



Government Affairs Extra



Alcohol, Cannabis, and State Driving Laws

BY
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As more states legalize the recreational use of marijuana, beer servers will undoubtedly face situations in which a patron is too impaired to drive due to the consumption of both cannabis and alcohol. State laws do not provide a crosswalk of breath alcohol concentration (BrAC) limits and nanograms per milliliter (ng/ml) of delta-9-tetrahydrocannabinol (THC) in a driver's bodily fluids. But a few states have established limits on the nanograms per milliliter (ng/ml) of THC that may be present in a driver's blood or urine. States will continue to create and modify statutory and regulatory schemes focused on marijuana impairment. In doing so, state legislatures will likely revisit the policy discussions on limits for alcohol consumption.

Drugged driving is on the rise nationally. According to the National Highway Traffic Safety Administration (NHTSA), 12.6 percent of drivers tested positive for THC from 2013-14, compared to 8.6 percent in 2007. In the same time period, the number of weekend nighttime drivers who tested positive for alcohol decreased from 12.4 to 8.3 percent. Data from states where recreational marijuana is legal shows an increase in cases of impaired driving or fatal crashes in which drivers are suspected of marijuana use, or test positive for it. For example, a 2018 report from the Washington Traffic Safety Commission found that the number of drivers in fatal crashes testing

positive for alcohol and one or more other drugs (or two or more drugs that were not alcohol) was more than double the number of alcohol-only drivers involved in fatal crashes and five times more than the number of drivers who tested positive for THC alone.

The consumption of either marijuana or alcohol alone can lead to similar types of impairment. Impaired drivers have slower reaction times, a diminished ability to complete tasks that necessitate divided attention, and decreased lane tracking skills. Combining small amounts of cannabis and alcohol may make a driver more impaired than when the driver consumes a similar or greater amount of either cannabis or marijuana alone.¹ According to one study, combining 5 ng/ml THC with 0.05 BrAC led to increases in standard deviation of lateral position (lane weaving) equal to a BrAC of 0.08, the upper legal limit nationwide.² The same study noted that the average THC blood level of 291 Swedish drivers arrested for driving under the influence who tested positive for THC and alcohol was 2.3 ng/ml. This is less than the current legal THC ng/ml limit in the majority of states that have established such limits.

Though drug-impaired driving is against the law in every state, the amount of permissible ng/ml of THC in a driver's whole blood, blood serum, or plasma varies by state. Washington and Montana have limits of 5 ng/ml, though in Washington, drivers under 21 cannot have any THC in their blood. Nevada and Ohio limit drivers to 2 ng/ml

for marijuana and 5 ng/ml for marijuana metabolite, which may indicate recent, earlier, or continuous use of the drug. Maryland has an incapacity standard under which a person may not drive while impaired by any drugs or a combination of drugs and alcohol such that the person cannot drive safely. Other states have zero tolerance laws.

In states with ng/ml-based THC thresholds, if a driver exceeds the limit, the state generally deems the person to be driving under the influence or presumes the driver is too impaired to drive safely. Colorado has a slightly different standard—there is a reasonable inference of impairment at greater than 5 ng/ml that a person is per se driving under the influence. But even if a driver has less than the 5 ng/ml limit of THC, in Montana and other states, the driver may still be convicted of driving under the influence based on other evidence of impairment.

While BrAC correlates with the person's degree of impairment, the NHTSA has stated that THC concentrations in the blood do not correlate well with impairment. People who consume cannabis frequently may have baseline levels of THC in their system, even if they have not consumed any cannabis for a month or more. Yet such an individual could be less impaired than a casual user of cannabis without any measurable THC in his or her blood. NHTSA observes that peak THC levels decline rapidly within an hour after smoking, though an individual may still be impaired hours later. The Washington State Liquor and Cannabis Board advises waiting more than five hours to



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operate a vehicle after consuming marijuana—longer if edibles have been consumed—or using a designated driver.

Current methods of roadside screenings for THC also differ from those for alcohol. Devices may test for THC in saliva, sweat, or surfaces such as one's forehead or the steering wheel. Many companies are racing to develop a marijuana breathalyzer that could be used by law enforcement in roadside stops. The challenge they face is creating a portable device sensitive enough to detect molecules of THC in a driver's breath. The National Institute of Standards and Technology (NIST), which manufactures ethyl alcohol solutions used to calibrate breathalyzers, recently measured the vapor pressure of THC. NIST believes this measurement will aid manufacturers in calibrating marijuana breathalyzers accurately. Universities and others are developing other devices to measure impairment, such as apps that will measure reaction time, coordination, visual functions, and other indicators of impairment. Massachusetts General Hospital is reportedly testing a brain imaging device, described as a cloth cap with a chin strap that has built-in sensors and receivers to measure brain impairment and blood flow changes due to consumption of THC.

As scientists and traffic safety experts produce more research about the correlation of THC levels with impaired driving, states may decide to lower current thresholds of ng/ml of THC. Likewise, states may create crosswalks of BrAC and ng/ml, which may have dram shop liability and insurance implications for premises and events with retail licenses. Though state laws typically do not permit the social consumption of alcohol and cannabis together at a licensed establishment or event, bartenders may need practical guidance on when to stop serving a patron and call a cab. The federal government could also tie grant programs to the enactment of particular limits of ng/ml, as Congress did with the enactment of 0.08 per se laws. Brewers should be prepared to participate in such policy discussions and lobby to ensure that the limits set for drugged driving are not more lenient than those for alcohol.

REFERENCES

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