

To Take or Not To Take the Breathalyzer? What you should know about refusing to take a breathalyzer.

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You have been out with your friends, on a date, or coming home from a sporting event and while there you indulged in a few alcoholic drinks. You can function, but have no clue if you are close to the .08 blood alcohol level. On your way home, your heart leaps into your throat as you look in the rear view mirror at the sight of the blue lights. You know that you may have to make a choice, to take the breathalyzer or not.

If you elect to take the breathalyzer and blow a .08 or higher the penalties are different if it is your first offense. For a first time offender that blows a .08 or higher you are facing no more than a license suspension of 30 days after the conclusion of the criminal charge if you elect to take a plea bargain. You are also immediately eligible, upon completion of the charge, to apply and receive a hardship license. Melanies' Law also allows extends the ability to receive a hardship license to second time offenders as well.

You may be asking yourself at this point why anybody would elect not to take the breathalyzer. The answer to this question is, without the breathalyzer results it is more difficult for the prosecution to prove that you were driving under the influence. Massachusetts Law allows the prosecution to prove that you drove under the influence in two different ways. The first way is the "per se" violation, this is where the prosecution proves that you drove under the influence by showing that your blood alcohol level was a .08 or higher. If the prosecution has a breathalyzer test with a result of a blood alcohol level of .08 or higher, it makes their case against you extremely strong, but not insurmountable. The test must still have been administered properly, and it needs to be established that there were no other legitimate factors that could have altered the results.

The Second way that the prosecution can prove that you were driving under the influence is by admitting other evidence. This evidence can come from testimony of the responding officers about your demeanor, appearance, and performance of field sobriety tests. The prosecution also may admit the testimony of other witnesses, circumstantial evidence, and physical evidence in order to establish that your ability to properly operate a vehicle was impaired by the consumption of alcohol.

After the trial concludes, and you are found not guilty and had refused the breathalyzer, there is a presumption that your license should be reinstated if it is still suspended for your initial refusal to take the breathalyzer. The prosecution then must establish that by reinstating your license, you pose a danger to the community.

That brings us back to the question of whether you should take the breathalyzer. While there is no one correct answer, in Massachusetts your legal options are best if you refuse to take the

breathalyzer. By taking a breathalyzer you are assisting the prosecution in building its case against you. As mentioned before, by having a test result of .08 or higher it is very difficult to get that evidence thrown out. Further, you have the right to refuse all field sobriety tests. Your refusal to engage in a field sobriety tests or take the breathalyzer cannot be used against you in court. By refusing the breathalyzer you assist yourself in building your defense to the criminal charge of operating a motor vehicle under the influence (“OUI”) by forcing the prosecutor to prove every element of the law. If the prosecution does not have a breathalyzer test result or any aggravating factors—such as a car accident, belligerent conduct, incriminating statements—there is a higher likelihood that a jury would acquit. Additionally, in light of the recent news that several counties in Massachusetts have suspended the use of breathalyzer’s due to their reliability, it further suggests that the BT testing should not occur.

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Whether it is your first offense or have faced an OUI charge before, you should not attempt to defend yourself. A lawyer is a vital in assisting you in defending yourself from an OUI charge. As the legislature is always looking at ways to strengthen the OUI law, it is important that you have someone that knows and understands the law, your rights, and opportunities to get you through this trying time.

At Cohen Cleary, P.C. we have extensive experience in successfully representing individuals accused of OUI, whether it is your first offense or if you are accused of a subsequent OUI. We customize our strategy based on the applicable law and facts of each case. If you or someone you know has been arrested and is accused of allegedly operating a motor vehicle under the influence, take steps to protect your rights and contact our office for a confidential case evaluation.