

**2660 OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL  
CONCENTRATION — CRIMINAL OFFENSE — 0.08 GRAMS OR  
MORE — § 346.63(1)(b)**

**Statutory Definition of the Crime**

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway<sup>1</sup> while that person has a prohibited alcohol concentration.<sup>2</sup>

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant (drove) (operated) a motor vehicle<sup>3</sup> on a highway.<sup>4</sup>

[“Drive” means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.]<sup>5</sup>

[“Operate” means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]<sup>6</sup>

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

**Definition of “Prohibited Alcohol Concentration”**

“Prohibited alcohol concentration” means<sup>7</sup>

[.08 grams or more of alcohol in 210 liters of the person’s breath].

[.08 grams or more of alcohol in 100 milliliters of the person’s blood].

**How to Use the Test Result Evidence**

The law states that the alcohol concentration in a defendant’s (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant’s alcohol concentration at the time of the (driving) (operating).<sup>8</sup>

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED<sup>9</sup> AND THERE IS NO ISSUE RELATING TO THE DEFENDANT’S POSITION ON THE “BLOOD-ALCOHOL CURVE,”<sup>10</sup> THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant’s blood] [.08 grams or more of alcohol in 210 liters of the defendant’s breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:<sup>11</sup>

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt 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.

### **COMMENT**

Wis JI-Criminal 2660 was originally published in 1982 and revised in 1985, 1993, 2004, and 2006. This revision was approved by the Committee in June 2020; it added to the Comment.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with two or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

The 2020 revision of the Comment reflected changes to the felony classes of fourth and subsequent offenses made by 2015 Wisconsin Act 371 [effective date: April 27, 2016]. The revision also reflected changes made by 2019 Wisconsin Act 106 [effective date: March 1, 2020] to the penalty provision of § 346.65(2)(am)5. This amendment increased the mandatory minimum confinement period of fifth and sixth offenses to not less than eighteen months, unless the court finds that a lesser term of confinement would be in the best interests of the community.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

The prohibited alcohol concentration is 0.02 for persons who have three or more prior convictions, suspension or revocations, as counted under § 343.307(1). See § 340.01(46m)(c) and Wis JI-Criminal 2660C.

This instruction is for a criminal offense under § 346.63(1)(b), which applies if “the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals two . . .” Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply “regardless of the sequence of offenses.” State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

The penalty for criminal violations of § 346.63(1) increases with the number of prior convictions the defendant has. See § 346.65(2). ). Fourth offenses are Class H felonies. § 346.65(2)(am)4. Fifth and sixth offenses are Class G felonies. § 346.65(2)(am)5. Seventh, eighth, and ninth offenses are Class F felonies. § 346.65(2)(am)6. Tenth and subsequent offenses are Class E felonies. § 346.65(2)(am)7. This instruction may be used without change for all criminal violations. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

The maximum penalty for these offenses is doubled if there was a child under the age of 16 years in the defendant’s vehicle. See § 346.65(2)(f) and Wis JI-Criminal 999.

First violations of the statute are forfeitures, see Wis JI-Criminal 2660A. For instructions for cases where both “under the influence” and “prohibited alcohol concentration” charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

The constitutionality of penalizing the “status” of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the “partition ratio” that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

1. Regarding the “on a highway” requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of “prohibited alcohol concentration” by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to “prohibited alcohol concentration” in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the second element. For cases involving the 0.02 level, see Wis JI-Criminal 2660C.

3. Regarding the definition of “motor vehicle,” see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the “on a highway” requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of “drive” provided in § 346.63(3)(a).

6. Regarding the definition of “operate,” see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600, Introductory Comment, Sec. V.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

9. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the “blood alcohol curve,” see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.