

BEFORE THE DEPARTMENT OF JUSTICE  
OF THE STATE OF MONTANA

In the matter of the adoption of a	)	NOTICE OF ADOPTION OF
Temporary Emergency Rule	)	TEMPORARY EMERGENCY RULE
Amendment of ARM 23.4.217,	)	AMENDMENT
pertaining to recertification of breath-	)	
test personnel	)	

TO: All Concerned Persons

1. The Department of Justice is adopting the following emergency rule amendment because in the 2007 amendment of ARM 23.4.217, under that new definition of "annual" as "365 days", the Division intended to keep "annual" certification of the breath-test instruments and remove all references to any "annual" examination or recertification for any breath-test specialists. Inadvertently, the word "annual" was not removed in ARM 23.4.217(8) in reference to breath-test specialist-senior operators (senior operators) and an "annual" examination. The division's intent was to have senior operators recertify on a "regular basis", as required of breath-test specialist operators in ARM 23.4.217(5) by taking the same examination as an operator. Under the division's procedure for recertification, all breath-test specialists take the same exam and exams are completed between October and December 31 of each year. The breath-test specialists are then recertified prior to their permit expiring at the end January of the following year, i.e., every 365 days. This procedure fully complies with ARM 23.4.218 and 23.4.217(5)'s recertification on a "regular basis". These exams were no longer dated as recertification occurred on a regular basis.

In January 2012, in a case involving a driving under the influence, fourth or subsequent offense, a felony, in violation of 61-8-601, MCA, a Montana district court interpreted ARM 23.4.217(8) to require that all senior operators take the recertification examination once within every 365 days. The prosecutor protested this interpretation but because the recertification examinations for the senior operators for the previous year no longer showed the actual date of examination, the prosecutor could not show proof of exact exam dates. Consequently, the district court ruled the results of the breath test in that case inadmissible at trial. The Attorney General's Office disagrees with the interpretation and has appealed the issue to the Montana Supreme Court.

Meanwhile, as ARM 23.4.217 stands, this type of interpretation potentially exposes any and all breath tests conducted by the approximately 1,900 breath-test specialists in the State of Montana to this type of ruling. Successful prosecution and removing drunk drivers from endangering the public depends on officers being on the roads as much as possible, and using the results of these breath tests as proof beyond a reasonable doubt of driving under the influence under 61-8-401, MCA, or a BAC greater than .08 under 61-8-406, MCA. Additionally, the district court in the case mentioned above, criticized the language in ARM 23.4.217 overall, especially ARM 23.4.217(7), claiming that it could include "Beatles songs." It is clear that the overall wording and context of language in ARM 23.4.217 is extremely

confusing, thereby exposing ARM 23.4.217 to further illogical legal arguments and rulings that breath-test results are inadmissible at trial. Successfully investigating and prosecuting drunk drivers from Montana's public roadways protects the public's safety and welfare. The current language of ARM 23.4.217 has the potential of rendering completely useless Montana's entire statewide system of successfully investigating and prosecuting cases of driving under the influence of alcohol. It is therefore imperative that the rule be amended immediately to clarify its intent and prevent a future court from excluding breath-test results.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact department no later than 5:00 p.m. on March 15, 2012, to advise us of the nature of the accommodation that you need. Please contact Kathy Stelling, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401; telephone (406) 444-2026; Montana Relay Service 711; fax (406) 444-3549; or e-mail [kstelling@mt.gov](mailto:kstelling@mt.gov).

3. The temporary emergency rule was effective February 15, 2012.

4. The text of the temporary emergency rule provides as follows:

23.4.217 RECERTIFICATION OF BREATH-TEST PERSONNEL SPECIALISTS (1) The division must approve any breath-test specialist recertification course materials necessary for the recertification of the breath-test specialists/operator. The division shall ~~place~~ provide a copy of the ~~recertification exam~~ approved breath-test specialist recertification materials to a ~~in the custody of the breath-test specialist/senior operator for each department. A senior operator from another department may provide the breath-test specialist recertification materials to departments with no senior operator.~~

(2) ~~The breath-test specialist/ senior operator shall have the responsibility of presenting~~ provide the approved breath-test specialist recertification ~~course and monitoring the examination of materials to all any personnel~~ breath-test specialists seeking recertification. ~~The division may, if it determines that the circumstances warrant, give recertification training to any individual(s) seeking recertification directly from the division.~~

(3) All ~~examinations~~ completed breath-test specialist recertification materials shall be sent to the division for grading verification of completion.

(4) Permits shall be ~~issued to~~ renewed for all individuals breath-test specialists successfully completing the breath-test specialist recertification training materials. ~~The permit expires the last day of the month, in the following year in which the specialist was certified prior to expiration of her/his current permit.~~

(5) ~~All breath test specialist/operators shall be recertified on a regular basis by attending a recertification course approved by the division.~~

(6) ~~In addition to the regular recertification, all breath test specialist/senior operators may be recertified by a representative of the division once every two years on a schedule to be determined by the division.~~

~~(7) (5) Training may include, The breath-test specialist recertification materials are related to the field of breath alcohol testing, which may include, but is are not limited to, the following subjects:~~

- ~~(a) toxicology and pharmacology of alcohol in the human system;~~
- ~~(b) breath analysis instrument theory;~~
- ~~(c) breath analysis instrument operation;~~
- ~~(d) current legal decisions; and~~
- ~~(e) training techniques; and~~
- ~~(f) any area deemed appropriate by the division.~~

~~(8) The breath test specialist/senior operator is still required to submit an annual examination based on the material he/she is presenting to the breath test specialist/operators, in addition to the biannual recertification which may be conducted by the division.~~

~~(9) A permit will be issued to all individuals successfully completing the senior operator's recertification training. Certification expires the last day of the month, in the following year in which the specialist was certified.~~

~~(10) The breath test specialist/technician is only required to fulfill the recertification requirements of a breath test specialist/senior operator. The technician's proficiency will be assessed through monitoring of his/her performance.~~

~~(11) All breath test specialists must successfully pass a recertification course within 90 days after his/her expiration date.~~

~~(12) (6) If a Any breath-test specialist fails to recertify within the specified time frame, he/she not completing the recertification materials prior to expiration of her/his current permit, may complete the recertification materials within 90 days of the expiration date of her/his current permit. A breath-test specialist shall not perform any analysis of a person's breath for alcohol until the breath-test specialist's permit is renewed. All breath-test specialists who fail to complete the recertification materials within 90 days of the expiration date of her/his current permit must either attend complete an initial certification course or file a written request, in writing, with the division for an exemption. Exemption requests will be reviewed and approved or denied by the division. If approved, the breath-test specialist must then complete that year's recertification materials within 30 days of the division's approval date.~~

~~(13) If a breath test specialist fails the recertification examination, he/she may retake the examination within 30 days of notification of failure. After a second test failure, all candidates for recertification must retake the appropriate breath test specialist course.~~

~~(7) If the division determines that the circumstances warrant, the division may give recertification materials to any breath-test specialists seeking recertification directly from the division.~~

AUTH: 61-8-405, MCA  
IMP: 61-8-405, MCA

5. The rationale for the temporary emergency rule amendment is as set forth in paragraph 1.

6. A standard rulemaking procedure will be undertaken prior to the expiration of this temporary emergency rule amendment.

7. Concerned persons are encouraged to submit their comments during the upcoming standard rulemaking process. If concerned persons wish to be personally notified of that rulemaking process, they should submit their names and addresses to Kathy Stelling at the address above.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 2 above or may be made by completing a request form at any rules hearing held by the department.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

By: /s/ Steve Bullock  
STEVE BULLOCK  
Attorney General  
Department of Justice

/s/ J. Stuart Segrest  
J. STUART SEGREST  
Rule Reviewer

Certified to the Secretary of State on February 14, 2012.