



STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

May 22, 2023

NOTICE OF FILING

ADMINISTRATIVE RULES

To: Secretary of the Senate
Clerk of the House of Representatives
Joint Committee on Administrative Rules
Michigan Office of Administrative Hearings and Rules (Administrative Rules #22-034-SP)
Legislative Service Bureau (Secretary of State Filing #23-05-11)
Department of State Police

In accordance with the requirements of Section 46 of Act No. 306 of the Public Acts of 1969, being MCL 24.246, and paragraph 16 of Executive Order 1995-6, this is to advise you that the Michigan Office of Administrative Hearings and Rules filed Administrative Rule #2022-034-SP (Secretary of State Filing #23-05-11) on this date at 1:47 PM. for the Department of State Police entitled, "Tests for Breath Alcohol."

These rules become effective immediately after filing with the secretary of state unless adopted under section 33, 44, or 45a(9) of the administrative procedures act of 1969, 1969 PA 306, MCL 24.233, 24.244, or 24.245a. Rules adopted under these sections become effective 7 days after filing with the secretary of state.

Sincerely,

Jocelyn Benson
Secretary of State

Lashana Threlkeld, Departmental Supervisor
Office of the Great Seal

Enclosure



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
SUZANNE SONNEBORN
EXECUTIVE DIRECTOR

ORLENE HAWKS
DIRECTOR

May 22, 2023

The Honorable Jocelyn Benson
Secretary of State
Office of the Great Seal
Richard H. Austin Building – 1st Floor
430 W. Allegan
Lansing, MI 48909

Dear Secretary Benson:

Re: Administrative Rules – Michigan Office of Administrative Hearings and Rules
Administrative Rules #: 2022-34 SP

The Michigan Office of Administrative Hearings and Rules received administrative rules, dated March 24, 2023 for the Department of State Police “**Forensic Science Division**”. We are transmitting these rules to you pursuant to the requirements of Section 46 of Act No. 306 of the Public Acts of 1969, being MCL 24.246, and paragraph 16 of Executive Order 1995-6.

Sincerely,

A handwritten signature in black ink, appearing to read "Suzanne Sonneborn", written over a horizontal line.

Michigan Office of Administrative Hearings and Rules



STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

GRETCHEN WHITMER
GOVERNOR

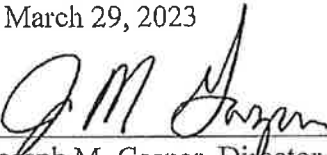
COL. JOSEPH M. GASPER
DIRECTOR

CERTIFICATE OF ADOPTION

I, Col. Joseph M. Gasper, Director of the Department of State Police, do formally adopt the attached administrative rules, by amending R 325.2651, R 325.2652, R 325.2653, R 325.2655, and R 325.2658, adding R 325.2656a, R 325.2657a, and R 325.2659, and rescinding R 335.2654 of the Michigan Administrative Code.

These rules are adopted pursuant to authority conferred on the Department of State Police by section 190 of the Aeronautics Code of the State of Michigan, 1945 PA 327, MCL 259.190, and section 625a of the Michigan Vehicle Code, 1949 PA 300, MCL 257.625a.

Date: March 29, 2023



Col. Joseph M. Gasper, Director



STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

ORLENE HAWKS
DIRECTOR

LEGAL CERTIFICATION OF RULES

I certify that I have examined the attached administrative rules, dated March 24, 2023, in which the Department of State Police proposes to modify a portion of the Michigan Administrative Code entitled "**Tests for Breath Alcohol**" by:


- ◆ Adding R 325.2656a, R 325.2657a, and R 325.2659.
- ◆ Amending R 325.2651, R 325.2652, R 325.2653, R 325.2655, and R 325.2658.
- ◆ Rescinding R 335.2654.

The Legislative Service Bureau has approved the proposed rules as to form, classification, and arrangement.

I approve the rules as to legality pursuant to the Administrative Procedures Act, MCL 24.201 *et seq.* and Executive Order No. 2019-6. In certifying the rules as to legality, I have determined that they are within the scope of the authority of the agency, do not violate constitutional rights, and are in conformity with the requirements of the Administrative Procedures Act.

Dated: March 27, 2023

Michigan Office of Administrative Hearings and Rules

By: 
Ashlee N. Lynn,
Attorney

CERTIFICATE OF APPROVAL

On behalf of the Legislative Service Bureau, and as required by section 45 of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.245, I have examined the proposed rules of the Department of State Police dated March 24, 2023, amending R 325.2651, R 325.2652, R 325.2653, R 325.2655, and R 325.2658, rescinding R 335.2654, and adding R 325.2656a, R 325.2657a, and R 325.2659 of the Department's rules entitled "Tests for Breath Alcohol." I approve the rules as to form, classification, and arrangement.

Dated: March 27, 2023

LEGISLATIVE SERVICE BUREAU



By _____

Rachel M. Hughart,
Legal Counsel

DEPARTMENT OF STATE POLICE

TRAINING DIVISION

TESTS FOR BREATH ALCOHOL

Filed with the secretary of state on May 22, 2023

These rules become effective immediately after filing with the secretary of state unless adopted under section 33, 44, or 45a(9) of the administrative procedures act of 1969, 1969 PA 306, MCL 24.233, 24.244, or 24.245a. Rules adopted under these sections become effective 7 days after filing with the secretary of state.

(By authority conferred on the department of state police by section 190 of the Aeronautics code of the state of Michigan, 1945 PA 327, MCL 259.190, and section 625a of the Michigan vehicle code, 1949 PA 300, MCL 257.625a)

R 325.2651, R 325.2652, R 325.2653, R 325.2655, and R 325.2658 of the Michigan Administrative Code are amended, R 325.2656a, R 325.2657a, and R 325.2659 are added, and R 335.2654 is rescinded, as follows:

R 325.2651 Definitions.

Rule 1. (1) As used in these rules:

(a) "Acts" means the Aeronautics code of the state of Michigan, 1945 PA 327, MCL 259.1 to 259.208; the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923; the railroad code of 1993, 1993 PA 354, MCL 462.101 to 462.451; and the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106.

(b) "Alcohol standard" means a certified alcohol standard.

(c) "Calendar week" means 12:01 a.m. Sunday to midnight Saturday.

(d) "Certified" means the operator completed the required training and possesses a certificate of training.

(e) "Class" means a classification of operator status as certified by the department, based on training and function as specified in R 325.2658.

(f) "Class I operator" means an operator certified to conduct a subject test with a preliminary breath testing instrument.

(g) "Class II operator" means an operator certified to calibrate a preliminary breath testing instrument.

(h) "Class III operator" means an operator certified to conduct a subject test with an evidential breath testing instrument.

(i) "Class IVA operator" means an operator certified to instruct the class I, II, and III certification courses.

(j) "Class IVB operator" means an operator certified to calibrate and repair an evidential breath testing instrument.

(k) "Department" means the department of state police.

March 24, 2023

(l) "Equipment" means evidential and preliminary breath alcohol test instruments, simulator devices, calibration stations, forms, and any accessories and supplies necessary to comply with the procedures in these rules or law.

(m) "Evidential breath alcohol analysis" means chemical analysis of an essentially alveolar breath sample that indicates a specific result in grams of alcohol per 210 liters of breath.

(n) "Evidential breath alcohol test instrument" means an evidential breath testing device that indicates a specific result in grams of alcohol per 210 liters of breath.

(o) "Preliminary breath alcohol analysis" means chemical analysis of essentially alveolar breath samples that indicates the presence or absence of alcohol in an individual's blood.

(p) "Preliminary breath alcohol test instrument" means a breath alcohol screening device that indicates the presence or absence of alcohol in an individual's blood.

(2) Terms used in the acts have the same meanings when used in these rules.

R 325.2652 Approved equipment.

Rule 2. (1) Except as provided in subrule (2) of this rule, evidential and preliminary breath alcohol test instruments must meet the existing model specifications for evidential breath alcohol analysis as established by the United States Department of Transportation, National Highway Traffic Safety Administration. The specifications are identified as "Model Specifications for Devices to Measure Breath Alcohol" 58 FR 48705, (September 17, 1993), as amended by 82 FR 50940 et seq., (November 2, 2017) and are adopted in these rules by reference. Copies of the specifications and a current conforming products list are available from the United States Department of Transportation, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, D.C. 20590 and its website at nhtsa.gov, or from the Michigan State Police, Records Resource Section, 7150 Harris Drive, P.O. Box 30634, Lansing, MI, 48909 and its website at www.michigan.gov/msp/services/foia. A fee of \$1.00 may be charged for each requested copy. A copy of the specifications and conforming products list may be inspected at the Michigan State Police, Training Division, 7426 N Canal Road, Lansing, MI, 48913 during normal business hours.

(2) If the United States Department of Transportation discontinues the testing of evidential breath alcohol test instruments or the issuance of model specifications for that test, only those instruments tested and approved by the department can be used.

(3) An application for equipment approval must be submitted to the department.

(4) Operators shall only use equipment approved by the department for evidential and preliminary breath alcohol analysis.

R 325.2653 Equipment accuracy evidential breath test instruments.

Rule 3. (1) For evidential breath test instruments that do not examine a known standard with each subject test, an appropriate class operator who has been certified in accordance with R 325.2658 shall verify an evidential breath alcohol test instrument for accuracy at least once each calendar week, or more frequently as the department may require. Alternatively, a pre-programmed self-test for accuracy may be initiated by the evidential breath alcohol test instrument and recorded by an appropriate class operator who has been certified in accordance with R 325.2658, if the instrument is so equipped and

programmed. The tests for accuracy are not required to be performed within 7 days of each other. The test for accuracy must be made using an alcohol standard that is approved by the department. For the evidential breath alcohol test instrument to meet the requirements for accuracy, a test result must not exceed +/- 5% when using a controlled device. Controlled devices include both of the following:

(a) A wet bath device that delivers an alcohol vapor concentration test result of 0.080 grams of alcohol per 210 liters of vapor.

(b) A compressed alcohol gas device that delivers a test result of 0.080 grams of alcohol per 210 liters of vapor before applying applicable barometric pressure correction. To meet this requirement, the instrument must analyze the known ethanol gas standard within +/- 5% of the adjusted or corrected alcohol concentration based on the barometric correction.

(2) A weekly test is not required for evidential breath test instruments that examine a known alcohol standard, either wet bath or compressed gas, with each test subject. If an accuracy check is conducted, then the results must be retained either in log form by the agency where the instrument is installed or electronically within the instruments memory.

(3) Approved evidential breath alcohol test instruments that do not examine a known alcohol standard with each test subject must be inspected, verified for accuracy, and certified as to their proper working order within 120 days after the previous inspection by either an appropriate class operator who has been certified in accordance with R 325.2658, or a manufacturer-trained representative approved by the department.

(4) Approved evidential breath alcohol test instruments that examine a known alcohol standard with each subject test must be inspected, verified for accuracy, and certified as to their proper working order not less than 2 times annually by either an appropriate class operator who has been certified in accordance with R 325.2658, or a manufacturer-trained representative approved by the department.

R 325.2654 Rescinded.

R 325.2655 Techniques and procedures – evidential breath test instruments.

Rule 5. A procedure that is used in conjunction with evidential breath alcohol analysis must be approved by the department and comply with the following requirements:

(a) Except as provided otherwise in these rules, evidential breath alcohol test instruments must be operated by appropriate class operators who are certified in accordance with R 325.2658.

(b) All analyses must be conducted following procedures approved by the department and using forms approved by the department, as required.

(c) Records of operation, analyses, and results must be maintained at the evidential breath alcohol test instrument location as prescribed by the department, and copies must be forwarded to the department as required.

(d) The department shall test samples from each lot of alcohol standards used in this state, in conjunction with evidential breath alcohol test instruments. The department shall certify for use those lots of alcohol standards that are found to be proper in chemical composition.

(e) An individual shall be administered an evidential breath alcohol analysis on an evidential breath alcohol test instrument only after being observed for not less than 15

minutes before collection of the breath sample by at least 1 appropriate class operator that is certified in accordance with R 325.2658. The observation period may be conducted by more than 1 operator working in concert. During the observation period, the individual shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the evidential breath alcohol analysis. The operator need not stare continuously at the individual, but shall be close enough to be aware of the individual's actions and conditions. The operator may complete paperwork, enter data into the evidential breath alcohol test instrument, or conduct other reasonable tasks during the observation period, if the individual is within the operator's field of vision. Breaks in the observation period lasting only a few seconds do not invalidate the observation if the operator can reasonably determine that the individual did not smoke, regurgitate, or place anything in his or her mouth during the breaks in the observation.

(f) The operator shall request a second evidential breath sample from the subject after the first sample is provided and analyzed by the instrument, unless an item or a substance is found in the subject's mouth after the first evidential breath sample analysis that could interfere with the result. Obtaining the first breath sample result is sufficient to meet the requirements for evidentiary purposes prescribed in section 625c of the Michigan vehicle code, 1949 PA 300, MCL 257.625c. The purpose of obtaining a second breath sample result is to confirm the result of the first breath sample result.

(g) For instruments reporting 2 digits after the decimal, a second breath sample result must not vary from the first breath sample result by more than the allowable variation listed in Table 1. Tables 1 and 2 read as follows:

Table 1

Allowable variation of second breath result range from the first sample result.

First Sample	Allowable variation
0.00 - 0.14	+/- 0.01
0.15 - 0.24	+/- 0.02
0.25 - 0.34	+/- 0.03
0.35 - or more	+/- 0.04

For instruments reporting 3 digits after the decimal, the second breath sample result must not vary from the first sample result by more than the allowed variation listed in Table 2.

Table 2

Allowable variation of second breath sample result from the first breath sample result.

First Sample	Allowable Variation
0.000 - 0.149	+/- 0.010
0.150 - 0.249	+/- 0.020
0.250 - 0.349	+/- 0.030
0.350 or more	+/- 0.040

(h) If the variation is more than allowed in either table under subdivision (g) of this rule, the operator shall request a third breath sample from the subject and a third breath sample

result may be obtained. If the third breath sample result does not conform to the allowable variations of either of the first 2 tests based on the allowable variation listed in either table under subdivision (g) of this rule, the subject shall be requested to submit a blood or urine sample for analysis in accordance with the acts and the procedures established in R 325.2671 to R 325.2677.

(i) The results of an evidential breath alcohol analysis of a subject's breath must be expressed in terms of grams of alcohol per 210 liters of breath, truncated to the second decimal place or expressed to 3 decimals if the instrument is programmed to do so.

(j) If the instrument analyzes a known ethanol standard during a subject's breath test, the results of that analysis must be no lower than 0.074 g/210L and no higher than 0.084 g/210L of the nominal value of the standard. If the analysis is not within the prescribed standard the instrument must abort the test indicating the ethanol standard was not within the required range. The operator may attempt additional tests.

R 325.2656a Equipment Accuracy – Preliminary Breath Test Instrument.

Rule 6a. An appropriate class operator who has been certified in accordance with R 325.2658 shall verify for accuracy a preliminary breath alcohol test instrument at least monthly, or more frequently as the department may require. The test for accuracy must be made using an alcohol standard that is approved by the department. For the preliminary breath alcohol test instrument to meet the requirements for accuracy, a test result not exceeding +/- 5% must be obtained when using a controlled device. Controlled devices include both of the following:

(a) A wet bath device that delivers an alcohol vapor concentration of 0.080 grams of alcohol per 210 liters of vapor.

(b) A compressed alcohol gas device that delivers a test result of 0.080 grams of alcohol per 210 liters of vapor before applying applicable altitude or topographic evaluation correction factor supplied by the manufacturer. The correction factor may be applied by the operator or by the preliminary breath alcohol test instrument calibration station, if pre-programmed.

R 325.2657a Techniques and Procedures – Preliminary Breath Test Instruments.

Rule 7a. (1) A procedure that is used in conjunction with preliminary breath alcohol analysis must be approved by the department and comply with all of the following:

(a) Except as provided otherwise in these rules, preliminary breath alcohol test instruments must only be operated by appropriate class operators who have been certified in accordance with R 325.2658.

(b) An individual may be administered a preliminary breath alcohol analysis on a preliminary breath alcohol test instrument only after the operator determines that the individual has not smoked, regurgitated, or placed anything in his or her mouth for not less than 15 minutes.

(c) Records must be maintained at the preliminary breath alcohol test instrument location as prescribed by the department and copies must be forwarded to the department as required.

(2) An individual's welfare must be protected by requesting medical assistance if the result of the evidential or preliminary breath alcohol analysis is 0.35 or more. Failure to

request medical assistance does not affect the validity or evidential value of the result of an evidential or preliminary breath alcohol analysis.

R 325.2658 Operator training and certification.

Rule 8. (1) The department shall train and certify personnel of law enforcement agencies to perform various functions as described in this rule, and designate those individuals as class I, class II, class III class IVA, or class IVB operators. An operator may hold multiple and concurrent classifications. To maintain a class III certification, each class III operator certified after January 1, 2022 is required to re-certify every 2 years. Class III operators certified before January 1, 2022 are required to recertify before December 31, 2023, and every 2 years after that. Any class III operator who fails to re-certify before the current certification expires is required to attend and successfully complete the class III operator training as detailed in R 325.2658(2)(c). An operator whose certification has lapsed can testify about incidents that occurred during their valid certification period.

(2) The minimum training requirements and proficiency standards for operator certification are as follows:

(a) A class I operator shall complete a class I training course approved by the department, and obtain a minimum score of 70% on a written examination administered by the department. An individual that fails the examination is provided an opportunity to retake the written examination. An individual that fails the second attempt to pass the written examination shall retake the class I training course and successfully pass the examination to qualify for the class I certification.

(b) A class II operator shall complete a class II training course approved by the department, and obtain a minimum score of 70% on a written examination administered by the department. An individual that fails the examination is provided an opportunity to retake the written examination. An individual that fails the second attempt to pass the written examination shall retake the class I training course and successfully pass the examination to qualify for the class II certification.

(c) A class III operator shall be currently certified as a class II operator, complete a class III training course approved by the department, obtain a minimum score of 70% on a written examination administered by the department, and demonstrate proficiency in the use of an evidential breath testing instrument. An individual that fails the examination or fails to demonstrate the required proficiency is provided an opportunity to retake the written examination or demonstrate the required proficiency. An individual that fails the second attempt to pass the written examination or fails to demonstrate the required proficiency shall retake the class III training course and successfully pass the written examination and demonstrate the required proficiency to qualify for the class III certification.

(d) A class IVA operator shall be currently certified as a class III operator and complete a class IVA training course approved by the department.

(e) A class IVB operator shall be currently certified as a class IVA operator. Before class IVB certification, the class IVB operator shall receive additional training in the repair and service of evidential breath instruments from the manufacturer of the instruments or by a current class IVB operator, if the manufacturer is unavailable for training.

(3) The department shall develop and distribute to each certified operator a training manual for each of the operator's classifications. Training manuals must specify the functions performed by each class pursuant to this rule, as well as the knowledge and skills necessary to perform the appropriate functions.

(4) The primary functions of each class are described in Table 3. Additional functions not described in Table 3 may be designated by the department and described and explained in the appropriate training manual.

(5) An individual that meets the training requirements and proficiency standards for operator certification in accordance with this rule is issued a certificate for the appropriate class by the department. The certificate must remain the property of the department.

(6) A class I, class II, class III, class IVA, and class IVB operator shall comply with all applicable department rules, policies, and procedures or the department may suspend his or her operator certification. An individual may request for reinstatement of operator certification to the department in writing and, after approval, the department may require the individual to complete an operator training class, pass a written examination, demonstrate required proficiency, or any combination thereof.

(7) The requirements for each class of operators are included in Table 3 as follows:

Table 3

	Class I	Class II	Class III	Class IVA	Class IVB
Administer preliminary breath alcohol analyses using preliminary breath alcohol test instruments approved for use by the department.	X	X	X	X	X
Calibrate preliminary breath alcohol test instruments approved for use by the department.		X	X	X	X
Administer evidential breath alcohol analyses using an evidential breath instrument approved by the department.			X	X	X
Record weekly verification for approved evidential breath test instruments that do not examine a known standard with each subject test.			X	X	X
Train and certify all lower-level class operators.				X	X
Calibrate and service an evidential breath testing instrument approved for use by the department.					X

R 325.2659 Equipment Repair and Service.

Rule 9. (1) The repair and service of equipment provided by the department for evidential and preliminary breath alcohol analysis must be at the expense of the agency using the equipment.

(2) The department or the agency using the equipment may arrange to have this service provided either by an appropriate class operator who has been certified in accordance with R 325.2658 or a manufacturer-trained authorized representative approved by the department.

(3) After repair or service and before being placed in service, evidential and preliminary breath alcohol test instruments must be verified for accuracy in accordance with R 325.2653. Records of verification must be maintained as required by the department.