

# SUMMARY OF THE STATE OF WYOMING’S IMPAIRED DRIVING STATUTES © 2017

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## I. BRIEF HISTORY OF WYOMING’S *DRIVING UNDER THE INFLUENCE* (DUI) AND IMPLIED CONSENT LAWS

### A. “Driving” or “Having Actual Physical Control of a Vehicle” while “*Under the Influence of Alcohol or Drugs* [W.S. §§ 31-5-233(b)(iii)(A-C)].

In 1939, the State of Wyoming made it “[u]nlawful . . . [f]or any person who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.”<sup>1</sup> With the passage of Wyoming’s first *driving under the influence* (DUI) law, the prosecution did not have to prove a specified or “per se” level of intoxicating liquor or narcotic drugs in the accused’s blood stream at the time of the DUI arrest to prove a DUI charge.

In 1961, the scope of Wyoming’s DUI law was broadened to prohibit any person from driving or “[h]av[ing] actual physical control of a motor vehicle” while under the influence of alcohol or drugs.<sup>2</sup> “Actual physical control” currently applies to any “intoxicated person seated behind the steering wheel of an automobile. . . [as] long as [the] person is physically or bodily able to assert dominion in the sense of movement by starting the car and driving away, then he has substantially as much control over the vehicle as he would if he were actually driving it.”<sup>3</sup> “[T]he statute is indicative of public

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<sup>1</sup> 1939 Wyo. Sess. Laws, Chap. 214, § 25.

<sup>2</sup> W.S. § 31-129 (a) & (c) (1957) (as amended 1961).

<sup>3</sup> *Schouboe v. Wyo. DOT*, 2010 WY 119, ¶ 9, 238 P.3d 1246, 1248-1249 (Wyo. 2010)(quoting *Adams v. State*, 1985 WY 50, ¶ 15, 697 P.2d 622, 625 (Wyo. 1985)).

policy of the State of Wyoming to discourage intoxicated persons from making any attempt to enter a vehicle except as passengers or passive occupants.”<sup>4</sup>

**B. Wyoming’s “Per Se” DUI law makes it illegal to have a specific blood alcohol concentration (BAC) level [W.S. §§ 31-5-233(b)(i-ii)].**

In 1955, the State of Wyoming adopted its first “per se” *blood alcohol concentration* (BAC) level, which created an mandatory presumption of guilt for a BAC level of *fifteen one-hundredths of one percent* (0.15%) or more,<sup>5</sup> at the same time it adopted a mandatory presumption of innocence for anyone with a BAC level of *five one-hundredths of one percent* (0.05%) or less.<sup>6</sup> Since due process requires the government to prove the “per se” element of a DUI charge beyond a reasonable doubt to overcome the presumption of innocence,<sup>7</sup> in 1989, the mandatory presumption of guilt associated with Wyoming’s “per se” BAC level was repealed, while the mandatory presumption of innocence was retained.<sup>8</sup> As of 2017, the mandatory presumption of innocence for a BAC level of 0.05% or less still exists in the State of Wyoming.<sup>9</sup>

In 1973, Wyoming’s “per se” BAC level was lowered from 0.15% or more, to 0.10% or more.<sup>10</sup> In 2002, Wyoming’s “per se” BAC level was again reduced to its current level of 0.08% or more.<sup>11</sup> “The intent underlying the legal BAC limit was simply

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<sup>4</sup> *Adams v. State*, 1985 WY 50, ¶ 16, 697 P.2d 622, 625 (Wyo. 1985).

<sup>5</sup> 1955 Wyo. Sess. Laws, Chap. 97, § 1; Wyo. Comp. Stat. § 60-414(b)(3) (1945)(as amended and reenacted in 1955).

<sup>6</sup> *Id.*, Wyo. Comp. Stat. § 60-414(b)(1) (1945) (as amended and reenacted in 1955)

<sup>7</sup> Comment, *The New Implied Consent Amendments: A Step in the Right Direction*, 21 LAND & WATER L. REV. 165, 170–172 (1986)(recognizing different burden of proof under due process for criminal DUI case and implied consent suspension hearing); *Rodriguez v. State*, 2010 WY 170, ¶ 11, 245 P.3d 818, 822 (Wyo. 2010)(improper to shift burden of proof to the defendant); *Ellison v. State*, 2000 WY 76, ¶ 16, 3 P.3d 845, 848 (Wyo. 2000)(mandatory presumptions of guilt violate due process); *State v. Brayman*, 751 P.2d 294, 299 (Wash. 1988)(improper to shift burden of proof concerning the validity of BAC result to the defendant in DUI case); *State v. Preece*, 971 P.2d 1, 6 (Utah 1998)(BAC result is not conclusive proof of guilt and the defendant is allowed to challenge the accuracy of BAC result on any relevant ground).

<sup>8</sup> DWUI - “PER SE” LAW, 1989 Wyo. Sess. Laws, Chap. 118, § 1.

<sup>9</sup> W.S. § 31-5-233(c)(i)(Lexis/Nexis 2017)(“If there was at that time an alcohol concentration of five one-hundredths of one percent (0.05%) or less, it shall be presumed that the person was not under the influence of alcohol;”).

<sup>10</sup> 1973 Wyo. Sess. Laws, Chap. 22, § 1.

<sup>11</sup> 2002 Wyo. Special Sess. Laws, Chap. 61, § 1; *see also*, W.S. § 31-5-233(c)(Lexis/Nexis 2017).

to make convictions for driving-while-intoxicated easier to obtain and to get the drunken driver off the road.”<sup>12</sup>

There is currently no scientific data to support the creation of “per se” drug concentration levels to prove drug impairment.<sup>13</sup> As of 2017, Wyoming had not created any “per se” drug impairment levels in DUI cases.

**C. Wyoming’s Implied Consent Laws [W.S. §§ 31-6-101 et seq.; 31-6-108 et seq.; 31-7-305].**

The State of Wyoming adopted its first implied consent law in 1971,<sup>14</sup> which legislatively fiats the fiction that “Any person who drives or is in actual physical control of a motor vehicle upon a public street or highway in [Wyoming] is deemed to have given consent . . . [t]o a chemical test or tests of his blood, breath or urine for the purpose of determining the alcohol concentration or controlled substance content of his blood.”<sup>15</sup> Wyoming has always had the statutory right to refuse a warrantless demand for chemical testing under Wyoming’s implied consent law, which currently is codified as Wyoming Statute § 31-6-102(d). However, since 2011, law enforcement officers are able to obtain a telephonic warrant for chemical testing pursuant to Wyoming Statute § 31-6-102(d). A

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<sup>12</sup> A.C., Donelson et al., DRUG RESEARCH METHODOLOGY: VOLUME ONE, THE ALCOHOL-HIGHWAY SAFETY EXPERIENCE AND ITS APPLICABILITY TO OTHER DRUGS, at p. 26, (DOT-HS-7-01530) (March 1980).

<sup>13</sup> Lacey J., Brainard K., Snitow S., DRUG PER SE LAWS: A REVIEW OF THEIR USE IN STATES (DOT HS 811 317)(Washington, DC: July 2010); Compton, R.P. et al., *Drug and Alcohol Crash Risk*, TRAFFIC SAFETY FACTS (DOT HS 812 117)(NHTSA Feb. 2015).

<sup>14</sup> 1971 Wyo. Sess. Laws, Chap. 158, §§ 1-7.

<sup>15</sup> W.S. §§ 31-6-102(a)(iii)(C), 31-6-108(a) & 31-7-307(c)(Lexis/Nexis 2017), *cf.*, W.S. §§ 31-6-102(d); 31-6-108(d) & 31-7-305(e)(Lexis/Nexis 2017)(allowing law enforcement to apply for telephonic warrants); *see also*, *State v. Chastain*, 1979 WY 62, ¶¶ 3-4, 594 P.2d 458, 461 (Wyo. 1979), *overruled on other grounds by Olson v. State*, 1985 WY 51, ¶ 21 698 P.2d 107, 113 (Wyo. 1985); *see also*, Jack B. Weinstein; *Statute Compelling Submission to a Chemical Test for Intoxication*, 45 J. CRIM. L. & CRIMINOLOGY 541, 544 (1954-1955); R. Donigan; CHEMICAL TESTS AND THE LAW, p. 177 (“[T]he ‘implied consent law’ . . . [p]rovided in effect that as a condition of the privilege of driving a motor vehicle upon the highways of the state, every motorist was deemed to have given his consent to a chemical test of his blood, breath or urine to determine blood alcohol concentration if charged with driving while in an intoxicated condition.”); *Birchfield v. North Dakota*, 579 U.S. ---, ---, 136 S. Ct. 2160, 2167-2169, 195 L. Ed. 2d 560, 568-570 (2016)(extensively citing to R. Donigan, CHEMICAL TESTS AND THE LAW pp. 2, 21-22, 22-23, 177-179 (1966) to explain history of “per se” BAC levels and creation of implied consent laws).

refusal to provide warrantless breath samples can also result in the possible disqualification of commercial driving privileges for one (1) year pursuant to Wyoming Statutes § 31-7-305(a)(v).<sup>16</sup>

## II. THE ELEMENTS FOR WYOMING’S NON-COMMERCIAL DUI CHARGE IS SET FORTH WITHIN W.S. § 31-5-233(b)(Lexis/Nexis 2017).

All DUI charges in the State of Wyoming that are brought pursuant to Wyoming Statute § 31-5-233(b)(Lexis/Nexis 2017) apply to “anyone” that is “driving or in actual physical control” of “**any vehicle**” that is being operated anywhere “within this state” and includes private property. Although Wyoming Statute § 31-5-233(b)(Lexis/Nexis 2017) applies anywhere “**within this state**”, if the accused was not on “[d]riving or in actual physical control of a motor vehicle upon a public street or highway in this state...,”<sup>17</sup> then the chemical test results may not be admissible and the person cannot be charged with a “per se” DUI offense.<sup>18</sup>

Wyoming law prevents the prosecution from dismissing or reducing a DUI charge unless the prosecuting attorney states there is insufficient evidence to sustain the DUI charge.<sup>19</sup> Wyoming permits a deferral of a DUI charge, if the accused meets the statutory requirements for receiving a deferred prosecution under W.S. § 7-13-301 (Lexis/Nexis 2017). However, since July 1, 2011, commercial driver’s license (CDL) holders can no longer receive possible first offender treatment for any DUI charge in any vehicle under W.S. § 7-13-301(f)(Lexis/Nexis 2017)(enacted as 2011 Wyo. Sess. Laws Chap. 31, § 1).

### 1. PER SE DUI OFFENSE—

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<sup>16</sup> W.S. § 31-7-305(a)(v)(Lexis/Nexis 2017)(“Refusal to submit to a test to determine the driver’s alcohol concentration while driving or in actual physical control of a motor vehicle;”).

<sup>17</sup> W.S. § 31-6-102(a)(i)(Lexis/Nexis 2017).

<sup>18</sup> W.S. §§ 31-5-233(b), 31-5-233(k) & 31-6-105(a)(Lexis/Nexis 2017); *State v. Chastain*, 594 P.2d 458, 461 (Wyo. 1979), *overruled on other grounds by Olson v. State*, [1985 WY 51, ¶ 21] 698 P.2d 107, 113 (Wyo. 1985); *Van Order v. State*, 600 P.2d 1056, 1058 (Wyo. 1979); *State v. Marquez*, [1982 WY 5] 638 P.2d 1292, 1294 (Wyo. 1982); *Mogard v. City of Laramie*, 2001 WY 88, ¶ 3, 32 P.3d 313, 315 (Wyo. 2001); *Allen v. State*, 2002 WY 48, ¶ 22, 43 P.3d 551, 559 (Wyo. 2002).

<sup>19</sup> W.S. § 31-5-233(j)(Lexis/Nexis 2017); *see also, Lacombe v. City of Cheyenne*, 733 P.2d 601, 603 (Wyo. 1987)(leaving open the question whether this provision violates separation of powers by taking away the prosecutor’s discretion for going forward with a case).

In order to prove a DUI charge, the prosecution must prove “that a person had taken into his stomach a sufficient quantity of intoxicating liquor so as to deprive him of the normal control of his bodily or mental faculties.”<sup>20</sup> The statutory elements for a “per se” DUI charge pursuant to Wyoming Statutes § 31-5-233(b)(i-ii)(Lexis/Nexis 2017) are:

“(b) No person shall drive or have actual physical control of any vehicle within this state [Wyoming] if the person:

- (i) Has an alcohol concentration of eight one-hundredths of one percent (0.08%), or
- (ii) Has an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, as measured within two (2) hours after the time of driving or being in actual physical control of the vehicle following a lawful arrest resulting from a valid traffic stop;”

## 2. “UNDER THE INFLUENCE” TO A DEGREE “INCAPABLE OF SAFELY DRIVING”—“ALCOHOL” DUI OFFENSE

The statutory elements for an “under the influence” DUI charge pursuant to Wyoming Statutes § 31-5-233(b)(iii)(A-C)(Lexis/Nexis 2017) are:

“(b) No person shall drive or have actual physical control of any vehicle within this state [Wyoming] if the person:

- (iii) To a degree which renders him incapable of safely driving:
  - (A) Is under the influence of alcohol;
  - (B) Is under the influence of a controlled substance; or
  - (C) Is under the influence of a combination of any of the elements named in subparagraphs (A) and (B) of this paragraph.

## 3. “CHILD ENDANGERMENT” DUI CHARGE

Wyoming Statute § 31-5-233(k)(Lexis/Nexis 2017) is Wyoming’s “Child Endangerment” DUI statute, which creates harsher penalties for a DUI. In order to prove a “Child Endangerment” DUI charge, the prosecution must prove either the elements of a “per se” and/or “under the influence” DUI charge, as well as the following additional elements: (1) the accused/driver was eighteen (18) years of age or older; and, (2) there was an occupant in the vehicle at the time of the DUI offense that was at least (16) years of age or younger.

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<sup>20</sup> *Michaels v. State ex rel. Dept. of Transp.*, 2012 WY 33, ¶ 18, 271 P.3d 1003, 1009-1010 (Wyo. 2012)(Licensee allowed to assert any valid theory of defense [i.e. diabetes, GERD, chewing tobacco, etc...] to rebut and explain an alleged high BAC level).

#### 4. WYOMING'S (FELONY) "SERIOUS BODILY INJURY" DUI CHARGE

Wyoming Statute § 31-5-233(h)(Lexis/Nexis 2017) is Wyoming's Felony "Serious Bodily Injury" DUI statute is another DUI sentence enhancement statute. Wyoming Felony "Serious Bodily Injury" DUI statute makes it a felony to cause "serious bodily injury" the during the commission of any "per se" and/or "under the influence" DUI charge.

### III. PENALTIES FOR VIOLATION OF W.S. § 31-5-233(b)(Lexis/Nexis 2017)

Any person convicted of any DUI charge must complete a "Substance Abuse Evaluation" (SAE) prior to sentencing and the SAE must be provided to the trial court under Wyoming law.<sup>21</sup>

#### **First DUI Offense in ten (10) years (MISDEMEANOR):**

1. Jail term of up to 6 months; fine of up to \$750, or both;<sup>22</sup>
2. 90-day license suspension in which person only eligible for driver's license if install an ignition interlock;<sup>23</sup>
3. If the underlying DUI conviction is based upon a BAC result of fifteen one-hundredths of one percent (0.15%) or more, then person can only drive a vehicle equipped with an ignition interlock device for a period of six (6) months from the date of conviction;<sup>24</sup>
4. Required to maintain proof of financial responsibility for three (3) years (SR-22);<sup>25</sup>
5. A probationary driver's license is available for ninety (90) day driver's license suspension so long as person makes a request for a record review to the Wyoming Department of Transportation (WYDOT);<sup>26</sup>
6. The trial court is allowed to exceed the maximum possible jail sentence allowed by law and place a person on probation not to exceed three (3) years.<sup>27</sup>

#### **Second DUI Offense in ten (10) years (MISDEMEANOR):**

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<sup>21</sup> W.S. § 31-5-233(e)(Lexis/Nexis 2017).

<sup>22</sup> W.S. § 31-5-233(e)(Lexis/Nexis 2017).

<sup>23</sup> W.S. §§ 31-5-233(f)(i) & 31-6-102(e)(Lexis/Nexis 2017).

<sup>24</sup> W.S. §§ 31-5-233(f)(ii) & 31-7-401 through 31-7-404 (Lexis/Nexis 2017).

<sup>25</sup> W.S. §§ 31-5-233(f)(i); 31-7-127(c) & 31-7-128(e)(Lexis/Nexis 2017).

<sup>26</sup> W.S. § 31-7-105(f)(Lexis/Nexis 2017).

<sup>27</sup> W.S. § 31-5-233(e)(Lexis/Nexis 2017).

1. Minimum mandatory jail term of seven (7) days up to six (6) months **AND** minimum fine of \$200 up to \$750 fine;<sup>28</sup>
2. 1 year license suspension with no right to a probationary driver's license;<sup>29</sup>
3. After serving forty-five (45) days of the mandatory suspension, the licensee is eligible to apply for a restricted driver's license, so long as driving vehicle equipped with an ignition interlock device for the entire one (1) year suspension from the date of conviction;<sup>30</sup>
4. Required to maintain proof of financial responsibility for three (3) years (SR-22);<sup>31</sup>
5. The trial court is allowed to exceed the maximum possible jail sentence allowed by law and place a person on probation not to exceed three (3) years.<sup>32</sup>

**Third DUI Offense in ten (10) years (MISDEMEANOR):**

1. Minimum mandatory jail term of thirty (30) days up to six (6) months **AND** minimum fine of \$750 up to \$3000 fine, of which fifteen (15) days can be suspended if the accused enters inpatient treatment;<sup>33</sup>
2. Mandatory revocation of driving privileges with no right to a probationary driver's license;<sup>34</sup>
3. After serving forty-five (45) days of the underlying suspension, the licensee is eligible to apply for a restricted driver's license, so long as driving vehicle equipped with an ignition interlock device for a two (2) year time period from date of conviction;<sup>35</sup>
4. Required to maintain proof of financial responsibility for three (3) years (SR-22);<sup>36</sup>
5. The trial court is allowed to exceed the maximum possible jail sentence allowed by law and place a person on probation not to exceed three (3) years.<sup>37</sup>

**Fourth DUI Offense (and more) within ten (10) years (FELONY):**

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<sup>28</sup> W.S. § 31-5-233(e)(Lexis/Nexis 2017).

<sup>29</sup> W.S. §§ 31-5-233(f)(i & iii); 31-7-105(f) & 31-7-128(b)(ii)(Lexis/Nexis 2017).

<sup>30</sup> W.S. §§ 31-5-233(f)(i & iii) & 31-7-401 through 31-7-404 (Lexis/Nexis 2017).

<sup>31</sup> W.S. §§ 31-5-233(f)(i); 31-7-127(c) & 31-7-128(e)(Lexis/Nexis 2017).

<sup>32</sup> W.S. § 31-5-233(e)(Lexis/Nexis 2017).

<sup>33</sup> W.S. § 31-5-233(e)(Lexis/Nexis 2017).

<sup>34</sup> W.S. §§ 31-5-233(f)(i & iv); 31-7-105(f) & 31-7-127(a)(ii)(Lexis/Nexis 2017).

<sup>35</sup> W.S. §§ 31-5-233(f)(i & iv) & 31-7-401 through 31-7-404 (Lexis/Nexis 2017).

<sup>36</sup> W.S. §§ 31-5-233(f)(i); 31-7-127(c) & 31-7-128(e)(Lexis/Nexis 2017).

<sup>37</sup> W.S. § 31-5-233(e)(Lexis/Nexis 2017).

1. Fourth or more DUI offenses within ten (10) years is a **Felony DUI** with a possible jail term of seven (7) years and a fine of not more than \$10,000.00, or both;<sup>38</sup>
2. Required to maintain proof of financial responsibility for three (3) years (SR-22);<sup>39</sup>
3. Revocation of driving privileges and lifetime ignition interlock requirement; but allowed to petition court to remove ignition interlock requirement after five (5) years.<sup>40</sup>

**First Offense “Child Endangerment” (MISDEMEANOR) Enhanced Penalty:**

1. All the penalties and sanctions associated with a first offense non-commercial DUI charge; and,
2. Possibility of not more than one (1) year in jail.<sup>41</sup>

**Second Offense (MISDEMEANOR) Enhanced Penalty:**

1. All the penalties and sanctions associated with a first offense non-commercial DUI charge; and,
2. Possibility of not more than (5) years in jail, if previously convicted of child endangerment.<sup>42</sup>

**(FELONY) “SERIOUS BODILY INJURY” DUI Enhanced Penalty:**

1. A fine of not less than two thousand dollars (\$2,000.00) nor more than five thousand dollars (\$5,000.00), imprisonment for not more than ten (10) years, or both.<sup>43</sup>
2. If previously convicted and sentenced under the “serious bodily injury” DUI law or any other law substantially conforming to the “Serious Bodily Injury” DUI law by imprisonment for not more than twenty years (20) years.<sup>44</sup>
3. Any person convicted under Wyoming’s “Serious Bodily Injury” DUI law “[s]hall have his driver’s license revoked as provided in W.S. § 31-7-127.”<sup>45</sup>

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<sup>38</sup> W.S. § 31-5-233(e)(Lexis/Nexis 2017).

<sup>39</sup> W.S. §§ 31-5-233(f)(i); 31-7-127(c) & 31-7-128(e)(Lexis/Nexis 2017).

<sup>40</sup> W.S. §§ 31-5-233(f)(v) & 31-7-127(a)(ii)(Lexis/Nexis 2017).

<sup>41</sup> W.S. § 31-5-233(m)(i)(Lexis/Nexis 2017).

<sup>42</sup> W.S. § 31-5-233(m)(ii)(Lexis/Nexis 2017).

<sup>43</sup> W.S. § 31-5-233(h)(i)(Lexis/Nexis 2017).

<sup>44</sup> W.S. § 31-5-233(h)(ii)(Lexis/Nexis 2017).

<sup>45</sup> W.S. § 31-5-233(h)(iii)(Lexis/Nexis 2017).



## IV. WYOMING'S "YOUTHFUL-OFFENDER" DUI CHARGE

### A. COVERED VEHICLES OR DEVICES:

Wyoming's "Youthful Offender" DUI statute applies to "a vehicle in this state."<sup>46</sup>

### B. COVERED LOCATIONS:

Wyoming's "Youthful Offender" DUI statute applies anywhere within the State of Wyoming.<sup>47</sup>

### C. NECESSARY PROOF FOR "YOUTHFUL-OFFENDER" DUI CHARGE:

The "Degree of Impairment" is not relevant to a "Youthful-Offender" charge, because the charge relies upon proof of the age of the offender and the alleged BAC result.<sup>48</sup> The statutory elements for Wyoming's Youthful-Offender DUI are as follows:

"(b) A person younger than twenty-one (21) years of age shall not operate or be in actual physical control of a vehicle in this state with an alcohol concentration of two one-hundredths of one percent (0.02%) or more nor operate or be in actual physical control of a vehicle in this state with an alcohol concentration of two one-hundredths of one percent (0.02%) or more as measured within two (2) hours after the time of driving or being in actual physical control following a lawful arrest resulting from a valid traffic stop."<sup>49</sup>

### D. PENALTIES FOR VIOLATION OF WYOMING'S "YOUTHFUL-OFFENDER" DUI LAW

A trial court "**may**" **order** the completion of a substance abuse evaluation by a "Youthful-Offender" **for any violation** of Wyoming's "Youthful-Offender" DUI statute as a condition of probation.<sup>50</sup>

#### First Offense (MISDEMEANOR):

1. Possible \$750 fine;<sup>51</sup>

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<sup>46</sup> W.S. §§ 31-5-234(b)(Lexis/Nexis 2017).

<sup>47</sup> W.S. § 31-5-234(b)(Lexis/Nexis 2017).

<sup>48</sup> W.S. § 31-5-234(b)(Lexis/Nexis 2017).

<sup>49</sup> W.S. § 31-5-234(b)(Lexis/Nexis 2017).

<sup>50</sup> W.S. § 31-5-234(e)(Lexis/Nexis 2017).

<sup>51</sup> W.S. § 31-5-234(e)(Lexis/Nexis 2017).

2. 90-day license suspension in which person only eligible for driver's license if install an ignition interlock;<sup>52</sup>
3. If conviction is based upon BAC result of fifteen one-hundredths of one percent (0.15%) or more, will result in an ignition interlock requirement for a six (6) month period from the date of conviction;<sup>53</sup>
4. A probationary driver's license is available for ninety (90) day driver's license suspension so long as person makes a request for a record review to the Wyoming Department of Transportation (WYDOT);<sup>54</sup>
5. The trial court is allowed to exceed the maximum possible jail sentence allowed by law and place a person on probation not to exceed three (3) years.<sup>55</sup>

Second Offense (MISDEMEANOR):

1. Possibility of one (1) month in jail, fine of not more than \$750, or both;<sup>56</sup>
2. Six (6) month license suspension with no right to a probationary driver's license;<sup>57</sup>
3. After serving forty-five (45) days of the six (6) month suspension, licensee is eligible to apply for a restricted driver's license, so long as driving vehicle equipped with an ignition interlock device for the entire one (1) year time frame from the date of the conviction;<sup>58</sup>
4. There is no ability to get a probationary driver's license for subsequent DUI offenses;<sup>59</sup>
5. The trial court is allowed to exceed the maximum possible jail sentence allowed by law and place a person on probation not to exceed three (3) years.<sup>60</sup>

Third Offense or more (MISDEMEANOR):

1. Possibility of six (6) months in jail, fine of \$750, or both;<sup>61</sup>
2. Six (6) month license suspension with no right to a probationary driver's license;<sup>62</sup>

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<sup>52</sup> W.S. §§ 31-5-234(f)(i) & 31-7-128(h)(i)(A)(Lexis/Nexis 2017).

<sup>53</sup> W.S. §§ 31-5-234(f)(ii); & 31-7-401 through 31-7-404 (Lexis/Nexis 2017).

<sup>54</sup> W.S. § 31-7-105(f)(Lexis/Nexis 2017).

<sup>55</sup> W.S. § 31-5-234(e)(Lexis/Nexis 2017).

<sup>56</sup> W.S. § 31-5-234(e)(Lexis/Nexis 2017).

<sup>57</sup> W.S. §§ 31-5-234(f)(i & iii); 31-7-105(f); & 31-7-128(h)(i)(B) (Lexis/Nexis 2017).

<sup>58</sup> W.S. §§ 31-5-234(f)(i & iii) & 31-7-401 through 31-7-404 (Lexis/Nexis 2017).

<sup>59</sup> W.S. § 31-7-105(f)(Lexis/Nexis 2017).

<sup>60</sup> W.S. § 31-5-234(e)(Lexis/Nexis 2017).

<sup>61</sup> W.S. § 31-5-234(e)(Lexis/Nexis 2017).

<sup>62</sup> W.S. §§ 31-5-234(f)(i & iv); 31-7-105(f) & 31-7-128(h)(B)(Lexis/Nexis 2017).

3. After serving forty-five (45) days of the six (6) month suspension, a licensee is eligible to apply for a restricted driver's license, so long as driving vehicle equipped with an ignition interlock device for the entire two (2) year time frame from the date of the conviction;<sup>63</sup>
4. There is no ability to get a probationary driver's license for subsequent DUI offenses;<sup>64</sup>
5. The trial court is allowed to exceed the maximum possible jail sentence allowed by law and place a person on probation not to exceed three (3) years.<sup>65</sup>

## V. WYOMING'S "COMMERCIAL" DUI CHARGE

### A. COVERED VEHICLES OR DEVICES:

Wyoming's commercial DUI law only applies to a "**motor vehicle**" that requires the driver to hold a valid commercial driver's license.<sup>66</sup>

### B. MANNERS OF PROOF OF "COMMERCIAL" DUI CHARGE:

Wyoming law allows WYDOT to disqualify CDL privileges for a period of one (1) year, if the accused has a BAC result of four one-hundredths of one percent (.04 percent) or more, while that person is operating a motor vehicle that requires a commercial driver's license.<sup>67</sup>

Wyoming law also allows WYDOT to disqualify CDL privileges for a period of one (1) year, if the accused was driving or in actual physical control of any motor vehicle while under the influence of alcohol or a controlled substance to a degree which renders him incapable of safely driving the motor vehicle anywhere in the State of Wyoming.<sup>68</sup>

Finally, Wyoming law allows WYDOT to take a person out of service for twenty-four (24) hours, if the accused was driving, operating or in actual physical control of a commercial at a time the person has ANY alcohol in their system.<sup>69</sup>

### C. PENALTIES FOR VIOLATING WYOMING'S "COMMERCIAL" DUI LAWS

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<sup>63</sup> W.S. §§ 31-5-233(f)(i & iii) & 31-7-401 through 31-7-404 (Lexis/Nexis 2017).

<sup>64</sup> W.S. § 31-7-105(f)(Lexis/Nexis 2017).

<sup>65</sup> W.S. § 31-5-234(e)(Lexis/Nexis 2017).

<sup>66</sup> W.S. § 31-7-305(b)(Lexis/Nexis 2017).

<sup>67</sup> W.S. § 31-7-305(a)(ii)(Lexis/Nexis 2017).

<sup>68</sup> W.S. § 31-7-305(a)(i)(Lexis/Nexis 2017).

<sup>69</sup> W.S. § 31-7-306 (Lexis/Nexis 2017)(Wyoming has a "no tolerance" policy that prohibits any person from consuming any alcohol and getting into a commercial vehicle).

Wyoming **does not** provide a criminal penalty for driving a commercial vehicle while under the influence of alcohol or a controlled substance. However, Wyoming law allows WYDOT to enforce the various drivers' license suspension sanctions with a general catchall criminal penalty, which can apply to a violation of Wyoming drivers' licensing laws.<sup>70</sup>

“Except as otherwise provided by this act any person who violates any provision of this act is guilty of a misdemeanor and may be punished by a fine of not more than seven hundred fifty dollars (\$750.00), by imprisonment for not more than ninety (90) days, or both. On conviction for a second or subsequent violation, the person may be fined not more than seven hundred fifty dollars (\$750.00), imprisoned for not to exceed six (6) months, or both.”<sup>71</sup>

Because the catchall criminal provision contains the possibility of a jail sentence, Article 1, § 9 of the Wyoming Constitution creates an automatic right to a jury trial with charges that are pursued based upon the criminal catchall provision.<sup>72</sup>

## **VI. WYOMING'S IMPLIED CONSENT LICENSE SUSPENSION LAWS:**

- A. **CHEMICAL TESTS PERMITTED:** As a result of the Fourth Amendment ruling in *Birchfield v. North Dakota*, 579 U.S. ---, ---, 136 S. Ct. 2160, 2185, 195 L. Ed. 2d 560, 588 (2016) (“Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.”), Wyoming law enforcement can no longer demand warrantless blood and urine testing after a lawful DUI arrest based upon the “is deemed to have given consent” provision of Wyoming Statute § 31-6-102(a)(i)(C)(Lexis/Nexis 2017).
- B. **TYPE OF ADVISEMENT REQUIRED:** Law enforcement are prohibited from tricking or misleading an accused to provide a biological sample for chemical testing under Wyoming's implied consent law,<sup>73</sup> however, the Wyoming Supreme Court has not

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<sup>70</sup> W.S. §§ 31-7-305 to 31-7-307 (Lexis/Nexis 2017).

<sup>71</sup> W.S. § 31-7-136(Lexis/Nexis 2017).

<sup>72</sup> *City of Casper v. Fletcher*, 916 P.2d 473, 474-475 (Wyo. 1996)(right to jury trial guaranteed by Article 1, § 9, of the Wyoming State Constitution applies if possibility of a jail sentence).

<sup>73</sup> *Olson v. State*, [1985 WY 51, ¶ 21] 698 P.2d 107, 113 (Wyo. 1985); *see also*, *Escarcega v. State ex rel. Wyo. Dept. of Transp.*, 2007 WY 264, ¶¶ 17-21, 153 P.3d 264, 269-70 (Wyo. 2007)(citing *Nesius v. State Dept. of Revenue and Taxation, Motor Vehicle Div.*, 791 P.2d 939, 942-44 (Wyo. 1990).

addressed whether law enforcement must advise the accused that they have a right to demand a warrant prior to providing biological samples for chemical testing in Wyoming. Wyoming's implied consent requires proof the accused was advised of the ninety (90) day administrative driver's license suspension associated with having a BAC level of 0.08% or more pursuant to W.S. § 31-6-102(a)(ii)(B); the possibility of having to drive with an ignition interlock in the future pursuant to W.S. § 31-6-102(a)(ii)(B); the right to have an independent test at own expense pursuant to W.S. § 31-6-102(a)(ii)(C); and, an explanation that Wyoming's implied consent law is a civil in nature and not criminal, which means the accused does not have the right to speak with an **attorney** prior to providing a biological sample for chemical testing after implied consent advisements.<sup>74</sup>

C. PENALTIES FOR REFUSAL: As of July 1, 2011, the Wyoming Legislature repealed the driver's license suspension sanctions associated with refusing to provide a biological sample for chemical testing under former W.S. § 31-6-107 and created a process to obtain a warrant pursuant to W.S. § 31-6-102(d).<sup>75</sup> Presently, the only sanction associated with a refusal to provide a biological sample for chemical testing is the possible disqualification of commercial driving privileges for one (1) year pursuant to W.S. § 31-7-305(a)(v).

D. ADMISSIBILITY OF REFUSAL: Since the Wyoming Legislature amended Wyoming's implied consent refusal provisions in July 1, 2011, an alleged refusal to provide a biological sample for chemical testing is no longer subject to automatic admission by statute in all proceedings,<sup>76</sup> but may be used to uphold a "commercial" driver's license disqualification.<sup>77</sup>

E. ADMINISTRATIVE PER SE LAW: If a biological sample is analyzed and creates a BAC result/measurement of 0.08% or more, then the person can have their non-commercial driving privileges suspended for ninety (90) days for a first offense within ten (10) years<sup>78</sup> and have their commercial driving privileges suspended for

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<sup>74</sup> See, *Walters v. State ex rel. Wyoming Dept. of Transp.*, 2013 WY 59, ¶¶ 22-23, 300 P.3d 879, 885 (Wyo. 2013)(citing *Mogard v. City of Laramie*, 2001 WY 88, ¶¶ 26-31, 32 P.3d 313, 324-25 (Wyo. 2001) to hold court lacked jurisdiction to rule on the Licensee constitutional claim that the implied consent advisement process was a "critical stage" of a criminal prosecution that required the right to an attorney under the Wyoming Constitution).

<sup>75</sup> Laws 2011, Ch. 178, 2.

<sup>76</sup> W.S. § 31-6-105(f) (repealed by Laws 2011, Ch. 178, § 2).

<sup>77</sup> W.S. §§ 31-7-305(a)(v) & 31-7-307(m)(Lexis/Nexis 2017); W.S. § 31-6-105(f) (repealed by Laws 2011, Ch. 178, § 2).

<sup>78</sup> W.S. § 31-7-128(b)(i)(Lexis/Nexis 2017).

one (1) year.<sup>79</sup> As set forth above, the penalties associated with subsequent DUI offenses within ten (10) years goes up with minimum mandatory jail sentences and harsher driver's license suspensions. If a licensee is found guilty or pleads guilty to the underlying DUI charge that formed the basis of the implied consent driver's license suspension, then the implied consent suspension will run concurrent with the non-commercial driver's license suspension associated with the underlying DUI conviction.<sup>80</sup>

F. CONTEST CASE HEARING: A licensee has twenty (20) days from the date of their underlying DUI arrest to request a contested case hearing to create an automatic stay on the proposed ninety (90) day implied consent suspension, which must include the current (\$25.00) administrative filing fee.<sup>81</sup>

G. PROBATIONARY DRIVER'S LICENSE: A probationary driver's license (PDL) is available for a person accused of a first offense within ten (10) years, who has not previously received a PDL within the last ten (10) years, so long as the person completes a substance abuse evaluation and pays the administrative fee of (\$15.00) that is currently associated with a "record review."<sup>82</sup>

H. IGNITION INTERLOCK: For a licensee who is not otherwise eligible for a probationary driver's license, the licensee may apply for a restricted driver's license, so long as the licensee has served forty-five (45) days of the suspension, pays the current (\$125.00) administrative fee, and only drives vehicles that are equipped with an ignition interlock device approved by WYDOT. The Licensee must have the interlock in their vehicle for either one (1) year or the length of their probation, depending on whichever is of the greatest length of time.<sup>83</sup>

## VII. WYOMING "YOUTHFUL-OFFENDER" IMPLIED CONSENT LAW:

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<sup>79</sup> W.S. § 31-7-305(a)(viii)(Lexis/Nexis 2017).

<sup>80</sup> W.S. § 31-6-102(e)(Lexis/Nexis 2017).

<sup>81</sup> W.S. §§ 31-6-102(f), 31-7-105(b)(i)(Lexis/Nexis 2017)(the form for requesting an implied consent contested case hearing is available from the WYDOT webpage at:

[http://www.dot.state.wy.us/files/live/sites/wydot/files/shared/Driver\\_Services/Forms/HEARING\\_RECORD%20REVIEW%20REQUEST%20FORM%20122613%20-%20Fillable.pdf](http://www.dot.state.wy.us/files/live/sites/wydot/files/shared/Driver_Services/Forms/HEARING_RECORD%20REVIEW%20REQUEST%20FORM%20122613%20-%20Fillable.pdf).

<sup>82</sup> W.S. § 31-7-105(f)(Lexis/Nexis 2017)(the form for requesting a record review of probationary license is available from the WYDOT webpage at:

[http://www.dot.state.wy.us/files/live/sites/wydot/files/shared/Driver\\_Services/Forms/HEARING\\_RECORD%20REVIEW%20REQUEST%20FORM%20122613%20-%20Fillable.pdf](http://www.dot.state.wy.us/files/live/sites/wydot/files/shared/Driver_Services/Forms/HEARING_RECORD%20REVIEW%20REQUEST%20FORM%20122613%20-%20Fillable.pdf).

<sup>83</sup> W.S. §§ 31-7-401 through 31-7-404 (Lexis/Nexis 2017).

- A. CHEMICAL TESTS PERMITTED: Blood, breath or urine as designated by law enforcement agency, except where officer has probable cause to believe person is under the influence of drugs in which case the officer can designate either blood or urine as the only test available.<sup>84</sup>
- B. TYPE OF ADVISEMENT REQUIRED: An officer must at least advise a person of the right to refuse to provide a biological sample and require the officer to obtain a warrant; the ninety (90) day administrative driver's license suspension associated with a first offense and the six (6) month suspension associated with a subsequent offense; the possibility of having to drive with an ignition interlock in the future based upon the BAC result; the right to have an independent test at own expense; and, the fact Wyoming's implied consent law does not allow the accused to speak with an attorney prior to making the choice of providing biological sample for chemical testing.<sup>85</sup>
- C. PENALTIES FOR REFUSAL: Since July 1, 2011, an alleged refusal to provide a biological sample for chemical testing is no longer subject to admission by statute in a non-commercial DUI case, however, there still exists a provision to admit an alleged refusal to provide a biological sample for chemical testing under Wyoming "commercial" driving while impaired laws.<sup>86</sup>
- D. ADMISSIBILITY OF REFUSAL: Since July 1, 2011, a refusal to provide a biological sample for chemical testing during the implied consent advisement process with a youthful offender proceeding is no longer admissible as a result of statutory decree.<sup>87</sup>
- E. ADMINISTRATIVE PER SE LAW: The suspension for a first offense "Youthful-Offender" implied consent violation is ninety (90) days.<sup>88</sup> The suspension for a subsequent offense "Youthful-Offender" implied consent violation is six (6) months.<sup>89</sup>

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<sup>84</sup> W.S. § 31-6-108(a)(ii)(Lexis/Nexis 2017).

<sup>85</sup> W.S. § 31-6-108(b)(i)(Lexis/Nexis 2017); *see also*, *Escarcega v. State ex rel. Wyo. Dept. of Transp.*, 2007 WY 264, ¶¶ 17-21, 153 P.3d 264, 269-70 (Wyo. 2007)(citing *Nesius v. State Dept. of Revenue and Taxation, Motor Vehicle Div.*, 791 P.2d 939, 942-44 (Wyo. 1990); and, *Olson v. State*, [1985 WY 51, ¶ 21] 698 P.2d 107, 113 (Wyo. 1985).

<sup>86</sup> W.S. §§ 31-6-108(b)(i), 31-6-108(e), 31-6-108(k), 31-6-108(n) & 31-6-108(p)(repealed by Laws 2011, Ch. 178, § 2).

<sup>87</sup> W.S. § 31-6-108(k)(repealed by Laws 2011, Ch. 178, § 2).

<sup>88</sup> W.S. §§ 31-6-108(b)(ii) & 31-7-128(h)(i)(A)(Lexis/Nexis 2017).

<sup>89</sup> W.S. §§ 31-6-108(b)(ii) & 31-7-128(h)(i)(B)(Lexis/Nexis 2017).

F. PROBATIONARY DRIVER'S LICENSE: A probationary driver's license is only available for a first offense.<sup>90</sup>

## VIII. WYOMING CHEMICAL TESTING LAWS:

A. GENERAL PROVISIONS: To be valid, a blood, breath or urine test must be performed according to methods approved by the Wyoming Department of Health's Chemical Testing Program (WCTP) and by a person with a valid permit to conduct the analysis issued by the WCTP for that purpose.<sup>91</sup>

B. COMPLIANCE WITH STATUTORY PREDICATE:

1. The state must prove compliance with the WCTP's scientific methods for analyzing biological samples to admit BAC results in any DUI or implied consent proceedings, because Wyoming's implied consent law is the exclusive mechanism for introduction of chemical test results in all DUI cases in Wyoming (non-commercial, commercial, and youthful-offender).<sup>92</sup>
2. Because Wyoming's implied consent law only applies to "driving or actual physical control of a motor vehicle upon a **public street or highway in this state**,"<sup>93</sup> it is possible to get a DUI while being parked, but the chemical test result should not be admissible.

C. ADMINISTRATIVE RULES & REGULATIONS: The WCTP's scientific methods for chemical analysis can be accessed through the Wyoming Secretary of State's Office.

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<sup>90</sup> W.S. §§ 31-6-108(f) & 31-7-105(f)(Lexis/Nexis 2017).

<sup>91</sup> W.S. §§ 31-5-233(k), 31-5-234(h), 31-7-307(n) & 31-6-105(a)(Lexis/Nexis 2017); *see also*, WYOMING DEPARTMENT OF HEALTH, RULES AND REGULATIONS FOR CHEMICAL ANALYSIS FOR ALCOHOL TESTING (Dec. 2013)(hereinafter WCTP's 2013 RULES).

<sup>92</sup> W.S. §§ 31-5-233(k) & 31-6-105(a)(Lexis/Nexis 2017). Since Wyoming's implied consent law was created in 1971, [Session Laws 1971, Chap. 158, §§ 1-7], the Wyoming Supreme Court has recognized that Wyoming's implied consent law is the exclusive mechanism for introduction of chemical test results in DUI cases. *See, Van Order v. State*, 600 P.2d 1056, 1058 (Wyo. 1979)(citing *State v. Chastain*, 594 P.2d 458, 461 (Wyo. 1979), *overruled on other grounds by Olson v. State*, [1985 WY 51, ¶ 21] 698 P.2d 107, 113 (Wyo. 1985); *Mogard v. City of Laramie*, 2001 WY 88, ¶ 3, 32 P.3d 313, 315 (Wyo. 2001).

<sup>93</sup> W.S. §§ 31-6-102(a)(i), 31-6-102(a)(i)(C), 31-6-102(e)(i)(A), 31-6-103(b)(Lexis/Nexis 2017). *See, McClean v. State*, 2003 WY 17, ¶ 3 62 P.2d 595, 598-99 (Wyo. 2003)(private roadway can be a "public street or highway," if the roadway is open to the public and meant for "vehicular travel.").



The most recent rules went into effect on December 13, 2013 and abrogated the January 2004 rules and regulations. The current version of the WCTP's rules and regulations for conducting chemical analysis can be found at the following website: <http://soswy.state.wy.us/Rules/default.aspx>

D. DISCLOSURE OF TEST INFORMATION: Upon request, a person provides a biological sample for chemical testing under Wyoming's implied consent law is supposed to be entitled to "[f]ull information concerning the test or tests shall be made available to the person or his attorney."<sup>94</sup>

E. INDEPENDENT RIGHT TO OWN TEST: If a person takes the test designated by the arresting officer, then they have the right to be taken to the nearest hospital or clinic to obtain their own independent test at their own expense. The failure or inability to obtain an additional test does not preclude the admissibility of the police test. The results of any tests obtained at the person's expense must be made available to the arresting officer.<sup>95</sup>

F. MEDICAL PERSONNEL REQUIRED FOR BLOOD DRAWS: Only a physician, registered nurse, qualified clinical or laboratory technician or other person who routinely does venipuncture at the direction of a physician may withdraw blood for purposes of chemical testing.<sup>96</sup>

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<sup>94</sup> W.S. § 31-6-105(e)(Lexis/Nexis 2017); *Jones v. State ex rel. Wyoming Department of Transportation*, 1999 WY 160, ¶¶ 9-14, 991 P.2d 1251, 1255 (Wyo. 1999)(finding discovery in criminal case is different than discovery allowed in implied consent hearing).

<sup>95</sup> W.S. §§ 31-6-102(b) & 31-6-105(d)(Lexis/Nexis 2017).

<sup>96</sup> W.S. § 31-6-105(b)(Lexis/Nexis 2017).