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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** SB 65                      **Hearing Date:** April 25, 2017  
**Author:** Hill  
**Version:** April 17, 2017  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** MK

**Subject:** *Vehicles: Alcohol and Marijuana: Penalties*

## HISTORY

**Source:** California District Attorneys Association

**Prior Legislation:** Proposition 64, November 19, 2016  
AB 266 (Bonta) Chapter 689, Stats. 2014

**Support:** Association for Los Angeles Deputy Sheriffs; California Association of Code Enforcement Officers; California Association of Driving Under the Influence Treatment Programs; California College and University Police Chiefs Association; California Medical Association; California Narcotic Officers Association; California Police Chiefs Association; Foundation for Advancing Alcohol Responsibility; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Peace Officers Research Association of California; Riverside Sheriffs' Association; Town of Los Gatos

**Opposition:** ACLU (unless amended); California Attorneys for Criminal Justice; California NORML; California Public Defenders Association; Drug Policy Alliance

## PURPOSE

*The purpose of this bill is to make it illegal to drive while smoking or ingesting marijuana or for a passenger to do so and to make it illegal for a person under 21 to drive with any marijuana in his or her system.*

*Existing law* prohibits drivers and passengers of motor vehicles from consuming any alcoholic beverage or possessing any open container of alcohol while on a highway. (Vehicle Code §§ 23221 and 23222)

*Existing law* allows police officers to request preliminary alcohol screening tests (breathalyzers) of drivers under 21 suspected of having a blood alcohol concentration (BAC) equal to or greater than 0.01%, or chemical lab screening of blood, breath, or urine if a screening device is not available. (Vehicle Code § 23136)

*Existing law* prohibits the operation of a vehicle while under the influence of any alcoholic beverage or to drive with a .08% or higher blood alcohol content. (Vehicle Code § 23152)

*Existing law* allows persons 21 or over to possess not more than 28.5 grams of marijuana and allows those individuals to smoke or ingest marijuana. (Health and Safety Code § 11362.1)

*Existing law* prohibits drivers and passengers of motor vehicles from possessing an open container or package of marijuana or marijuana products, treating violations as infractions punishable by up to a \$250 fine. (Health and Safety Code § 11362.3)

*Existing law* punishes possession of not more than one ounce of marijuana by those under 18 as an infraction, requiring four hours of drug education and up to 10 hours of community service for first-time offenders. (Health and Safety Code § 11357)

*Existing law* punishes possession of not more than one ounce of marijuana by 18 to 21 year-olds as an infraction with a \$100 fine. (Health and Safety Code § 11357)

*This bill* provides creates a zero tolerance for marijuana for people under 21 providing that a person under 21 years of ages is prohibited from driving with a detectable amount quantity of delta-9-tetrahydrocannabinol (THC).

*This bill* provides that the zero tolerance does not apply to a person under 21 who has in his or her possession a physician's recommendation of medical cannabis.

*This bill* if a peace officer believes a person under 21 to be driving a Vehicle with marijuana in his or her system the officer shall request the person to take a chemical field test to determine the presence of THC.

*This bill* provides that if the person refuses or fails to take the chemical test or the chemical field test reveal any detectible quantity of THC in the person than the officer, acting on behalf of DMV, shall serve the person with a notice of suspension of the person's driving privilege.

*This bill* defines a "chemical field test" as a chemical test, including an oral swab saliva test, that is designed to be used in the field and indicates, without laboratory testing, the presence of THC in the body of the test subject.

*This bill* defines a "detectible quantity" as a blood plasma concentration of THC of five nanograms per milliliter or higher as indicated by a chemical test, or a positive indication on a binary chemical field test that has a detection threshold of not less than five nanograms per milliliter.

*This bill* provides that a person should not smoke or ingest marijuana or any marijuana product while driving or riding as a passenger in a vehicle.

*This bill* provides that the penalty is an infraction which is the current penalty for drinking while driving.

*This bill* also provides that in addition to other penalties the court, in its discretion, may order a person to attend and complete a state-licensed driving-under-the-influence program.

## COMMENTS

### 1. Need for This Bill

According to the author:

Under current law, California motorists can be arrested for driving under the influence of alcohol, marijuana or other drugs, if they are unable to drive with the caution and care of a sober person. A basic offense is usually charged as a misdemeanor. There's no standard for marijuana impairment like the .08 blood alcohol content threshold used for drunk driving because technology for a roadside test of marijuana use is still being developed. But a law enforcement officer or a trained drug recognition expert working with police may deem a motorist marijuana impaired.

With the passage of Prop 64., motorists may be cited for an infraction for having an open container or package of marijuana in a vehicle as a result of provisions in the initiative that attempted to make laws on marijuana use and possession while driving consistent with laws on use and possession of alcohol while driving. Unfortunately, nothing in Prop. 64 or pre-existing law expressly prohibits smoking or ingesting marijuana while driving – leaving law enforcement officers with limited options if a driver is spotted smoking or ingesting marijuana products. SB 65 would make it an infraction for anyone to smoke or consume marijuana in any form while driving a vehicle, consistent with the law on drinking while operating a vehicle.

### 2. Driving While Smoking

Existing law makes it an infraction to drink alcohol while driving or riding as a passenger in a vehicle. This bill would expand that infraction to include smoking marijuana while driving or riding in a vehicle. This is consistent with Health and Safety Code Section 11362.3 which states that nothing in the section allowing the recreational use of marijuana shall be construed to permit a person to “ smoke or ingest marijuana or marijuana products while driving , operating a motor vehicle, boat, vessel, aircraft or other vehicle used for transportation. (Health and Safety Code § 1132.3 (a)(7))

The bill adds a provision that states the court can order a person to attend a driving-under-the-influence program. The practical reality is this will likely not happen because a person charged with an infraction will likely just pay their fine. However, if they ask for a court trial it is possible that a judge could order the program at that time.

### 3. Zero Tolerance for Under 21 Years of Age

There is a currently a zero tolerance for people under 21 years of age. The presence of alcohol in a person under 21 leads to the license suspension. This bill adds a zero tolerance for marijuana in a driver under 21 years of age making it illegal for a person under 21 to have a detectable quantity of marijuana in his or her body.

## a. Detectable Quantity

This bill a “detectable quantity” as a blood plasma concentration of THC of five nanograms per milliliter or higher as indicated by a chemical test, or a positive indication on a binary chemical field test that has a detection threshold of not less than five nanograms per milliliter.

## b. Chemical field tests

The author’s office states that the chemical field tests can detect as 5 nanograms per liter of THC and thus set the zero tolerance amount in this bill at that level. The Drug Policy Alliance and other opponents argue that these field tests are imprecise. Drug Policy Alliance states in part:

First, field chemical tests, including oral swab tests, fail to demonstrate whether a driver is impaired. A recent report by the AAA foundation for Traffic Safety noted that per se THC standard, including the zero tolerance standard for persons under 21 years of age proposed in this bill, are so unscientific that they both under and over punish drivers. Meaning that they fail to detect some people who are actually impaired and punish some drivers who are not. Thus, the chemical tests proposed in this bill will waste taxpayer dollars and result in administrative penalties that unnecessarily interfere with the lives of people who are driving safety.

Second, chemical testing, including oral fluid tests, like many other forensic disciplines is highly technical and imperfect. There are a host of problems with drug testing techniques and analyses, including: the substantial risk of false positive results, false negative results, specimen contamination; and chain of custody, storage and retesting issues. These problems are made worse when chemical tests are performed in the field.

Are the roadside chemical tests ready for a zero tolerance law?

## c. Timeliness

Proposition 64 just recently passed and even before that happened there were already people studying marijuana and its impact on driving.

The University of California, San Diego houses the Center for Medicinal Cannabis Research. AB 266 (Bonta), Chapter 689, Statutes of 2014, required the Bureau of Medical Cannabis Regulation to contract with the California Marijuana Research Program, known as the Center for Medicinal Cannabis Research, to develop a study that identifies the impact that cannabis has on motor skills. The Center for Medicinal Cannabis Research is currently engaged in that clinical study. The title of the study is “A Randomized, Controlled Trial of Cannabis in Healthy

Volunteers Evaluating Simulated Driving, Field Performance Tests and Cannabinoid Levels.” As part of the study, volunteers will inhale smoked cannabis with either 0% (placebo), 6.7%, or 12.6% Δ9-THC at the beginning of the day, and then complete driving simulations, iPad-based performance assessments, and bodily fluid draws (e.g., blood, saliva,

breath) before the cannabis smoking and hourly over the subsequent 7 hours after cannabis smoking. (<http://www.cmcrc.ucsd.edu/index.php/2015-11-20-20-52-15/active-studies/62-ab266>) The purpose of the study is to determine (1) the relationship of the dose of  $\Delta$ 9-THC on driving performance and (2) the duration of driving impairment in terms of hours from initial use, (3) if saliva or expired air can serve as a useful substitute for blood sampling of  $\Delta$ 9-THC in judicial hearings and (4) if testing using an iPad can serve as a useful adjunct to the standardized field sobriety test in identifying acute impairment from cannabis. (Id.) Proposition 64 provides the University of California San Diego Center for Medicinal Cannabis Research will continue to receive \$2,000,000 annually for research on understanding the efficacy and adverse effects of marijuana.

In addition, Proposition 64 provides a couple of funding streams for CHP to address driving under the influence, including driving under the influence of marijuana. The source of the revenue streams is the money that will be generated by taxing marijuana (The Marijuana Tax Fund). One revenue stream is a fixed amount of \$3,000,000 a year for four years starting in fiscal year 2018-2019. That money is for CHP “to establish and adopt protocols to determine whether a driver is operating a vehicle while impaired, including impairment by the use of marijuana or marijuana products, and to establish and adopt protocols setting forth best practices to assist law enforcement agencies.” (Health and Saf. Code § 34019, subd. (c).) The language of Proposition 64 allows CHP to use those funds to hire personnel to establish the protocols for driving under the influence. In addition, the department may make grants to public and private research institutions for the purpose of developing technology for determining when a driver is operating a vehicle while impaired, including impairment by the use of marijuana or marijuana products. (Health and Saf. Code § 34019, subd. (c).) Proposition 64 provides a second funding stream to CHP from the Marijuana Tax Fund. The money generated by taxing marijuana will go to a variety of entities to ensure effective implementation of the Proposition 64 and to address policy concerns surrounding the use of marijuana. After the mandatory disbursements from the Marijuana Tax Fund are made each year, the remaining money will be disbursed to specified entities on a percentage basis.

Should we await the results of these studies and CHP recommendations before we set a zero tolerance level for marijuana in people under 21 years of age.

#### **4. Argument in Support**

The California Police Chiefs Association support this bill stating:

The current lack of tools for law enforcement to both identify and measure marijuana-impaired driving, coupled with the lack of statute addressing drugged driving, sends the message to the public that drugged driving is not as serious of an issue as drunk driving. This lack of recognition simply does not match the facts. The national Highway Traffic Safety Administration’s 2012 nation Roadside Survey of Alcohol and Drug use by Drivers finds that the proportion of total drug-positive nighttime weekend drivers increased from 16.3 percent in 2007 to 20.0 percent in 2013-14. By comparison, in 2013-14, about 1.5 percent of weekend drivers had blood alcohol concentrations at or above the legal limit of .08 breath alcohol concentration (BAC) and 8.3 percent of drivers had a measurable amount of alcohol in their systems.

## 5. Argument in Opposition

The ACLU opposes this bill unless it is amended stating:

SB 65 also seeks to expand the zero tolerance law for consuming alcohol while driving for people under 21 years old to apply to consumption of marijuana. This part of SB 65 would require drivers under 21 to submit to a roadside chemical test for the presence of marijuana and would result in immediate license suspension for refusal to take such a test or a positive result on such a test.

Given that it remains illegal for people under 21 to consume marijuana, we understand the desire to apply the zero tolerance law for underage drinking and driving to consumption of marijuana as well. However, we do not believe that the roadside chemical tests for the presence of marijuana are sufficiently reliable to serve as the basis for a license suspension and other legal consequences.

Current tests are used as one form of field sobriety test, to aid an officer in assessing whether someone is under the influence of drugs sufficient to establish probable cause for a blood draw. SB 65 would elevate their use from a preliminary screening device to detect potential impairment to proof of the presence of marijuana in the driver's system. To our knowledge, these tests cannot distinguish between trace levels of marijuana that might be the result of second hand smoke and levels that would be indicative that the driver himself or herself consumed the marijuana within a short period of time. While it is illegal for a person under 21 to personally consume marijuana, we should not punish young drivers who are inadvertently exposed to marijuana through second hand smoke.

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