

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PROPOSED
ARM 23.4.201 and 23.4.212) AMENDMENT
pertaining to drug and/or alcohol)
analysis) NO PUBLIC HEARING
) CONTEMPLATED

TO: All Concerned Persons

1. On May 27, 2024, the Department of Justice proposes to amend the above-stated rules.

2. The Department of Justice will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Justice no later than 5:00 p.m. on May 10, 2024, to advise us of the nature of the accommodation that you need. Please contact Laura Schultz, Department of Justice, P.O. Box 201401, Helena, Montana, 49620-1401; telephone (406) 444-3342; fax (406) 444-3549; or e-mail Laura.Schultz@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

23.4.201 DEFINITIONS Unless the context requires otherwise, the following definitions apply to this subchapter:

(1) and (2) remain the same.

(3) "Alveolar air" means that air which is located in the alveoli of the lungs and is responsible for the exchange of gases between the blood and the lung. This is the type of breath upon which the 2100:1 breath blood ratio is established.

(3) through (25) remain the same, but are renumbered (4) through (26).

AUTH: 61-8-1019, MCA
IMP: 61-8-1019, MCA

23.4.212 BREATH ANALYSIS INSTRUMENTATION AND ASSOCIATED EQUIPMENT (1) through (7) remain the same.

(8) All results of a breath analysis shall be reported as grams of alcohol by weight per 210 liters of deep lung breath, which contains a portion of alveolar air (G/210L). All test results will be reported on a form approved by the division. Copies of all test results will be sent to the division on a monthly schedule. Failure to file a copy of the report with the division does not invalidate the test results, if the report is on file at the testing location.

AUTH: 61-8-1019, MCA
IMP: 61-8-1019, MCA

REASON: The addition of the term "alveolar air," including its definition, is necessary as it sets the scientific background for using G/210L as a reporting method for breath alcohol content (BrAC) results. This reference is helpful with certain types of defense challenges in court as it relates to the definition of "alcohol concentration" as set forth in 61-8-1001, MCA.

4. Concerned persons may submit their data, views, or arguments concerning the proposed actions in writing to: Laura Schultz, Department of Justice, P.O. Box 201401, Helena, Montana, 49620-1401; telephone (406) 444-3342; fax (406) 444-3549; or e-mail Laura.Schultz@mt.gov, and must be received no later than 5:00 p.m., May 24, 2024.

5. If persons who are directly affected by the proposed actions wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Laura Schultz at the above address no later than 5:00 p.m., May 24, 2024.

6. If the agency receives requests for a public hearing on the proposed actions from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 429 persons based on 4,290 total BrAC tests run between July 1, 2022, and July 1, 2023.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sosmt.gov/ARM/Register>.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ DAVID ORTLEY
David Ortley
Deputy Attorney General
Rule Reviewer

/s/ AUSTIN KNUDSEN
Austin Knudsen
Attorney General
Department of Justice

Certified to the Secretary of State April 16, 2024.