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SENATE DRS75150-ML-87 (2/21)

Short Title: Eliminate ILAC Requirement. (Public)

Sponsors: Senator J. Davis (Primary Sponsor).

Referred to:

A BILL TO BE ENTITLED

AN ACT TO ELIMINATE THE REQUIREMENT UNDER G.S. 20-139.1 THAT A LABORATORY CONFORM TO FORENSIC SPECIFIC REQUIREMENTS AND BE ACCREDITED BY AN ACCREDITING BODY THAT IS A SIGNATORY TO THE INTERNATIONAL LABORATORY ACCREDITATION COOPERATION (ILAC) MUTUAL RECOGNITION ARRANGEMENT AND TO ALLOW FOR THE ADMISSIBILITY OF A CHEMICAL ANALYSIS UNDER G.S. 20-139.1, PERFORMED BY AN INDIVIDUAL WHO QUALIFIES AS AN EXPERT WITNESS UNDER RULE 702 OF THE NORTH CAROLINA RULES OF EVIDENCE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-139.1 reads as rewritten:

"§ 20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs.

(a) Chemical Analysis Admissible. – In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests ~~showing the presence of an impairing substance, including other chemical tests, performed by an individual who qualifies as an expert witness under Rule 702 of the North Carolina Rules of Evidence, as contained in G.S. 8C-1.~~

(b) Approval of Valid Test Methods; Licensing Chemical Analysts. – The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration. A chemical analysis of the breath administered pursuant to the implied-consent law is admissible in any court or administrative hearing or proceeding if it meets both of the following requirements:

- (1) It is performed in accordance with the rules of the Department of Health and Human Services.
- (2) The person performing the analysis had, at the time of the analysis, a current permit issued by the Department of Health and Human Services authorizing the person to perform a test of the breath using the type of instrument employed.

For purposes of establishing compliance with subdivision (b)(1) of this section, the court or administrative agency shall take notice of the rules of the Department of Health and Human Services. For purposes of establishing compliance with subdivision (b)(2) of this section, the court or administrative agency shall take judicial notice of the list of permits issued to the person performing the analysis, the type of instrument on which the person is authorized to



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1 perform tests of the breath, and the date the permit was issued. The Department of Health and
2 Human Services may ascertain the qualifications and competence of individuals to conduct
3 particular chemical analyses and the methods for conducting chemical analyses. The
4 Department may issue permits to conduct chemical analyses to individuals it finds qualified
5 subject to periodic renewal, termination, and revocation of the permit in the Department's
6 discretion.

7 (b1) When Officer May Perform Chemical Analysis. – Any person possessing a current
8 permit authorizing the person to perform chemical analysis may perform a chemical analysis.

9 (b2) Breath Analysis Results Preventive Maintenance. – The Department of Health and
10 Human Services shall perform preventive maintenance on breath-testing instruments used for
11 chemical analysis. A court or administrative agency shall take judicial notice of the preventive
12 maintenance records of the Department. Notwithstanding the provisions of subsection (b), the
13 results of a chemical analysis of a person's breath performed in accordance with this section are
14 not admissible in evidence if:

15 (1) The defendant objects to the introduction into evidence of the results of the
16 chemical analysis of the defendant's breath; and

17 (2) The defendant demonstrates that, with respect to the instrument used to
18 analyze the defendant's breath, preventive maintenance procedures required
19 by the regulations of the Department of Health and Human Services had not
20 been performed within the time limits prescribed by those regulations.

21 (b3) Sequential Breath Tests Required. – The methods governing the administration of
22 chemical analyses of the breath shall require the testing of at least duplicate sequential breath
23 samples. The results of the chemical analysis of all breath samples are admissible if the test
24 results from any two consecutively collected breath samples do not differ from each other by an
25 alcohol concentration greater than 0.02. Only the lower of the two test results of the
26 consecutively administered tests can be used to prove a particular alcohol concentration. A
27 person's refusal to give the sequential breath samples necessary to constitute a valid chemical
28 analysis is a refusal under G.S. 20-16.2(c).

29 A person's refusal to give the second or subsequent breath sample shall make the result of
30 the first breath sample, or the result of the sample providing the lowest alcohol concentration if
31 more than one breath sample is provided, admissible in any judicial or administrative hearing
32 for any relevant purpose, including the establishment that a person had a particular alcohol
33 concentration for conviction of an offense involving impaired driving.

34 (b4) Repealed by Session Laws 2006-253, s. 16, effective December 1, 2006, and
35 applicable to offenses committed on or after that date.

36 (b5) Subsequent Tests Allowed. – A person may be requested, pursuant to G.S. 20-16.2,
37 to submit to a chemical analysis of the person's blood or other bodily fluid or substance in
38 addition to or in lieu of a chemical analysis of the breath, in the discretion of a law enforcement
39 officer; except that a person charged with a violation of G.S. 20-141.4 shall be requested to
40 provide a blood sample in addition to or in lieu of a chemical analysis of the breath. However,
41 if a breath sample shows an alcohol concentration of .08 or more, then requesting a blood
42 sample shall be in the discretion of a law enforcement officer. If a subsequent chemical analysis
43 is requested pursuant to this subsection, the person shall again be advised of the implied
44 consent rights in accordance with G.S. 20-16.2(a). A person's willful refusal to submit to a
45 chemical analysis of the blood or other bodily fluid or substance is a willful refusal under
46 G.S. 20-16.2. If a person willfully refuses to provide a blood sample under this subsection, and
47 the person is charged with a violation of G.S. 20-141.4, then a law enforcement officer with
48 probable cause to believe that the offense involved impaired driving or was an alcohol-related
49 offense made subject to the procedures of G.S. 20-16.2 shall seek a warrant to obtain a blood
50 sample. The failure to obtain a blood sample pursuant to this subsection shall not be grounds
51 for the dismissal of a charge and is not an appealable issue.

1 (b6) The Department of Health and Human Services shall post on a Web page a list of all
2 persons who have a permit authorizing them to perform chemical analyses, the types of
3 analyses that they can perform, the instruments that each person is authorized to operate, the
4 effective dates of the permits, and the records of preventive maintenance. A court or
5 administrative agency shall take judicial notice of whether, at the time of the chemical analysis,
6 the chemical analyst possessed a permit authorizing the chemical analyst to perform the
7 chemical analysis administered and whether preventive maintenance had been performed on
8 the breath-testing instrument in accordance with the Department's rules.

9 (c) Blood and Urine for Chemical Analysis. – Notwithstanding any other provision of
10 law, when a blood or urine test is specified as the type of chemical analysis by a law
11 enforcement officer, a physician, registered nurse, emergency medical technician, or other
12 qualified person shall withdraw the blood sample and obtain the urine sample, and no further
13 authorization or approval is required. If the person withdrawing the blood or collecting the
14 urine requests written confirmation of the law enforcement officer's request for the withdrawal
15 of blood or collecting the urine, the officer shall furnish it before blood is withdrawn or urine
16 collected. When blood is withdrawn or urine collected pursuant to a law enforcement officer's
17 request, neither the person withdrawing the blood nor any hospital, laboratory, or other
18 institution, person, firm, or corporation employing that person, or contracting for the service of
19 withdrawing blood or collecting urine, may be held criminally or civilly liable by reason of
20 withdrawing the blood or collecting the urine, except that there is no immunity from liability
21 for negligent acts or omissions. A person requested to withdraw blood or collect urine pursuant
22 to this subsection may refuse to do so only if it reasonably appears that the procedure cannot be
23 performed without endangering the safety of the person collecting the sample or the safety of
24 the person from whom the sample is being collected. If the officer requesting the blood or urine
25 requests a written justification for the refusal, the medical provider who determined the sample
26 could not be collected safely shall provide written justification at the time of the refusal.

27 (c1) Admissibility. – The results of a chemical analysis of blood or urine reported by the
28 North Carolina State Crime Laboratory, the Charlotte, North Carolina, Police Department
29 Laboratory, ~~or any other~~ laboratory approved for chemical analysis by the Department of
30 Health and Human ~~Services, Services,~~ or any other individual from any other laboratory who
31 can demonstrate competence pursuant to subsection (c2) of this section are admissible as
32 evidence in all administrative hearings, and in any court, without further authentication and
33 without the testimony of the analyst. The results shall be certified by the person who performed
34 the analysis. The provisions of this subsection may be utilized in any administrative hearing,
35 but can only be utilized in cases tried in the district and superior court divisions, or in an
36 adjudicatory hearing in juvenile court, if:

- 37 (1) The State notifies the defendant at least 15 business days before the
38 proceeding at which the evidence would be used of its intention to introduce
39 the report into evidence under this subsection and provides a copy of the
40 report to the defendant, and
41 (2) The defendant fails to file a written objection with the court, with a copy to
42 the State, at least five business days before the proceeding at which the
43 report would be used that the defendant objects to the introduction of the
44 report into evidence.

45 If the defendant's attorney of record, or the defendant if that person has no attorney, fails to file
46 a written objection as provided in this subsection, then the report may be admitted into
47 evidence without the testimony of the analyst. Upon filing a timely objection, the admissibility
48 of the report shall be determined and governed by the appropriate rules of evidence.

49 The report containing the results of any blood or urine test may be transmitted
50 electronically or via facsimile. A copy of the affidavit sent electronically or via facsimile shall
51 be admissible in any court or administrative hearing without further authentication. A copy of

1 the report shall be sent to the charging officer, the clerk of superior court in the county in which
2 the criminal charges are pending, the Division of Motor Vehicles, and the Department of
3 Health and Human Services.

4 Nothing in this subsection precludes the right of any party to call any witness or to
5 introduce any evidence supporting or contradicting the evidence contained in the report.

6 (c2) A chemical analysis of blood or urine, to be admissible under this section, shall be
7 performed by a laboratory that is accredited by an ~~accrediting body that requires conformance~~
8 ~~to forensic specific requirements and which is a signatory to the International Laboratory~~
9 ~~Accreditation Cooperation (ILAC) Mutual Recognition Arrangement For Testing for the~~
10 ~~submission, identification, analysis, and storage of forensic analyses.~~ individual who qualifies as
11 an expert witness under Rule 702 of the North Carolina Rules of Evidence, as contained in
12 G.S. 8C-1.

13 The analyst who analyzes the sample and signs the report shall complete an affidavit. In the
14 affidavit, the analyst shall state (i) that the person is qualified by education, training, and
15 experience to perform the analysis, (ii) the name and location of the laboratory where the
16 analysis was performed, and (iii) that performing this type of analysis is part of that individual's
17 regular duties. The analyst shall also aver in the affidavit that the tests were performed pursuant
18 to that individual's and that laboratory accrediting body's standards for that discipline and that
19 the evidence was handled in accordance with established and accepted procedures while in the
20 custody of the laboratory. The affidavit shall be sufficient to constitute prima facie evidence
21 regarding the person's qualifications. The analyst shall attach the affidavit to the laboratory
22 report and shall provide the affidavit to the investigating officer and the district attorney in the
23 prosecutorial district in which the criminal charges are pending. An affidavit by an analyst
24 sworn to and properly executed before an official authorized to administer oaths, such as a
25 notary public, is admissible in evidence without further authentication in any criminal
26 proceeding, subject to the requirements of subdivision (c4)(2) and subsection (e2) of this
27 section with respect to the analysis administered and the procedures followed.

28 With regards to findings under Rule 702(a)(1)-(3) of the North Carolina Rules of Evidence,
29 as contained in G.S. 8C-1, the court shall take judicial notice of and shall apply each of the
30 following:

- 31 (1) An analysis of the defendant's blood, breath, or urine shall qualify under
32 Rule 702(a)(1) of the North Carolina Rules of Evidence as sufficient data.
- 33 (2) The principles and methods previously accepted as reliable within the
34 meaning of Rule 702(a)(2) of the North Carolina Rules of Evidence by the
35 appellate courts of this State. Examples of these principles and methods
36 include gas headspace chromatography, gas chromatography-mass
37 spectrometry, liquid chromatography-mass spectrometry, and liquid
38 chromatography-tandem mass spectrometry.
- 39 (3) The court shall find a defendant who has failed to object under subsection
40 (e2) of this section has waived any and all objections under Rule 702(a)(3)
41 of the North Carolina Rules of Evidence.

42 (c3) Procedure for Establishing Chain of Custody Without Calling Unnecessary
43 Witnesses. –

- 44 (1) For the purpose of establishing the chain of physical custody or control of
45 blood or urine tested or analyzed to determine whether it contains alcohol, a
46 controlled substance or its metabolite, or any impairing substance, a
47 statement signed by each successive person in the chain of custody that the
48 person delivered it to the other person indicated on or about the date stated is
49 prima facie evidence that the person had custody and made the delivery as
50 stated, without the necessity of a personal appearance in court by the person
51 signing the statement.

1 (2) The statement shall contain a sufficient description of the material or its
2 container so as to distinguish it as the particular item in question and shall
3 state that the material was delivered in essentially the same condition as
4 received. The statement may be placed on the same document as the report
5 provided for in subsection (c1) of this section.

6 (3) The provisions of this subsection may be utilized in any administrative
7 hearing, but can only be utilized in cases tried in the district and superior
8 court divisions, or in an adjudicatory hearing in juvenile court, if:

9 a. The State notifies the defendant at least 15 business days before the
10 proceeding at which the statement would be used of its intention to
11 introduce the statement into evidence under this subsection and
12 provides a copy of the statement to the defendant, and

13 b. The defendant fails to file a written notification with the court, with a
14 copy to the State, at least five business days before the proceeding at
15 which the statement would be used that the defendant objects to the
16 introduction of the statement into evidence.

17 If the defendant's attorney of record, or the defendant if that person has no
18 attorney, fails to file a written objection as provided in this subsection, then
19 the statement may be admitted into evidence without the necessity of a
20 personal appearance by the person signing the statement. Upon filing a
21 timely objection, the admissibility of the report shall be determined and
22 governed by the appropriate rules of evidence.

23 (4) Nothing in this subsection precludes the right of any party to call any
24 witness or to introduce any evidence supporting or contradicting the
25 evidence contained in the statement.

26 (c4) The results of a blood or urine test are admissible to prove a person's alcohol
27 concentration or the presence of controlled substances or metabolites or any other impairing
28 substance if:

29 (1) A law enforcement officer or chemical analyst requested a blood and/or
30 urine sample from the person charged; and

31 (2) A chemical analysis of blood or urine, to be admissible under this section,
32 shall be performed by ~~a laboratory that is accredited by an accrediting body~~
33 ~~that requires conformance to forensic specific requirements and which is a~~
34 ~~signatory to the International Laboratory Accreditation Cooperation (ILAC)~~
35 ~~Mutual Recognition Arrangement For Testing for the submission,~~
36 ~~identification, analysis, and storage of forensic analyses.~~an individual who
37 qualifies as an expert witness under Rule 702 of the North Carolina Rules of
38 Evidence, as contained in G.S. 8C-1.

39 For purposes of establishing compliance with subdivision (2) of this subsection, the court or
40 administrative agency shall take judicial notice of the list of persons possessing permits, the
41 type of instrument on which each person is authorized to perform tests of the blood and/or
42 urine, and the date the permit was issued and the date it expires.

43 (d) Right to Additional Test. – Nothing in this section shall be construed to prohibit a
44 person from obtaining or attempting to obtain an additional chemical analysis. If the person is
45 not released from custody after the initial appearance, the agency having custody of the person
46 shall make reasonable efforts in a timely manner to assist the person in obtaining access to a
47 telephone to arrange for any additional test and allow access to the person in accordance with
48 the agreed procedure in G.S. 20-38.5. The failure or inability of the person who submitted to a
49 chemical analysis to obtain any additional test or to withdraw blood does not preclude the
50 admission of evidence relating to the chemical analysis.

1 (d1) Right to Require Additional Tests. – If a person refuses to submit to any test or tests
2 pursuant to this section, any law enforcement officer with probable cause may, without a court
3 order, compel the person to provide blood or urine samples for analysis if the officer reasonably
4 believes that the delay necessary to obtain a court order, under the circumstances, would result
5 in the dissipation of the percentage of alcohol in the person's blood or urine.

6 (d2) Notwithstanding any other provision of law, when a blood or urine sample is
7 requested under subsection (d1) of this section by a law enforcement officer, a physician,
8 registered nurse, emergency medical technician, or other qualified person shall withdraw the
9 blood and obtain the urine sample, and no further authorization or approval is required. If the
10 person withdrawing the blood or collecting the urine requests written confirmation of the
11 charging officer's request for the withdrawal of blood or obtaining urine, the officer shall
12 furnish it before blood is withdrawn or urine obtained. A person requested to withdraw blood or
13 collect urine pursuant to this subsection may refuse to do so only if it reasonably appears that
14 the procedure cannot be performed without endangering the safety of the person collecting the
15 sample or the safety of the person from whom the sample is being collected. If the officer
16 requesting the blood or urine requests a written justification for the refusal, the medical
17 provider who determined the sample could not be collected safely shall provide written
18 justification at the time of the refusal.

19 (d3) When blood is withdrawn or urine collected pursuant to a law enforcement officer's
20 request, neither the person withdrawing the blood nor any hospital, laboratory, or other
21 institution, person, firm, or corporation employing that person, or contracting for the service of
22 withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that
23 blood, except that there is no immunity from liability for negligent acts or omissions. The
24 results of the analysis of blood or urine under this subsection shall be admissible if performed
25 by the State Crime Laboratory or any other hospital or qualified laboratory.

26 (e) Recording Results of Chemical Analysis of Breath. – A person charged with an
27 implied-consent offense who has not received, prior to a trial, a copy of the chemical analysis
28 results the State intends to offer into evidence may request in writing a copy of the results. The
29 failure to provide a copy prior to any trial shall be grounds for a continuance of the case but
30 shall not be grounds to suppress the results of the chemical analysis or to dismiss the criminal
31 charges.

32 (e1) Use of Chemical Analyst's Affidavit in District Court. – An affidavit by a chemical
33 analyst sworn to and properly executed before an official authorized to administer oaths is
34 admissible in evidence without further authentication and without the testimony of the analyst
35 in any hearing or trial in the District Court Division of the General Court of Justice with respect
36 to the following matters:

- 37 (1) The alcohol concentration or concentrations or the presence or absence of an
38 impairing substance of a person given a chemical analysis and who is
39 involved in the hearing or trial.
- 40 (2) The time of the collection of the blood, breath, or other bodily fluid or
41 substance sample or samples for the chemical analysis.
- 42 (3) The type of chemical analysis administered and the procedures followed.
- 43 (4) The type and status of any permit issued by the Department of Health and
44 Human Services that the analyst held on the date the analyst performed the
45 chemical analysis in question.
- 46 (5) If the chemical analysis is performed on a breath-testing instrument for
47 which regulations adopted pursuant to subsection (b) require preventive
48 maintenance, the date the most recent preventive maintenance procedures
49 were performed on the breath-testing instrument used, as shown on the
50 maintenance records for that instrument.

1 The Department of Health and Human Services shall develop a form for use by chemical
2 analysts in making this affidavit.

3 (e2) Except as governed by subsection (c1), (c2), or (c3) of this section, the State can
4 only use the provisions of subsection (e1) of this section if:

5 (1) The State notifies the defendant at least 15 business days before the
6 proceeding at which the affidavit would be used of its intention to introduce
7 the affidavit into evidence under this subsection and provides a copy of the
8 affidavit to the defendant, and

9 (2) The defendant fails to file a written notification with the court, with a copy
10 to the State, at least five business days before the proceeding at which the
11 affidavit would be used that the defendant objects to the introduction of the
12 affidavit into evidence.

13 The failure to file a timely objection as provided in this subsection shall be deemed a
14 waiver of the right to object to the admissibility of the affidavit. Upon filing a timely objection,
15 the admissibility of the report shall be determined and governed by the appropriate rules of
16 evidence. The case shall be continued until the analyst can be present. The criminal case shall
17 not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to
18 appear after being ordered to appear by the court. Nothing in subsection (e1) or subsection (e2)
19 of this section precludes the right of any party to call any witness or to introduce any evidence
20 supporting or contradicting the evidence contained in the affidavit.

21 (f) Evidence of Refusal Admissible. – If any person charged with an implied-consent
22 offense refuses to submit to a chemical analysis or to perform field sobriety tests at the request
23 of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative
24 action against the person.

25 (g) Controlled-Drinking Programs. – The Department of Health and Human Services
26 may adopt rules concerning the ingestion of controlled amounts of alcohol by individuals
27 submitting to chemical testing as a part of scientific, experimental, educational, or
28 demonstration programs. These regulations shall prescribe procedures consistent with
29 controlling federal law governing the acquisition, transportation, possession, storage,
30 administration, and disposition of alcohol intended for use in the programs. Any person in
31 charge of a controlled-drinking program who acquires alcohol under these regulations must
32 keep records accounting for the disposition of all alcohol acquired, and the records must at all
33 reasonable times be available for inspection upon the request of any federal, State, or local
34 law-enforcement officer with jurisdiction over the laws relating to control of alcohol. A
35 controlled-drinking program exclusively using lawfully purchased alcoholic beverages in
36 places in which they may be lawfully possessed, however, need not comply with the
37 record-keeping requirements of the regulations authorized by this subsection. All acts pursuant
38 to the regulations reasonably done in furtherance of bona fide objectives of a
39 controlled-drinking program authorized by the regulations are lawful notwithstanding the
40 provisions of any other general or local statute, regulation, or ordinance controlling alcohol."

41 **SECTION 2.** This act becomes effective December 1, 2013.