

Chapter 813

1985 REPLACEMENT PART

Driving Under the Influence of Intoxicants

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GENERAL PROVISIONS

813.010 Driving under the influence of intoxicants; penalty. (1) A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:

(a) Has .08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath or blood of the person made under the implied consent laws described in ORS 813.100;

(b) Is under the influence of intoxicating liquor or a controlled substance; or

(c) Is under the influence of intoxicating liquor and a controlled substance.

(2) A person convicted of the offense described in this section is subject to ORS 813.020 in addition to this section.

(3) The offense described in this section, driving while under the influence of intoxicants, is a Class A misdemeanor and is applicable upon any premises open to the public. [1983 c.338 §587, 1985 c 16 §293]

813.020 Fee to be paid on conviction; examination; treatment; mandatory imprisonment or community service. When a person is convicted of driving under the influence of intoxicants in violation of ORS 813.010, a court shall comply with the following in addition to any fine or other penalty imposed upon the person under ORS 813.010:

(1) The court shall require the person to do all of the following:

(a) Pay to the court the fee described under ORS 813.030 in addition to any fine imposed under ORS 813.010.

(b) Complete an examination by an agency or organization designated by the court to determine whether the person has a problem condition involving alcohol or controlled substances as described in ORS 813.040. The designated agencies or organizations must meet the standards set by the Mental Health Division to perform the diagnostic assessment and treatment of problem drinking, alcoholism and drug dependency and must be certified by the Mental Health Division. Wherever possible a court shall designate agencies or organizations to perform the examination that are separate from those that may be designated to carry out a program of treatment for problem drinking or drug dependency.

(c) Complete a treatment program, paid at the expense of the person convicted, as follows:

(A) If the examination required under this section shows that the person has a problem condition involving alcohol or controlled substances, a program for rehabilitation for alcoholism or drug dependence approved by the Mental Health Division.

(B) If the examination required by this section shows that the person does not have a problem condition involving alcohol or controlled substances, an alcohol or drug information program approved by the Mental Health Division.

(2) The court must impose and not suspend execution of a sentence requiring the person either to serve at least 48 hours' imprisonment or to perform community service for times specified by the court under ORS 137.129. For purposes of this subsection, a court may provide for the imprisonment to be served in jail, minimum security facilities or inpatient rehabilitation or treatment centers. [1983 c.338 §588; 1985 c 16 §294 and former 487.549]

813.030 Amount of fee; distribution.

The fee required by ORS 813.020 (1) shall comply with all of the following:

(1) Except as otherwise provided in this section, the fee shall be in the amount of \$175. The court may waive all or part of the fee in cases involving indigent defendants. The court may make provision for payment of the fee on an instalment basis.

(2) The court shall distribute the money received from the fee under this section in accordance with an expenditure plan approved by the Legislative Assembly through the budget process during the period when the Legislative Assembly is in session or by the Emergency Board during the interim period between sessions. The expenditure plan may provide for distribution of the moneys for any of the following purposes:

(a) For payment of the agency or organization providing the examination required under ORS 813.020.

(b) For the Intoxicated Driver Program Fund established under ORS 813.270.

(c) To pay for police training.

(d) To pay for the administrative expenses of governmental agencies involved in administering programs relating to persons who drive under the influence of intoxicants.

(e) To provide moneys for other programs relating to persons who drive under the influence of intoxicants as the legislative review agency determines appropriate. [1985 c.16 §296]

813.040 Standards for determination of problem condition involving alcohol or

controlled substances. This section establishes, for purposes of ORS 807.060, 813.020 and 813.500, when a person has a problem condition involving alcohol or controlled substances. For purposes of ORS 807.060, 813.020 and 813.500, a person has a problem condition involving alcohol or controlled substances if it is determined that the person has a problem condition in which the person's health or that of others is substantially impaired or endangered or the person's social or economic function is substantially disrupted because of the person's:

(1) Habitual or periodic use of alcoholic beverages; or

(2) Use of or loss of the ability to control the use of controlled substances or other substances with abuse potential including a condition that may have developed:

(a) A physical dependence in which the body requires a continuing supply of a drug or controlled substance to avoid characteristic withdrawal symptoms; or

(b) A psychological dependence characterized by an overwhelming mental desire for continued use of a drug or controlled substance. [1983 c.338 §589]

IMPLIED CONSENT

813.100 Implied consent to breath test; confiscation of license upon refusal or failure of test. (1) Any person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent, subject to the implied consent law, to a chemical test of the person's breath for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. A test shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. Before the test is administered the person requested to take the test shall be informed of consequences and rights as described under ORS 813.130.

(2) No chemical test of the person's breath shall be given, under subsection (1) of this section, to a person under arrest for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance, if the person refuses the request of a police officer to submit to the chemical test after

the person has been informed of consequences and rights as described under ORS 813.130.

(3) If a person refuses to take a test under this section or if the test under this section discloses that the person, at the time of the test, had a level of alcohol in the person's blood that constitutes being under the influence of intoxicating liquor under ORS 813.300, the person's driving privileges are subject to suspension under ORS 813.410 and the police officer shall do all of the following:

(a) Immediately take custody of any driver license or permit issued by this state to the person to grant driving privileges.

(b) Provide the person with a written notice of intent to suspend, on forms prepared and provided by the division. The written notice shall inform the person of consequences and rights as described under ORS 813.130.

(c) If the person qualifies under ORS 813.110, issue to the person, on behalf of the Motor Vehicles Division, a temporary driving permit described under ORS 813.110.

(d) Within a period of time required by the division by rule, report action taken under this section to the division and prepare and cause to be delivered to the division a report as described in ORS 813.120, along with the confiscated license or permit and a copy of the notice of intent to suspend. [1983 c.338 §591, 1985 c.16 §298; 1985 c.672 §19]

813.110 Temporary permit upon confiscation of license. (1) Except as otherwise provided by this section, police officers, on behalf of the Motor Vehicles Division, shall issue temporary driving permits described under this section to persons when required under ORS 813.100.

(2) The division shall provide police departments and agencies with permits for issuance as required by this section. The division shall establish the form and content of permits described in this section as the division determines appropriate, but in a manner consistent with this section.

(3) A permit described in this section is subject to all the following:

(a) Except as provided in paragraph (b) of this subsection, the permit is valid until the 30th day after the date of arrest.

(b) During the 12-hour period following issuance of the permit, the person is subject to ORS 807.570, and the permit is not a defense to a charge under ORS 807.570.

(c) The permit shall be issued without payment of any fee.

(d) The permit grants the same driving privileges as those granted by the person's license taken into possession under ORS 813.100.

(4) A police officer shall not issue a permit under this section if:

(a) Driving privileges of the person were suspended, revoked or canceled at the time the person was arrested;

(b) The person whose license was taken into custody was operating on an invalid license;

(c) The person was not entitled to driving privileges at the time of the arrest for any other reason; or

(d) The person holds a license or permit granting driving privileges that was issued by another state or jurisdiction and that is not taken into custody under ORS 813.100. [1985 c.16 §142, 1985 c.672 §17]

813.120 Police report to division. A report required by ORS 813.100 shall disclose substantially all of the following information:

(1) Whether the person, at the time the person was requested to submit to a test, was under arrest for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance.

(2) Whether the police officer had reasonable grounds to believe, at the time the request was made, that the person arrested had been driving under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance.

(3) Whether the person refused to submit to a test or if the person submitted to the test whether the level of alcohol in the person's blood, as shown by the test, was sufficient to constitute being under the influence of intoxicating liquor under ORS 813.300.

(4) Whether the person was informed of consequences and rights as described under ORS 813.130.

(5) Whether the person was given written notice required by ORS 813.100.

(6) If the arrested person took the test, a statement affirming that the person conducting the test was appropriately qualified.

(7) If the arrested person took the test, a statement affirming that any methods, procedures and equipment used in the test comply with any requirements under ORS 813.160. [1983 c.338 §405, 1985 c.16 §215; 1985 c.672 §20]

813.130 Rights of and consequences for person asked to take test. This section establishes the requirements for information about

rights and consequences for purposes of ORS 813.100 and 813.410. The following apply to the information about rights and consequences:

(1) The information about rights and consequences shall be substantially in the form prepared by the Motor Vehicles Division. The division may establish any form it determines appropriate and convenient.

(2) The information about rights and consequences shall be substantially as follows:

(a) Driving under the influence of intoxicants is a crime in Oregon, and the person is subject to criminal penalties if the test shows that the person is under the influence of intoxicants. If the person refuses the test or fails, evidence of the refusal or failure may also be offered against the person.

(b) The person will fail the test if the test shows that the person is under the influence of intoxicants under Oregon law.

(c) If the person refuses or fails the test, the person's driving privileges will be suspended. The outcome of a criminal charge for driving under the influence of intoxicants will not affect the suspension. The suspension will be substantially longer if the person refuses the test.

(d) If the person refuses or fails the test and has an Oregon driver license or permit, the license or permit will be taken immediately and, unless the person does not currently have full valid driving privileges, a temporary driving permit will be issued to the person.

(e) If the person refuses the test, the person will have to wait substantially longer to get an occupational permit than if the person fails the test. The person may possibly qualify for an occupational permit immediately if the person fails the test, depending on the person's driving record.

(f) After taking the test, the person will have a reasonable opportunity, upon request, for an additional chemical test for blood alcohol content to be performed at the person's own expense by a qualified individual of the person's choosing.

(g) The person has a right to a hearing to challenge the validity of the suspension before the suspension becomes effective. The person must make a written request to the Motor Vehicles Division for such a hearing. If the person wins at the hearing, the person's driving privileges will not be suspended. If the person loses at the hearing, the suspension will remain in effect during any court review of the hearing.

(h) The following times:

(A) If the person is issued a temporary driving permit under ORS 802.500, the number of hours before the driving permit will be effective and the number of days the permit will be effective.

(B) The number of days within which a person must request a hearing under ORS 813.410.

(C) The number of days within which a hearing under ORS 813.410 will be held.

(3) Nothing in this section prohibits the division from providing additional information concerning rights and consequences that the division considers convenient or appropriate. [1985 c.672 §22]

CHEMICAL TESTS; METHODS AND REQUIREMENTS

813.140 Chemical test with consent; unconscious person. Nothing in ORS 813.100 is intended to preclude the administration of a chemical test described in this section. A police officer may obtain a chemical test of the blood to determine the amount of alcohol in any person's blood or a test of the person's blood or urine, or both, to determine the presence of a controlled substance in the person as provided in the following:

(1) If, when requested by a police officer, the person expressly consents to such a test.

(2) Notwithstanding subsection (1) of this section, from a person without the person's consent if:

(a) The police officer has probable cause to believe that the person was driving while under the influence of intoxicants and that evidence of the offense will be found in the person's blood or urine; and

(b) The person is unconscious or otherwise in a condition rendering the person incapable of expressly consenting to the test or tests requested. [1983 c 338 §593; 1985 c.16 §299]

813.150 Chemical test at request of arrested person. In addition to a chemical test of the breath, blood or urine administered under ORS 813.100 or 813.140, upon the request of a police officer, a person shall be permitted upon request, at the person's own expense, reasonable opportunity to have any licensed physician and surgeon, licensed professional nurse or qualified technician, chemist or other qualified person of the person's own choosing administer a chemical test or tests of the person's breath or blood for the purpose of determining the alcoholic content of

the person's blood or a chemical test or tests of the person's blood or urine, or both, for the purpose of determining the presence of a controlled substance in the person. The failure or inability to obtain such a test or tests by a person shall not preclude the admission of evidence relating to a test or tests taken upon the request of a police officer. [1983 c.338 §594; 1985 c.16 §300]

813.160 Methods of conducting chemical tests; duties of Health Division and Department of State Police; reports; costs.

(1) To be valid under ORS 813.300:

(a) Chemical analyses of a person's blood shall be performed by an individual shown to be qualified to perform such analyses and shall be performed according to methods approved by the Health Division. For purposes of this paragraph, the Health Division shall approve methods of performing chemical analyses of a person's blood that are satisfactory for determining alcoholic content.

(b) Chemical analyses of a person's breath shall be performed by an individual possessing a valid permit to perform such analyses issued by the Department of State Police and shall be performed according to methods approved by the Department of State Police. For purposes of this paragraph, the Department of State Police shall do all of the following:

(A) Approve methods of performing chemical analyses of a person's breath.

(B) Prepare manuals and conduct courses throughout the state for the training of police officers in chemical analyses of a person's breath, which courses shall include, but are not limited to, approved methods of chemical analyses, use of approved equipment and interpretation of test results together with a written examination on these subjects.

(C) Test and certify the accuracy of equipment to be used by police officers for chemical analyses of a person's breath before regular use of such equipment and periodically thereafter at intervals of not more than 90 days. Tests and certification required by this subparagraph shall be conducted by trained technicians.

(D) Ascertain the qualifications and competence of individuals to conduct such analyses in accordance with one or more methods approved by the department.

(E) Issue permits to individuals according to their qualifications. Permits shall be issued to police officers only upon satisfactory completion of the prescribed training course and written examination. A permit shall state the methods

and equipment which the police officer is qualified to use. Permits shall be subject to termination or revocation at the discretion of the Department of State Police.

(2) In conducting a chemical test of the blood, only a duly licensed physician or a person acting under the direction or control of a duly licensed physician may withdraw blood or pierce human tissue. A licensed physician, or a qualified person acting under the direction or control of a duly licensed physician, shall not be held civilly liable for withdrawing any bodily substance, in a medically acceptable manner, at the request of a peace officer.

(3) An individual who performs a chemical analysis of breath or blood under ORS 813.100 or 813.140 shall prepare and sign a written report of the findings of the test which shall include the identification of the police officer upon whose request the test was administered.

(4) Any individual having custody of the report mentioned in subsection (3) of this section shall, upon request of the person tested, furnish that person or that person's attorney, a copy of the report.

(5) The expense of conducting a chemical test as provided by ORS 813.100 or 813.140 shall be paid by the governmental unit on whose equipment the test is conducted or by the governmental unit upon whose request the test was administered if no governmental unit's equipment is used to conduct the test. [1983 c.338 §173; 1985 c.16 §57; 1985 c.337 §2]

Note: Section 5, chapter 822, Oregon Laws 1983, provides.

Sec. 5. Notwithstanding ORS 487.815, a chemical analysis of a person's breath is not invalid under ORS 487.545 when the individual performing the analysis is doing so under authority of a permit issued by the Health Division that is valid on the effective date of this Act [October 15, 1983]. Persons performing such chemical analysis under such permit may continue to do so for purposes of ORS 487.545 and 487.815 so long as the permit remains valid as provided by the Department of State Police

PLEA AGREEMENT

813.170 Plea agreement prohibited.

(1) Notwithstanding ORS 135.405 to 135.445, a person charged with the offense of driving under the influence of intoxicants shall not be allowed to forfeit bail or plead "guilty" or "no contest" to any other offense in exchange for a dismissal of the offense charged. No district attorney or city attorney shall make any motion and no judge shall enter any order in derogation of this section. This section does not prohibit diversion as provided under ORS 813.200.

(2) Notwithstanding ORS 135.881 to 135.901, a person charged with the offense of driving under the influence of intoxicants shall not be allowed to enter into any program of supervised performance or diversion except as provided under ORS 813.200. [1983 c.338 §382]

DIVERSION

813.200 Notice of availability of diversion; petition; form; contents. (1) The court shall inform at arraignment a defendant charged with the offense of driving while under the influence of intoxicants as defined in ORS 813.010 or a city ordinance conforming thereto that a diversion agreement may be available if the defendant meets the criteria set out in ORS 813.210 and files with the court a petition for a driving while under the influence of intoxicants diversion agreement.

(2) The petition forms for a driving while under the influence of intoxicants diversion agreement shall be available to a defendant at the court.

(3) The form of the petition for a driving while under the influence of intoxicants diversion agreement and the information and blanks contained therein shall be determined by the Supreme Court under ORS 1.525. The petition forms made available to a defendant by any city or state court shall conform to the requirements adopted by the Supreme Court.

(4) In addition to any other information required by the Supreme Court to be contained in a petition for a driving while under the influence of intoxicants diversion agreement, the petition shall include:

(a) A waiver by the defendant of the right to speedy trial or sentencing in any subsequent action upon the charge;

(b) An agreement by the defendant to complete at an agency or organization designated by the city or state court a diagnostic assessment to determine the possible existence and degree of an alcohol or drug abuse problem;

(c) An agreement by the defendant to complete, at defendant's own expense based on defendant's ability to pay, the program of treatment indicated as necessary by the diagnostic assessment;

(d) An agreement by the defendant to not use intoxicants in conjunction with the defendant's operation of a motor vehicle and to comply fully with the laws of this state designed to discourage the use of intoxicants in conjunction with motor vehicle operation;

(e) A notice to the defendant that the diversion agreement will be considered to be violated if the court receives notice that the defendant at any time during the diversion period committed the offense of driving while under the influence of intoxicants or committed a violation of ORS 811.170;

(f) An agreement by the defendant to keep the court advised of the defendant's current mailing address at all times during the diversion period;

(g) A waiver by the defendant of any former jeopardy rights under the federal and state constitutions and ORS 131.505 to 131.525 in any subsequent action upon the charge or any other offenses based upon the same criminal episode; and

(h) A sworn statement, as defined in ORS 162.055, by the defendant certifying that the defendant meets the criteria set out in ORS 813.210 to be eligible to enter into the driving while under the influence of intoxicants diversion agreement. [1983 c.338 §369; 1985 c 16 §191]

813.210 Petition; filing fee; service on prosecutor; objection; eligibility. (1) After an accusatory instrument has been filed charging the defendant with the offense of driving while under the influence of intoxicants, a defendant may file with the court a petition for a driving while under the influence of intoxicants diversion agreement described in ORS 813.200. The petition must be filed within 30 days after the date of the defendant's first appearance on the summons, unless a later filing date is allowed by the court upon a showing of good cause.

(2) The defendant shall pay to the court, at the time of filing a petition for a driving while under the influence of intoxicants diversion agreement, a filing fee established under ORS 813.240. The court may make provision for payment of the filing fee by the defendant on an instalment basis. The court may waive all or part of the filing fee in cases involving indigent defendants. The filing fee paid to the court under this subsection shall be retained by the court if the petition is allowed. The filing fee shall be distributed as provided by ORS 813.240.

(3) The defendant shall cause a copy of the petition for a driving while under the influence of intoxicants diversion agreement to be served upon the district attorney or city attorney. The district attorney or city attorney may file with the court, within 15 days after the date of service, a written objection to the petition and a request for a hearing.

(4) After the time for requesting a hearing under subsection (3) of this section has expired and no request has been filed, or after hearing requested under subsection (3) of this section, the court may allow a petition for a driving while under the influence of intoxicants diversion agreement unless the court determines, by a preponderance of the evidence, that one or more of the following applies:

(a) The defendant has another charge presently pending, on the date of commission of the present offense, or within 10 years before the date of commission of the present offense the defendant was convicted of or forfeited bail or security for the offense of driving while under the influence of intoxicants or its statutory counterpart in this state or of the statutory counterpart of that offense in any other jurisdiction.

(b) The defendant is participating, on the date of commission of the present offense, or within 10 years before the date of commission of the present offense has participated in a driving while under the influence of intoxicants diversion program or in any similar alcohol or drug rehabilitation program in this state or in any other jurisdiction.

(c) The defendant has pending, on the date of commission of the present offense, or within 10 years before the date of commission of the present offense the defendant was convicted of any degree of murder, manslaughter, criminally negligent homicide or assault which resulted from the operation of a motor vehicle in this state or of the statutory counterpart of any of those offenses in any other jurisdiction.

(d) The present driving while under the influence of intoxicants offense involved an accident resulting in death or physical injury, as defined in ORS 161.015, to any person, other than the defendant.

(e) The date of the offense for which the agreement is petitioned is earlier than November 1, 1981. [1983 c.338 §370, 1985 c.16 §192]

813.220 Matters to be considered by court in determining to allow diversion agreement. In making a determination of whether to allow or deny a petition for a driving while under the influence of intoxicants diversion agreement under ORS 813.210, a court:

(1) Shall consider whether the diversion will be of benefit to the defendant and the community.

(2) May take into consideration whether there was an early recognition by the defendant during the proceeding that a course of diagnosis

and treatment of problem drinking, alcoholism or drug dependency would be beneficial.

(3) May take into consideration whether there is a probability that the defendant will cooperate with the diagnostic assessment and treatment agencies.

(4) May take into consideration whether the defendant will observe the restrictions contained in the diversion agreement. [1983 c.338 §371]

813.230 Diversion agreement; record; duration; effect of denial. (1) When the court allows a petition for a driving while under the influence of intoxicants diversion agreement filed as provided in ORS 813.210, the judge taking that action shall sign the petition and indicate thereon the date of allowance of the diversion period, the length of the diversion period and the date upon which the driving while under the influence offense occurred. The petition when signed and dated becomes the diversion agreement between the defendant and the court. The court shall make the agreement a part of the record of the case. The court shall send to the Motor Vehicles Division, within 48 hours after allowing the petition, a certified copy of the diversion agreement. The Motor Vehicles Division shall make the diversion agreement a part of the defendant's operating record.

(2) A driving while under the influence of intoxicants diversion agreement shall be for a period of one year after the date the court allows the petition. During the diversion period the court shall stay the driving while under the influence of intoxicants offense proceeding pending completion of the diversion agreement or its termination.

(3) When the court denies a petition for a driving while under the influence of intoxicants diversion agreement, it shall continue the offense proceeding against the defendant. [1983 c.338 §372; 1985 c.16 §193; 1985 c.710 §7]

813.240 Amount and distribution of filing fee. (1) The filing fee paid by a defendant at the time of filing a petition for a driving while under the influence of intoxicants diversion agreement as provided in ORS 813.210 shall be \$282 and shall be distributed by the court as follows if the petition is allowed:

(a) \$70 to the agency or organization providing the diagnostic assessment;

(b)(A) In the case of distribution of the fee by a municipal or justice court, \$12 to the Department of Revenue to be credited to the Police Standards and Training Account established by ORS 181.690; or

(B) In the case of distribution of the fee by a circuit or district court, \$12 to the State Court Administrator for deposit in the Police Standards and Training Account;

(c) \$100 to the Mental Health Division for deposit in the fund created under ORS 813.270, to be used for purposes of that fund; and

(d) \$100 to be distributed as provided for the disposition of costs under ORS 153.630.

(2) If less than the \$282 filing fee is paid to the court by the defendant under subsection (1) of this section, the money actually received shall be allocated in the amounts provided first to the agency or organization providing the diagnostic assessment, second to the Police Standards and Training Account, third to the fund created under ORS 813.270 and the remainder as provided for the disposition of costs under ORS 153.630.

(3) The Chief Justice of the Oregon Supreme Court may require that any or all fees distributed by circuit and district courts under this section be distributed through the offices of the State Court Administrator. [1983 c.338 §373, 1985 c.16 §194; 1985 c.277 §3]

813.250 Motion to dismiss charge on completion of diversion; termination of agreement; admissibility of statements. (1) At any time after the conclusion of the period of a driving while under the influence of intoxicants diversion agreement described in ORS 813.230, a defendant who has fully complied with and performed the conditions of the diversion agreement may apply by motion to the court wherein the diversion agreement was entered for an order dismissing the charge with prejudice.

(2) The defendant shall cause to be served on the district attorney or city attorney a copy of the motion for entry of an order dismissing with prejudice the charge of driving while under the influence of intoxicants. The motion shall be served on the district attorney or city attorney at the time it is filed with the court. The district attorney or city attorney may contest the motion.

(3) If the court finds, by a preponderance of the evidence, at any time prior to dismissing with prejudice the charge of driving while under the influence of intoxicants that any of the reasons described in this subsection exist for termination, the court shall require the defendant to appear in court, terminate the agreement and continue the offense proceeding. The court may take into account at the time of sentencing any partial fulfillment by the defendant of the terms of the diversion agreement. The court shall terminate a

diversion agreement under this subsection for any of the following reasons:

(a) If the defendant has failed to fulfill the terms of the diversion agreement.

(b) If the defendant did not qualify for the diversion agreement under the criteria in ORS 813.210.

(4) If the defendant does not appear as provided by subsection (1) of this section within six months after the conclusion of the diversion period, and if the court finds that the defendant fully complied with and performed the conditions of the diversion agreement, and if it gives notice of that finding to the district attorney or city attorney the court may on its own motion enter an order dismissing the charge of driving while under the influence of intoxicants with prejudice.

(5) No statement made by the defendant about the offense with which the defendant is charged shall be offered or received in evidence in any criminal or civil action or proceeding arising out of the same conduct which is the basis of the charge of driving while under the influence of intoxicants, if the statement was made during the course of the diagnostic assessment or the rehabilitation program and to a person employed by the program. [1983 c 338 §374; 1985 c 16 §195]

813.260 Designation of agencies to perform diagnostic assessments; duties of agency. (1) Courts having jurisdiction over driving while under the influence of intoxicants offenses shall designate agencies or organizations to perform the diagnostic assessment and treatment required under driving while under the influence of intoxicants diversion agreements described in ORS 813.200. The designated agencies or organizations must meet the standards set by the Mental Health Division to perform the diagnostic assessment and treatment of problem drinking, alcoholism and drug dependency and must be certified by the Mental Health Division. Wherever possible a court shall designate agencies or organizations to perform the diagnostic assessment that are separate from those that may be designated to carry out a program of treatment for problem drinking, alcoholism or drug dependency.

(2) Monitoring of a defendant's progress under a diversion agreement shall be the responsibility of the diagnostic assessment agency or organization. It shall make a report to the court stating the defendant's successful completion or failure to complete all or any part of the treatment program specified by the diagnostic assessment. The form of the report shall be determined by agreement between the court and the diag-

nostic assessment agency or organization. The court shall make the report of the diagnostic assessment agency or organization that is required by this subsection a part of the record of the case. [1983 c.338 §375].

813.270 Intoxicated Driver Program Fund; creation; uses. The Intoxicated Driver Program Fund is created to consist of moneys placed in the fund under ORS 813.030 and 813.240 or as otherwise provided by law. The moneys in the fund may be used only for the following purposes:

(1) To pay for providing treatment for individuals who enter diversion agreements under ORS 813.200 and who are found to be indigent. Payment for treatment under this subsection may include treatment for problem drinking, alcoholism or drug dependency. Payment shall be made as provided by the Mental Health Division by rule to agencies or organizations providing treatment.

(2) To pay for evaluation as provided by law of programs used for diversion agreements.

(3) To pay the cost of administration of the fund by the Mental Health Division.

(4) To pay for materials, resources and training supplied by the Mental Health Division to those persons, organizations or agencies performing the diagnostic assessments or providing education or treatment to persons under diversion agreements.

(5) To pay for providing treatment or information programs required under ORS 813.020 for individuals who are found to be indigent. [1983 c 338 §141, 1985 c.16 §42]

EVIDENCE

813.300 Use of blood alcohol percentage as evidence; percentage required for being under the influence. (1) At the trial of any civil or criminal action, suit or proceeding arising out of the acts committed by a person driving a motor vehicle while under the influence of intoxicants, if the amount of alcohol in the person's blood at the time alleged is less than .08 percent by weight of alcohol as shown by chemical analysis of the person's breath or blood, it is indirect evidence that may be used with other evidence, if any, to determine whether or not the person was then under the influence of intoxicants.

(2) Not less than .08 percent by weight of alcohol in a person's blood constitutes being under the influence of intoxicating liquor.

(3) Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood. [1983 c.338 §590, 1985 c 16 §297]

813.310 Refusal to take chemical test admissible as evidence. If a person refuses to submit to a chemical test under ORS 813.100 or refuses to consent to chemical tests under ORS 813.140, evidence of the person's refusal is admissible in any civil or criminal action, suit or proceeding arising out of acts alleged to have been committed while the person was driving a motor vehicle on premises open to the public or the highways while under the influence of intoxicants. [1983 c.338 §595; 1985 c.16 §301]

813.320 Effect of implied consent law on evidence. The provisions of the implied consent law, except ORS 813.300, shall not be construed by any court to limit the introduction of otherwise competent, relevant evidence in any civil action, suit or proceedings or in any criminal action other than a violation of ORS 813.010 or a similar municipal ordinance in proceedings under ORS 813.410. [1983 c 338 §596, 1985 c 16 §302]

SUSPENSION

(For Conviction)

813.400 Suspension upon conviction; duration; hearing. Driving any vehicle upon any highway or on premises open to the public while under the influence of intoxicants constitutes grounds for suspension of driving privileges. The following apply to this section:

(1) Upon receipt of a record of conviction for an offense described in this section, the division shall suspend the driving privileges or right to apply for driving privileges.

(2) The suspension shall be for a period described under Schedule II of ORS 809.420, except the division shall not reinstate any driving privileges to the person until the person complies with future responsibility filings.

(3) The hearing shall be a limited hearing under ORS 809.440 that is limited to the issue of whether the person is the person convicted. The division may use expedited hearing procedures under ORS 809.440. [1983 c 338 §353 (8); 1985 c 16 §166 (8); 1985 c 393 §10a (8); 1985 c.669 §2a (8)]

(Under Implied Consent Law)

813.410 Suspension upon receipt of police report on implied consent test; hearing; validity of suspension; appeal. (1) If the division receives from a police officer a report

that is in substantial compliance with ORS 813.100, the division shall suspend the driving privileges of the person in this state on the 30th day after the date of arrest unless, at a hearing described under this section, the division determines that the suspension would not be valid as described in this section. A suspension imposed under this section shall be for a period of time established under ORS 813.420.

(2) If within 10 days from the date of arrest, the division receives a written request for a hearing from a person whose driving privileges the division proposes to suspend under this section, the division shall provide a hearing in accordance with this section. Except as otherwise provided under this section, a hearing held by the division under this section shall be subject to the provisions for contested cases, other than appeal provisions, under ORS 183.310 to 183.550. The applicable appeal provisions are as provided under ORS 813.450 and section 24, chapter 672, Oregon Laws 1985. Notwithstanding ORS 809.430, the division is not required to give any notice of intent to suspend or suspension in addition to that provided under ORS 813.100.

(3) A hearing required by this section is subject to all of the following:

(a) The hearing shall be before a representative of the division.

(b) Unless there is an agreement between the person and the division that the hearing be conducted elsewhere, the hearing shall be held either in the county where the alleged offense occurred or at any place within 100 miles of the place where the offense is alleged to have occurred, as established by the division by rule.

(c) The division may contract with any person or agency to hold the hearing on behalf of the division and to report findings from the hearing to the division and any person or agency may in individual cases issue final orders on behalf of the division.

(d) A person who requests a hearing under this section and who fails, without just cause, to appear in person or through an attorney waives the right to a hearing notwithstanding the provisions of ORS 183.415. If a person waives a right to a hearing under this paragraph, the division is not required to make any showing at hearing.

(e) Except as provided in ORS 813.440 or upon remand under ORS 813.450, the division shall hold the hearing and issue a final order within 30 days of the date of the arrest.

(f) In connection with the hearing, the division or its authorized representative may admin-

ister oaths and shall issue subpoenas for the attendance of witnesses at the hearing requested by the person or the division and the production of relevant documents.

(g) The hearing shall be recorded by whatever means may be determined by the division and shall include testimony and exhibits, if any. The record of the proceedings shall not be transcribed unless requested by a party to the proceeding.

(4) The scope of a hearing under this section shall be limited to whether the suspension is valid as described in this subsection. A suspension under this section is valid if all of the following requirements under ORS 813.100 have been met:

(a) The person, at the time the person was requested to submit to a test under ORS 813.100, was under arrest for driving while under the influence of intoxicants in violation of ORS 813.010 or a municipal ordinance.

(b) The police officer had reasonable grounds to believe, at the time the request was made, that the person arrested had been driving under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance.

(c) The person refused the test under ORS 813.100, or took the test and the test disclosed that the level of alcohol in the person's blood at the time of the test was sufficient to constitute being under the influence of intoxicating liquor under ORS 813.300.

(d) The person had been informed under ORS 813.100 of rights and consequences as described under ORS 813.130.

(e) The person was given written notice required under ORS 813.100.

(f) If the person arrested submitted to the test, the person administering the test was qualified to administer the test under ORS 813.160.

(g) If the person arrested submitted to the test, the methods, procedures and equipment used in the test complied with requirements under ORS 813.160.

(5) A suspension imposed under this section shall remain in effect pending any appeal or remand of a final order issued under this section and there shall be no stay of the suspension pending appeal or remand.

(6) Unless a person fails, without just cause, to appear in person or through an attorney at a hearing requested under this section, a person shall have the right to appeal any final order by the division after a hearing under this section by filing a petition. The following apply to this subsection:

(a) The person shall file the petition in the circuit court for the county where the person resides or, if the person does not reside in Oregon, in the circuit court of the county in which the arrest took place within 30 days after issuance of the final order of the division.

(b) The court upon receipt of the petition shall set the matter for hearing upon 10 days' notice to the division and the petitioner unless hearing is waived by both the division and the petitioner. [1983 c.338 §358; 1985 c.16 §167, 1985 c.672 §13]

813.420 Duration of suspension for refusal or failure of breath test. When the division imposes a suspension under ORS 813.410, the suspension shall be for a period of time determined according to the following:

(1) If the suspension is for refusal of the test under ORS 813.100 and the person is not subject to an increase in the suspension time for reasons described in ORS 813.430, the suspension shall be for a period of one year.

(2) If the suspension is for refusal of the test under ORS 813.100 and the person is subject to an increase in the suspension time for reasons described in ORS 813.430, the suspension shall be for a period of three years.

(3) If the suspension is because the test under ORS 813.100 disclosed that the person had a level of alcohol in the person's blood that constituted being under the influence of intoxicating liquor under ORS 813.300 and the person is not subject to an increase in the suspension time for reasons described in ORS 813.430, the suspension shall be for a period of 90 days.

(4) If the suspension is because the test under ORS 813.100 disclosed that the person had a level of alcohol in the person's blood that constituted being under the influence of intoxicating liquor under ORS 813.300 and the person is subject to an increase in the suspension time for reasons described in ORS 813.430, suspension shall be for a period of one year. [1985 c 16 §171]

813.430 Grounds for increase in duration of suspension. This section establishes circumstances under which ORS 813.420 requires an increase in the time for suspension of driving privileges and under which ORS 813.520 requires an increase in the time before the division may issue an occupational permit. A person is subject to an increase in suspension time under this section if any of the following apply:

(1) The person is presently participating in a driving while under the influence of intoxicants diversion program in this state or in any similar

alcohol or drug rehabilitation program in this or any other jurisdiction.

(2) Within the five years preceding the date of arrest any of the following occurred:

(a) A suspension of the person's driving privileges under ORS 813.410 or ORS 482.540 (1981 Replacement Part) became effective.

(b) The person was convicted of driving under the influence of intoxicants in violation of ORS 813.010 or its statutory counterpart in another jurisdiction or a municipal ordinance.

(c) The person commenced participating in a driving while under the influence of intoxicants diversion program in this state or in any similar alcohol or drug rehabilitation program in this or any other jurisdiction. [1985 c.16 §173, 1985 c.672 §15]

813.440 Hearing on validity of suspension for persons unable to request or appear at hearing within required time. (1) Notwithstanding ORS 813.410, the division may provide a hearing to determine the validity of a suspension under ORS 813.410 for a person who, for one of the reasons described in subsection (2) of this section, was unable to:

(a) Request a hearing within the time required by ORS 813.410; or

(b) Appear, either in person or through an attorney, at a hearing held under ORS 813.410.

(2) The division may provide a hearing under this section only if the reason for the person's inability to request or attend a hearing within the time required under ORS 813.410 was caused by any of the following:

(a) The person's physical incapacity, verified by a physician to the satisfaction of the division to be of a nature that would prevent the person from making the appropriate request or attending the hearing.

(b) A death in the immediate family of the person, verified to the satisfaction of the division.

(c) An error of the division.

(d) Other just cause as defined by the division by administrative rule.

(3) A hearing held under this section is subject to the same provisions as a hearing held under ORS 813.410, except that the division is not required to hold the hearing and make the determination within the time required by ORS 813.410.

(4) The granting of a hearing under this section shall not delay the imposition of a suspension under ORS 813.410 within the time required under ORS 813.410. However, if a person estab-

lishes that the person was deprived by division error of an opportunity to appear at a hearing, the division shall rescind the suspension and shall promptly schedule a subsequent hearing to determine the validity of the suspension under ORS 813.410. In other cases under this section, when the division is unable to hold the hearing within the time required by ORS 813.410, the division shall rescind any suspension imposed under ORS 813.410 only if the division determines, at a hearing held under this section, that the suspension was not valid as described under ORS 813.410.

(5) The following apply to this section:

(a) The division shall issue a final order 10 days after the hearing described in this section.

(b) If the division has rescinded a suspension under subsection (4) of this section and if the division, at the hearing described in this section, determines that the suspension is valid as described under ORS 813.410, the division shall reinstate the suspension effective five days after the final order is issued.

(c) Notwithstanding ORS 809.430, no additional notice or order of suspension need be given. [1985 c.16 §169; 1985 c.672 §14]

813.450 Appeal from suspension for refusal or failure of breath test. (1) The petition to the circuit court appealing an order of the division after a hearing under ORS 813.410 shall state the nature of the petitioner's interest and the ground or grounds upon which the petitioner contends the order should be reversed or remanded.

(2) The court shall conduct the review without a jury. Review shall be limited to the record of the division's hearing.

(3) Any party to the proceedings before the circuit court may appeal from the judgment of the court to the Court of Appeals.

(4) Upon review in the circuit court and Court of Appeals, the court may affirm, reverse or remand the order as follows:

(a) If the court finds that the division has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(A) Set aside or modify the order; or

(B) Remand the case to the division for further action under a correct interpretation of the provision of law.

(b) The court shall remand the order to the division if it finds the division's exercise of discretion to be any of the following:

(A) Outside the range of discretion delegated to the agency by law.

(B) Inconsistent with a division rule, an officially stated division position, or a prior division practice, if the inconsistency is not explained by the division.

(C) Otherwise in violation of a constitutional or statutory provision.

(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record.

(5) Upon review, the court shall affirm the division's order unless the court finds a ground for setting aside, modifying or remanding to the division under a specified provision of this section. [1985 c 672 §23]

Note: Section 24, chapter 672, Oregon Laws 1985, provides:

Sec. 24. Section 23 of this 1985 Act applies to all actions in proceedings pending on or commenced after the effective date of this 1985 Act, except that, where justice requires, a judge may order that an action or proceeding pending before that date be governed by the prior practice of the court.

813.460 Division procedures upon verification of suspension of driving privileges of wrong person. If the division verifies to its satisfaction that it has suspended the driving privileges of the wrong person under ORS 813.410 because a person arrested for driving under the influence of intoxicants gave false identification at the time of the arrest, all the following apply:

(1) The division shall immediately rescind the suspension order under the false name and shall issue a suspension order for the period set forth in ORS 813.420 to the person arrested.

(2) The division shall issue the order in the manner set forth in ORS 809.430.

(3) No further notice of suspension need be given.

(4) The time limitations in ORS 813.410 (1), (2) and (3)(e) do not apply to a suspension order issued under this section. [1985 c 672 §25]

OCCUPATIONAL PERMITS

813.500 Restrictions on issuance. (1) If a person's license is suspended a second or subsequent time for driving while under the influence of intoxicants under ORS 813.400 the division may only issue an occupational permit to the person under ORS 807.240 if the person, in addition to any requirement under ORS 807.240 and any applicable requirements under ORS 807.250 and 813.520:

(a) Is examined by the Mental Health Division or its designee to determine whether the person has a problem condition involving alcohol or controlled substances as described in ORS 813.040; and

(b) Complies with the requirements of this section.

(2) If the Mental Health Division determines that the person has a problem condition involving alcohol or controlled substance, as described in ORS 813.040, the division may issue the occupational permit to the person only if both the following apply:

(a) The person enrolled in a program for rehabilitation for alcoholism or drug dependence approved by the Mental Health Division.

(b) The Mental Health Division recommends, on the basis of the person's progress in the rehabilitation program, such reinstatement in writing to the division. If the Mental Health Division makes a recommendation under this paragraph, the Mental Health Division shall state specifically in the recommendation the times, places, routes and days of the week minimally necessary for the person to retain employment or to attend any alcohol treatment or rehabilitation program.

(3) If the Mental Health Division determines that the person does not have a problem condition involving alcohol or controlled substances as described in ORS 813.040, the division may issue the occupational permit to the person only if, in addition to any requirements under ORS 807.240, the person enters an alcohol or drug information program approved by the Mental Health Division and the division determines that issuance of an occupational permit is appropriate. If the division issues an occupational permit to a person described in this subsection, the division shall require, under ORS 807.240, that the person complete the program as a condition of retaining the occupational permit. [1983 c 338 §328, 1985 c.16 §145]

813.510 Limitations on privileges granted by permit; conditions of permit.

This section establishes limitations that the division is required or permitted to place on occupational permits issued under ORS 807.240 to persons whose suspension is based upon a conviction for driving under the influence of intoxicants or upon ORS 813.100. Limitations placed on an occupational permit under this section are in addition to any limitations placed on the permit under ORS 807.240. A person's occupational permit is subject to suspension or revocation as provided under ORS 807.240 if the

division determines that the holder of the permit has violated any limitation placed upon the permit under this section. Violation of a limitation under this section is punishable as provided by ORS 811.175. The limitations are as described in the following:

(1) An occupational permit issued to the person shall limit the person's driving privileges:

(a) To the times, places, routes and days the division determines to be minimally necessary for the person to retain employment or to attend any alcohol treatment or rehabilitation program; and

(b) To times, places, routes and days that are specifically stated.

(2) The person's driving privileges under the permit are subject to suspension or revocation if the person does not maintain a good driving record, as defined by the administrative rules of the division, during the term of the permit.

(3) If the person is in a rehabilitation program under ORS 813.500, the person must complete the rehabilitation program.

(4) The division may require the person to complete a driver improvement program under ORS 809.480 as a condition of the permit.

(5) If the person is involved in a diversion agreement under ORS 813.220 and 813.230, the division may require the person to successfully complete the diversion program as a condition of retaining the permit.

(6) The division shall condition the permit so that the permit will be revoked if the person is convicted of any of the following:

(a) Reckless driving under ORS 811.140.

(b) Driving under the influence of intoxicants under ORS 813.010.

(c) Failure to perform the duties of a driver under ORS 811.700 or 811.705.

(d) Fleeing or attempting to elude a police officer under ORS 811.540.

(e) Driving while suspended or revoked under ORS 811.175.

(f) Driving after being declared a habitual offender under ORS 811.185. [1983 c.338 §329; 1985 c 16 §146]

813.520 Limitations on division authority to issue occupational permit or reinstate driving privileges. In addition to any provisions of ORS 807.240 and 813.510 or 807.250, this section establishes limitations on the authority of the Motor Vehicles Division to issue driving privileges under ORS 807.240. The division may not reinstate any driving privileges

or issue any occupational permit under ORS 807.240 as provided under any of the following:

(1) For a period of 90 days after the beginning of the suspension if the suspension is for refusal of the test under ORS 813.100 and the person is not subject to an increase in the time before an occupational permit may be issued for reasons described in ORS 813.430.

(2) For a period of 90 days after the beginning of the suspension if the suspension is because the test under ORS 813.100 disclosed that the person had a level of alcohol in the person's blood that constituted being under the influence of intoxicating liquor under ORS 813.300 and the person is subject to an increase in the time before an occupational permit may be issued for reasons described under ORS 813.430.

(3) For a period of one year after the beginning of the suspension if the suspension is for refusal of the test under ORS 813.100 and the person is subject to an increase in the time before an occupational permit may be issued for reasons described in ORS 813.430.

(4) For a period of 90 days after the beginning of the suspension under ORS 813.400 if it is the person's second conviction for driving while under the influence of intoxicants. The division shall not refuse to issue an occupational permit for the reason described in this subsection if the person's driving privileges were suspended under ORS 813.410 based upon the same occurrence and the division refused under subsection (1), (2) or (3) of this section to issue an occupational permit for any period of time during that suspension.

(5) For a period of one year after the beginning of the suspension under ORS 813.400 if it is the person's third or subsequent conviction for driving while under the influence of intoxicants. The division shall not refuse to issue an occupational permit for the reason described in this subsection if the person's driving privileges were suspended under ORS 813.410 based upon the same occurrence and the division refused under subsection (1), (2) or (3) of this section to issue an occupational permit for any period of time during that suspension.

(6) To any person who is afflicted with mental or physical infirmities or disabilities rendering it unsafe for the person to drive a motor vehicle.

(7) If the suspension is based upon a conviction for a violation of ORS 813.010 or is imposed under ORS 813.410 based upon ORS 813.100 to a person who has available public or private transportation sufficient to fulfill the person's transportation needs while the person is suspended.

(8) For a period of 30 days following imposition of suspension, if the person, within the previous year, has been convicted of a major traffic offense as defined in ORS 153.500 and the suspension is based upon a conviction for vio-

lation of ORS 813.010 or is imposed under ORS 813.410 based upon ORS 813.100. [1985 c.16 §148; 1985 c.672 §16]
