Using Oral Fluid to Detect Drugs: State-of-the-States

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State Laws Relative to Use of Oral Fluid

- Implied Consent
- Impaired Driving Statute
- Pilot Program/Research Purposes
State Law

• Implied consent laws or other statute must *authorize the collection* of blood and/or oral fluid specimens.

  * and *

• Implied consent law or other statute must *extend to drugs other than alcohol*.

Notes:

**Blood**: 40 states

• Exemptions in ≥ eight states limit application of the law.

**Oral Fluid**: 23 states

• In practice, most of these states don’t collect oral fluid specimens for use in impaired driving cases.
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**ORAL FLUID AUTHORIZED TO DETECT DRUGS?**

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- **Covered by implied consent law (14)**
- **Authorized by impaired driving statute; implied consent N/A (8)**
- **Authorized for state pilot program (1)**
- **Not authorized (27 plus DC)**

In practice, oral fluid is not collected/used even if authorized.
States that collect oral fluid:

INDIANA

Roadside screening devices used to:

• Build Probable Cause, and/or

• Determine whether or not to call for a Drug Recognition Expert.
Law Enforcement Agency Perspective on Use of Oral Fluid to Detect Drugs:

• Priority is to double down on police training (back to the basics).

• Lack of confidence in oral fluid roadside screening devices.

• High degree of interest in collection of oral fluid for evidentiary testing in labs.
States that collect oral fluid:

ALABAMA

New legislation pending Gov’s signature.

- Collection of oral fluid was not originally covered by implied consent law, but that changed this year.

- Statewide oral fluid drug screening at the roadside and evidentiary confirmation testing in the lab.

- Law enforcement officers collect specimens.
• Not currently collecting oral fluid.

• New legislation established a lab-based program (evidentiary), not a roadside program (screening).

• There’s one big problem…
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Complicating Factors

**STATE LAW**

- Expect loopholes/exemptions
- Law makers do not typically understand complexity of establishing oral fluid drug screening/testing programs for impaired driving.
- Funding for program implementation.

**LAW ENFORCEMENT AGENCY POLICY**

- Existing backlog at labs
- Perception of scientific uncertainty and reliability of roadside oral fluid devices and admissibility of results in court.
- Law enforcement agency policy that BAC $\geq .08$ is sufficient for arrest/conviction such that drug screening/testing is unnecessary.
Strategies to Boost Use of Oral Fluid

- Significant education effort within states on strengths and limitations of use of oral fluid for:
  - Roadside screening
  - Lab testing

- Facilitate diverse coalition of key players to help advance use of oral fluid to meet the needs within that state, and to close loopholes.

- Coalition to advocate for amendments to state law (if needed) and shift in law enforcement agency policy.

- Align incentives for law enforcement agencies to pursue drug testing even when BAC $\geq$ .08

- Articulate the ROI in terms of public health/safety of better/faster identification of drugs other than alcohol in impaired driving cases.
When Cannabis Use Becomes Legal...

- Avoid per se standards for cannabis, consider permissible inference
- Direct tax revenue to law enforcement training, public education about drug-impaired driving, and toxicology labs
- Improve data quality and availability on DUID
- Open container law for cannabis
- Require dispensaries to educate consumers about the safety and legal implications of driving high.
- Leverage oral fluid to detect drugged drivers.
- Authorize testing of oral fluid and blood for any substance capable of impairing a driver’s ability to safely operate a motor vehicle. Avoid finite drug lists.
- Use electronic warrant systems
- Establish a special commission comprised of qualified experts to advise on evolving science and technology relative to detection of drugged drivers and determination of drug impairment among drivers.
Thank you!

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