



**House
Legislative
Analysis
Section**

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UNDERAGE DRINKING: PENALTIES

House Bill 4136 as enrolled
Public Act 122 of 1995
Second Analysis (8-16-95)

Sponsor: Rep. Jim McBryde
House Committee: Judiciary and Civil
Rights
Senate Committee: Judiciary

THE APPARENT PROBLEM:

The legal drinking age in Michigan is 21. The Liquor Control Act contains penalties for licensees, such as bars, bowling alleys, restaurants, supermarkets, and package stores, who sell or furnish alcohol to people under that age, and penalties for young people under the legal drinking age who purchase, possess, and consume alcohol. Licensees complain, however, that enforcement is unequal. Penalties against licensees, which can include suspensions and revocations, as well as civil fines and criminal penalties, are far more severe than those facing underage drinkers. Underage drinkers face only small civil fines (like traffic tickets) and possibly required attendance at substance abuse programs. These penalties are considered too low to be effective deterrents and low enough to make enforcement unprofitable and not worth the effort. Licensees complain that underage drinkers routinely escape punishment while duped licensees face serious sanctions. What is even more galling to licensees, some young people who violate the underage drinking law escape prosecution by subsequently participating in "sting" operations for law enforcement agencies. Legislation has been proposed for several years purporting to level the playing field between licensees and underage drinkers and to discourage young people from underage drinking by stiffening penalties. Further, it has been proposed that there be strict penalties for those of legal drinking age who furnish alcohol to underage drinkers.

In 1994, the legislature passed a bill to amend the Michigan Liquor Control Act by, among other things, increasing penalties to underage drinkers and those furnishing alcohol to them. This bill (enrolled Senate Bill 482, enacted as Public Act 447 of 1994) was tie-barred to House Bill 4323, which would have made complementary amendments to the Michigan Vehicle Code. (For more information,

see the House Legislative Analysis Section's analysis of House Bill 4323 and Senate Bill 482 dated 1-20-95.) House Bill 4323 was vetoed by the governor, and because of the tie-bar, Senate Bill 482 (Public Act 447) did not take effect. Once again, legislation has been introduced to address this problem.

THE CONTENT OF THE BILL:

House Bill 4136 would amend the Michigan Liquor Control Act to alter the penalties for conduct related to the purchase, possession, and consumption of alcohol by a person under the legal drinking age of 21. The bill would require the suspension or restriction of a driver's license for repeat offenders of underage drinking. It also would require, with some exceptions, that if a licensee was to be charged for an underage drinking violation then the underage drinker also would have to be charged.

Specifically, House Bill 4136 would do the following:

Licensee Protections

****As of September 1, 1995, a retail licensee, such as a bar or package store, could not be charged with a violation involving selling or furnishing alcohol to an underage person, unless enforcement action was also taken against the underage person and, if applicable, the person of drinking age who furnished the alcohol to the underage person.**

This would only apply when the enforcing agency was the state police or a local law enforcement agency. It would not apply when the enforcing agent was a Liquor Control Commission inspector. (In such cases, the LCC would have to recommend to a local law enforcement agency that action be

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taken.) It also would not apply if the underage person was not alive or was not present in the state at the time the licensee was charged. And, it would not apply if the violation was the result of an undercover operation in which the underage person purchased or received alcohol either: (a) under the direction of the licensee with the prior approval of the local prosecutor's office as part of an employer-sponsored internal enforcement action, or (b) under the direction of a police agency or the commission as part of an enforcement action where the initial or contemporaneous purchase or receipt of alcohol was under law enforcement direction and part of the operation.

****A licensee or an employee of an on-premise licensee (such as a bar or restaurant) could not be charged with a violation of underage drinking laws unless both (a) the licensee or employee knew or should reasonably have known, with the exercise of due diligence, that the underage person possessed or consumed alcohol at the establishment, and (b) the licensee or employee failed to take immediate corrective action.**

(Under current law, if a licensee violates the act, the Liquor Control Commission may suspend or revoke the liquor license, assess a \$300 fine for each violation, and, when the violation consists of selling or furnishing alcohol to a minor, may assess a \$1,000 fine in addition to (or instead of) suspending or revoking the license. The commission must suspend or revoke a liquor license if the licensee has sold or furnished alcohol to a minor three or more times within 24 months. The act also says that any licensee who violates the act (or any rule or regulation promulgated by the Liquor Control Commission) is guilty of a misdemeanor, punishable by up to six months in the county jail and a fine of \$500.)

Penalties for Underage Drinkers

****An underage person who purchased, attempted to purchase, consumed, attempted to consume, or possessed or attempted to possess alcohol would be guilty of a misdemeanor, rather than subject to a civil fine only. (The "attempt" language is not in the act currently; it would be added by the bill.) The maximum fines, which would become criminal fines rather than civil fines, would be increased from \$25 to \$100 for a first violation; from \$50 to \$200 for a second violation; and from \$100 to \$500 for third and subsequent violations.**

****A peace officer who had reasonable cause to believe an underage person had consumed alcohol could require the person to submit to a preliminary chemical breath analysis. A legal presumption would be made by the court that the person had consumed or possessed alcohol if the test indicated a reading of at least .02 percent blood alcohol content. An underage person who refused to submit to a breathalyzer test would be responsible for a state civil infraction. (Note: For more information on state civil infractions, see the House Legislative Analysis Section's analysis on House Bills 4426 and 4427 dated 8-9-95.)**

****A court could order the performance of community service for violations.**

****A court could order a violator to undergo substance abuse screening and assessment at his or her own expense in order to determine whether the person was likely to benefit from rehabilitative services, including alcohol or drug education programs or alcohol or drug treatment programs.**

****The driver's license would be suspended or restricted in cases where an underage person had one or more prior violations. Upon a finding that a person had one prior violation, the court would order the secretary of state to suspend a license for 90 days to 180 days, but could order the issuance of a restricted license after the first 30 days of suspension. For two or more prior violations, the suspension would be for 180 days to one year, with a restricted license possible after the first 60 days of suspension. The bill would require the court, in imposing its sanctions, to consider all prior underage drinking violations, including violations of local ordinances and similar laws in other states. (If a person did not have a license, the secretary of state would deny the application of the person for a license for the applicable suspension period.)**

A court would not be allowed to order a restricted license unless the affected person stated under oath, and the court found based on the record in open court, that the person was unable to take public transportation to work, substance abuse treatment, the probation department, court-ordered community service program, or school, and did not have anyone who could provide the transportation. The court order and the restricted license would indicate the work location of the affected person, the approved route or routes and the permitted times of travel.

The restricted license would only permit the person to drive to and from work and in the course of employment, to and from a treatment program, to and from the court probation department, to and from community service, and to and from school. (The suspension or restriction could be rescinded pursuant to a circuit court review.)

****Law enforcement agencies would be required to notify the parent/custodian/guardian of a violation by an underage drinker less than 18 years of age within 48 hours, and would have to contact the parents or legal guardians immediately if a person under 17 was incarcerated for an underage drinking violation. Notification could be made in person, by phone, or first-class mail. This requirement would not apply in the case of an emancipated minor.**

****A person under 21 would not be charged with a violation if he or she participated in an undercover operation where either a) alcohol was purchased or received under the direction of an employer and with the approval of a local prosecutor as part of an employer-sponsored internal enforcement action; or b) alcohol was purchased or received under the direction of the state police, LCC, or a local police agency as part of an enforcement action. However, in any law enforcement undercover operation, the initial or contemporaneous purchase or receipt of alcohol by an underage person would have to have been under the direction of the law enforcement agency. Enforcing agencies would be prohibited from recruiting or attempting to recruit underage persons for undercover operations at the scene of a violation.**

Penalties for Non-licensees

****A non-licensee who illegally sold or furnished alcohol to an underage drinker would receive a mandatory fine of \$1,000 and could be sentenced to up to 60 days imprisonment for a first offense, and would receive a mandatory fine of \$2,500 and a mandatory sentence of imprisonment for up to 90 days for a second offense, and could also be ordered to perform community service.**

****A non-licensee who furnished or sold alcohol to an underage person would be guilty of a felony, punishable by imprisonment for up to 10 years, a fine of up to \$5,000, or both, if the subsequent consumption of the alcohol was the direct and substantial cause of an underage person's death or accidental injury that caused the person's death.**

Other Provisions

**** The parent or legal guardian of a person under 18 years old would have to give consent before the young person could participate in an undercover operation in which he or she were to purchase or receive alcohol under the supervision of a law enforcement agency.**

**** The Liquor Control Commission would have to provide an annual written report to the state police on the number of actions they had heard involving violations of selling or furnishing alcohol to underage drinkers (and to people who were visibly intoxicated). The report would include the disposition of each action and contain figures regarding decoy operations, off-premises violations, on-premises violations, and repeat offenses within the previous three years.**

****The bill would specify that the consumption of sacramental wine in connection with religious services at a church, synagogue, or temple was not prohibited by the act.**

The bill would take effect September 1, 1995.

MCL 436.33 et al.

FISCAL IMPLICATIONS:

According to a House Fiscal Agency analysis, House Bill 4136 would result in indeterminate increased administrative costs at the state and local level. Costs are associated primarily with increased police agency workloads due to the bill's requirement that police officers notify the parent of a person 17 years of age and under within 48 hours of a violation. At this time, it is not clear how much time the average police officer spends in notifying parents; how much additional time, staff, and materials police agencies would need to track and maintain records of the parental notifications; and if the revenues generated by the increase in fines to underage drinkers would be enough to offset the costs.

Since the bill would change a violation from a civil infraction to a misdemeanor and increase the fines, there would be increased revenue at the state level and a decrease in revenue for local funding units which fund district courts. Currently, the act specifies that 50 percent of the fines for underage drinking violations go to the general fund to the credit of the Department of Public Health (DPH)

to be used for substance abuse treatment and rehabilitation services (typically, the other 50 percent stays within the local funding unit). In fiscal year 1994, DPH and the district court local funding units each received approximately \$82,000 from underage drinking fines. However, the state constitution specifies that revenues generated from a breach of the penal laws are to be used exclusively for the support of public libraries (Article VIII, Section 9 of the Constitution of the State of Michigan of 1963). Therefore, the constitution would supersede the act and redirect the revenues from the fines to support the state's public libraries. Information was not available as to the impact that this loss of funding would have on the DPH substance abuse program or to local funding units.

The actual annual increase in revenue is indeterminate at this time due to an absence of statistical data. For instance, the bill would impose a fine of \$1,000 for a first offense and \$2,500 for a subsequent offense for a non-licensee furnishing alcohol to an underage person; but since this is a new fine, and without reporting requirements to categorize the number of and amount paid for first and subsequent offenses, actual annual revenue would be hard to predict. Similarly, statistics for 1994 report that 741 licensed establishments were cited for selling alcohol to minors. However, these statistics do not reflect how many minors were cited; how many were first, second, or subsequent violations; or the number of minors possessing alcohol from other sources. (8-1-95)

ARGUMENTS:

For:

The aim of this bill is to try to reduce underage drinking. If the state is serious about this, it needs to increase the likelihood that violators will be punished and increase the penalties to make them more of a deterrent. The bill would do this in several ways. It requires that if a licensee was to be cited for a violation of the law by a law enforcement officer, the underage drinker would also have to be. This puts enforcement on a fairer footing as far as licensees are concerned, and makes it more likely young people will be cited for violations. As it is now, licensees face the potential loss of livelihood for serving underage drinkers while the young people face small penalties when they are cited at all. The maximum civil fines for underage drinkers would be increased four- or five-fold. Community service could be required. But most significantly, a

young person's driver's license could be suspended for second and subsequent violations (or withheld if the underage drinker did not yet hold a driver's license). This is more likely to get a young person's attention. In addition, the bill would add a stiff penalty in the way of fines and jail sentences for persons furnishing alcohol to minors. This would provide a strong deterrent for situations where adults "buy" for underage acquaintances and strangers.

Underage drinking is a serious problem, as is teenage drunk driving. It is said to be a leading cause of death for teenagers and people in their 20's. Information from the Department of State shows that 5,278 drivers between the ages of 18 and 20 were charged with operating under the influence during 1991. This suggests underage drinking is widespread. There are now few disincentives for teenagers because the penalties are so low (when enforced), yet there is great social pressure to consume alcohol both from peers and advertising. There is no penalty now, for example, for attempting to purchase alcohol and so nothing to stop teenagers from going from store to store or bar to bar trying to get served. They can only get in trouble if they succeed in obtaining alcohol (and get caught and get cited). The bill adds "attempts" to the list of violations to try to get at this problem. The legislation also would specifically permit licensees to run their own undercover operations, with the approval of local prosecutors, to test the behavior of employees.

Against:

There are several problems with using the driver's license as an enforcement tool in this way. First, there is evidence that license suspensions are not effective in deterring people from driving. Instead, people with suspended or revoked licenses continue to drive without licenses (although perhaps more cautiously). One possible consequence of this is that some people develop the attitude that being licensed is not necessary if one is careful; reportedly, many drivers who lose their licenses do not apply for new ones when their penalty time is up. Second, some people argue that driver's licenses should not be suspended for offenses unrelated to driving or not involving motor vehicles. Under this bill, a 20-year-old who illegally possessed or consumed alcohol, or even attempted to do so, but who did not drive under the influence or even use a vehicle at all, could lose his or her license. Will driver's license suspensions be used to deter

other crimes, such as shoplifting or breaking-and-entering? This trend is disturbing. If the driver's license is used as an enforcement tool for routine crimes or civil infractions (or even such "offenses" as dropping out of school, which is not against the law at all), won't it lose its force as a weapon against drunk driving?

Response:

The bill would allow the suspension of a driver's license only for a second or subsequent offense. And a restricted license would be available to allow a person to get to and from work or school or to certain other activities (although not just to drive around aimlessly). Besides, the driver's license is already used as an enforcement tool. A license can be suspended now if an underage person uses fake identification to buy alcohol (regardless of whether a car is involved or even whether the ID is a driver's license). It can also be suspended for driving away from a self-service gas station without paying. In some states, the driver's license has also been used to discourage school dropouts.

For:

Liquor licensees are not the only adults who share responsibility for the problem of underage drinking. All too often, minors obtain their alcohol through the help of someone old enough to purchase liquor. With strong criminal penalties for these adults who furnish alcohol to minors, the bill would impress upon adults that the offense of furnishing alcohol to minors is a serious one, deter would-be "furnishers" from engaging in the practice, reduce the ease of availability of alcohol for minors, and appropriately punish adults who fail to acknowledge the importance of keeping kids from drinking.

Against:

In specifying criminal penalties for furnishing alcohol to underage drinkers that differ according to whether the person is a licensee or a private citizen, the bill raises a constitutional question of equal protection under the law. Though it would be a misdemeanor offense for either a licensee or non-licensee, the fines for a first offense by a non-licensee would be double that of a licensee and would be five times as much for subsequent offenses, coupled with mandatory jail time. Further, some might find the felony penalties for furnishing alcohol when that results in an underage person's death to be conceptually flawed, because they punish not so much the furnishing of alcohol, but whether the furnishing led to consumption that in turn caused a death. In doing so, the provisions

(like an analogous provision in the drunk driving laws) contradict basic premises of criminal law: that one's state of mind is pertinent, and that punishment should be at least partially dependent on what one meant to do. Finally, the bill's penalties for furnishing alcohol to underage drinkers appear to conflict with those recently enacted under Public Act 31 of 1994 (enrolled Senate Bill 154), the "party host liability" bill, which makes it a misdemeanor to allow underage possession or consumption of alcohol on premises under one's control.

Against:

While it has many good provisions, the bill could have the effect of weakening enforcement efforts in some instances. For example, some law enforcement agencies are concerned that they will not be able to use young people they apprehend illegally purchasing alcohol in an immediate undercover operation. The legislation would appear to require that a young person caught illegally purchasing alcohol would have to be charged with the violation. The exception for undercover operations would apply to alcohol illegally purchased as part of a previously planned undercover operation. Some law enforcement officials say they often catch an underage person with illegally purchased alcohol and, instead of citing them for the offense, send them back into the establishment immediately as part of an undercover operation to catch the licensee or the employee selling illegally. While there may be resentment that young people get off in such circumstances, the question becomes, "which is the greater evil?" If the police's aim is to get at those establishments that routinely sell to underage persons (because it is profitable to do so), and particularly to youngsters they know, then it is a small price to pay to let a young person go unpunished to combat the greater evil.

LCC officials are concerned about the new standards for charging licensees with violations of underage drinking provisions or dram shop provisions. House Bill 4136 would require that two separate standards be met: 1) that the licensee or employee had actual knowledge or should have reasonably known that a person possessed or consumed alcohol on licensed premises; and 2) that the licensee or employee failed to take immediate corrective action. This appears to set a higher standard than exists now and could make enforcement more difficult.

A third concern is the general tie-in between charging both licensees and underage violators. It does not seem sensible to say that one clear violation of the law cannot be prosecuted because another one is not. Law enforcement officials ought to have discretion over what charges to bring. Besides, it could make cooperation by underage drinkers and their older accomplices more difficult.

Response:

Undercover operations by police would still be possible if they used cadets or other underage persons specifically for that purpose. Those used in an undercover operation would not have to be charged. But, it is true, the bill does not intend to allow the police to forgive an offense on the spot in order to use a young person to entrap a licensee. (Think of the incentive the underage person has to succeed in such circumstances.) Licensees are concerned about aggressive sting operations generally, where older-looking young people are used in an effort to entrap them. This is not fair to bar and store operators. As for other enforcement standards, it is possible now for well-meaning bar owners to be victimized by devious underage drinkers (sometimes in crowds with legal drinkers) and suffer large penalties as a result while the underage drinkers escape. The bill makes it clear that licensees or employees should not be charged if they did not know or could not reasonably have known someone underage was drinking. And it specifies that if bars and bowling alleys find someone drinking illegally, they are responsible if they allow it to continue.

Against:

While this bill aims at protecting licensed establishments from devious underage drinkers, it should be noted that licensees are already somewhat protected if they ask potential buyers for identification. The law says that proof that a licensee demanded and was shown proper identification is a defense against charges of serving an underage person. Further, even if provided with what appears to be proof that a person is legally of age to buy alcohol, the licensee is still not obligated to sell it if doubts exist as to the age of the customer. Licensees who are diligent in asking for proof of age and identity should not fear enforcement actions.

Response:

As a practical matter, it is not easy for a licensee to prove that identification was properly requested. If bogus identification is offered a licensee but does not turn up when an underage person is caught with

alcohol, there is no evidence to substantiate the licensee's claim. Even if false identification is later found on the underage purchaser, the fact remains that the licensee has sold to an underage person; even if identification was shown, a violation exists. While the identification defense may affect the penalty imposed, it is not likely to excuse a licensee from the violation.

Against:

Some people have pointed out that young people who drink legally in Canada and then return to Michigan would, under this proposal, be presumed to have violated this state's underage drinking laws if a breath analysis test indicated a reading of at least .02 percent blood alcohol content.

Response:

It ought to be remembered that what is at issue here is the effective and fair enforcement of the state's drinking age laws and, ultimately, a reduction in the harm caused by underage drinking. The expectation is that the law would be applied reasonably in most cases.

Against:

The bill would provide that a particular subsection of law would not apply to someone under age 21 who participated in an undercover operation; however, that subsection not only forbids underage purchase, but also forbids underage consumption, leading to the possibility that the bill might inadvertently legalize underage consumption for people participating in "sting" operations. The bill should be carefully reviewed to eliminate these and various other technical problems.

Against:

Currently, the act specifies that 50 percent of the revenues from civil fines issued to underage drinkers is to be credited to the Department of Public Health for substance abuse treatment and rehabilitation services. Though the bill would add "prevention" services to this list, because the bill would change the violation from a civil infraction to a misdemeanor, these monies would no longer be available to the department. Under Article 8, Section 9 of the Constitution of Michigan of 1963, all fines assessed and collected for a breach of the penal laws are required to be used to fund public libraries. A misdemeanor offense is a criminal offense; therefore, the fines that the bill would increase will no longer be able to be used to fund these substance abuse programs. It is reported that

under current law, the civil fines for fiscal year 1994 represented a revenue of approximately \$82,000. Since "prevention" services had been added as a service to be funded and provided to underage drinkers, this loss of revenue to these programs might not have been intended.