

Nevada Advisory Committee on Traffic Safety (NVACTS) 2023 Legislative/Policy Recommendations: Roadside Oral Fluid Testing

Nevada Law:

In Nevada, roadside preliminary breath testing for the presence of alcohol is addressed in NRS 484C.150.

NRS 484C.150. Implied consent to preliminary test of person's breath; effect of failure to submit to test; use of results of test.

1. Any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his or her consent to a preliminary test of his or her breath to determine the concentration of alcohol in his or her breath when the test is administered at the request of a police officer at the scene of a vehicle crash or where the police officer stops a vehicle, if the officer has reasonable grounds to believe that the person to be tested was:

(a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance; or

(b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430.

2. If the person fails to submit to the test, the officer shall, if reasonable grounds otherwise exist, arrest the person and take him or her to a convenient place for the administration of a reasonably available evidentiary test under NRS 484C.160.

3. The result of the preliminary test must not be used in any criminal action, except to show there were reasonable grounds to make an arrest.

Currently, there is no similar provision for roadside oral fluid testing for drugs.

Background:

Provide background information, reference to national studies, national recommendations, information from other states.

As taught in Peace Officer Standards and Training (POST) academies across the nation from the National Highway Transportation Safety Administration (NHTSA) curricula, preliminary breath testing is a standardized part of the impaired driving investigation. It is conducted at the roadside and is the last step of the investigation before the law enforcement officer makes an arrest decision. It is not admissible in court and is not used to show the amount of impairment. It is used to help the officer determine what is causing the impairment that he/she has already observed.

If the preliminary breath testing device (PBT) displays a BAC reading that is in parity with the impairment the officer has observed, the officer may have no reason to suspect drug impairment. In Nevada when this situation exists, the driver has a statutory right under NRS 484C.160(5) to choose to submit to an

evidentiary breath test with an approved testing device (currently the Intoxilyzer 8000 in Nevada) instead of a blood test to determine the concentration of alcohol in the driver's body.

If, on the other hand, the PBT displays a BAC value that is lower than what the officer would expect to see for the level of impairment observed up to that point, the officer would have reason to suspect something other than or in addition to alcohol was impairing the driver. In such an instance, the officer can preclude the driver from choosing a breath test and, also pursuant to NRS 484C.160(5), will direct the suspect to submit to a blood test.

However, what is not known is what type of other substances have been recently used by the driver. In the second scenario, even if the driver submits to an evidentiary blood test, results of that forensic toxicology analysis are not available for months. In the interim, there is no objective way to determine how to help the driver if he or she has a substance use disorder and no guidance for pretrial services officers with regard to testing the DUI defendant.

It is more problematic in the first scenario, where the driver's BAC is high enough that the officer permits the driver to submit to a breath test. In that scenario, there is no blood toxicology testing at all, so any substance use by the DUI defendant will remain unknown to the officer and the court and any treatment court or counseling to which the defendant may be later directed. The services that are ready and able to help the defendant and protect the public from subsequent impaired driving conduct are essentially hobbled.

Nevada's impaired driving fatality statistics show a steady increase in the use of a combination of impairing substances. The following table shows data covering 2016 to 2019 and collected by the Office of Traffic Safety for fatal crashes where alcohol and drugs were involved. It was originally compiled to show if there was any impact on the legalization of cannabis on roadway fatalities, but the data is informative for the instant purpose as well.

PERCENT OF TOTAL SUBSTANCE INVOLVED FATAL CRASHES					
	Alcohol only (.08+ BAC)	Marijuana only	Other Drug	Poly-Substance	Any Marijuana
2016	38.10%	11.11%	5.29%	46.03%	35.98%
2017	25.00%	16.48%	6.82%	49.43%	40.34%
2018	22.16%	13.07%	10.23%	53.41%	39.20%
2019	26.51%	18.07%	14.46%	51.81%	51.20%

As shown, fatal crashes involving a driver using drugs alone or in combination with another substance comprise a majority of the fatal crashes in Nevada.

Roadside detection of recent drug use and impairment, however, is limited to the individual officer's ability to effectively conduct field sobriety tests. These tests may or may not be available to the officer for a variety of reasons, including, but not limited to weather, circumstances of the stop (e.g., a crash may preclude administration of psychophysical testing), and age, weight, and other medical conditions of the driver.

Research & Data:

In 2019, Michigan issued a report on their oral fluid roadside testing pilot program. From the report:

Preliminary oral fluid drug screening on the roadside has many benefits. Studies have shown that drugs accumulate in the oral fluid by passive diffusion from the blood (Cone & Huestis, 2007). Certain drugs tested in oral fluid are well correlated with positive results from the same drug when tested in the blood (Moore & Miles, 2015). Collecting oral fluid from a driver on the roadside can be easy, quick, and non-invasive. There is limited risk of adulteration from the oral fluid sample and the collection is painless (Edwards, Smith, & Savage, 2017). Oral fluid collection can occur at the scene, close to the time the driver was operating a vehicle (Moore & Miles, 2015). The oral fluid test instrument provides the investigating police officer positive or negative results, within five minutes, on recent drug intake (Alere Toxicology, 2019).

Michigan State Police (2019, February, p. 3).

The Michigan State Police's pilot program and research was robust. In their two-volume 2019 published study, the MSP committee concluded:

Roadside Oral Fluid testing in the Phase II Pilot has been proven to be accurate to a certain degree as demonstrated in the data contained within this report. Each of the six drug classes demonstrated varied percentages of accuracy when compared to the "Gold Standard", which is a blood test. Oral fluid testing does not equal the "Gold Standard" but has been found to be accurate for purposes of preliminary roadside testing.

Id.

In Nevada, NRS 484C.160 includes the evidentiary testing of oral fluid by referencing "blood, urine, breath or other bodily substance" in the implied consent provisions of subsection 1. However, there is no provision for use of non-evidentiary or preliminary testing of oral fluid at the roadside akin to the preliminary breath test referenced in NRS 484C.150.

National Trends:

As noted above, Michigan determined oral fluid testing to be accurate for use in impaired driving investigations after an extensive two-part pilot program.

Alabama currently has an oral fluid testing program after completing their pilot program.

Indiana is currently using a pilot oral fluid testing program for DRE use only. It will use the results of the program to determine whether to expand it beyond DRE use.

Pros:

- Minimally-invasive search.

- No pain or discomfort to the subject.
- Provides the officer with information of recent drug use in a short period of time, usually less than 5 minutes.
- Provides the officer with information that would assist with determining if an evidentiary breath or blood test should be administered.
- Provides insight for pre-adjudication supervision and treatment options for the arrested suspect.
- Minimal training required to competently operate.

Cons:

- Initial cost of individual devices and subsequent replacements as needed.
- Devices would need to be maintained and calibrated regularly, much like the preliminary breath testing devices are now. Calibration of devices is typically performed by the manufacturer at a cost.
- Non-evidentiary, which is the same as the preliminary breath testing devices currently utilized.

Options:

- Pass and implement for statewide use in all agencies that wish to use the devices.
- Pass, but limit utilization of the devices to Nevada peace officers who are Drug Recognition Experts with current credentials certified by the International Association of the Chiefs of Police (IACP).
- Do nothing

Resources & Reference:

- Bloch, S. National Conference of State Legislatures (2021, May). *States Explore Oral Fluid Testing to Combat Impaired Driving*. <https://www.ncsl.org/research/transportation/states-explore-oral-fluid-testing-to-combat-impaired-driving.aspx>
- Moore, C., Lindsey, B., Harper, C.E., & Knudsen, J.R. (2020, Oct.). *Use of Oral Fluid to Detect Drugged Drivers*, *Between the Lines* (National Traffic Law Center), 28:10. <https://ndaa.org/wp-content/uploads/October-2020-BTL-Oral-Fluid.pdf>
- Oral Fluid Roadside Analysis Pilot Program Committee, Michigan State Police (2019, Feb.). *Oral Fluid Roadside Analysis Pilot Program*, Retrieved from: https://www.michigan.gov/documents/msp/Oral_Fluid_Report_646833_7.pdf