-4 Authorization of certified breath test operators

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 4. Certified and recertified breath test operators are authorized to:

(1) administer breath tests; and

(2) make replacements and adjustments to breath test instruments not related to calibration.

(State Department of Toxicology; 260 IAC 2-2-4)

260 IAC 2-2-5 Breath test operators certified or recertified under repealed rule

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 5. The certifications of breath test operators who were certified or recertified under 260 IAC 1.1-1 before its repeal shall be valid until the date they would have expired under 260 IAC 1.1-1 before its repeal. *(State Department of Toxicology; 260 IAC 2-2-5)*

Rule 3. Selection, Inspection, and Certification of Breath Test Instruments and Chemicals

260 IAC 2-3-1 Selection of breath test equipment

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 1. (a) The department shall select breath test equipment for use for **evidentiary** breath testing to ensure the accurate analysis of breath specimens for the determination of breath ethanol concentrations. The department shall select only breath test equipment that meets the following criteria:

(1) The equipment must analyze breath samples and report a numerical value expressed as grams of ethanol per two hundred ten (210) liters of breath.

(2) The equipment must be:

(A) capable of calibration for the purpose of certification with a known ethanol standard in accord with section 2 of this rule;

(B) able to analyze a known ethanol reference sample within the limits specified by section 2 of this rule separate from calibration for certification; and

(C) equipped with sufficient features to prevent unauthorized alteration, tampering, or manipulation to safeguard the breath sampling process and ethanol concentration analysis.

(b) The breath test instruments for which approved methods are provided in 260 IAC 2-4 shall constitute the list of breath test equipment selected by the department. *(State Department of Toxicology; 260 IAC 2-3-1)*

260 IAC 2-3-2 Inspection of breath test instruments

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 2. (a) A person authorized by the department shall inspect each breath test instrument at the instrument's established location at least once every one hundred eighty (180) days. If the location of a breath test instrument is changed, the instrument must be inspected and certified under this rule prior to use.

(b) The inspection shall include at least one (1) test demonstrating that the breath test instrument:

(1) is in good operating condition; and

(2) satisfies the accuracy requirements in subsection (e) or (f).

(c) The inspection shall include tests using ethanol-water or ethanol-gas standards selected and certified under section 5 of this rule to simulate breath samples.

(d) The analytical results of inspection tests shall be expressed to the third decimal place.

(e) The analytical results of BAC DataMaster breath test instruments shall not deviate more than minus eight percent (-8%) from the **known ethanol content** of the ethanol-water standard.

certified value

(f) The analytical results of Intox EC/IR II breath test instruments shall not deviate more than five percent (5%)

or 0.005, whichever is greater, from the certified value of the ethanol-water standard or the value adjusted for the ambient barometric pressure of the certified ethanol-gas standard. (*State Department of Toxicology; 260 IAC 2-3-2*)

260 IAC 2-3-3 Certification of breath test instruments

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 3. (a) The department shall certify each breath test instrument as to compliance with the standards in section 2 of this rule at least once every one hundred eighty (180) days.

(b) The certification of breath test instruments shall be in writing by the department.

(c) The certification shall be based on information provided by persons authorized by the department to inspect breath test instruments. (*State Department of Toxicology; 260 IAC 2-3-3*)

260 IAC 2-3-4 Breath test instruments certified under repealed rule

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 4. The certifications of breath test instruments inspected and certified under 260 IAC 1.1-2 before its repeal shall be valid until the date they would have expired under 260 IAC 1.1-2 before its repeal. (*State Department of Toxicology; 260 IAC 2-3-4*)

260 IAC 2-3-5 Selection and certification of chemicals

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 5. The property values of chemicals used in the inspections described in section 2 of this rule and used as controls in the performance of evidentiary breath tests shall be certified by a procedure that establishes traceability to an accurate realization of the unit in which the property values are expressed, and for which each certified value is accompanied by an uncertainty at a stated level of confidence. (*State Department of Toxicology; 260 IAC 2-3-5*)

Rule 4. Approved Methods for Administering Breath Tests

260 IAC 2-4-1 Approved method for BAC DataMaster breath analysis

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 1. (a) The approved method that shall be followed in making an analysis of breath for ethanol using the BAC DataMaster breath test instrument is as follows:

STEP ONE: The person to be tested must:

(A) have had nothing to eat or drink;

(B) not have put any foreign substance into his or her mouth or respiratory tract; and

(C) not smoke;

within fifteen (15) minutes before the time a breath sample is taken.

STEP TWO: The green LED on the instrument display must be glowing.

STEP THREE: Depress the run button, enter the password, and insert the evidence ticket.

STEP FOUR: Follow the displayed request for information, and enter the information by the keyboard.

STEP FIVE: When "please blow" appears on the display, place a new mouthpiece in the breath tube. Instruct the subject to deliver a breath sample.

STEP SIX: When the printer stops, remove the instrument report from the printer, and check it for the numerical value for the subject's breath ethanol concentration and correct date and time.

(b) If any of the following messages are printed on the instrument report, proceed as follows:

(1) If "subject sample interferent" is printed on the instrument report, perform an additional breath test beginning with STEP ONE and proceeding through STEP SIX. If "subject sample interferent" is printed on the

instrument report of this additional breath test:

- (A) obtain an alternate chemical test for ethanol; or
 - (B) perform a breath test on another breath test instrument.
- (2) If "subject sample invalid" is printed on the instrument report, perform an additional breath test beginning with STEP ONE and proceeding through STEP SIX. If "subject sample invalid" is printed on the instrument report of this additional breath test:
- (A) obtain an alternate chemical test for ethanol; or
 - (B) perform a breath test on another breath test instrument.
- (3) If "radio interference" is printed on the instrument report, locate and remove the source of the radio interference and perform an additional breath test beginning with STEP TWO and proceeding through STEP SIX. If "radio interference" is printed on the instrument report of this additional breath test:
- (A) obtain an alternate chemical test for ethanol; or
 - (B) perform a breath test on another breath test instrument.
- (4) If "subject sample incomplete" is printed on the instrument report, perform an additional breath test beginning with STEP TWO and proceeding through STEP SIX. If "subject sample incomplete" is printed on the instrument report of this additional breath test:
- (A) obtain an alternate chemical test for ethanol; or
 - (B) perform a breath test on another breath test instrument.

If the "subject sample incomplete" was caused by the lack of cooperation of the subject, the breath test operator should record that the test was refused.

(State Department of Toxicology; 260 IAC 2-4-1)

260 IAC 2-4-2 Approved method for Intox EC/IR II breath analysis

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 2. (a) The approved method that shall be followed in making an analysis of breath for ethanol using the Intox EC/IR II breath test instrument is as follows:

STEP ONE: The person to be tested must:

- (A) have had nothing to eat or drink;
- (B) not have put any foreign substance into his or her mouth or respiratory tract; and
- (C) not smoke;

within fifteen (15) minutes before the time the first breath sample is taken or at any time from the taking of the first breath sample until after the taking of the final breath sample.

STEP TWO: Verify that the instrument is in ready mode, as indicated by the instrument display.

STEP THREE: Press "Enter" key to start subject test.

STEP FOUR: Insert identification card into the barcode reader, or press the "Enter" key and use the keyboard to enter the breath test operator information requested by the instrument display.

STEP FIVE: When requested by the instrument display, enter the beginning date and time of the fifteen (15) minute period described in STEP ONE.

STEP SIX: When requested by the instrument display, select "Y" or "N" to indicate whether the breath test operator is the officer with control of the subject during the fifteen (15) minute period described in STEP ONE.

STEP SEVEN: If "N" is selected in STEP SIX, when requested by the instrument display, enter the information of the officer with control of the subject during the fifteen (15) minute period described in STEP ONE.

STEP EIGHT: Enter incident information requested by the instrument display.

STEP NINE: Enter subject information by:

- (A) inserting the subject's driver/operator license or identification card into the barcode reader; or
- (B) pressing the "Enter" key and using the keyboard to enter the available subject information requested by the instrument display.

STEP TEN: When "Please blow" appears on the instrument display, place a new mouthpiece in the breath tube. Instruct the subject to deliver a breath sample. Remove mouthpiece when prompted by the instrument display and discard.

STEP ELEVEN: When "Please blow" appears again on the instrument display, place a new mouthpiece in the breath tube. Instruct the subject to deliver a breath sample. Remove mouthpiece when prompted by the instrument display and discard.

STEP TWELVE: Print the instrument report and remove it from the printer; check the instrument report for the numerical value of the subject's breath ethanol concentration and the correct date and time and sign the instrument report where indicated.

(b) If any of the following messages appear on the instrument display or report, proceed as follows:

(1) If "Please blow" appears on the instrument display after completion of STEPS ONE through ELEVEN, perform an additional breath test, beginning with STEP ELEVEN. If "No 0.020 Agreement" is printed on the instrument report after this additional breath test:

- (A) perform an additional breath test, beginning with STEP TWO and proceeding through STEP TWELVE;
- (B) obtain an alternate chemical test for ethanol; or
- (C) perform a breath test on another breath test instrument.

(2) If "Interfering Substance" is printed on the instrument report, perform an additional breath test, beginning with STEP ONE and proceeding through STEP TWELVE. If "Interfering Substance" is printed on the instrument report after this additional breath test:

- (A) obtain an alternate chemical test for ethanol;
- (B) perform a breath test on another breath test instrument; or
- (C) if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated.

(3) If "RFI Detected" is printed on the instrument report, locate and remove the source of the interference and perform an additional breath test, beginning with STEP TWO and proceeding through STEP TWELVE. If "RFI Detected" is printed on the instrument report after this additional breath test:

- (A) obtain an alternate chemical test for ethanol;
- (B) perform a breath test on another breath test instrument; or
- (C) if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated.

(4) If "Mouth Alcohol" is printed on the instrument report, perform an additional breath test, beginning with STEP ONE and proceeding through STEP TWELVE. If "Mouth Alcohol" is printed on the instrument report after this additional breath test:

- (A) obtain an alternate chemical test for ethanol;
- (B) perform a breath test on another breath test instrument; or
- (C) if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated.

(5) If "Insufficient Sample" or "Time Out" is printed on the instrument report, perform an additional breath test, beginning with STEP TWO and proceeding through STEP TWELVE. If "Insufficient Sample" or "Time Out" is printed on the instrument report after this additional breath test:

- (A) obtain an alternate chemical test for ethanol;
- (B) perform a breath test on another breath test instrument; or
- (C) if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated.

If an "Insufficient Sample" or "Time Out" message is caused by the lack of cooperation of the subject, the breath test operator should record that the test was refused and, if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated.

(State Department of Toxicology; 260 IAC 2-4-2)

SECTION 2. THE FOLLOWING ARE REPEALED: 260 IAC 1.1-0.5; 260 IAC 1.1-1; 260 IAC 1.1-2; 260 IAC 1.1-3; 260 IAC 1.1-4-8; 260 IAC 1.1-5.

Notice of Public Hearing