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Model Language

Refusal to Submit to Testing

Existing Florida Statute

316.1939 Refusal to Submit to Testing; Penalties

- (1) Any person who has refused to submit to a chemical or physical test of his or her breath, blood, or urine, as described in s. 316.1932, and whose driving privilege was previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, and:
 - (a) Who the arresting law enforcement officer had probable cause to believe was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages, chemical substances, or controlled substances;
 - (b) Who was placed under lawful arrest for a violation of s. 316.193 unless such test was requested pursuant to s. 316.1932(1)(c);
 - (c) Who was informed that, if he or she refused to submit to such test, his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months;
 - (d) Who was informed that a refusal to submit to a lawful test of his or her breath, urine, or blood, if his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, is a misdemeanor; and
 - (e) Who, after having been so informed, refused to submit to any such test when requested to do so by a law enforcement officer or correctional officer commits a misdemeanor of the first degree and is subject to punishment as provided in s. 775.082 or s. 775.083.
- (2) The disposition of any administrative proceeding that relates to the suspension of a person's driving privilege does not affect a criminal action under this section.
- (3) The disposition of a criminal action under this section does not affect any administrative proceeding that relates to the suspension of a person's driving privilege. The department's records showing that a person's license has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood shall be admissible and shall create a rebuttable presumption of such suspension.

Limitations of Existing Florida Statute

Florida's existing Refusal statute encourages defendants, who have been detained upon probable cause for impaired driving, to refuse to submit to testing for impairment. As a result, more *than* 35 percent of those detained on probable cause refuse to comply with Florida's Implied Consent law. Comparing Florida to other states, it is apparent that this high refusal rate is attributable to the lack of a misdemeanor sanction for first-time refusals. The proposed amendment *allows* prosecutors to exercise their discretion to charge first-time refusals as a second-degree misdemeanor. It does not change existing provisions of Florida's Implied Consent law with respect to the right to an administrative hearing to challenge the suspension of driving privileges.

Proposed Model Legislative Language

Note: New language is underlined and deleted language is shown by a ~~strikethrough~~.

316.1939 Refusal to Submit to Testing; Penalties

- (1) Any person who has refused to submit to a chemical or physical test of his or her breath, blood, or urine, as described in s. 316.1932, ~~and whose driving privilege was previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, and:~~
 - (a) Who the arresting law enforcement officer had probable cause to believe was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages, chemical substances, or controlled substances;
 - (b) Who was placed under lawful arrest for a violation of s. 316.193 unless such test was requested pursuant to s. 316.1932(1)(c);
 - (c) Who was informed that, if he or she refused to submit to such test, his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months; and
 - (d) ~~Who was informed that a refusal to submit to a lawful test of his or her breath, urine, or blood, if his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, is a misdemeanor; and Who being so informed, refused to submit to a lawful test of his or her breath or urine when requested to do so by a law enforcement officer or correctional officer commits a misdemeanor of the second degree and is subject to punishment as provided in s. 775.082 or s. 775.083 or:~~
Who being so informed, refused to submit to a lawful test of his or her breath or urine when requested to do so by a law enforcement officer or correctional officer commits a misdemeanor of the second degree and is subject to punishment as provided in s. 775.082 or s. 775.083 or:
 - (e) ~~Who, after having been so informed, refused to submit to any such test when requested to do so by a law enforcement officer or correctional officer commits a misdemeanor of the first degree and is subject to punishment as provided in s. 775.082 or s. 775.083. Who being informed that a refusal to submit to a lawful test of his or her breath or urine if his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, is a misdemeanor; and who, after having been so informed is found to have previously refused to submit to any such test when requested to do so by a law enforcement officer or correctional officer, commits a misdemeanor of the first degree and is subject to punishment as provided in s. 775.082 or s. 775.083.~~
Who, after having been so informed, refused to submit to any such test when requested to do so by a law enforcement officer or correctional officer commits a misdemeanor of the first degree and is subject to punishment as provided in s. 775.082 or s. 775.083.
- (2) The disposition of any administrative proceeding that relates to the suspension of a person's driving privilege does not affect a criminal action under this section.
- (3) The disposition of a criminal action under this section does not affect any administrative proceeding that relates to the suspension of a person's driving privilege. The department's records showing that a person's license has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood shall be admissible and shall create a rebuttable presumption of such suspension.

Optional Provisions

- (4) Any person, found to be guilty under this section, shall not operate a motor vehicle unless that vehicle is equipped with a functioning ignition interlock device certified by the department as provided in s. 316.1938, and installed in such a manner that the vehicle will not start if the operator's blood alcohol level is in excess of 0.025 percent or as otherwise specified by the court. The court shall require the use of an approved ignition interlock device for a period of not less than 6 months and not exceeding 18 months, if the person is

permitted to operate a motor vehicle, whether or not the privilege to operate a motor vehicle is restricted.

- (5) Notwithstanding the provisions of s. 948.01, no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violations of this section.

Rationale for Model Language Adjustment

A 2014 National Highway Safety Administration (NHTSA) research note identified Florida as having the Nation's highest refusal rate at 82 percent.¹ This figure was disputed by the Florida Department of Highway Safety and Motor Vehicles, (DHSMV) which maintains that Florida's refusal rate in 2014 was 35 percent. Even at 35 percent, Florida would be tied for the fourth highest refusal rate in the Nation. Other states, such as California, Tennessee, Nebraska, and Maine have only single digit refusal rates. States that provide a criminal penalty for first-time refusals have dramatically lower refusal rates than Florida. Refusal to comply with Florida's Implied Consent law substantially impairs prosecution of impaired drivers and frequently results in prosecutors having to dismiss or reduce DUI/DWI charges because of the diminished probability of successful prosecution. This statute would improve highway safety by encouraging drivers detained upon probable cause to comply with Florida's Implied Consent law.

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Published: ??/??/19

¹Namuswe, E. S., Coleman, H. L., & Berning, A. (2014). *Breath Test Refusal Rates in the United States – 2011 Update*. National Highway Traffic Safety Administration. Washington, DC: Office of Behavioral Safety Research. Retrieved from https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/breath_test_refusal_rates-811881.pdf