

Virginia Administrative Code
Title 6. Criminal Justice And Corrections
Agency 40. Department of Forensic Science
Chapter 20. Regulations for Breath Alcohol Testing

Part I. Definitions

6VAC40-20-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Agency" means any law-enforcement agency under whose auspices breath tests are performed.

"Blood alcohol concentration" means percent by weight of alcohol in a person's blood based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

"Breath test device" means an instrument designed to perform a quantitative chemical test for alcohol on a sample of breath of a person subject to the provisions of §§ 18.2-268.1 through 18.2-268.3, 18.2-268.9, 29.1-738.2, 46.2-341.26:1 through 46.2-341.26:3 or 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

"Chemical test" or "chemical analysis" means a quantitative test for alcohol using infrared, or fuel cell methodologies or a combination thereof performed on a sample or samples of breath of a person subject to the provisions of §§ 18.2-267, 18.2-268.1 through 18.2-268.3, 18.2-268.9, 29.1-738.1, 29.1-738.2, 46.2-341.25, 46.2-341.26:1 through 46.2-341.26:3 or 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

"Department" means the Department of Forensic Science.

"Licensee" means a person holding a valid license from the department to perform a breath test of the type set forth within these regulations under the provisions of § 18.2-268.9, § 29.1-738.2 or § 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

"Preliminary breath test device" means an instrument designed to perform a quantitative chemical test for alcohol on a sample of breath of a person suspected of an offense subjecting such person to the provisions of § 18.2-267, 29.1-738.1 or 46.2-341.25 of the Code of Virginia.

"Supplies and accessories" means any item, device, chemical, reagent, tube, mouthpiece, replacement part, or glassware, whether or not reusable, which is used in conjunction with a breath test device to determine the blood alcohol concentration of any person subject to the provisions of §§ 18.2-268.1 through 18.2-268.3, 18.2-268.9, 29.1-738.2, 46.2-341.26:1 through 46.2-341.26:3 or 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-10 derived from Virginia Register Volume 17, Issue 3, eff. November 23,

2000; amended, Virginia Register Volume 20, Issue 4, eff. December 3, 2003; Volume 21, Issue 2, eff. November 3, 2004; amended and renumbered as 6VAC40-20-10, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

6VAC40-20-20. Substantial compliance.

These regulations and the steps set forth herein relating to the taking, handling, identification and disposition of breath samples, the testing of such samples, and the completion and filing of any form or record prescribed by these regulations are procedural in nature and not substantive. Substantial compliance therewith shall be deemed sufficient.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-20 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-20, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

Part II. Breath Tests Under §§ 18.2-268.9, 29.1-738.2, and 46.2-341.26:9 of the Code of Virginia

Article 1. Breath Test Administrative Procedures

6VAC40-20-30. Breath test devices.

Breath test devices shall be tested for accuracy by the department at least once every six months. All new breath test devices or those having been repaired by the manufacturer shall be tested for accuracy by the department before their return to service.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-30 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-30, Virginia Register Volume 22, Issue 10, eff. February 22, 2006; amended, Virginia Register Volume 24 Issue 26, eff. October 16, 2008.

6VAC40-20-40. Storage.

The breath test device must be stored in a clean, dry location that is only accessible to licensees and to other authorized individuals.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-40 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended, Virginia Register Volume 20, Issue 4, eff. December 3, 2003; amended and renumbered as 6VAC40-20-40, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

6VAC40-20-50. Care.

Proper care shall be taken to ensure that the breath test device is kept free from excessive moisture, heat and dust.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-50 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended, Virginia Register Volume 21, Issue 2, eff. November 3, 2004; amended and renumbered as 6VAC40-20-50, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

6VAC40-20-60. Modifications.

No modifications shall be made to any breath test device by an agency without the written consent of the department.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-60 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended, Virginia Register Volume 20, Issue 4, eff. December 3, 2003; amended and renumbered as 6VAC40-20-60, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

6VAC40-20-70. Use.

The breath test device shall not be used for administration of tests for alcohol use pursuant to the Federal Omnibus Transportation Employees Testing Act of 1991, 49 CFR Part 40.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-70 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-70, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

Article 2. Approval of Breath Test Devices

6VAC40-20-80. Approval.

All breath tests as prescribed in §§ 18.2-268.9, 29.1-738.2 and 46.2-341.26:9 of the Code of Virginia shall be performed on a breath test device approved by the department. Those breath test devices listed in the "Conforming Products List of Evidential Breath Measurement Devices" as established by the National Highway Traffic Safety Administration ("NHTSA"), United States Department of Transportation, or in such other list as may be established by NHTSA evidencing that such device meets criteria, standards or specifications promulgated by it, as published from time to time in the Federal Register, may be approved by the department as a breath test device. In approving such devices, the department will consider factors including, but not limited to, costs, maintenance, necessity of instruction and/or training by the department, ease of operation, availability of parts and service facilities, reliability, maintenance instruction and the historical performance record of the device.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-80 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-80, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

6VAC40-20-90. Publishing list of devices.

The department shall periodically publish in the Virginia Register of Regulations a list of any device(s) approved for use as breath test device(s). Such list shall be published forthwith after any addition or deletion of any device(s) to or from the department's approved list. The department may, in addition, provide copies of its approved list to any agency subject to this chapter.

Statutory Authority

§9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-90 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended, Virginia Register Volume 20, Issue 4, eff. December 3, 2003; amended and renumbered as 6VAC40-20-90, Virginia Register Volume 22, Issue 10, eff. February 22, 2006. Publication of approved devices: General Notices, 24:18 VA.R. 2728 May 12, 2008; 26:4 VA.R. 442-443 October 26, 2009; 26:7 VA.R. 921-922 December 7, 2009; 29:2 VA.R. 334 September 24, 2012; 31:21 VA.R. 1888 June 15, 2015; 35:13 VA.R. 1833 February 18, 2019; 39:26 VA.R. 2893 August 14, 2023.

6VAC40-20-100. Publishing list of supplies.

The department shall periodically publish in the Virginia Register of Regulations a list of any supplies and accessories approved for use with breath test devices that may be purchased by an agency. Such list shall be published forthwith after any addition or deletion of any supplies or accessories to or from the department's approved list. The department may, in addition, provide

copies of its approved list to any agency subject to this chapter.

Statutory Authority

§9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-100 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended, Virginia Register Volume 20, Issue 4, eff. December 3, 2003; amended and renumbered as 6VAC40-20-100, Virginia Register Volume 22, Issue 10, eff. February 22, 2006. Publication of approved supplies: General Notices, 24:18 VA.R. 2728 May 12, 2008; 26:4 VA.R. 442 October 26, 2009; 26:7 VA.R. 921-922 December 7, 2009; 29:2 VA.R. 334 September 24, 2012; 31:21 VA.R. 1888 June 15, 2015; 35:13 VA.R. 1833 February 18, 2019; 39:26 VA.R. 2893 August 14, 2023.

Article 3. Methods of Conducting Breath Tests

6VAC40-20-110. Methods and procedures.

The department shall approve such methods of performing breath tests as are demonstrated to the satisfaction of the department to produce accurate and reliable determinations in a reasonable, convenient and effective manner. The department approves the following breath test methods and procedures:

1. All breath test devices shall be operated in accordance with those sections of the instructional manual published by the department that are applicable to the particular breath test device. Licensees shall follow any additional instructions or modifications of instructions published by the department in supplements to the foregoing instructional manual.
2. The person to be tested shall be observed for at least 20 minutes prior to collection of the breath specimen, during which period the person must not have ingested fluids, regurgitated, vomited, eaten, or smoked. Should any of these actions occur, an additional 20-minute observation period must be performed.
3. The licensee shall verify that the breath test device is properly calibrated and in proper working order by conducting a room air blank analysis prior to analysis of the breath of the person and by conducting a validation test with a control sample as part of the test protocol.
4. The licensee must use only supplies and accessories issued by or approved by the department in conducting breath tests on approved breath test devices.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-110 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-110, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

Article 4. Licensing Procedures

6VAC40-20-120. Licensing procedures.

- A. The department shall issue, renew, terminate and revoke licenses for individuals to perform breath alcohol tests on the basis of standards set forth in this chapter.
- B. Application for an initial license to perform breath tests shall be made in writing to the department. The applicant shall have the endorsement of the appropriate supervisory law-enforcement officer or designated representative unless an exception is granted by the department.
- C. The initial licenses shall be granted to individuals who demonstrate the ability to perform breath tests accurately and reliably in accordance with the methods approved by the department.
- D. Only individuals successfully completing a basic course of instruction shall be deemed to have demonstrated competence to qualify for the issuance of an initial license. Further instruction may be required by the department to qualify a licensee to perform tests using additional breath test devices.
- E. Licenses shall be limited in scope to those breath test devices on which the individual applying for an initial or renewal license has demonstrated competence.
- F. Licenses shall state the date upon which they are to expire, which date shall, in no event, be later than 24 months after the date of issuance. Licenses shall be subject to renewal at expiration or at such time prior to expiration as is convenient for the department on demonstration by the licensee of continuing competency to perform accurate and reliable breath tests. The department may at any time examine licensees to determine such continuing competency. Licenses may be terminated or revoked by the department at any time upon good cause shown.
- G. Any individual whose license has expired may renew his license within one year after its expiration date by successfully completing a recertification class and by demonstrating his competence in the performance of breath tests. Any individual (i) who fails the recertification class or (ii) whose license has expired and who does not renew his license within one year after its expiration date may renew his license by again attending and successfully completing the basic course of instruction referred to in subsection D of this section and demonstrating competence in the performance of breath tests as otherwise required.
- H. The failure of a licensee to comply with this chapter may be grounds for revocation of such individual's license.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-120 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended, Virginia Register Volume 20, Issue 4, eff. December 3, 2003; amended and renumbered as 6VAC40-20-120, Virginia Register Volume 22, Issue 10, eff. February 22, 2006;

amended, Virginia Register Volume 24 Issue 26, eff. October 16, 2008.

6VAC40-20-130. Certificates.

The department shall issue, terminate and revoke instructor certificates for individuals to teach breath alcohol testing on the basis of the following standards:

1. The instructor certificate shall be granted only to individuals who (i) demonstrate the ability to teach the breath test method or methods approved by the department, (ii) possess a valid breath test license, and (iii) satisfactorily complete a course for Breath Alcohol Instructors. The department may issue instructor certificates to persons who have acquired the knowledge, skills and abilities by past experience or formal education. DFS has the authority to deny issuance of a certificate upon good cause shown.
2. Instructor certificates shall be limited in scope to the breath test devices for which the individual has demonstrated competence.
3. The department may at any time examine instructors to determine continuing ability.
4. Instructor certificates may be terminated or revoked by the department upon good cause shown.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-130 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-130, Virginia Register Volume 22, Issue 10, eff. February 22, 2006; amended, Virginia Register Volume 24 Issue 26, eff. October 16, 2008.

6VAC40-20-140. Revocation.

Any revocation of a license or instructor certificate shall be by notice sent by registered or certified mail or equivalent delivery method from the department to the licensee or instructor.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-140 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-140, Virginia Register Volume 22, Issue 10, eff. February 22, 2006; Volume 30, Issue 7, eff. January 17, 2014.

Article 5. Forms and Records

6VAC40-20-150. Records.

The department shall download by modem, at least once each month, data from each breath test

device assigned to an agency. The department shall keep this data on file for at least three years.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-150 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended, Virginia Register Volume 20, Issue 4, eff. December 3, 2003; Volume 21, Issue 2, eff. November 3, 2004; amended and renumbered as 6VAC40-20-150, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

6VAC40-20-160. Checklist.

Breath test worksheets are provided to an agency by the department but may also be accessed and printed from the department's website.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-160 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended, Virginia Register Volume 20, Issue 4, eff. December 3, 2003; Errata, 20:8 VA.R. 850 December 29, 2003; amended, Virginia Register Volume 21, Issue 2, eff. November 3, 2004; amended and renumbered as 6VAC40-20-160, Virginia Register Volume 22, Issue 10, eff. February 22, 2006; amended, Virginia Register Volume 24 Issue 26, eff. October 16, 2008; Volume 30, Issue 7, eff. January 17, 2014.

Part III. Preliminary Breath Tests Under §§ 18.2-267, 29.1-738.1 and 46.2-341.25 of the Code of Virginia

6VAC40-20-170. Preliminary breath test device.

All preliminary breath tests shall be performed on a preliminary breath test device approved by the department. Such devices shall offer convenience and efficiency in operation as determined by the department and shall also satisfy the requirements of either subdivision 1 or 2 of this section.

1. For instruments having a numeric readout, the device shall have a systematic error not exceeding $\pm 10\%$.
2. For instruments having a pass/fail, colored light readout, the device shall satisfy the following specifications:
 - a. When a sample of breath is properly taken from a person with an actual blood alcohol concentration of 0.05% or less by weight by volume or 0.05 grams of alcohol per 210 liters of breath, the device shall not indicate a positive result.

b. When a sample of breath is properly taken from a person with an actual blood alcohol concentration of 0.08% or more by weight by volume or 0.08 grams of alcohol per 210 liters of breath, the device shall not indicate a negative result.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-170 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended, Virginia Register Volume 20, Issue 4, eff. December 3, 2003; amended and renumbered as 6VAC40-20-170, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

6VAC40-20-180. List of preliminary devices.

The department shall periodically publish in the Virginia Register of Regulations a list of devices approved for use as preliminary breath test devices. Such list shall be published forthwith after any addition or deletion of any device(s) to or from the department's approval list.

Statutory Authority

§9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-180 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-180, Virginia Register Volume 22, Issue 10, eff. February 22, 2006. Publication of approved preliminary devices: General Notices, 24:18 VA.R. 2728 May 12, 2008; 26:4 VA.R. 442-443 October 26, 2009; 26:7 VA.R. 921-922 December 7, 2009; 29:2 VA.R. 334 September 24, 2012; 31:21 VA.R. 1888 June 15, 2015; 35:13 VA.R. 1833 February 18, 2019; 39:26 VA.R. 2893 August 14, 2023.

6VAC40-20-190. Operational procedures.

All preliminary breath tests shall be conducted substantially in accordance with the operational procedures set forth in the instruction manual of the manufacturer of the instrument in use except as may be modified by the department.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-190 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-190, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

6VAC40-20-200. Preventive maintenance.

It shall be the responsibility of each agency using preliminary breath test devices to provide

preventive maintenance and repairs according to the manufacturer's instructions or procedures except as may be modified by the department.

Statutory Authority

§ 9.1-1110 of the Code of Virginia.

Historical Notes

Former 6VAC20-190-200 derived from Virginia Register Volume 17, Issue 3, eff. November 23, 2000; amended and renumbered as 6VAC40-20-200, Virginia Register Volume 22, Issue 10, eff. February 22, 2006.

FORMS (6VAC40-20).

[EC/IR II Breath Test Worksheet, DFS Document 250-F115 \(eff. 10/08\)](#)

Statutory Authority

Historical Notes