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**HOUSE BILL NO. 1896**

Offered January 12, 2005

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*A BILL to amend and reenact §§ 18.2-268.2 through 18.2-268.5, 18.2-268.8, 18.2-268.9 and 18.2-268.10 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 18.2-266.2, relating to driving motor vehicle, engine, etc., while having a Schedule I or Schedule II drug in bloodstream; penalty.*

Patron—Carrico

Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 18.2-268.2 through 18.2-268.5, 18.2-268.8, 18.2-268.9 and 18.2-268.10 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 18.2-266.2 as follows:**

*§ 18.2-266.2. Driving motor vehicle, engine, etc. while having Schedule I or Schedule II drug in blood; penalty.*

*It shall be unlawful for any person to drive or operate any motor vehicle, engine, or train while such person has in his blood any detectable amount of a Schedule I or Schedule II drug as defined in § 54.1-3446 or 54.1-3448, unless prescribed by a health care practitioner. For purposes of this section, the term "motor vehicle" includes mopeds while operated on the public highways of this Commonwealth.*

*B. A violation of this section is a Class 2 misdemeanor. In addition, a violation of this section shall be punishable by forfeiture of such person's license to operate a motor vehicle, engine, or train for a period of 12 months from the date of conviction. Any person convicted of a violation of this section shall be eligible to attend an alcohol safety action program under the provisions of 18.2-271.1 and may, in the discretion of the court, be issued a restricted license during the term of license suspension.*

*§ 18.2-268.2. Implied consent to post-arrest chemical test to determine drug or alcohol content of blood.*

*A. Any person, whether licensed by Virginia or not, who operates a motor vehicle upon a highway, as defined in § 46.2-100, in this Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood, breath, or both blood and breath taken for a chemical test to determine the alcohol, drug, or both alcohol and drug content of his blood, if he is arrested for violation of §§ 18.2-266, 18.2-266.1, 18.2-266.2, or § 18.2-272, or of a similar ordinance within three hours of the alleged offense.*

*B. Any person so arrested for a violation of clause (i) or (ii) of § 18.2-266 or both, § 18.2-266.1, 18.2-266.2 or § 18.2-272, or of a similar ordinance shall submit to a breath test. If the breath test is unavailable or the person is physically unable to submit to the breath test, a blood test shall be given. The accused shall, prior to administration of the test, be advised by the person administering the test that he has the right to observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform the breath test. If the equipment automatically produces a written printout of the breath test result, the printout, or a copy, shall be given to the accused.*

*C. A person, after having been arrested for a violation of clause (iii) or (iv) of § 18.2-266 or § 18.2-266.1, 18.2-266.2, or § 18.2-272, or of a similar ordinance, may be required to submit to a blood test to determine the drug or both drug and alcohol content of his blood. When a person, after having been arrested for a violation of § 18.2-266 (i) or (ii) or both, submits to a breath test in accordance with subsection B of this section or refuses to take or is incapable of taking such a breath test, he may be required to submit to tests to determine the drug or both drug and alcohol content of his blood if the law-enforcement officer has reasonable cause to believe the person was driving under the influence of any drug or combination of drugs, or the combined influence of alcohol and drugs.*

*§ 18.2-268.3. Refusal of tests; procedures.*

*A. When a person is arrested for a violation of §§ 18.2-51.4, 18.2-266, 18.2-266.1, 18.2-266.2, or § 18.2-272, or of a similar ordinance the arresting officer shall advise the person, from a form described in subsection B, that (i) a person who operates a motor vehicle upon a public highway in the Commonwealth is deemed thereby, as a condition of such operation, to have consented to have samples of his blood and breath taken for chemical tests to determine the alcohol or drug content of his blood; (ii) a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial; (iii) that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of the Commonwealth; (iv) the criminal penalty for unreasonable*

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59 refusal within 10 years of a prior conviction for driving while intoxicated or unreasonable refusal is a  
60 Class 2 misdemeanor; and (v) the criminal penalty for unreasonable refusal within 10 years of any two  
61 prior convictions for driving while intoxicated or unreasonable refusal is a Class 1 misdemeanor, refuses  
62 to permit blood or breath or both blood and breath samples to be taken for such tests.

63 B. The form from which the arresting officer shall advise the person arrested shall be provided by  
64 the Office of the Executive Secretary of the Supreme Court and shall contain a brief statement of the  
65 law requiring the taking of blood or breath samples, that a finding of unreasonable refusal to consent  
66 may be admitted as evidence at a criminal trial, and the penalties for refusal, a declaration of refusal,  
67 and an acknowledgement of the arresting officer that he has read the form to the defendant and a line  
68 for the signature of the arresting officer. The form shall be signed by the arresting officer and the  
69 arresting officer shall acknowledge before the magistrate that the form was read to the person arrested.  
70 The magistrate shall promptly issue a warrant or summons charging the person with a violation of  
71 subsection A and shall attach the executed advisement form to the warrant or summons. The magistrate  
72 or arresting officer, as the case may be, shall forward the executed advisement and warrant or summons  
73 to the appropriate court. The warrant or summons for a first offense under this section shall be executed  
74 in the same manner as criminal warrants or summonses. If the person has been taken to a medical  
75 facility for treatment or evaluation of his medical condition, the arresting officer at a medical facility  
76 may issue, on the premises of the medical facility, a summons for a violation of subsection A in lieu of  
77 securing a warrant.

78 C. Unreasonable refusal is a violation of this section and shall be an offense punishable as set forth  
79 in §§ 18.2-268.3 and 18.2-268.4. Venue for the trial of the warrant or summons shall lie in the court of  
80 the county or city in which the offense of driving under the influence of intoxicants is to be tried.

81 § 18.2-268.4. Appeal and trial; penalties for refusal.

82 A. The procedure for appeal and trial of a first offense of § 18.2-268.3 shall be the same as provided  
83 by law for misdemeanors; if requested by either party on appeal to the circuit court, trial by jury shall  
84 be as provided in Article 4 (§ 19.2-260 et seq.) of Chapter 15 of Title 19.2, and the Commonwealth  
85 shall be required to prove its case beyond a reasonable doubt.

86 If the court or jury finds the defendant guilty of a first offense as charged in the warrant or summons  
87 issued pursuant to § 18.2-268.3, the court shall suspend the defendant's privilege to drive for a period of  
88 one year.

89 B. Any person convicted of a violation of § 18.2-268.3 committed within 10 years of a prior offense  
90 of § 18.2-266, § 18.2-268.3 or any offense set forth in subsection E of § 18.2-270 arising out of separate  
91 occurrences or incidents, as charged in the warrant or summons issued pursuant to § 18.2-268.3, is guilty  
92 of a Class 2 misdemeanor and the court shall suspend the defendant's privilege to drive for a period of  
93 three years. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

94 C. Any person convicted of a violation of § 18.2-268.3 committed within 10 years of any  
95 combination of two or more offenses of § 18.2-266, § 18.2-268.3 or any offense set forth in subsection  
96 E of § 18.2-270 arising out of separate occurrences or incidents, as charged in the warrant or summons  
97 issued pursuant to § 18.2-268.3, is guilty of a Class 1 misdemeanor and the court shall suspend the  
98 defendant's privilege to drive for a period of three years. This suspension period is in addition to the  
99 suspension period provided under § 46.2-391.2.

100 D. If the defendant pleads guilty to a violation of § 18.2-266 or § 18.2-266.1, 18.2-266.2, or of a  
101 similar ordinance, the court may dismiss the warrant or summons.

102 The court shall forward the defendant's license to the Commissioner of the Department of Motor  
103 Vehicles of Virginia as in other cases of similar nature for suspension of license. If the defendant  
104 appeals his conviction, the court shall return the license to him upon his appeal being perfected;  
105 however, the defendant's license shall not be returned during any period of suspension imposed under  
106 § 46.2-391.2.

107 § 18.2-268.5. Qualifications and liability of persons authorized to take blood sample; procedure for  
108 taking samples.

109 For purposes of this article, only a physician, registered nurse, licensed practical nurse, phlebotomist,  
110 graduate laboratory technician or a technician or nurse designated by order of a circuit court acting upon  
111 the recommendation of a licensed physician, using soap and water, polyvinylpyrrolidone iodine, pvp  
112 iodine, povidone iodine or benzalkonium chloride to cleanse the part of the body from which the blood  
113 is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which  
114 will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall  
115 withdraw blood for the purpose of determining its alcohol or drug or both alcohol and drug content. It is  
116 a Class 3 misdemeanor to reuse single-use-only needles or syringes. No civil liability shall attach to any  
117 person authorized to withdraw blood as a result of the act of withdrawing blood as provided in this  
118 section from any person submitting thereto, provided the blood was withdrawn according to recognized  
119 medical procedures. However, the person shall not be relieved from liability for negligence in the  
120 withdrawing of any blood sample.

No person arrested for a violation of §§ 18.2-266, 18.2-266.1, 18.2-266.2, ~~or~~ §18.2-272, or a similar ordinance shall be required to execute in favor of any person or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for in this section.

§ 18.2-268.8. Fees.

Payment for withdrawing blood shall not exceed \$25, which shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for a violation of §§18.2-266, 18.2-266.1, 18.2-266.2, ~~or~~ §18.2-272, or of a similar ordinance, or is placed under the purview of a probational, educational, or rehabilitational program as set forth in § 18.2-271.1, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

If the person whose blood sample was withdrawn is subsequently convicted for violation of §§ 18.2-266, 18.2-266.1, 18.2-266.2, ~~or~~ §18.2-272, or a similar ordinance, a fee of \$25 for testing the first blood sample by the Division shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

§ 18.2-268.9. Assurance of breath-test validity; use of test results as evidence.

To be capable of being considered valid as evidence in a prosecution under §§ 18.2-266, 18.2-266.1, 18.2-266.2, ~~or~~ §18.2-272, or a similar ordinance, chemical analysis of a person's breath shall be performed by an individual possessing a valid license to conduct such tests, with a type of equipment and in accordance with methods approved by the Department of Criminal Justice Services, Division of Forensic Science. The Division shall test the accuracy of the breath-testing equipment at least once every six months.

The Division shall establish a training program for all individuals who are to administer the breath tests. Upon a person's successful completion of the training program, the Division may license him to conduct breath-test analyses. Such license shall identify the specific types of breath test equipment upon which the individual has successfully completed training.

Any individual conducting a breath test under the provisions of § 18.2-268.2 shall issue a certificate which will indicate that the test was conducted in accordance with the Division's specifications, the equipment on which the breath test was conducted has been tested within the past six months and has been found to be accurate, the name of the accused, that prior to administration of the test the accused was advised of his right to observe the process and see the blood alcohol reading on the equipment used to perform the breath test, the date and time the sample was taken from the accused, the sample's alcohol content, and the name of the person who examined the sample. This certificate, when attested by the individual conducting the breath test, shall be admissible in any court in any criminal or civil proceeding as evidence of the facts therein stated and of the results of such analysis. Any such certificate of analysis purporting to be signed by a person authorized by the Division shall be admissible in evidence without proof of seal or signature of the person whose name is signed to it. A copy of the certificate shall be promptly delivered to the accused.

The officer making the arrest, or anyone with him at the time of the arrest, or anyone participating in the arrest of the accused, if otherwise qualified to conduct such test as provided by this section, may make the breath test or analyze the results.

§ 18.2-268.10. Evidence of violation of § 18.2-266, 18.2-266.1, 18.2-266.2, or 18.2-272.

A. In any trial for a violation of §§ 18.2-266, 18.2-266.1, 18.2-266.2, ~~or~~ §18.2-272, or a similar ordinance, the admission of the blood or breath test results shall not limit the introduction of any other relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of any blood or breath tests, consider other relevant admissible evidence of the condition of the accused. If the test results indicate the presence of any drug other than alcohol, the test results shall be admissible only if other competent evidence has been presented to relate the presence of the drug or drugs to the impairment of the accused's ability to drive or operate any motor vehicle, engine or train safely.

B. The failure of an accused to permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood is not evidence and shall not be subject to comment by the Commonwealth at the trial of the case, except in rebuttal or pursuant to subsection C; nor shall the fact that a blood or breath test had been offered the accused be evidence or the subject of comment by the Commonwealth, except in rebuttal or pursuant to subsection C.

C. Evidence of a finding against the defendant under § 18.2-268.3 for his unreasonable refusal to permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood shall be admissible into evidence, upon the motion of the Commonwealth or the defendant, for the sole purpose of explaining the absence at trial of a chemical test of such sample. When admitted pursuant to this subsection such evidence shall not be considered evidence of the accused's guilt.

D. The court or jury trying the case involving a violation of clause (ii), (iii) or (iv) of § 18.2-266 or

**182** § 18.2-266.1, *18.2-266.2*, or ~~§~~18.2-272 shall determine the innocence or guilt of the defendant from all  
**183** the evidence concerning his condition at the time of the alleged offense.