

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PUBLIC HEARING ON
Rules I through VII and the)	PROPOSED ADOPTION AND
amendment of ARM 23.3.231,)	AMENDMENT
23.18.301, 23.18.302, 23.18.303,)	
23.18.304, 23.18.305, 23.18.306,)	
23.18.308, and 23.18.309 pertaining)	
to the Montana 24/7 Sobriety)	
Program Act)	

TO: All Concerned Persons

1. On November 5, 2020, at 10:00 a.m., the Department of Justice will hold a public hearing in the auditorium of the Department of Public Health and Human Services building, 111 North Sanders, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Justice 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 the Department of Justice no later than 5:00 p.m. on October 26, 2020, to advise us of the nature of the accommodation that you need. Please contact Jay Porteen, Department of Justice, 215 N. Sanders, P.O. Box 201401, Helena, MT 59601; (406) 437-4779 or email at Jay.Porteen@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The 2019 Legislature enacted Chapter 374, Laws of 2019 (Senate Bill 362), an act revising the requirements for the 24/7 Sobriety and Drug Monitoring Program Act. The Montana Highway Patrol, Department of Justice (department), is enacting new rules and amending certain rules to update processes and correct terminology in compliance with the statutory changes and to further implement the legislation.

As part of the periodic review of its administrative rules, the department is proposing further additions and revisions throughout the rules. The existing landscape for alcohol and drug testing in Montana does not conform to the current administrative rule structure. Since 2011, when the rules were first enacted, available testing technology has advanced and multiplied. The program itself has grown to include over 10,000 participants and is now spearheaded by a program director. Accordingly, the department has determined that reasonable necessity exists to propose and amend certain rules to address the new technology and practices. Where additional specific bases for a proposed action exist, the department will identify those reasons immediately following that rule.

4. The rules as proposed to be adopted provide as follows:

NEW RULE I APPROVED TESTING METHODOLOGIES, INSTRUMENTS, AND VENDORS (1) The department shall maintain a list of approved testing methodologies, instruments, and vendors for the 24/7 sobriety program. Only approved methodologies, instruments, and vendors may be used.

(2) To be approved:

(a) the testing methodology and instrument must conform to the requirements of [NEW RULE II through NEW RULE IV]; and

(b) the participating vendor must have a current vendor agreement.

(3) The department shall publish the list on the department's website. The department shall distribute copies of the list to the participating agencies, judges, and any other entity using the 24/7 program.

(4) The department shall remove a methodology, instrument, or vendor from the list if:

(a) the instrument or vendor fails to comply with any requirement in (2) after notification and an opportunity to remedy the failure; or

(b) the methodology or instrument is no longer supported by evidence of effectiveness.

(5) The department shall notify all participating law enforcement agencies, judges, and participating entities when removing a methodology, instrument, or vendor from the list.

(6) The sheriff shall ensure that the individuals administering all 24/7 program testing methodologies and instruments are properly trained.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, MCA

REASON: Several vendors have contacted the department asking how to join the 24/7 sobriety program in Montana. This rule is necessary to set out a transparent approval (and removal) process for testing methodologies, instruments, and vendors. This rule is also reasonably necessary because a published list will clarify for participating law enforcement agencies, judges, prospective vendors, and any other participating entities which testing methodologies, instruments, and vendors are approved by the department for purposes of 44-4-1203, MCA.

NEW RULE II PRELIMINARY ALCOHOL SCREENING TEST (PAST) DEVICES (1) The department shall approve a PAST device for use in the 24/7 sobriety program if the device:

(a) appears on the list of approved PAST devices maintained by the Forensic Science Division; and

(b) is field certified pursuant to ARM 23.4.213.

(2) The department shall include a device approved pursuant to (1) on its list of approved testing methodologies, instruments, and vendors.

(3) The following definitions apply to a twice-daily PAST testing regimen:

(a) "Confirmation test" or "confirmatory test" is the final breath alcohol test used to determine if a participant violated the requirements of the program.

(b) "Confirmed no show" means a pending no show that is unexcused and confirmed. A confirmed no show is a non-compliant event.

(c) "Deprivation period" means the time required between a non-negative initial test and a confirmatory test. During a deprivation period, the participant is instructed to remove any non-fixed foreign material from their mouth and to not place any new foreign matter into their mouth.

(d) "Excused no show" means a pending no show that is excused by the participant's supervisor. An excused no show is not a non-compliant event.

(e) "Initial test" is a first test that screens out compliant participants. Participants with a non-negative initial test are subject to a confirmatory test.

(f) "Negative for the presence of alcohol" means the PAST initial or confirmatory test results are less than 0.006 G/210L, where G means the weight of alcohol in grams and L means the volume of breath in liters.

(g) "Non-negative test result" means the PAST initial test results are greater than or equal to 0.006 G/210L, where G means the weight of alcohol in grams and L means the volume of breath in liters. Non-negative test results are compliant test results.

(h) "Pending no show" means a scheduled test for which a participant did not appear or did not provide a sample for analysis, but the no show is not yet confirmed or excused by the participant's supervisor.

(i) "Positive for the presence of alcohol" means the initial and confirmatory test results are 0.006 G/210L or greater, where G means the weight of alcohol in grams and L means the volume of breath in liters.

(j) "Refusal to test" means a participant is unwilling to provide a confirmatory test after an initial test. This is a non-compliant event.

(4) All testing data from a PAST device must be entered into the data management system.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, MCA

REASON: NEW RULES II through VI are reasonably necessary to resolve confusion and uncertainty as to the testing methodologies and instruments approved for use in the statewide 24/7 sobriety program. Each rule provides definitions applicable to its type of testing methodology. The definitions for a positive test and a negative test vary based upon the instrument type, whether it is testing breath, blood, urine, sweat, or saliva and whether it is testing for alcohol use, drug use, or both. The rules specify the data elements to be entered, downloaded, or transferred into the data management system for each test method and instrument. Each rule also specifies when test results must be entered, downloaded, or transferred into the data management system. If a particular testing method has a variable unique to that testing method, the rule addresses it. If applicable, the rule lists any required nationally recognized certifications for the appropriate testing method or instrument. Collectively, these rules are reasonably necessary to ensure that all participating jurisdictions are using approved testing methodologies consistently.

Currently, program data is not consistently gathered or transmitted to the State. The rules are necessary to ensure that the data collected from the various testing methods is consistent so the department can analyze the effectiveness of the

program and each testing method with reliable, uniform data. Accurate, comprehensive, and searchable data located in a single database is critical for making informed public policy decisions related to the program and to the public safety implications of drug and alcohol testing requirements in general.

The proposed New Rule II also addresses significant confusion regarding PAST devices and the amount of alcohol necessary to constitute a violation of the 24/7 sobriety program. That confusion appears to stem from ARM 23.4.225, which states that a PAST result of 0.020 G/210L or greater is considered positive for the presence of alcohol. PAST devices currently are tested for accuracy to 0.020 G/210L, as that standard encompasses the Blood Alcohol Content offenses under Montana law. Unlike offenses involving a specific, quantifiable measurement of alcohol, such as the offenses set forth in 61-8-406, 61-8-410, and 61-8-465, MCA, the 24/7 sobriety program tests for *any* presence of alcohol; thus, PAST results have a different significance when obtained as part of a 24/7 sobriety program. Because authorized PAST devices have a margin of error of +/- 0.0050 G/210L, this rule clarifies that any result of 0.0060 G/210L or greater is considered a violation of the requirements of the 24/7 sobriety program.

NEW RULE III TRANSDERMAL TESTING (1) Only transdermal alcohol monitoring devices and vendors on the department's list of approved testing methodologies, instruments, and vendors may be used in the 24/7 program.

(2) The following definitions apply to a transdermal testing regimen:

(a) "Confirmed positive transdermal result" means the transdermal instrument reports a "confirmed positive" based on the participant's alcohol use.

(b) "Confirmed tamper" means an instance where a participant attempts to foil the testing process or alter the test result, with or without success.

(c) "Positive for the use of alcohol" or "confirmed positive" means the transdermal system reports and confirms a participant's alcohol use.

(3) Transdermal alcohol monitoring devices must transmit stored test data to the transdermal alcohol monitoring system for interpretation and storage at least once a week.

(4) At least once a day, the transdermal alcohol monitoring system must transmit collected enrollment and test data into the data management system through a department-approved interface. The uploaded data shall include recently collected data with a date stamp for the day it was collected and a date stamp for the day that the results were generated. If all of the tests for a day are collected, but not confirmed, a message indicating that the data for that day is "in process" should be transmitted to the data management system. No data or message should be transmitted for a day where data has yet to be collected from the testing device. Once confirmed data has been successfully uploaded to the data management system, it should not be uploaded again unless the data management system requests it.

(5) Required data includes the following:

(a) enrollment data as outlined in ARM 23.18.303(4);

(b) the instrument's identification;

(c) the name of the instrument/bracelet owner;

- (d) the program start and end dates;
 - (e) the device attachment date;
 - (f) the data transfer type;
 - (g) the days monitored;
 - (h) the number of analyses performed daily;
 - (i) any confirmed test results with the time, date, and if the test result is positive, the transdermal alcohol concentration;
 - (j) the device removal date;
 - (k) the removed instrument's identification;
 - (l) the reason for the device's removal;
 - (m) the reason for the participant's program termination; and
 - (n) the date and time of the participant's program termination.
- (6) Transdermal alcohol monitoring devices must sample a person's perspiration at least once every 30 minutes.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, MCA

NEW RULE IV REMOTE BREATH TESTING (1) Only remote breath testing devices and vendors on the department's list of approved testing methodologies, instruments, and vendors may be used in the program.

(2) The following definitions apply to a remote breath testing regimen:

(a) "Confirmation test" or "confirmatory test" is the final breath alcohol test used to determine if a participant violated the requirements of the program.

(b) "Confirmed no show" means a pending no show that is unexcused and confirmed. A confirmed no show is a non-compliant event.

(c) "Confirmed tamper" means an instance where a participant attempts to foil the testing process or alter the test result, with or without success.

(d) "Deprivation period" means the time required between a non-negative initial test and a confirmatory test. During a deprivation period, the participant is instructed to remove any non-fixed foreign material from their mouth and to not place any new foreign matter into their mouth.

(e) "Excused no show" means a pending no show that is excused by the participant's supervisor. An excused no show is not a non-compliant event.

(f) "Initial test" is a first test that screens out compliant participants.

Participants with a non-negative initial test are subject to a confirmatory breath alcohol test.

(g) "Negative for the presence of alcohol" means the initial or confirmatory test results are less than 0.020 G/210L, where G means the weight of alcohol in grams and L means the volume of breath in liters.

(h) "Non-negative test result" means the initial test results are greater than or equal to 0.020 G/210L, where G means the weight of alcohol in grams and L means the volume of breath in liters. Non-negative tests are compliant tests.

(i) "Pending no show" means a scheduled test for which a participant did not appear or did not provide an initial sample for analysis, but the no show is not yet resolved by the participant's supervisor.

(j) "Positive for the presence of alcohol" means the initial and confirmatory test results where both results are 0.020 G/210L or greater, where G means the weight of alcohol in grams and L means the volume of breath in liters.

(k) "Refusal to test" means a participant's unwillingness to provide a confirmatory test after an initial test. This is a non-compliant event.

(3) At least once a day, remote breath alcohol monitoring devices must transmit stored test data to the remote breath alcohol monitoring system for interpretation and storage.

(4) At least once a day, a remote breath alcohol monitoring system must transmit collected enrollment and test data into the data management system through a department-approved interface. The uploaded data shall include recently collected data with a date stamp for the day the data was collected and the day the results were generated. If all of the tests for a day have been collected, but not confirmed, a message indicating that the data for that day are "in process" should be transmitted. No data or message should be transmitted for a day where data has yet to be collected from the testing device. Once confirmed data has been successfully uploaded to the data management system, it should not be uploaded again unless the data system requests it.

(5) Required data includes the following:

- (a) enrollment data as outlined in ARM 23.18.303(4);
- (b) the instrument's identification;
- (c) the name of the instrument owner;
- (d) the program start and end dates;
- (e) the instrument acceptance date;
- (f) the data transfer type;
- (g) the days monitored;
- (h) the number of analyses performed daily;
- (i) any confirmed test results, including a refusal to provide a confirmation test, a confirmed no show, or an excused no show, with the time, date, and if the test result is positive, the alcohol concentration;
- (j) the instrument return date;
- (k) the returned instrument's identification;
- (l) the reason for the instrument's return;
- (m) the reason for the participant's program termination; and
- (n) the date and time of the participant's program termination.

(6) Remote breath alcohol testing devices must conduct between three and six tests per day, with two of the tests twelve hours apart.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, MCA

NEW RULE V DRUG PATCH USAGE (1) Only drug patches and vendors on the department's list of approved testing methodologies, instruments, and vendors may be used in the program.

(2) A drug patch shall be used and transmitted to the laboratory for analysis in accordance with manufacturer specifications.

(3) The individual removing the drug patch shall collect specimens using a container from an approved vendor and send the container to the laboratory for testing.

(4) For each specimen, the individual administering the drug patch shall complete a test-requisition and chain of custody form in accordance with industry standards.

(5) Required data from drug patch testing must be promptly entered into the data management system. The required data includes:

- (a) enrollment data as outlined in ARM 23.18.303(4);
- (b) the program start date;
- (c) the program end date;
- (d) the drug patch attachment date;
- (e) the drug patch identification;
- (f) the test status and result;
- (g) the reason for the participant's program termination; and
- (h) the date and time of the participant's program termination.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, MCA

NEW RULE VI SALIVA AND URINALYSIS TESTING (1) Only saliva and urinalysis testing instruments and vendors on the department's list of approved testing methodologies, instruments, and vendors may be used in the program.

(2) For purposes of this rule, the following definitions apply:

(a) "Confirmatory test" means the final drug test used to determine if a participant has violated the requirements of the program. If the participant does not admit use and chooses to perform a laboratory confirmation test, the laboratory confirmation test is considered a confirmatory test and the on-site analysis is considered an initial test. If the participant chooses not to run a laboratory confirmation test, the on-site test is considered the confirmatory test.

(b) "Initial test" means a first test that screens out compliant participants. If the initial test is non-negative, the participant is subject to a confirmatory test in urinalysis and oral swab testing unless the participant admits use.

(c) "Laboratory" means:

(i) a facility that receives and tests saliva and urine specimens to determine the presence of drugs; and

(ii) a facility with at least one of the following certifications or accreditations: Clinical Laboratory Improvement Amendment (CLIA); American Association for Laboratory Accreditation; American Osteopathic Association/Healthcare Facilities Accreditation Program (AOA/HFAP); College of American Pathologists (COLA); ANSI National Accreditation Board (ANAB); or The Joint Commission.

(d) "Non-negative test result" means a test result on an initial test that is greater than the cutoff level for a psychoactive substance or metabolite but is not confirmed as a positive test.

(e) "Positive test result" means a test result confirming the presence of a psychoactive substance or metabolite in a sample provided by a participant.

(3) The individual administering the saliva or urinalysis test shall collect specimens using a container from an approved vendor and send the container to a laboratory for testing if the testing protocol requires laboratory review. For each specimen requiring laboratory review, the individual administering the test shall complete a test-requisition and/or chain of custody form in accordance with industry standards.

(4) Required data from saliva and urinalysis testing must be promptly entered into the data management system. Required data includes:

- (a) enrollment data as outlined in ARM 23.18.303(4);
- (b) the program start date;
- (c) the program end date;
- (d) the reason for a participant's program enrollment;
- (e) the name of the individual administering the test;
- (f) the primary test site;
- (g) the type of test; the oral fluid or urinalysis kit identification number;
- (h) for a laboratory sample, the chain of custody number;
- (i) the test status and result;
- (j) the reason for the participant's program termination; and
- (k) the date and time of the participant's program termination.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, MCA

NEW RULE VII VIOLATIONS—NONCOMPLIANT EVENTS (1) A

participant fails to comply with the requirements of the 24/7 sobriety program if the participant:

- (a) fails to enroll in the 24/7 sobriety program;
- (b) is unwilling to pay the associated testing or participation fees;
- (c) admits use of alcohol or a dangerous drug;
- (d) fails to provide a proper test sample;
- (e) violates a condition of program participation; or
- (f) is otherwise determined to be noncompliant by a program administrator or judge.

(2) In addition to the noncompliant events in (1), a participant who is ordered to submit to twice-daily breath tests on a PAST fails to comply with the requirements of the 24/7 sobriety program if the participant:

- (a) fails to report to the testing location during the scheduled testing times;
- (b) reports to the testing site but refuses or is unable to provide an initial sample or a confirmatory sample for analysis; or
- (c) provides a confirmatory test that is positive for the presence of alcohol greater than or equal to 0.006 G/210L of breath for PAST devices.

(3) In addition to the noncompliant events in (1), a participant who is ordered to submit to transdermal alcohol monitoring fails to comply with the requirements of the 24/7 sobriety program if:

- (a) the transdermal alcohol monitoring system reports a confirmed positive transdermal result; or
- (b) the transdermal alcohol monitoring system reports a confirmed tamper.

(4) In addition to the noncompliant events in (1), a participant who is ordered to submit to remote breath alcohol monitoring fails to comply with the requirements of the 24/7 sobriety program if:

(a) the remote breath alcohol monitoring system reports a confirmed positive result;

(b) the remote breath alcohol monitoring system reports a confirmed tamper; or

(c) the participant fails to provide a breath sample within thirty minutes of a scheduled test time.

(5) In addition to the noncompliant events in (1), a participant who is ordered to submit to drug patch testing fails to comply with the requirements of the 24/7 sobriety program if the participant:

(a) fails to appear for a scheduled patch installation or removal;

(b) receives a positive test result after laboratory analysis of the patch; or

(c) tampers with the patch.

(6) In addition to the noncompliant events in (1), a participant who is ordered to submit to urinalysis testing or saliva testing fails to comply with the requirements of the 24/7 sobriety program if the participant:

(a) fails to report to the testing location at a scheduled testing time;

(b) reports to the testing site but refuses or is unable to provide an initial sample or a confirmatory sample for analysis;

(c) fails a screening test and refuses a confirmatory test;

(d) fails a confirmatory test;

(e) admits use of a prohibited substance; or

(f) adulterates or otherwise tampers with a sample.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, MCA

REASON: This rule is reasonably necessary to establish uniform standards for what constitutes a failure to comply with the requirements of the 24/7 sobriety program. It has been brought to the department's attention that participants, participating agencies, and courts have inconsistent interpretations and practices as to what constitutes a violation of the 24/7 program, especially when preliminary alcohol screening test (PAST) devices are used. The confusion regarding PAST devices appears to stem from ARM 23.4.225, which states that a PAST result of 0.020 G/210L or greater is considered positive for the presence of alcohol. PAST devices currently are tested for accuracy to 0.020 G/210L, as that standard encompasses the Blood Alcohol Content offenses under Montana law. Unlike offenses involving a specific, quantifiable measurement of alcohol, such as the offenses set forth in 61-8-406, 61-8-410, and 61-8-465, MCA, the 24/7 sobriety program tests for *any* presence of alcohol; thus, PAST results have a different significance when obtained as part of a 24/7 sobriety program. Because authorized PAST devices have a margin of error of +/- 0.0050 G/210L, this rule clarifies that any result of 0.0060 G/210L or greater is considered a violation of the requirements of the 24/7 sobriety program.

Because this issue recently arose regarding twice-daily testing on a PAST device, it will likely arise as other testing methodologies are introduced into the 24/7 sobriety program. To prevent confusion, this rule lists general 24/7 sobriety program violations, as well as violations for each type of testing method/device currently authorized under the 24/7 program.

5. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

23.3.231 PROBATIONARY LICENSES (1) The division may issue a persona restricted probationary license to any person whose driver's license or privilege to drive in Montana is subject to suspension or revocation when: ~~in lieu of suspension of driving privilege for six months upon conviction or forfeiture of bail or collateral not vacated for the offense of driving or being in control of a motor vehicle while under the influence of alcohol or drugs for the first time in five years as detailed in section 61-5-208, MCA if:~~

(a) ~~the judge of the court in which the conviction or forfeiture occurred recommends probation; and~~ the licensee is eligible for the Driver Rehabilitation Program under ARM 23.3.203 through 23.3.205 and the licensee enrolls and continues to participate in the Driver Rehabilitation Program; or

(b) ~~the licensee continues to comply with the alcohol treatment program or driver improvement school participation directed by the court~~ the division is otherwise authorized by statute to do so.

(2) ~~When~~ When ~~the division may issue a restricted probationary license in lieu of suspension or revocation to any person, not covered in subsection (1), whose license or permission to operate a motor vehicle in Montana is subject to suspension or revocation if:~~ receives notification of a conviction for a second or subsequent driving under the influence of alcohol or drugs and a court's recommendation for a probationary license based on participation in an alcohol or drug testing program and the driver is otherwise eligible for a probationary license, the Division may issue a probationary license only when the alcohol or drug testing program meets the requirements of 44-4-1203(6), MCA.

(a) ~~the licensee is eligible for the Driver Rehabilitation Program under ARM 23.3.203 through 23.3.205, and~~

(b) ~~the licensee enrolls and continues to participate in the Driver Rehabilitation Program.~~

(3) ~~If a probationary licensee fails to continue to comply with the requirements for issuance of his or her probationary license or the restrictions thereon, the Division shall require the return of the person's probationary license and shall reinstate the full term of the originally authorized suspension or revocation.~~

(4) ~~If a probationary licensee is convicted of or forfeits bail or collateral on any traffic violation during the period of suspension or revocation, the Division shall require the return of the person's probationary license and shall reinstate the full term of the originally authorized suspension or revocation.~~

AUTH: 61-2-302(4), 61-14-201, MCA

IMP: 44-4-1203, 44-4-1205, 61-2-302, 61-5-206(2), 61-5-208, 61-5-231, 61-8-442, MCA.

REASON: The department's rule regarding the issuance of restricted probationary licenses in the context of convictions for driving while under the influence of alcohol or drugs has not been amended since 1985. The rule amendment is reasonably necessary to remove the outdated statutory language contained in (1) and to reflect that there is now more than one circumstance where the issuance of a probationary license may be authorized by statute. The rule amendment in (2) is also necessary to harmonize the requirements for a probationary license with the Legislature's requirement that all drug and alcohol testing ordered by a court must utilize the data management technology plan provided for in 44-4-1203(6) and 44-4-1204, MCA. Finally, the removal of (3) and (4) is necessary to reflect that the division no longer takes the actions described in those sections.

23.18.301 DEFINITIONS Unless the context indicates otherwise, the words and phrases in this subchapter have the definitions set forth in this rule.

(1) and (2) remain the same, but are renumbered (3) and (4).

(5) "Drug patch" means an adhesive patch affixed to the skin for a set number of days that uses sweat to detect the parent drug and drug metabolite.

(3) through (5) remain the same, but are renumbered (6) through (8).

(6)(9) "Preliminary alcohol screening test device" or "PAST" means a device designed to detect and verify the presence of alcohol or provide an estimated value of alcohol concentration listed on the Forensic Science Division's list for approved PAST devices.

(7) remains the same but is renumbered (10)

(8)(1) "24/7 sobriety program" or "program" means the program established in 2011 Mont. Laws, ch. 318, § 3 44-4-1203, MCA. The program is a continuous sobriety program in which a participant submits to testing of breath or other bodily substances to determine whether alcohol or drugs are present in the participant's body.

(9)(2) "Continuous remote transdermal alcohol monitoring device" means a device that is capable of remote continuous or transdermal alcohol monitoring that can be attached directly to the participant an instrument that is securely located in close proximity to the wearer's skin and is capable of remotely sampling the wearer's sweat for the presence of transdermal alcohol concentration or TAC. The term includes any associated equipment necessary for the device to perform properly.

(10) remains the same but is renumbered (14).

(11) "Remote breath test device" means a mobile breath alcohol testing device capable of scheduling tests at least three to six times a day and detecting and verifying the presence and level of alcohol in a testing participant's body. The term also includes ignition interlock devices.

(12) "Saliva testing" means testing that analyzes a saliva sample for parent drugs and metabolites.

(13) "Urinalysis" means the testing of urine by physical, chemical, and microscopical means to test for the presence of alcohol, drugs, or other substances.

AUTH: 44-4-1204, MCA

IMP: 44-4-1204, MCA

REASON: This rule amendment is reasonably necessary to provide updated and/or new definitions for testing methodologies previously recognized in 44-4-1202, MCA (in-person breath, urine, saliva, and perspiration), and the remote breath testing methodology added to the statute by Chapter 374, Laws of 2019 (Senate Bill 362). It is unclear whether all participating agencies have been using PAST devices on the Forensic Science Division's approved device list, so this rule amendment is reasonably necessary to clarify that only devices on the approved list can be used for the primary twice-daily breath testing methodology.

The rule amendment to the definition of the 24/7 program is reasonably necessary to reflect that Chapter 318, § 3, Laws of 2011, was codified at 44-4-1203, MCA.

23.18.302 PLACEMENT IN THE 24/7 SOBRIETY PROGRAM (1) and (2) remain the same.

(3) A participant shall report for twice-daily breath tests or, in cases of hardship, submit to ~~testing through a continuous remote transdermal alcohol monitoring device~~ a hardship testing methodology for the length of time ordered by the court, the Board of Pardons and Parole, the Department of Corrections, or a parole officer.

(4) remains the same.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, 44-4-1205, MCA

REASON: This rule amendment is reasonably necessary to reflect that remote transdermal monitoring is no longer the only hardship testing methodology available under 44-4-1203, MCA.

23.18.303 ENROLLMENT (1) through (3) remain the same.

(4) A representative of a participating agency must enter the following information into the data management system for each participant at the time of enrollment:

- (a) the participant's first and last names;
- (b) the participant's national identification or social security number;
- (c) the participant's program identifier;
- (d) the case docket number, jurisdiction, and judge;
- (e) the participant's gender, date of birth, race, ethnicity, email address, phone number, address, and current occupation;
- (f) the program start date;
- (g) the projected program end date;
- (h) the monitoring type;
- (i) offense;
- (j) the supervising agency;
- (k) the supervising agent; and

(l) the primary test site.

AUTH: 44-4-1204, MCA
IMP: 44-4-1203, 44-4-1204, MCA

REASON: The department is not currently receiving uniform or regularly updated data relating to program participants. This rule amendment is reasonably necessary to ensure that data is collected and entered into the data management system for each program participant. This amendment provides for program consistency across all participating agencies. Accurate, comprehensive, and searchable data located in a single database is critical for making informed public policy decisions related to the program and to the public safety implications of drug and alcohol testing requirements in general.

23.18.304 TESTING AUTHORIZED (1) Except as provided in (3), a participant in the 24/7 sobriety program shall submit to alcohol testing at a central location through a twice-daily breath tests on a preliminary alcohol screening test device primary testing methodology.

(2) A participant who has been ordered to provide twice-daily breath tests shall report to the participating agency's testing location at two daily testing times approximately 12 hours apart. A trained person shall administer the required testing. The participant shall wait at least 20 minutes between an initial test with a non-negative test result and the confirmatory test.

(3) In cases of hardship, A participant alternatively may be ordered to submit to continuous remote transdermal alcohol monitoring on a continuous remote transdermal alcohol monitoring device a hardship testing methodology that appears on the department's list of approved methodologies, instruments, and vendors.

Factors to be considered include whether:

- ~~(a) a device is available;~~
- ~~(b) the participant is capable of paying the fees and costs associated with continuous remote transdermal alcohol monitoring;~~
- ~~(c) the participant is capable of wearing the device; and-~~
- ~~(d) the participant does not qualify for twice-daily breath tests because of one or more of the following:~~
 - ~~(i) the participant lives in a rural area and submitting to twice-daily breath tests would be unduly burdensome;~~
 - ~~(ii) the participant's employment requires job performance at a location remote from the testing location and submitting to twice-daily breath tests would be unduly burdensome; or~~
 - ~~(iii) the participant repeatedly has violated the 24/7 sobriety program while submitting to twice-daily breath tests and poses a substantial risk of future violation.~~

(4) A participating agency shall record all testing results installations, removals, test results, confirmed tampers, and reasons for a participant's termination from the program in the data management system on a timely basis.

AUTH: 44-4-1204, MCA
IMP: 44-4-1203, 44-4-1204, MCA

REASON: This rule amendment is reasonably necessary to reflect the distinction contained in Chapter 374, Laws of 2019 (Senate Bill 362), between primary and hardship testing methodologies and the new addition of remote breath testing as a hardship testing methodology. It is unclear whether all participating agencies have been utilizing trained personnel to administer the PAST testing with a standard deprivation period. The rule amendment to (2), requiring twice-daily breath testing to be administered by a certified individual with a 20-minute deprivation period, is reasonably necessary to establish a uniform statewide standard to that effect. The rule amendment to (3), eliminating the "factors" to be considered attendant to remote continuous transdermal alcohol monitoring, is reasonably necessary to reflect both: (1) the addition of remote breath testing as a hardship testing methodology; and (2) Senate Bill 362's inclusion of specific language regarding when a hardship methodology may be used. The rule amendment to (4), expanding the types of information to be timely recorded in the State's data management system, is reasonably necessary to establish consistency and address issues of delay the department has observed.

23.18.305 PARTICIPANT FEES (1) A 24/7 program participant may be charged a fee of up to \$30 each time a participant enrolls in a 24/7 sobriety program, in addition to any fees charged under (2) through (4).

~~(1)~~(2) A participating agency shall charge a participant who has been ordered to provide twice-daily breath tests a fee, which may not exceed the amount provided for in the vendor agreement.

~~(2)~~(3) A participating agency shall charge a participant who has been ordered to submit to ~~continuous~~ remote transdermal alcohol monitoring or remote breath testing the following fees and costs, which may not exceed the amounts provided for in the vendor agreement:

(a) a daily monitoring fee as provided for in the vendor agreement, which must be paid in advance on a one-week, two-week, or four-week basis;

(b) an installation/ or activation fee as provided for in the vendor agreement; and

(c) any repair or replacement costs due to misuse.

(4) A participating agency shall charge a participant who has been ordered to submit to the use of a drug patch or to saliva or urinalysis testing a fee which may not exceed the amount provided for in the vendor agreement.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, 44-4-1206, MCA

REASON: This rule amendment allows participating agencies to charge a participation fee upon program enrollment to help cover the program's administrative and operating costs. 1,230 participants enrolled in the 24/7 sobriety program in 2019. The number of people affected by this proposed rule amendment therefore would be about 1,200 per year. The cumulative amount of the fees for all persons affected would be about \$36,900. The amendment is reasonably necessary to afford an additional funding stream for a range of program support options (i.e.,

indigent participant support, new instruments, etc.) that may vary from location to location.

23.18.306 COLLECTION, DISTRIBUTION, AND USE OF ENROLLMENT AND TESTING FEES (1) remains the same.

(2) A participating agency shall distribute a portion of the testing fees to the participating vendors in accordance with the vendor agreements.

(3) The participation fees and the remainder of the testing fee proceeds ~~is~~ are for the use of the participating agency and must be placed in the sobriety program account authorized in ARM 23.18.307. The fee proceeds may be used only for the purposes of administering the 24/7 sobriety program.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, 44-4-1206, MCA

REASON: This rule amendment is reasonably necessary to reflect the addition of the new participation fee to be authorized upon program enrollment as proposed in ARM 23.18.305(1) above and to clarify that the participation fee is for the use of the participating agencies and not subject to distribution to a participating vendor.

23.18.308 DATA MANAGEMENT SYSTEM (1) and (2) remain the same.

(3) The data management system must support breath testing (in-person and remote), continuous remote transdermal alcohol monitoring, drug patch testing, ~~and~~ urinalysis testing, and saliva testing. The data management system must also support an interactive voice response system for generating random drug test schedules.

(4) and (5) remain the same.

AUTH: 44-4-1204, MCA

IMP: 44-4-1203, 44-4-1204, 44-4-1206, MCA

REASON: This rule amendment is reasonably necessary to reflect the additional forms of testing referenced in Chapter 374, Laws of 2019 (Senate Bill 362), and these new rules, specifically remote breath and saliva testing. The amendment is also necessary to require compatibility with newer technology for the use of interactive voice systems as part of testing prompts and reminders.

23.18.309 24/7 SOBRIETY PROGRAM MANAGEMENT GROUP ADVISORY COUNCIL (1) The Attorney General shall establish a 24/7 sobriety program ~~management group advisory council~~. The group council must include:

(a) remains the same.

(b) ~~two representatives from rural participating agencies, one representing eastern Montana and one representing western Montana~~ members of the judiciary, one from an urban area and one from a rural area;

(c) ~~two representatives from participating agencies, one from urban participating agencies, one representing eastern Montana and one from representing western Montana; and~~

(d) a representative from the Lewis and Clark County participating agency;
(d) two legislators appointed by the Attorney General, one from the majority party and one from the minority party; and

(e) up to two other at large members appointed by the Attorney General. At large members must be stakeholders involved in the program.

(2) The Attorney General ~~shall meet at least annually with~~ may convene meetings of the 24/7 sobriety program management group advisory council to review the program and administrative rules.

(3) Except as provided in (4), each appointed representative shall serve a term of two years. There shall be no limit on the number of terms a representative may serve.

(4) One representative appointed pursuant to each subsection from (1)(b) through (1)(e) shall serve an initial term of one year.

AUTH: 44-4-1204, MCA

IMP: 44-4-1204, MCA

REASON: The program has existed for eight years, the department now has a dedicated 24/7 program coordinator, and the council has not met for over two years. This rule amendment is reasonably necessary because the testing device and process landscape has solidified considerably since the program's inception and there is no longer a need for frequent council meetings or for active council involvement in the program operation and administration. This rule is also reasonably necessary to ensure advisory council members better reflect the program stakeholders across the state. The advisory council will now contain stakeholders from rural and urban jurisdictions, as well as judicial and legislative stakeholders, to provide varied and broad inputs from those that are involved in the program in different capacities.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Jay Porteen, Department of Justice, 215 N. Sanders, P.O. Box 201401, Helena, MT 59601; (406) 437-4779 or email at Jay.Porteen@mt.gov, to be received no later than 5:00 p.m., November 6, 2020.

7. Jay Porteen, Department of Justice, has been designated to preside over and conduct this hearing.

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 6 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, apply and have been fulfilled. The primary bill sponsor was contacted by email on August 31, 2020, by text message on September 10, 2020, and by email and telephone on September 14, 2020.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption and amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Hannah E. Tokerud
Hannah E. Tokerud
Rule Reviewer

/s/ Timothy C. Fox
Timothy C. Fox
Attorney General

Certified to the Secretary of State September 29, 2020.