

# Chapter 813

1991 EDITION

## Driving Under the Influence of Intoxicants

### GENERAL PROVISIONS

- 813.010 Driving under the influence of intoxicants; penalty
- 813.020 Fee to be paid on conviction; examination; treatment; mandatory imprisonment or community service
- 813.025 Designation of agency to perform diagnostic assessment and treatment; qualifications
- 813.030 Amount of fee; distribution
- 813.040 Standards for determination of problem condition involving alcohol or controlled substances
- 813.050 Out-of-service orders for operators of commercial motor vehicles; grounds; duration; rules

### IMPLIED CONSENT

#### (Breath Test)

- 813.100 Implied consent to breath test; confiscation of license upon refusal or failure of test
- 813.110 Temporary permit upon confiscation of license
- 813.120 Police report to division
- 813.130 Rights of and consequences for person asked to take test

#### (Field Sobriety Tests)

- 813.135 Implied consent to field sobriety tests
- 813.136 Consequence of refusal to submit to or failure of field sobriety tests

### CHEMICAL TESTS; METHODS AND REQUIREMENTS

- 813.140 Chemical test with consent; unconscious person
- 813.150 Chemical test at request of arrested person
- 813.160 Methods of conducting chemical tests; duties of Health Division and Department of State Police; reports; costs

### PLEA AGREEMENT

- 813.170 Plea agreement prohibited

### DIVERSION

- 813.200 Notice of availability of diversion; petition; form; contents
- 813.210 Petition; filing fee; service on prosecutor; objection
- 813.215 Eligibility for diversion
- 813.220 Matters to be considered by court in determining to allow diversion agreement
- 813.230 Diversion agreement; record; duration; effect of denial
- 813.235 Attendance at victim impact treatment session as condition of diversion; fee
- 813.240 Amount and distribution of filing fee

- 813.250 Motion to dismiss charge on completion of diversion; admissibility of statements
- 813.255 Termination of diversion
- 813.260 Designation of agencies to perform diagnostic assessments; duties of agency
- 813.270 Intoxicated Driver Program Fund; creation; uses

### EVIDENCE

- 813.300 Use of blood alcohol percentage as evidence; percentage required for being under the influence
- 813.310 Refusal to take chemical test admissible as evidence
- 813.320 Effect of implied consent law on evidence

### SUSPENSION

#### (For Conviction)

- 813.400 Suspension upon conviction; duration; review

#### (Of Commercial Driver License)

- 813.403 Suspension of commercial driver license upon conviction; review
- 813.404 Duration of suspension of commercial driver license for conviction, implied consent violation or out-of-state conviction or suspension

#### (Under Implied Consent Law)

- 813.410 Suspension upon receipt of police report on implied consent test; hearing; validity of suspension; appeal
- 813.420 Duration of suspension for refusal or failure of breath test
- 813.430 Grounds for increase in duration of suspension
- 813.440 Hearing on validity of suspension for persons unable to request or appear at hearing within required time
- 813.450 Appeal from suspension for refusal or failure of breath test
- 813.460 Division procedures upon verification of suspension of driving privileges of wrong person
- 813.470 Division notation on record of person acquitted after suspension

### HARDSHIP PERMITS

- 813.500 Restrictions on issuance
- 813.510 Limitations on privileges granted by permit; conditions of permit
- 813.520 Limitations on division authority to issue hardship permit or reinstate driving privileges

### IGNITION INTERLOCK DEVICES

(Temporary provisions relating to ignition interlock devices are compiled as notes following ORS 813.520)

## OREGON VEHICLE CODE

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### CROSS REFERENCES

- Arrest procedure, certain provisions not applicable to violations of Oregon Vehicle Code, 133.080
- Arrest without warrant for certain traffic offenses when officer has probable cause to believe person committed offense, 133.310
- Driving under influence of intoxicants is major traffic offense, 153.500
- Intoxicants, local laws prohibited except for traffic regulation, 430.325
- Notice by health care provider that intoxicated person is about to drive, 441.827
- Release of defendant, application to certain traffic offenses, 135.295
- 813.010**
- Impoundment of vehicle upon second conviction of driving under influence, 809.700
- Release of vehicle to intoxicated person, refusal by police, 809.710
- Suspension of vehicle registration for second offense, 809.010
- 813.200 to 813.270**
- Driving record maintained by Motor Vehicles Division, 802.200
- Program for persons convicted of driving under influence of alcohol or crimes committed while intoxicated, 430.850 to 430.880
- 813.210 to 813.230**
- Unitary assessment, 135.905
- 813.400**
- Court appearance required when conviction will result in mandatory suspension, 153.540
- Driver License Compact, treatment of certain offenses, 802.550
- Records of any conviction resulting in mandatory suspension to be kept by Motor Vehicles Division, 153.625, 802.200

**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 ORS 813.100, 813.140 or 813.150;

(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; 1987 c.138 §5]

**Note:** The amendments to 813.010 by section 7, chapter 835, Oregon Laws 1991, take effect October 1, 1992. See section 9, chapter 835, Oregon Laws 1991. The text that is in effect on and after October 1, 1992, is set forth for the user's convenience.

**813.010.** (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 ORS 813.100, 813.140 or 813.150;

(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 may not be convicted of driving under the influence of intoxicants on the basis of being under the influence of a controlled substance unless the fact that the person was under the influence of a controlled substance is pleaded in the accusatory instrument and is either proved at trial or is admitted by the person through a guilty plea.

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

(4) 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.

**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 Assistant Director for Alcohol and Drug Abuse Programs to perform the diagnostic assessment and treatment of problem drinking, alcoholism and drug dependency and must be certified by the Assistant Director for Alcohol and Drug Abuse Programs. 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.

(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 Assistant Director for Alcohol and Drug Abuse Programs.

(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 Assistant Director for Alcohol and Drug Abuse Programs.

(2) The court must impose and not suspend execution of a sentence requiring the person either to serve at least 48 hours' imprisonment which shall be served consecutively unless justice requires otherwise or to perform community service for times specified by the court under ORS 137.129. For purposes of this subsection:

(a) A court may provide for the imprisonment to be served in jail, minimum security facilities or inpatient rehabilitation or treatment centers.

(b) Whenever the judge provides for the mandatory imprisonment to be served other than consecutively, the judgment must specifically so provide and the judge must state the reasons in writing. [1983 c.338 §588; 1985 c.16 §294 and former 487.549; 1989 c.576 §5; 1991 c.557 §3]

**813.025 Designation of agency to perform diagnostic assessment and treatment; qualifications.** A court may designate a single agency or organization to perform the diagnostic assessment and treatment described in ORS 813.020 (1) or 813.260

(1) when the Assistant Director for Alcohol and Drug Abuse Programs certifies that:

(1) An agency or organization may accept such designations due to the lack of alternative agencies or organizations in the service area; or

(2) An agency or organization has applied to and been authorized by the Assistant Director for Alcohol and Drug Abuse Programs to operate a demonstration project which combines diagnostic assessment and treatment. The assistant director shall by rule set forth the conditions under which a demonstration project may be authorized. [1991 c.557 §2]

**813.030 Amount of fee; distribution.**

The fee required by ORS 813.020 (1) shall be in the amount of \$220, except that 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 installment basis. The fee shall be ordered paid as follows:

(1) \$90 to be paid by the defendant directly to the agency or organization providing the diagnostic assessment;

(2) \$105 to be credited and distributed under ORS 137.295 as an obligation payable to the state; and

(3) \$25 to be paid to the Assistant Director for Alcohol and Drug Abuse Programs for deposit in the Intoxicated Driver Program Fund created by ORS 813.270. [1985 c.16 §296; 1987 c.905 §29; 1989 c.576 §§6a, 7a; 1989 c.635 §§1, 3; 1991 c.557 §4]

**Note:** The amendments to 813.030 by section 29, chapter 905, Oregon Laws 1987, as amended by section 7a, chapter 576, Oregon Laws 1989, and section 4, chapter 557, Oregon Laws 1991, take effect July 1, 1992. See section 39, chapter 905, Oregon Laws 1987, as amended by section 1, chapter 460, Oregon Laws 1991. The text that is in effect until July 1, 1992, is set forth for the user's convenience.

**813.030** 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 \$220. 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 installment basis.

(2) Except as otherwise provided in subsection (3) of this section, 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.

(3) In addition to any moneys distributed to the Intoxicated Driver Program Fund under subsection (2) of this section, the court shall distribute \$25 from each fee collected under subsection (1) of this section to the Intoxicated Driver Program Fund.

**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]

**813.050 Out-of-service orders for operators of commercial motor vehicles; grounds; duration; rules.** (1) A police officer or a person authorized by the Public Utility Commission to perform vehicle safety inspections shall issue an out-of-service order to the operator of a commercial motor vehicle if any of the following applies:

(a) The person has reasonable grounds to believe that the operator has consumed alcohol or other intoxicating beverage within four hours prior to the time the operator began operating the vehicle or at any time while operating the vehicle. As used in this paragraph, "reasonable grounds" includes, but is not limited to, smelling alcohol on the breath or person of the operator.

(b) A chemical test of the operator's breath discloses any amount of alcohol in the blood of the operator.

(c) The operator possesses an intoxicating beverage while operating the

vehicle. This subsection does not apply to possession of an intoxicating beverage that is manifested and transported as part of a shipment.

(2) An out-of-service order issued under this section shall become effective upon its issuance and shall remain in effect for 24 hours.

(3) The division shall adopt rules requiring that any driver issued an out-of-service order under this section be required to report the order to the division and to the driver's employer. Rules adopted under this section may include, but need not be limited to, rules specifying the times within which reports must be made and the contents of the reports. [1991 c.185 §14]

### IMPLIED CONSENT (Breath Test)

**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.** (1) A report required by ORS 813.100 shall disclose substantially all of the following information:

(a) 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.

(b) 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.

(c) 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.

(d) Whether the person was driving a commercial motor vehicle and 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 .04 percent or more by weight.

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

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

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

(h) 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.

(2) A report required by ORS 813.100 may be made on one or more forms provided by the division. [1983 c.338 §405; 1985 c.16 §215; 1985 c.672 §20; 1989 c.636 §42]

**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 for purposes of criminal penalties if the test discloses a blood alcohol content of .08 percent or more by weight. The person will fail the test for purposes of the Motorist Implied Consent Law if the test discloses a blood alcohol content of:

(A) .08 percent or more by weight if the person was not driving a commercial motor vehicle;

(B) .04 percent or more by weight if the person was driving a commercial motor vehicle; or

(C) Any amount if the person was under 21 years of age.

(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 not be eligible for a hardship permit for at least 90 days, and possibly for one year, depending on the person's driving record. The person may possibly qualify for a hardship permit in 30 days 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 813.100, 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) If the person is driving a commercial motor vehicle, the information about rights and consequences shall include, in addition to the provisions of subsection (2) of this section, substantially the following:

(a) If the person refuses the test or submits to the test and the level of alcohol in the person's blood is .04 percent or more by weight, the person's commercial driver license or right to apply for a commercial driver license will be suspended and no hardship permit authorizing the person to drive a commercial motor vehicle will be issued. The suspension will be substantially longer if the person refuses the test.

(b) The suspension of the person's commercial driver license or right to apply for a commercial driver license will be for the person's lifetime if:

(A) The person refuses the test or submits to the test and the level of alcohol in the person's blood is .04 percent or more by weight; and

(B) The person's commercial driver license or right to apply for a commercial driver license has previously been suspended because the person was convicted of a crime punishable as a felony, of failure to perform the duties of a driver or of driving while under the influence of intoxicants or because the person refused a previous test or submitted to the test and the level of alcohol in the person's blood was .04 percent or more by weight.

(4) 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; 1987 c.673 §3; 1987 c.801 §11; 1989 c.171 §92; 1989 c.636 §43; 1991 c.185 §15; 1991 c.860 §10]

### (Field Sobriety Tests)

**813.135 Implied consent to field sobriety tests.** Any person who operates a vehicle upon premises open to the public or the highways of the state shall be deemed to have given consent to submit to field sobriety tests upon the request of a police officer for the purpose of determining if the person is under the influence of intoxicants if the police officer reasonably suspects that the person has committed the offense of driving while under the influence of intoxicants in violation of ORS 813.010 or a municipal ordinance. Before the tests are administered, the person requested to take the tests shall be informed of the consequences of refusing to take or failing to submit to the tests under ORS 813.136. [1989 c.576 §15]

**813.136 Consequence of refusal to submit to or failure of field sobriety tests.** If a person refuses or fails to submit to field sobriety tests as required by ORS 813.135, evidence of the person's refusal or failure to submit is admissible in any criminal or civil action or proceeding arising out of allegations that the person was driving while under the influence of intoxicants. [1989 c.576 §14]

### 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 ana-

lyses 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]

### 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 813.215 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 813.215 to be eligible to enter into the driving while under the influence of intoxicants diversion agreement. [1983 c.338 §369; 1985 c.16 §191; 1987 c.441 §4]

**813.210 Petition; filing fee; service on prosecutor; objection.** (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:

(a) 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.

(b) Notwithstanding paragraph (a) of this subsection, may not be filed after entry of a guilty plea or a no contest plea or after commencement of any trial on the charge whether or not a new trial or retrial is ordered for any reason.

(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 installment 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. [1983 c.338 §370; 1985 c.16 §192; 1987 c.441 §5; 1987 c.534 §1]

**813.215 Eligibility for diversion.** A defendant is eligible for diversion if:

(1) The defendant had no charge of driving while under the influence of intoxicants or its statutory counterpart in any jurisdiction pending on the date of commission of the present offense and within 10 years before the date of the commission of the present offense the defendant has not been convicted of or forfeited bail or security for such an offense;

(2) The defendant was not participating 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 on the date of commission of the present offense and within 10 years before the date of commission of the present offense the defendant has not participated in any such program;

(3) The defendant had no charge of murder, manslaughter, criminally negligent homicide or assault that resulted from the operation of a motor vehicle pending in this state or in any other jurisdiction on the date of commission of the present offense and within 10 years before the date of commission of the present offense the defendant has not been convicted of any such charge;

(4) The present driving while under the influence of intoxicants offense did not involve an accident resulting in death or physical injury, as defined in ORS 161.015, to any person other than the defendant; and

(5) The date of commission of the offense for which the agreement is petitioned is later than November 1, 1981. [1987 c.441 §3]

**813.220 Matters to be considered by court in determining to allow diversion agreement.** After the time for requesting a hearing under ORS 813.210 has expired with no request for a hearing, or after a hearing requested under ORS 813.210, the court shall determine whether to allow or deny a petition for a driving while under the influence of intoxicants diversion agreement. In making a determination under this section, the 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; 1987 c.441 §6]

**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 §71]

**813.235 Attendance at victim impact treatment session as condition of diversion; fee.** In a county that has a victim impact program a court may require as a condition of a driving while under the influence of intoxicants diversion agreement that the defendant attend a victim impact treatment session. If the court requires attendance under this section, the court may require the defendant, as part of the diversion agreement, to pay a reasonable fee to the victim impact program to offset the cost of the defendant's participation. A court shall not order a defendant to pay a fee in excess of \$5 under this section. [1987 c.830 §2]

**813.240 Amount and distribution of filing fee.** 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 \$327 and shall be ordered paid as follows if the petition is allowed:

(1) \$90 to be paid by the defendant directly to the agency or organization providing the diagnostic assessment;

(2) \$112 to be credited and distributed under ORS 137.295 as an obligation payable to the state;

(3) \$100 to be treated as provided for disposition of fines, costs and forfeited bail under ORS 153.630; and

(4) \$25 to be paid to the Assistant Director for Alcohol and Drug Abuse Programs for deposit in the Intoxicated Driver Program Fund created under ORS 813.270, to be used for purposes of the fund. [1983 c.338 §373; 1985 c.16 §194; 1985 c.277 §3; 1987 c.905 §30; 1989 c.576 §§8a, 9a; 1989 c.635 §§2, 4; 1991 c.557 §6]

**Note:** The amendments to 813.240 by section 30, chapter 905, Oregon Laws 1987, as amended by section 9a, chapter 576, Oregon Laws 1989, and section 6, chapter 557, Oregon Laws 1991, take effect July 1, 1992. See section 39, chapter 905, Oregon Laws 1987, as amended by section 1, chapter 460, Oregon Laws 1991. The text that is in effect until July 1, 1992, is set forth for the user's convenience.

**813.240** (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 \$327 and shall be distributed by the court as follows if the petition is allowed:

(a) \$90 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) \$125 to the Assistant Director for Alcohol and Drug Abuse Programs 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 \$327 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.

**813.250 Motion to dismiss charge on completion of diversion; 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 or-

der 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 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.

(4) 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; 1987 c.441 §7]

**813.255 Termination of diversion.** (1) At any time before the court dismisses with prejudice the charge of driving while under the influence of intoxicants, the court on its own motion or on the motion of the district attorney or city attorney may issue an order requiring defendant to appear and show cause why the court should not terminate the diversion agreement. The order to show cause shall state the reasons for the proposed termination and shall set an appearance date.

(2) The order to show cause shall be served on the defendant and on the defendant's attorney, if any. Service may be made by first class mail, postage paid, addressed to the defendant at the mailing address shown on the diversion petition and agreement or at any other address that the defendant provides in writing to the court.

(3) The court shall terminate the diversion agreement and continue the offense proceeding if:

(a) At the hearing on the order to show cause, the court finds by a preponderance of the evidence that any of the reasons for termination described in this section exist; or

(b) The defendant fails to appear at the hearing on the order to show cause.

(4) If the court terminates the diversion agreement and continues the offense proceeding, the court:

(a) On defendant's motion and for good cause shown, may reinstate the diversion agreement at any time before conviction, acquittal or dismissal with prejudice.

(b) If defendant is convicted, may take into account at time of sentencing any partial fulfillment by the defendant of the terms of the diversion agreement.

(5) 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 813.215. [1987 c.441 §9]

**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 Assistant Director for Alcohol and Drug Abuse Programs to perform the diagnostic assessment and treatment of problem drinking, alcoholism and drug dependency and must be certified by the Assistant Director for Alcohol and Drug Abuse Programs. 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.

(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 diagnostic 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; 1991 c.557 §7]

**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 and of gifts and grants made to the fund for carrying out the purposes of the

fund. 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 Assistant Director for Alcohol and Drug Abuse Programs 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 Assistant Director for Alcohol and Drug Abuse Programs.

(4) To pay for materials, resources and training supplied by the Assistant Director for Alcohol and Drug Abuse Programs 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; 1989 c.576 §10; 1991 c.557 §8]

## 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) Notwithstanding subsection (2) of this section, for purposes of the Motorist Implied Consent Law as defined in ORS 801.010, for a person who is under 21 years of age, any amount of alcohol in the blood constitutes being under the influence of intoxicating liquor.

(4) 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; 1989 c.715 §7; 1991 c.860 §8]

**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; review.** 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) A person is entitled to administrative review of a suspension imposed under this section. [1983 c.338 §353 (8); 1985 c.16 §166 (8); 1985 c.393 §10a (8); 1985 c.669 §2a (8); 1991 c.702 §13]

#### (Of Commercial Driver License)

**813.403 Suspension of commercial driver license upon conviction; review.** Driving a commercial motor vehicle upon any highway or on premises open to the public while under the influence of intoxicants constitutes grounds for commercial driver license suspension. The following apply to this section:

(1) Upon receipt of a record of conviction for driving while under the influence of intoxicants, the division shall suspend the person's commercial driver license if the person was driving a commercial motor ve-

hicle at the time the person committed the offense.

(2) The suspension shall be for a period described under ORS 813.404.

(3) A person is entitled to administrative review of a suspension imposed under this section.

(4) Suspension under this section is in addition to any suspension under ORS 813.400. [1989 c.636 §40; 1991 c.702 §14]

**813.404 Duration of suspension of commercial driver license for conviction, implied consent violation or out-of-state conviction or suspension.** When the division imposes a suspension of a commercial driver license under ORS 813.403 or 813.410 (2), or when the division imposes a suspension of a commercial driver license under ORS 809.400 (3) for conduct in another jurisdiction that is substantially similar to that described in either ORS 813.403 or 813.410 (2), the suspension shall be for a period of time determined according to the following:

(1) If the person's commercial driver license has not previously been suspended under ORS 809.410 (18), 813.403 or 813.410 (2) or under ORS 809.400 (3) for anything other than a serious traffic violation, and:

(a) The person was not driving a commercial motor vehicle containing a hazardous material and the suspension is for refusal of the test under ORS 813.100, the suspension shall be for a period of three years.

(b) The person was not driving a commercial motor vehicle containing a hazardous material and the suspension is either because the person was convicted under ORS 813.010 or because the test under ORS 813.100 disclosed that the person had a level of alcohol in the person's blood that was .04 percent or more by weight, the suspension shall be for a period of one year.

(c) The person was driving a commercial motor vehicle containing a hazardous material and the suspension is for refusal of the test under ORS 813.100, the suspension shall be for a period of five years.

(d) The person was driving a commercial motor vehicle containing a hazardous material and the suspension is either because the person was convicted under ORS 813.010 or because the test under ORS 813.100 disclosed that the person had a level of alcohol in the person's blood that was .04 percent or more by weight, the suspension shall be for a period of three years.

(2) If the person's commercial driver license has previously been suspended under ORS 809.410 (18), 813.403 or 813.410 (2), or has been suspended under ORS 809.400 (3) for something other than a serious traffic vi-

olation, the suspension shall be for the lifetime of the person. For purposes of this subsection, a suspension is not a previous suspension if it arose from the same occurrence as the current suspension. [1989 c.636 §41; 1991 c.185 §16]

**(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 813.120, 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 of driving privileges imposed under this subsection shall be for a period of time established under ORS 813.420.

(2) If the division receives from a police officer a report pursuant to ORS 813.120 that discloses that the person was driving a commercial motor vehicle and refused to submit to the test or submitted to the test and the person's blood, as shown by the test, had .04 percent or more by weight of alcohol, the division shall suspend the person's commercial driver license 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 commercial driver license suspension imposed under this subsection shall be for a period of time established under ORS 813.404.

(3) If within 10 days from the date of arrest, the division receives a written request for a hearing from a person whose driving privileges or commercial driver license 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.

(4) 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 administer 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.

(5) 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 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:

(A) .08 percent or more by weight if the person was not driving a commercial motor vehicle;

(B) .04 percent or more by weight if the person was driving a commercial motor vehicle; or

(C) Any amount if the person was under 21 years of age.

(d) If the report under ORS 813.120 indicates that the person was driving a commercial motor vehicle, the vehicle was in fact a commercial motor vehicle as defined in ORS 801.208.

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

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

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

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

(6) 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.

(7) 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; 1987 c.158 §170; 1989 c.636 §44; 1991 c.860 §11]

**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 a hardship 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 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; 1987 c.801 §12]

**813.440 Hearing on validity of suspension for persons unable to request or ap-**

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 establishes 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 within 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 suspen-

sion 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; 1987 c.272 §5]

**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]

**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), (3) and (4)(e) do not apply to a suspension order issued under this section. [1985 c.672 §25; 1989 c.636 §47]

**813.470 Division notation on record of person acquitted after suspension.** The division shall make a notation on the driving record of a person indicating that the person was acquitted of a charge of driving under the influence of intoxicants if:

(1) The person's driving privileges were suspended 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;

(2) An accusatory instrument was filed charging the person with driving under the influence of intoxicants in violation of ORS 813.010 arising out of the same incident that led to the suspension of the person's driving privileges;

(3) The person was acquitted of the charge; and

(4) The person presents the division with a certified copy of the judgment of acquittal from the court clearly showing the location of the court, the date of the arrest and the findings of the court. [1987 c.303 §2]

### HARDSHIP PERMITS

**813.500 Restrictions on issuance.** (1) If a person's license is suspended for driving while under the influence of intoxicants under ORS 813.400 and the suspension period is determined by ORS 809.420 (2)(b) or (c), the division may only issue a hardship 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 Assistant Director for Alcohol and Drug Abuse Programs 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 Assistant Director for Alcohol and Drug Abuse Programs determines that the person has a problem condition involving alcohol or controlled substance, as described in ORS 813.040, the division may issue the 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 Assistant Director for Alcohol and Drug Abuse Programs.

(b) The Assistant Director for Alcohol and Drug Abuse Programs recommends, on the basis of the person's progress in the rehabilitation program, such reinstatement in writing to the division. If the Assistant Director for Alcohol and Drug Abuse Programs makes a recommendation under this paragraph, the Assistant Director for Alcohol and Drug Abuse Programs shall state specifically in the recommendation the times, places, routes and days of the week minimally necessary for the person to retain employment, to attend any alcohol treatment or rehabilitation program or to obtain necessary medical treatment for the person or a member of the person's immediate family.

(3) If the Assistant Director for Alcohol and Drug Abuse Programs 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 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 Assistant Director for Alcohol and Drug Abuse Programs and the division determines that issuance of a permit is appropriate. If the division issues a 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 permit. [1983 c.338 §328; 1985 c.16 §145; 1987 c.801 §13; 1989 c.401 §2; 1991 c.557 §9]

**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 hardship 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 a hardship permit under this section are in addition to any limitations placed on the permit under ORS 807.240. A person's 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 or 811.182. The limitations are as described in the following:

(1) A hardship 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, to attend any alcohol treatment or rehabilitation program or to obtain required medical treatment for the person or a member of the person's immediate family; 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 or 811.182. [1983 c.338 §329; 1985 c.16 §146; 1987 c.730 §21; 1987 c.801 §14; 1991 c.208 §5]

**813.520 Limitations on division authority to issue hardship 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 hardship 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 a permit may be issued for reasons described in ORS 813.430. This period of 90 days shall be reduced by the time the division refused to issue a hardship permit under subsection (5) or (6) of this section if the person's driving privileges were suspended based on the same occurrence.

(2) For a period of 30 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 not subject to an increase in the time before a hardship permit may be issued for reasons described in ORS 813.430. This period of 30 days shall be reduced by the time the division refused to issue a hardship permit under subsection (5) or (6) of this section if the person's driving privileges were suspended based on the same occurrence.

(3) For a period of one year 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 a hardship permit may be issued for reasons described under ORS 813.430. This period of one year shall be reduced by the time the division refused to issue a hardship permit under subsection (5) or (6) of this section if the person's driving privileges were suspended based on the same occurrence.

(4) 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 a hardship permit may be issued for reasons described in ORS 813.430. This period of one year shall be reduced by the time the division refused to issue a hardship permit under subsection (5) or (6) of this section if the person's driving privileges were suspended based on the same occurrence.

(5) 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 if the suspension period is determined by ORS 809.420 (2)(b). This period of 90 days shall be reduced by the time the division refused to issue a hardship permit under subsection (1), (2), (3) or (4) of this section if the person's driving privileges were suspended based on the same occurrence.

(6) For a period of one year after the beginning of the suspension under ORS 813.400

for driving while under the influence of intoxicants if the suspension period is determined by ORS 809.420 (2)(c). This period of one year shall be reduced by the time the division refused to issue a hardship permit under subsection (1), (2), (3) or (4) of this section if the person's driving privileges were suspended based on the same occurrence.

(7) To any person who has a mental or physical condition rendering it unsafe for the person to drive a motor vehicle.

(8) 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.

(9) 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 violation of ORS 813.010 or is imposed under ORS 813.410 based upon ORS 813.100. [1985 c.16 §148; 1985 c.672 §16; 1987 c.673 §1a; 1987 c.801 §15; 1989 c.224 §141; 1989 c.401 §3]

### IGNITION INTERLOCK DEVICES

**Note:** Chapter 746, Oregon Laws 1987, as amended by chapter 576, Oregon Laws 1989, and chapter 453, Oregon Laws 1991, provides:

**Sec. 1.** (1) The Traffic Safety Division, in consultation with the Traffic Safety Committee, shall establish a pilot program for the use of ignition interlock devices by persons convicted of driving under the influence of intoxicants and granted hardship permits under ORS 807.240. The Traffic Safety Division shall select an appropriate number of counties for participation in the pilot program.

(2) The Motor Vehicles Division shall adopt rules that specify requirements for ignition interlock devices that may be used and shall publish a list of devices that meet the requirements. The list may include devices that:

- (a) Do not impede the safe operation of the vehicle;
- (b) Have the fewest opportunities to be bypassed;
- (c) Correlate well with established measures of alcohol impairment;
- (d) Work accurately and reliably in an unsupervised environment;
- (e) Require a deep lung breath sample or other accurate measure of blood alcohol content equivalence;
- (f) Resist tampering and give evidence if tampering is attempted;
- (g) Are difficult to circumvent, and require premeditation to do so;
- (h) Minimize inconvenience to a sober user;
- (i) Operate reliably over the range of automobile environments or automobile manufacturing standards;
- (j) Are manufactured by a party who is adequately insured for product liability; and
- (k) Have a label affixed in a prominent location warning that any person tampering with, circumventing or otherwise misusing the device is subject to civil penalty. [1987 c.746 §1; 1991 c.453 §14]

**Sec. 2.** (1)(a) When a person is convicted of driving while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance, the Motor Vehicles Division, in addition to any other requirement, shall require that an approved ignition interlock device be installed and used in any vehicle operated by the person:

(A) Before the person is eligible for a hardship permit. The requirement shall become a condition of the hardship permit for the duration of the hardship permit.

(B) As a condition of full reinstatement of the person's driving privileges after the ending date of the suspension resulting from the conviction. The Motor Vehicles Division shall only require a device under this paragraph for the first six months after the ending date of the suspension caused by the conviction. Violation of the condition imposed under this subparagraph is a Class A traffic infraction.

(b) Paragraph (a) of this subsection applies only to persons convicted in counties chosen by the Traffic Safety Division to participate in the ignition interlock device pilot program.

(2) If the court determines that approved ignition interlock devices are reasonably available, the court may require as a condition of a driving while under the influence of intoxicants diversion agreement that an approved ignition interlock device be installed in any vehicle operated by the person. Courts shall not exercise authority under this subsection during any period the courts have notice from the Executive Department Office of Economic Analysis that there are not sufficient moneys in the Intoxicated Driver Program Fund to pay the costs under subsection (4) of this section. The Executive Department Office of Economic Analysis shall not issue any notice under this subsection if federal funds are available to pay the cost of the interlock devices for indigents and costs of analysis of the use of interlock devices.

(3) Except as provided in subsection (4) of this section, if an ignition interlock system is ordered or required under subsection (1) or (2) of this section, the person so ordered or required shall pay to the provider the reasonable costs of leasing, installing and maintaining the device. A payment schedule may be established for the person by the Traffic Safety Division.

(4) The Traffic Safety Division may waive, in whole or in part, or defer the defendant's responsibility to pay all or part of the costs under subsection (3) of this section if the defendant meets the criteria for indigence established for waiving or deferring such costs under subsection (5) of this section. If the defendant's responsibility for costs is waived, then notwithstanding ORS 813.270, the costs described in subsection (3) of this section shall be paid from the Intoxicated Driver Program Fund.

(5) The Traffic Safety Division, by rule, shall establish criteria and procedures it will use for qualification to waive or defer costs described under subsection (3) of this section for indigence. The criteria shall be consistent with the standards for indigence adopted by the Federal Government for purposes of the food stamp program.

(6) The Motor Vehicles Division shall suspend the driving privileges or right to apply for driving privileges of a person who fails to install or use an ignition interlock device when required under subparagraph (B) of paragraph (a) of subsection (1) of this section. The suspension shall continue until six months after the ending date of the suspension resulting from the conviction. [1987 c.746 §2; 1989 c.576 §1; 1991 c.453 §15]

**Sec. 3.** (1) When a court orders installation of an ignition interlock device pursuant to section 2, chapter 746, Oregon Laws 1987, the court shall send a copy of the order to the Motor Vehicles Division. The division

shall note the requirement on the driving record of the person required to install the device.

(2) The division may not issue a hardship permit under ORS 807.240 to any person who is ordered to install an ignition interlock device on the person's vehicle until the person furnishes the division satisfactory proof that the device has been installed on any vehicle owned or operated by the person. The division shall determine by rule what constitutes satisfactory proof under this subsection.

(3) When the division issues a hardship permit to a person who is required to have an ignition interlock device, the division shall note on the permit that the device is required. The notation constitutes a limitation on the permit and a person who violates the limitation is punishable as provided in ORS 811.182 for driving in violation of a hardship permit. [1987 c.746 §3; 1989 c.398 §2]

**Sec. 4.** Notwithstanding section 3 of this Act, if a person is required, in the course and scope of the person's employment, to operate a motor vehicle owned by the person's employer, the person may operate that vehicle without installation of an ignition interlock device if:

(1) The employer has been notified that the employee is operating with a hardship permit restricted as provided in section 3 of this Act; and

(2) The employee has proof of the notification in the possession of the employee while operating the employer's vehicle in the course of employment. [1987 c.746 §4]

**Sec. 5.** (1) A person commits the offense of knowingly furnishing a motor vehicle without an ignition interlock device to someone who is not authorized to drive such a vehicle if the person rents, leases, lends or otherwise furnishes a motor vehicle to someone the person knows to have been ordered or required under section 2, chapter 746, Oregon Laws 1987, to install an ignition interlock device, and the motor vehicle is not equipped with such a device that is in working order.

(2) The offense described in this section, knowingly furnishing a motor vehicle without an ignition interlock device to someone who is not authorized to drive such a vehicle, is a Class A traffic infraction. [1987 c.746 §5; 1989 c.576 §2]

**Sec. 6.** (1) A person commits the offense of unlawfully soliciting another to blow into an ignition interlock device or start a motor vehicle equipped with an ignition interlock device if the person has such a device as a result of an order or requirement under section 2, chapter 746, Oregon Laws 1987, and the person requests or solicits another to blow into the device or start the motor vehicle so as to circumvent the device.

(2) The offense described in this section, unlawfully soliciting another to blow into an ignition interlock device or start a motor vehicle equipped with an ignition interlock device, is a Class A traffic infraction. [1987 c.746 §6; 1989 c.576 §3]

**Sec. 7.** (1) A person commits the offense of unlawfully blowing into an ignition interlock device or starting a motor vehicle equipped with an ignition interlock device if, for the purpose of providing an operable motor vehicle for someone required under section 2 of this Act to have such a device, the person blows into an ignition interlock device or starts an automobile equipped with the device.

(2) This section does not apply to a person who is required to have an ignition interlock device and who blows into or starts the person's own vehicle that is so equipped.

(3) The offense described in this section, unlawfully blowing into an ignition interlock device or starting a motor vehicle equipped with an ignition interlock device, is a Class A traffic infraction. [1987 c.746 §7]

**Sec. 8.** Notwithstanding ORS 813.270, moneys in the Intoxicated Driver Program Fund may be used to pay for administration and evaluation of the pilot program established by this Act and for the costs of participation in the program for indigents. [1987 c.746 §8]

**Sec. 9.** (1) A person commits the offense of tampering with an ignition interlock device if the person does anything to a device that was ordered installed pursuant to section 2 of this Act that circumvents the operation of the device.

(2) The offense described in this section, tampering with an ignition interlock device, is a Class A traffic infraction. [1987 c.746 §9]

**Sec. 10.** (1) The Traffic Safety Division in cooperation with the Motor Vehicles Division shall evaluate the pilot program authorized by chapter 746, Oregon Laws 1987, and shall report the evaluation to the Sixty-seventh Legislative Assembly. The program will be considered successful if the recidivism rate for those subject to chapter 746, Oregon Laws 1987, is reduced by at least 10 percent over a one-year period.

(2) The Traffic Safety Division shall evaluate the effectiveness of the use of diversion in cases involving driving under the influence of intoxicants. The Motor Vehicles Division and Alcohol and Drug Abuse Programs of the Mental Health and Developmental Disability Services Division shall cooperate and assist the Traffic Safety Division in the evaluation and study under this subsection. The study and evaluation shall be presented to the Sixty-seventh Legislative Assembly and shall include any recommendations for the improvement of the use of diversion that are developed during the study and evaluation. [1987 c.746 §10; 1989 c.576 §4; 1991 c.453 §16]

**Sec. 11.** This Act applies to persons convicted of driving under the influence of intoxicants on and after the effective date of this Act [July 16, 1987]. [1987 c.746 §11]

**Sec. 12.** Chapter 746, Oregon Laws 1987, is repealed on June 30, 1993. [1987 c.746 §12; 1989 c.576 §12]

**Note:** Section 11, chapter 576, Oregon Laws 1989, provides:

**Sec. 11.** The provisions regarding requirement of ignition interlock devices under section 2, chapter 746, Oregon Laws 1987, apply to persons who do any of the following on or after the effective date of this section [June 30, 1989]:

(1) Apply for a hardship permit, regardless of the date of suspension.

(2) Apply for a driving under the influence of intoxicants diversion agreement, regardless of the date of the alleged offense.

(3) Become eligible for reinstatement of driving privileges after suspension based on a conviction under ORS 813.010, regardless of the date of the conviction. [1989 c.576 §11]