



# Judicial Impact Statement

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## Substitute Senate Bill 17 127th General Assembly

### Sponsor

Senator Timothy J. Grendell

### Status

House Criminal Justice

### Version

As Passed by the Senate

### TITLE

To amend sections 1547.11, 1547.111, 1547.99, 4503.231, 4503.233, 4507.164, 4510.13, 4510.43, 4511.181, 4511.19, 4511.191, 4511.192, 4511.193, and 4511.203 and to enact sections 1547.112, 4503.235, 4511.198, 4511.199, and 5502.10 of the Revised Code to increase certain penalties for OVI offenders; to authorize a court to issue a vehicle immobilization waiver order in favor of specified family members of an OVI offender; to specify that wrongful entrustment of a motor vehicle is a strict liability offense, remove the requirement that an offender charged with the offense know or have reasonable cause to believe that the person provided a vehicle did not have a right to drive, and provide for that offense an affirmative defense of lack of such knowledge after reasonably diligent inquiry; to require a person with two prior applicable convictions to submit upon request to a chemical test under the vehicle or watercraft Implied Consent Law; to require the consideration of prior convictions in determining the length of a refusal suspension under the vehicle Implied Consent Law; to expand the list of offenses that are "equivalent offenses" for certain vehicle or watercraft OVI purposes; to clarify the application of a qualified immunity to persons who withdraw blood at the request of law enforcement personnel pursuant to the Implied Consent Law; to expand the circumstances when evidence on the concentration of alcohol or drugs of abuse in a bodily substance may be admitted in a watercraft OVI case; to require the Department of Public Safety to establish a state registry of Ohio's habitual OVI/OMWI arrestees and an Internet database, both of which are public records, containing information about persons with five or more Ohio arrests within the preceding twenty years for vehicle OVI or watercraft OMWI; to require law enforcement officers who arrest a person for vehicle OVI or watercraft OMWI to send to the Department of Public Safety a sworn report with specified information about the arrestee, the arrest, and prior similar arrests within the preceding 20 years; and to revise the criteria for certification of ignition interlock devices.

### What is a Judicial Impact Statement?

A Judicial Impact Statement describes as objectively and accurately as possible the probable, practical effects on Ohio's court system of the adoption of the particular bill. The court system includes people who use the courts (parties to suits, witnesses, attorneys and other deputies, probation officials, judges and others). The Ohio Judicial Conference prepares these statements pursuant to R.C. 105.911.

**IMPACT SUMMARY**

The Criminal Law and Procedure Committee of the Ohio Judicial Conference has reviewed Substitute Senate Bill 17 regarding its impact on the judiciary. The Committee has concluded that if the bill is enacted in its present form, the bill will have a significant negative impact upon the administration of justice in this state by increasing court caseload; increasing court workload; and potentially imposing unfunded mandates upon the courts. The duties the bill imposes upon courts relative to remote electronic alcohol monitoring will be particularly burdensome for courts. The Committee has further concluded that making the offense of wrongful entrustment of a motor vehicle a strict liability offense may conflict with procedural and substantive due process guarantees. Requiring innocent family members who are granted an impoundment waiver to display restricted license plates may likewise conflict with those constitutional guarantees. At a minimum, requiring the use of restricted license plates will undermine public confidence in the fairness of the law.

**RELEVANT PROVISIONS OF SUBSTITUTE SENATE BILL 17**

(1) The bill makes the following changes to Ohio's OVI laws:

- Requires that the vehicle used in a repeat OVI offense, if registered to the offender, as well as all other motor vehicles registered to the offender, be immobilized for one year and the license plates of those vehicles impounded for one year. (Current law allows only for the immobilization for 90 days of the vehicle used in the offense.)
- Allows a court to waive immobilization of a vehicle on behalf of an offender's spouse or driving-age child if the spouse or driving-age child files a motion establishing that he or she is "completely dependent upon the vehicle for the necessities of life and that the immobilization of the vehicle would be an undue hardship" to that person. Requires that a person granted waiver display restricted license plates on the vehicle.
- Extends the period of "hard suspension" during which no driving privileges may be granted to one year.
- Expands the list of "equivalent offenses" that are classified as prior convictions to additionally include a state watercraft OMWI; a violation of a municipal ordinance that is substantially equivalent to a state OMWI; a violation of an existing or former municipal ordinance, law of another state, or federal law that is substantially equivalent to a state OMWI; and violation of a former Ohio law that was substantially equivalent to a state watercraft OMWI.
- Requires that courts sentence repeat offenders to a requirement that the offender wear a monitor that provides continuous remote electronic alcohol monitoring until the conclusion of all community control sanctions and requires that the offender pay all costs associated with the monitoring.
- Specifies that if a court grants bail to a person who is alleged to have committed an OVI offense that would, upon conviction, cause the person to be sentenced as a repeat OVI offender, the court as a condition of bail must prohibit the person from consuming any beer or intoxicating liquor and must require the person to wear a monitor that provides continuous remote electronic alcohol monitoring until the person is convicted of, pleads guilty to, or is found not guilty of the alleged violation or the charges are dismissed. Specifies that any alcohol consumption prior to that time is grounds for revoking bail and that the defendant is required to pay all costs associated with the monitoring.
- Requires courts to order repeat offenders to attend driver's intervention programs.

(2) Removes the criminal intent element of knowledge from the offense of wrongful entrustment of a motor vehicle; permits a defendant charged with that offense to argue lack of knowledge as an affirmative defense; and specifies that the offense is one of strict liability.

**FEDERAL REQUIREMENTS**

**Overview of federal requirements.** The Criminal Law and Procedure Committee is aware that certain provisions in Substitute Senate Bill 17 are intended to comply with the federal Transportation Equity Act for the 21<sup>st</sup> Century (23 USC §164) (TEA-21), which establishes minimum penalties that the federal government encourages each state to impose for repeat drunk driving offenses. TEA-21 encourages each state to amend its laws to provide for all of the following in response to a repeat offense:

- A “hard” driver’s license suspension for at least one year.
- Impoundment or immobilization of each of the offender’s vehicles or the installation of an ignition interlock system on each of the vehicles.
- An assessment of the offender’s degree of alcohol abuse and treatment as appropriate.
- For a second offense, not less than 30 days community service or not less than 5 days of imprisonment.
- For a third or subsequent offense, not less than 60 days community service or not less than 10 days of imprisonment.

Beginning in 2001, states that do not pass and enforce laws complying with TEA-21 have a portion of their annual apportionments for highway construction programs transferred to their safety grant programs. The federal funds are not lost to a state, but may be used only for (1) behavioral programs dealing with developing alcohol-impaired driving countermeasures or enforcement (e.g., education programs for high school students, drunk driving task forces, and alcohol server training); or (2) certain highway safety improvement projects. The current penalty transfer amount is 3% of the funds that would otherwise be apportioned for highway construction.

**Changes to current law resulting from Substitute Senate Bill’s TEA-21 Implementation.** Ohio’s current minimum jail sentences are stricter than those required under TEA-21; accordingly, Substitute Senate Bill 17 makes no changes to Ohio’s current jail sentences. For purposes of complying with TEA-21, Substitute Senate Bill 17 proposes the following changes to current law governing immobilization, license plate impoundment, and driver’s intervention.

**Offenders with one prior conviction in preceding six years.** With respect to repeat offenders having one prior OVI conviction within six years of the offense, current law requires a ninety-day immobilization of the vehicle used in the offense if registered in the offender’s name and the impoundment of the vehicle’s license plates. Current law permits, but does not require, courts to order those offenders to attend a driver’s intervention program where, among other things, their degree of alcohol abuse is assessed. The bill changes the ninety-day immobilization and license plate impoundment to one year and extends it to all other vehicles owned by or registered with the offender. The bill also removes judicial discretion with respect to driver’s intervention, requiring courts to order participation in a driver’s intervention program. (At least some repeat OVI offenders will have attended a driver’s intervention program in connection with a previous offense. The committee believes that mandating repeat participation in those programs may be unproductive and that it may therefore be advisable to comply with TEA-21 by requiring repeat offenders to participate in an alternative alcohol and drug addiction program identified by the court, as both current law and the bill permit for offenders with two or more prior convictions (see **Driver’s intervention programs.**” below).)

**Offenders with two or more prior convictions.** With respect to repeat offenders having two, three, or four prior OVI convictions within six years of the offense or having five or more OVI convictions within 20 years of the offense, current law requires forfeiture of the vehicle used in the offense if registered in the offender’s name. Current law also requires those offenders to participate in an alcohol and drug addiction program. The bill adds an additional requirement that every other vehicle owned by or registered with the offender be immobilized for one year and the license plates impounded.

**Federal compliance.** The Criminal Law and Procedure recognizes that it is entirely appropriate for the General Assembly to make a determination that Ohio should come into compliance with TEA-21 and avoid the 3% annual penalty transfer. Accordingly, the committee does not object to modifying current law for the purpose of coming into compliance with TEA-21’s specific requirements, notwithstanding the potential negative implications that compliance may have for the administration of justice in this state.

## **JUDICIAL IMPACT OF SUBSTITUTE SENATE BILL 17**

The Criminal Law and Procedure Committee of the Ohio Judicial Conference has conducted a comprehensive analysis of Substitute Senate Bill 17 and has concluded that the bill will have a significant negative impact upon the administration of justice in this state.

First, the Committee believes that the bill's removal of the criminal intent element from the wrongful entrustment statute potentially raises due process concerns. Likewise the bill's requirement that spouses and driving-age children who are granted an immobilization waiver use restricted license plates may also raise due process concerns. At a minimum, requiring innocent family members who have committed no offense to use restricted license plates could diminish the public's confidence in the law.

The Committee also believes that the bill's remote electronic alcohol monitoring requirements will increase judicial caseloads and workloads. Courts will be required to hire additional staff to oversee the alcohol consumption of repeat offenders and those charged with a repeat OVI offense. The bill's expansion of the class of offenses that qualify as prior offenses will further tax courts' resources by broadening the class of offenders to which the bill's new repeat offender provisions apply. Requiring innocent family members to use restricted license plates will increase court workloads by encouraging offenders to file motions seeking court approval to sell their impounded vehicles.

Finally, Substitute Senate Bill 17 potentially imposes unfunded mandates upon courts. As a practical matter, many courts currently lack the capacity to satisfy the numerous duties imposed upon them by the bill. Many also lack the capacity to jail offenders who violate the bill's new bail and sentencing requirements. Thus, if enacted in its present form, the bill could result in legal requirements that are, in effect, unenforceable. This could have the effect of diminishing the public's confidence in both the law and the public officials who are sworn to uphold it.

**CONSTITUTIONAL STANDARDS FOR DUE PROCESS.** The due process guarantees of the Ohio and United States Constitutions place limits on the government's ability to deprive persons of life, liberty, or property without due process of law. There is both a procedural and substantive component to those due process limits. Procedural due process refers to the manner in which the government deprives a person of life, liberty, or property and whether the government has provided the person with adequate notice and a hearing prior to the deprivation. Substantive due process refers to whether the government is justified in depriving the person of life, liberty, or property. Substantive due process involves basic notions of fundamental fairness.

Removing the criminal intent element of knowledge from the offense of wrongful entrustment of a motor vehicle and allowing individuals to be convicted of that offense without any showing of criminal motivation may implicate constitutional due process guarantees. Strict liability offenses – i.e., offenses that punish those who act without any awareness of wrongdoing – are generally disfavored and considered inconsistent with the basic tenets of American criminal law. Though Substitute Senate Bill 17 ameliorates the potential due process concerns by allowing defendants to assert lack of knowledge as an affirmative defense, allowing that affirmative defense may not entirely cure the potential constitutional problem.

**INCREASED COURT CASELOAD AND WORKLOAD /UNFUNDED MANDATES.** Substitute Senate Bill 17 will significantly increase the caseload and workload of the courts. "Caseload" refers to the number of cases that come before the courts while "workload" refers to the time and resources required to dispose of cases. In addition, the bill imposes unfunded mandates that, as a practical matter, many courts lack the capacity to fulfill.

**Electronic alcohol monitoring.** The Committee is concerned that electronically monitoring the alcohol intake of defendants charged with, and offenders convicted of, a repeat OVI offense will require courts to hire additional staff. The Committee is also concerned by the fact that the bill does not address the issue of indigent defendants who will be unable to pay the costs associated with remote electronic alcohol monitoring. Remote electronic alcohol monitoring is a fairly expensive technology. The cost of the monitor itself is approximately

\$1,600. The daily monitoring charge is around \$10 a day for each offender being monitored. (Ten dollars a day is on the low-end of what courts are currently being charged. One court reports being charged as much as \$15 a day per offender.) Given that the bill requires that monitoring occur over a long period of time, there will be many defendants who will be unable to pay those costs. If, in those cases, courts will be required to pay the costs of monitoring, this would constitute a substantial economic burden that many courts would be unable to sustain on their current budgets.

To illustrate the potential judicial impact, suppose, under the bill, the average court would need to pay the monitoring costs of 50 offenders. The typical period of community control for these offenders is two to three years. To monitor 50 offenders for two years at a cost of \$10 per day would cost the court \$365,000. This includes only the cost of monitoring, and does not include the cost of the monitoring unit itself.

On a related matter, it is unclear whether courts will be required to deny bail to defendants who are unable to pay the costs of remote electronic alcohol monitoring. If so, this could substantially burden local jails. If bail will not be denied to defendants unable to pay the costs of monitoring, there remains an unresolved issue as to how the costs will be paid.

The bill is also ambiguous as to whether remote electronic alcohol monitoring applies only to defendants who are physically arrested and then subsequently granted bail at a bail hearing, or whether the requirement also applies to defendants who are not physically arrested but who are issued a summons to appear in court.

The Committee believes that it may be overly punitive to require repeat offenders to be subject to remote electronic alcohol monitoring until the conclusion of all community control sanctions, especially in light of the significant costs associated with that technology. It is the Committee's view that judges are in the best position to determine the necessity for, and appropriate duration of, alcohol monitoring on a case by case basis.

Finally, the Committee is concerned by the fact that remote electronic alcohol monitoring is currently available only through Alcohol Monitoring Systems, Inc., which markets a technology known as "SCRAM," or Secure, Continuous, Remote Alcohol Monitoring. If enacted, the bill would effectively create a statewide, statutorily mandated commercial monopoly, which could make substantial profits from the state's mandatory monitoring. At least some of those profits will come from the public coffers because, as noted above, not every offender will be able to afford the costs associated with the technology. The creation of a state mandated and state supported commercial monopoly could undermine the public's confidence in the law, especially in light of SCRAM's limitations. While SCRAM may be a useful tool for monitoring an offender's alcohol intake, SCRAM, unlike an ignition interlock device, cannot prevent a person from operating a motor vehicle while intoxicated.

**Additional complexity.** The bill adds more complexity to Ohio's OVI/OMWI laws, which are already very complex. The additional complexity added by the bill will increase the time required to dispose of cases and will make enforcement of, and compliance with, those laws more difficult.

**Expanding list of "equivalent offenses".** Expanding the list of "equivalent offenses" that are classified as prior convictions will increase the number of offenders who will be subject to the bill's requirements, thereby increasing court caseload and workload.

**Driver's intervention programs.** The Committee concluded that the bill unnecessarily limits judicial discretion by requiring courts to order repeat offenders to attend driver's intervention programs. The committee recognizes that TEA-21 requires that repeat offenders be assessed for their degree of alcohol abuse and undergo treatment as needed. At the same time, the committee believes that ordering an offender to attend a driver's intervention program may not be productive in every case. If, for example, an offender has already been ordered to attend a driver's intervention program in connection with a previous offense, there may be little to be gained by ordering an offender to attend such a program again. The committee believes that, in lieu of mandating participation in a driver's intervention program, TEA-21 could be satisfied simply by requiring courts to order all repeat offenders to undergo an alcohol abuse assessment and treatment as appropriate.

**Impact on innocent family members.** The Committee is also concerned about provisions in the bill requiring that spouses and driving-age children who are granted waiver display restricted license plates. Requiring innocent family members to use restricted plates unfairly punishes those individuals for crimes committed by their family members. In effect, the restricted license plates imply that the family member is guilty merely by association. In addition to raising procedural and substantive due process concerns, the inherent unfairness of punishing innocent family members for crimes they did not commit could diminish the public's confidence in the law.

**Motions for court approval of vehicle sale.** Requiring innocent family members to use restricted license plates may also lead to more offenders filing motions requesting that their sentencing courts authorize the sale of their vehicles in lieu of impoundment because at least some families will choose to sell their vehicles rather than use the restricted plates. This could significantly increase courts' workloads because each motion requesting approval of a sale requires a court to determine whether the sale proposed in the motion is in good faith and not for the purpose of circumventing the court's immobilization order.

**Impact on local jails.** Substitute Senate Bill 17's new bail conditions could place a substantial burden on local jails, especially if courts will be required to hold in jail those defendants who are unable to pay the costs of remote electronic alcohol monitoring as part of their bail conditions. Regardless, local jails will face the additional burden of holding those defendants who violate the new bail conditions. Many local jurisdictions are already experiencing significant overcrowding and do not have the capacity to house the additional offenders who will be jailed as a result of the bill's requirements. It is probably unrealistic to expect that the local taxing authorities on which those courts depend for funding will have the capacity to raise the additional revenue needed to meet the mandates.

**Unenforceability.** As indicated above, as a practical matter, many courts will have neither the staff nor the fiscal resources necessary to comply with Substitute Senate Bill 17's requirements. Therefore, if enacted in its present form, the bill could result in legal requirements that are, in effect, unenforceable. This could have the effect of generally undermining the public's confidence in both the law and the public officials who are sworn to uphold it.

**RECOMMENDATIONS.** For the reasons described above, the Committee believes that Substitute Senate Bill 17 will have a significant negative impact upon the administration of justice in this state. At the same time, the Committee believes that the bill's negative impact could be minimized by making the following changes to the bill:

- Provide a source of funding that will allow courts to pay the costs associated with remote electronic alcohol monitoring of indigent defendants released on bail; monitoring indigent offenders convicted of a repeat OVI offense; and jailing defendants who violate the new bond conditions.
- Remove provisions in the bill requiring remote electronic alcohol monitoring until the conclusion of all community control sanctions and grant judges discretion to determine its necessity and appropriate duration.
- Clarify whether remote electronic alcohol monitoring will be required only of those defendants who are physically arrested, granted bail, and awaiting trial or whether the requirement also applies to those who are issued a summons.
- Remove the requirement that spouses and driving-age children granted waiver under the bill's impoundment provisions display restricted license plates.
- In lieu of requiring that all repeat offenders participate in a driver's intervention program, satisfy TEA-21 by requiring courts to order all repeat offenders to undergo some form of alcohol abuse assessment and treatment as appropriate.