

**2622 OPERATING WHILE SUSPENDED: CIVIL FORFEITURE —
§ 343.44(1)(a)**

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly suspended.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)¹ must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That the State Must Prove

1. The defendant operated a motor vehicle² on a highway.³

A motor vehicle is operated when it is set in motion.⁴

2. The defendant's operating privilege⁵ was duly suspended at the time the defendant operated a motor vehicle.

[A person's operating privilege remains suspended until it is reinstated.]⁶

Proof that the defendant knew (his) (her) operating privilege had been suspended is not required.⁷

IF THERE IS EVIDENCE THAT A NOTICE OF SUSPENSION WAS PROPERLY MAILED, ADD THE FOLLOWING:⁸

[Refusal to accept) (Failure to receive) an order of suspension is not a defense.]

Jury's Decision

If you are satisfied beyond a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH CAUSING GREAT BODILY HARM OR DEATH⁹

If you find the defendant guilty, answer the following question:

"Did the defendant's operation of the vehicle cause (great bodily harm) (death) to (name of victim)?"

"Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).¹⁰

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.]¹¹

Before you may answer "yes," you must be satisfied to a reasonable certainty by evidence which is clear, satisfactory and convincing that the answer is "yes."

COMMENT

Wis JI-Criminal 2622 was originally published in 2001 and revised in 2006. This revision was approved by the Committee in March 2012; it was revised to reflect changes in penalties made by 2011 Wisconsin Act 113.

The 2001 version of this instruction replaced Wis JI-Criminal 2620A for violations of § 343.44(1)(a) committed after August 1, 2000, when changes made by 1997 Wisconsin Act 84 took effect. After that date, all operating after suspension violations were punished as forfeitures.

The 2012 revision added a special question for offenses resulting in great bodily harm or death. 2011 Wisconsin Act 113 [effective date: March 1, 2012] created new forfeitures for those offenses: \$5,000 to \$7,500 forfeiture if great bodily harm is caused; \$7,500 to \$10,000 forfeiture if death is caused. See § 343.44(2)(ag)2. and 3. If the actor knew his or her operating privilege was suspended, the offenses are punished as felonies. See Wis JI-Criminal 2623A.

1. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.
2. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.
3. Subsection 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.
4. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

5. Subsection 340.01(40) defines "operating privilege" as follows:

"Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

6. Subsection 343.44(1g) provides:

Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

7. Subsection (1)(a) of § 343.44 includes the following:

A person's knowledge that his or her operating privilege is suspended is not an element of the offense under this paragraph.

8. See § 343.44(3). Because the offense definition does not require that the person "knowingly" operate while suspended, the jury may be told that failure to receive a mailed notice is not a defense. Compare note 8, Wis JI-Criminal 2621, discussing this issue with respect to operating while revoked offenses, which do have "knowingly" as an element.

9. 2011 Wisconsin Act 113 [effective date: March 1, 2012] created new forfeitures for offenses resulting in great bodily harm or death: \$5,000 to \$7,500 forfeiture if great bodily harm is caused; \$7,500 to \$10,000 forfeiture if death is caused. See § 343.44(2)(ag)2. and 3. The Committee recommends submitting the degree of harm caused as a special question. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant's operation of the vehicle cause (great bodily harm) (death) to (name of victim)?"

10. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

11. See § 939.22(14) and Wis JI-Criminal 914.