

6 VAC 20-190-10 *et seq.* REGULATIONS FOR BREATH ALCOHOL TESTING.

Statutory Authority: §§ ~~9-170~~ 9.1-102, 18.2-267, ~~and~~ 18.2-268.9, 29.1-738.1, 29.1-738.2, 46.2-341.25, and 46.2-341.26:9 of the Code of Virginia

Summary:

The Code of Virginia directs the Department of Criminal Justice Services, Division of Forensic Science to establish a training program, approve equipment, and establish methods to conduct chemical analyses of a person's breath, either to obtain a preliminary analysis of alcoholic content for the purposes of §§ 18.2-267, 29.1-738.1 and 46.2-341.25 or, pursuant to §§ 18.2-268.9, 29.1-738.2 and 46.2-341.26:9, to obtain an analysis that can be considered valid as evidence in a prosecution under §§ 18.2-266, 18.2-266.1, 29.1-738 or 46.2-341.24. These regulations describe the process for approval of breath test devices, general methods of conducting breath tests, training and licensing procedures for operators, required forms and records, and the use of preliminary breath test devices.

The amendments make technical corrections to the regulations and clarify breath test administrative procedures, the approval of breath test devices, licensing procedures, required forms and records, and specifications of preliminary breath test devices.

CHAPTER 190.
REGULATIONS FOR BREATH ALCOHOL TESTING.

PART I.
DEFINITIONS

6 VAC 20-190-10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

“Agency” means any town, city, county, or state law enforcement agency under whose auspices breath tests are performed.

“Blood alcohol concentration” or “blood alcohol level” means percent by weight of alcohol in a person's blood based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

“Breath test device” means, ~~as used in Part II (6 VAC 20-190-30 et seq. of this chapter)~~, an instrument designed to perform a quantitative chemical test for alcohol on a sample of breath of a person subject to the provisions of §§ 18.2-268.1 through 18.2-268.3, 18.2-268.9, 29.1-738.2, 46.2-341.26:1 through 46.2-341.26:3 and 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

“Chemical test” or “chemical analysis” means a quantitative test for alcohol using ~~photometric, infrared, oxidation-reduction,~~ or fuel cell methodologies or any combination thereof performed on a sample or samples of breath of a person subject to the provisions of §§ 18.2-267, 18.2-268.1 through 18.2-268.3, 18.2-268.9, 29.1-738.1, 29.1-738.2, 46.2-341.25, 46.2-341.26:1 through 46.2-341.26:3 or 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

“Division” means the Division of Forensic Science.

“Licensee” means a person holding a valid license from the division to perform a breath test of the type set forth within these regulations under the provisions of § 18.2-268.9 of the Code of Virginia or a parallel local ordinance.

“Preliminary breath test device” means, ~~as used in Part III (6 VAC 20-190-170 et seq. of this chapter)~~ an instrument designed to perform a quantitative chemical test for alcohol on a sample of breath of a person suspected of an offense subjecting such person to the provisions of §§ 18.2-267, 29.1-738.1, and 46.2-341.25 of the Code of Virginia.

“Supplies and accessories” means any item, device, chemical, reagent, tube, mouthpiece, replacement part, or glassware, whether or not reusable, which is used in conjunction with a breath test device ~~or a preliminary breath test device~~ to determine the blood alcohol level of any person subject to the provisions of §§ ~~18.2-267,~~ 18.2-268.1 through 18.2-268.3, 18.2-268.9, ~~29.1-738.1,~~ 29.1-738.2, ~~46.2-341.25,~~ 46.2-341.26:1 through 46.2-341.26:3 or 46.2-341-26:9 of the Code of Virginia or a parallel local ordinance.

6 VAC 20-190-20. Substantial compliance.

These regulations and the steps set forth herein relating to the taking, handling, identification and disposition of breath samples, the testing of such sample, and the completion and filing of any form or record prescribed by these regulations are procedural in nature and not substantive. Substantial compliance therewith shall be deemed sufficient.

PART II.

BREATH TESTS UNDER §§ 18.2-268.9, 29.1-738.2, AND 46.2-341.26:9 OF THE CODE OF VIRGINIA.

Article 1.

Breath Test Administrative Procedures.

6 VAC 20-190-30. Breath test devices.

Breath test devices shall be tested for accuracy by the division at least once every six months. All new breath test devices or those having been repaired by the manufacturer or the manufacturer’s authorized repair service shall be tested for accuracy by the division before their return to service.

6 VAC 20-190-40. Storage.

The breath test device must be stored in a clean, dry location that is only accessible to ~~an authorized licensee for the purpose of actually administering a breath test, preventative maintenance check, or other official uses,~~ and to other authorized individuals.

6 VAC 20-190-50. Care.

Proper care shall be taken at all times to ensure that the breath test device shall be kept free from excessive moisture, excessive heat and dust, as well as any unintentional jars, knocks or falls that may damage the internal mechanism.

6 VAC 20-190-60. Modifications.

No modifications shall be made ~~on~~ to any breath test device by an agency without the written consent of the division.

6 VAC 20-190-70. Use.

The breath test device shall not be used for administration of tests for alcohol use pursuant to the Federal Omnibus Transportation Employees Testing Act of 1991, 49 CFR Part 40.

Article 2.

Approval of Breath Test Devices.

6 VAC 20-190-80. Approval.

All breath tests as prescribed in §§ 18.2-268.9, 29.1-738.2, and 46.2-341.26:9 of the Code of Virginia shall be performed on a breath test device approved by the division. Those breath test devices listed in the “Conforming Products List of Evidential Breath Measurement Devices” as established by the National Highway Traffic Safety Administration (“NHTSA”), United States Department of Transportation, or in such other list as may be established by NHTSA evidencing that such device meets criteria, standards or specifications promulgated by it, as published from time to time in the Federal Register, may be approved by the division as a breath test device. In approving such devices, the division will consider factors including, but not limited to, costs, maintenance, necessity ~~or~~ of instruction and/or training by the division, ease of operation, availability ~~or~~ of parts and service facilities, reliability, maintenance instruction and the historical performance record of the device.

6 VAC 20-190-90. Publishing list of devices.

The division shall periodically publish in the Virginia Register of Regulations a list of any device(s) approved for use as breath test device(s). Such list shall be published forthwith after any addition or deletion of any device(s) to or from the division’s approved list. The division may, in addition, provide copies of its approved list to any agency subject to this chapter.

6 VAC 20-190-100. Publishing list of supplies.

The division shall periodically publish in the Virginia Register of Regulations a list of ~~approved~~ any supplies and accessories approved for use with breath test devices that may be purchased by an agency. Such list shall be published forthwith after any addition or deletion of any supplies or accessories to or from the division’s approved list. The division may, in addition, provide copies of its approved list to any agency subject to this chapter.

Article 3.

Methods of Conducting Breath Tests.

6 VAC 20-190-110. Methods and procedures.

The division shall approve such methods of performing breath tests as are demonstrated to the satisfaction of the division to produce accurate and reliable determinations in a reasonable, convenient and effective manner. The division approves the following breath test methods and procedures:

1. All breath test devices shall be operated in accordance with those sections of the instructional manual published by the division that are applicable to the particular breath test device. Licensees shall follow any additional instructions or modifications of instructions published by the division in supplements to the foregoing instructional manual.
2. The person to be tested shall be observed for at least 20 minutes prior to collection of the breath specimen, during which period the person must not have ingested fluids, regurgitated, vomited, eaten, or smoked. Should any of these actions occur, an additional 20-minute observation period must be performed.
3. The licensee shall verify that the breath test device is properly calibrated and in proper working order by conducting a room air blank analysis prior to analysis of the breath of the person and by conducting a validation test with a control sample as part of the test protocol.
4. The licensee must use only supplies and accessories issued by or approved by the division in conducting breath tests on approved breath test devices.

Article 4. Licensing Procedures.

6 VAC 20-190-120. Licensing procedures.

A. The division shall issue, renew, terminate and revoke licenses for individuals to perform breath alcohol tests on the basis of standards set forth in this chapter.

B. Application for an initial license to perform breath tests shall be made in writing to the division. The applicant shall have the endorsement of the appropriate supervisory law-enforcement officer or designated representative unless an exception is granted by the division.

C. The initial licenses shall be granted to individuals who demonstrate the ability to perform breath tests accurately and reliably in accordance with the methods approved by the division. ~~and who satisfactorily explain the theoretical basis for such chemical analysis.~~

D. Only individuals successfully completing a basic course of instruction shall be deemed to have demonstrated competence to qualify for the issuance of an initial license. Further instruction may be required by the division to qualify a licensee to perform tests using additional breath test devices.

E. Licenses shall be limited in scope to those breath test devices on which the individual applying for an initial or renewal license has demonstrated competence. ~~This limitation may be upon the device(s) on which the applicant received instruction in the course referred to in subsection D of this section or in such further instruction as may be necessary to qualify the individual for additional breath test device(s).~~

F. Licenses shall state the date upon which they are to expire, which date shall, in no event, be later than 24 months after the date of issuance. Licenses shall be subject to renewal at expiration or at such time prior to expiration as is convenient for the division on demonstration by the licensee of continuing competency to perform accurate and reliable breath tests. The division may at any time examine licensees to determine such continuing competency. ~~Licenses shall expire at the end of the expiration date, unless renewed on or before that date.~~ Licenses may be terminated or revoked by the division at any time upon its finding that the licensee no longer meets the qualifications necessary for the issuance of a license.

G. Any individual whose license has expired may renew his license within one year after its expiration date by successfully completing a recertification class and by demonstrating his competence in the performance of breath tests. Any individual (i) who fails the recertification class, or (ii) whose license has expired and who does not renew his license within one year after its expiration date may renew his license by again attending and successfully completing the basic course of instruction referred to in subsection D of this section and demonstrating competence in the performance of breath tests as otherwise required.

H. The failure of a licensee to comply with this chapter may be grounds for revocation of such individual's license.

6 VAC 20-190-130. Certificates.

The division shall issue, terminate and revoke instructor certificates for individuals to teach breath alcohol testing on the basis of the following standards:

1. The instructor certificate shall be granted only to individuals who (i) demonstrate the ability to teach the breath test method or methods approved by the division, (ii) possess a valid breath test license and (iii) satisfactorily complete a course for Breath Alcohol Instructors. The division may issue instructor certificates to persons who have acquired the necessary ability by past experience or formal education.
2. Instructor certificates shall be limited in scope to the methods or devices for which the individual has demonstrated competence.
3. The division may, at any time, examine instructors to determine continuing ability.
4. Instructor certificates shall be terminated or revoked by the division upon its finding that the instructor no longer meets the necessary qualifications.

6 VAC 20-190-140. Revocation.

Any revocation of a license or instructor certificate shall be by notice sent by registered or certified mail from the division to the licensee or instructor.

Article 5. Forms and Records.

6 VAC 20-190-150. Log.

A. ~~Each agency to which a~~ For each breath test device ~~is~~ assigned to an agency, shall keep a permanent log of all completed, evidential tests and simulator solution changes administered by

the licensees of that agency or other agencies shall be kept. This log shall be provided by the division and must be kept in the same location with the breath test device. The log shall be subject to periodic inspection by the division at any time. At least once each month, a copy of the log entries for the preceding month shall be submitted to the division to be kept on file for at least three years.

B. For each ~~agency to which a~~ breath test device ~~is~~ assigned to an agency, the division shall download by modem, at least once each month, data also recorded on the breath testing log. The division shall keep this data on file for at least three years.

6 VAC 20-190-160. Checklist.

A. ~~At least once each month, each agency to which a~~ For each breath test device ~~is~~ assigned to an agency shall complete a preventive maintenance checklist provided by the division shall be completed at least once each month. A signed copy of this preventive maintenance checklist shall be submitted to the division to be kept on file for at least three years.

B. For each ~~agency to which a~~ breath test device ~~is~~ assigned to an agency, the division shall download by modem, at least once each month, data also recorded on the preventive maintenance checklist. The division shall keep this data on file for at least three years.

PART III.

PRELIMINARY BREATH TESTS UNDER §§ 18.2-267, 29.1-738.1, AND 46.42-341.25 OF THE CODE OF VIRGINIA.

6 VAC 20-190-170. Preliminary breath test device.

All preliminary breath tests shall be performed on a preliminary breath test device approved by the division. Such devices shall offer convenience and efficiency in operation as determined by the division and shall also satisfy the requirements of either subdivision 1 or 2 or this section.

1. For instruments having a numeric readout, the device shall have a systematic error not exceeding $\pm 10\%$.
2. For instruments having a pass/fail, colored light readout, the device ~~shall satisfy~~ satisfies the following specifications:
 - a. When a sample of breath is properly taken from a person with an actual blood alcohol level of 0.05% or less by weight by volume or 0.05 grams of alcohol per 210 liters of breath, the device shall not indicate a positive result.
 - b. When a sample of breath is properly taken from a person with an actual blood alcohol level of 0.08 ~~0.09~~% or more by weight by volume or 0.08 ~~0.09~~ grams of alcohol per 210 liters of breath, the device shall not indicate a negative result.

6 VAC 20-190-180. List of preliminary devices.

The division shall periodically publish in the Virginia Register of Regulations a list of devices approved for use as preliminary breath test devices. Such list shall be published forthwith after any addition or deletion of any device(s) to or from the division's approval list.

6 VAC 20-190-190. Operational procedures.

All preliminary breath tests shall be conducted substantially in accordance with the operational procedures set forth in the instruction manual of the manufacturer of the instrument in use except as may be modified by the division.

6 VAC 20-190-200. Preventive maintenance.

It shall be the responsibility of each agency using preliminary breath test devices to provide preventive maintenance and repairs according to the manufacturer's instructions or procedures except as may be modified by the division.