

CHAPTER 78

AN ACT

HB 2627

Relating to driving while under the influence diversion agreements; creating new provisions; amending ORS 137.109, 813.200, 813.210 and 813.255 and section 1, chapter 670, Oregon Laws 2011; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 813.255 is amended to read:

813.255. (1) At any time before the court dismisses with prejudice the charge of driving while under the influence of intoxicants, the court on its own motion or on the motion of the district attorney or city attorney may issue an order requiring the defendant to appear and show cause why the court should not terminate the diversion agreement. The order to show cause [*shall*] **must:**

(a) State the reasons for the proposed termination [*and shall*];

(b) **Specify the amount of any fees owed and, if the amount owed is \$500 or less, inform the defendant that the court may dismiss with prejudice the charge of driving while under the influence of intoxicants if the person has complied with and performed all of the conditions of the diversion agreement and pays the remaining amount before or on the date of the hearing; and**

(c) Set an appearance date.

(2) The order to show cause shall be served on the defendant and on the defendant's attorney, if any. Service may be made by first class mail, postage paid, addressed to the defendant at the mailing address shown on the diversion petition and agreement or at any other address that the defendant provides in writing to the court.

[(3) *Except as provided in subsection (4) of this section, the court shall terminate the diversion agreement and enter the guilty plea or no contest plea that was filed as part of the petition for the diversion agreement if:*]

[(a) *At the hearing on the order to show cause, the court finds by a preponderance of the evidence that any of the reasons for termination described in this section exist; or*]

[(b) *The defendant fails to appear at the hearing on the order to show cause.*]

(3) Except as provided in subsections (4), (5) and (6) of this section, the court shall terminate the diversion agreement and enter the guilty plea or no contest plea that was filed as part of the petition for the diversion agreement if the defendant fails to appear at the hearing on the order to show cause or if, at the hearing on the order to show cause, the court finds by a preponderance of the evidence that:

(a) The defendant no longer qualifies for the diversion agreement under the conditions described in ORS 813.215; or

(b) The defendant failed to fulfill all of the terms of the diversion agreement.

(4) If a defendant is a member of the Armed Forces of the United States, the reserve components of the Armed Forces of the United States or the National Guard and is on active duty, the court shall:

(a) Allow the defendant to appear at the hearing by telephone or other communication device approved by the court, if the defendant's military service permits such an appearance; or

(b) Stay the termination proceeding if the defendant's military service prohibits the defendant's appearance by telephone or other communication device and prohibits the defendant from aiding and assisting the attorney who would appear on the defendant's behalf.

(5) If the defendant appears at the hearing on the order to show cause, the court shall dismiss with prejudice the charge of driving while under the influence of intoxicants if:

(a) **The defendant has complied with and performed all of the conditions of the diversion agreement except that the defendant owes \$500 or less of the fees required under ORS 813.200, 813.210, 813.235 and 813.240; and**

(b) **The defendant pays the balance of the fees owed by 5 p.m. on the day the hearing is held. The defendant may also pay the balance of the fees owed before the day the hearing is held.**

(6) **A court may not terminate a diversion agreement under this section for failure to pay restitution under section 7 of this 2013 Act if the defendant has otherwise complied with and performed all of the conditions of the diversion agreement.**

(7) Before the court dismisses with prejudice the charge of driving while under the influence of intoxicants under this section, the court shall enter a judgment containing a money award, as defined in ORS 18.005, for any remaining amount of restitution owed by the defendant.

[(5)] (8) If the court terminates the diversion agreement and enters the guilty plea or no contest plea, the court may take into account at time of sentencing any partial fulfillment by the defendant of the terms of the diversion agreement.

[(6) *The court shall terminate a diversion agreement under this section for any of the following reasons:*]

[(a) *The defendant fails to fulfill the terms of the diversion agreement.*]

[(b) *The defendant does not qualify for the diversion agreement under the criteria in ORS 813.215.*]

SECTION 2. Section 3 of this 2013 Act is added to and made a part of ORS chapter 813.

SECTION 3. (1) At any time before entry of a judgment of conviction and within 180 days after the conclusion of the period of a driving while under the influence of intoxicants diver-

sion agreement described in ORS 813.230 or an extension described in ORS 813.225, a defendant who has complied with and performed all of the conditions of the diversion agreement, except that the defendant owes \$500 or less of the fees required under ORS 813.200, 813.210, 813.235 and 813.240, may apply by motion to the court wherein the diversion agreement was entered for a judgment dismissing with prejudice the charge of driving while under the influence of intoxicants.

(2) The defendant shall cause to be served on the district attorney or city attorney a copy of the motion for a judgment dismissing with prejudice the charge of driving while under the influence of intoxicants. The copy of the motion shall be served on the district attorney or city attorney at the time the motion is filed with the court. The district attorney or city attorney may contest the motion.

(3) At the hearing on the motion described in subsection (1) of this section, the court shall dismiss with prejudice the charge of driving while under the influence of intoxicants, if the defendant pays the balance of the fees owed by 5 p.m. on the day the hearing is held. The defendant may also pay the balance of the fees owed before the day the hearing is held.

(4) Before the court dismisses with prejudice a charge of driving while under the influence of intoxicants under this section, the court shall enter a judgment containing a money award, as defined in ORS 18.005, for any remaining amount of restitution owed by the defendant.

SECTION 4. ORS 813.200 is amended to read:

813.200. (1) The court shall inform at arraignment a defendant charged with the offense of driving while under the influence of intoxicants as defined in ORS 813.010 or a city ordinance conforming thereto that a diversion agreement may be available if the defendant meets the criteria set out in ORS 813.215 and files with the court a petition for a driving while under the influence of intoxicants diversion agreement.

(2) The petition forms for a driving while under the influence of intoxicants diversion agreement shall be available to a defendant at the court.

(3) The form of the petition for a driving while under the influence of intoxicants diversion agreement and the information and blanks contained therein shall be determined by the Supreme Court under ORS 1.525. The petition forms made available to a defendant by any city or state court shall conform to the requirements adopted by the Supreme Court.

(4) In addition to any other information required by the Supreme Court to be contained in a petition for a driving while under the influence of intoxicants diversion agreement, the petition shall include:

(a) A plea of guilty or no contest to the charge of driving while under the influence of intoxicants signed by the defendant;

(b) An agreement by the defendant to complete at an agency or organization designated by the city or state court a diagnostic assessment to determine the possible existence and degree of an alcohol or drug abuse problem;

(c) An agreement by the defendant to complete, at defendant's own expense based on defendant's ability to pay, the program of treatment indicated as necessary by the diagnostic assessment;

(d) Except as provided in subsection (5) of this section, an agreement by the defendant to not use intoxicants during the diversion period and to comply fully with the laws of this state designed to discourage the use of intoxicants;

(e) A notice to the defendant that the diversion agreement will be considered to be violated if the court receives notice that the defendant at any time during the diversion period committed the offense of driving while under the influence of intoxicants or committed a violation of ORS 811.170;

(f) An agreement by the defendant to keep the court advised of the defendant's current mailing address at all times during the diversion period;

(g) A waiver by the defendant of any former jeopardy rights under the federal and state Constitutions and ORS 131.505 to 131.525 in any subsequent action upon the charge or any other offenses based upon the same criminal episode;

(h) A sworn statement, as defined in ORS 162.055, by the defendant certifying that the defendant meets the criteria set out in ORS 813.215 to be eligible to enter into the driving while under the influence of intoxicants diversion agreement; [and]

(i) An agreement by the defendant to pay court-appointed attorney fees as determined by the court[.]; and

(j) An agreement by the defendant to pay restitution if ordered by the court under section 7 of this 2013 Act.

(5) A person may use intoxicants during the diversion period if:

(a) The person consumes sacramental wine given or provided as part of a religious rite or service;

(b) The person has a valid prescription for a substance and the person takes the substance as directed; or

(c) The person is using a nonprescription drug, as defined in ORS 689.005, in accordance with the directions for use that are printed on the label for that nonprescription drug.

SECTION 5. ORS 813.210 is amended to read:

813.210. (1) After an accusatory instrument has been filed charging the defendant with the offense of driving while under the influence of intoxicants, a defendant may file with the court a petition for a driving while under the influence of intoxicants diversion agreement described in ORS 813.200. The petition:

(a) Must be filed within 30 days after the date of the defendant's first appearance on the summons, unless a later filing date is allowed by the court upon a showing of good cause. For purposes of this paragraph, the filing of a demurrer, a motion to suppress or a motion for an omnibus hearing does not constitute good cause.

(b) Notwithstanding paragraph (a) of this subsection, may not be filed after entry of a guilty plea or a no contest plea or after commencement of any trial on the charge whether or not a new trial or retrial is ordered for any reason.

(2) The defendant shall pay to the court, at the time of filing a petition for a driving while under the influence of intoxicants diversion agreement, a filing fee established under ORS 813.240. The court may make provision for payment of the filing fee by the defendant on an installment basis. The court may waive all or part of the filing fee in cases involving indigent defendants. The filing fee paid to the court under this subsection shall be retained by the court if the petition is allowed. The filing fee shall be distributed as provided by ORS 813.240.

(3) The defendant shall pay to the agency or organization providing the diagnostic assessment, at the time the petition is allowed, the fee required by ORS 813.240 (3).

(4)(a) Unless otherwise provided under paragraph (b) of this subsection, the defendant shall pay to the court any court-appointed attorney fees agreed to under ORS 813.200 (4)(i). Payments shall be made prior to the end of the diversion period on a schedule determined by the court.

(b) The court may waive all or part of the court-appointed attorney fees agreed to under ORS 813.200 (4)(i).

(5) The defendant shall begin paying to the court any restitution ordered under section 7 of this 2013 Act. Payments shall be made during the diversion period on a schedule determined by the court.

[5] (6) The defendant shall cause a copy of the petition for a driving while under the influence of intoxicants diversion agreement to be served upon the district attorney or city attorney. The district attorney or city attorney may file with the court, within 15 days after the date of service, a written objection to the petition and a request for a hearing.

SECTION 6. Section 7 of this 2013 Act is added to and made a part of ORS 137.103 to 137.109.

SECTION 7. (1) When a person has entered into a driving while under the influence of intoxicants diversion agreement and the person's actions resulted in economic damages, the district attorney shall investigate and present to the court within 90 days of when the diversion agreement is entered, evidence of the nature and amount of the damages. If the court finds from the evidence presented that a victim suffered economic damages, the court shall order

the defendant to pay restitution and include in the diversion agreement one of the following:

(a) A requirement that the defendant pay the victim restitution in a specific amount that equals the full amount of the victim's economic damages as determined by the court.

(b) A requirement that the defendant pay the victim restitution in a specific amount that is less than the full amount of the victim's economic damages, with the consent of the victim.

(2) After the district attorney makes a presentation described in subsection (1) of this section, if the court is unable to find from the evidence presented that a victim suffered economic damages, the court shall make a finding on the record to that effect.

(3) A finding made by the court under this section, or a failure of the court to make a finding, does not limit or impair the right of a person injured to sue and recover damages in a civil action as provided in ORS 137.109.

(4) If the defendant objects to the imposition, amount or distribution of the restitution, the court shall allow the defendant to be heard on such issue at the time the court determines the amount of restitution.

(5) As used in this section, "victim" includes any person the court determines has suffered economic damages as a result of the act that has brought the defendant before the court for the purpose of entering into a driving while under the influence of intoxicants diversion agreement.

SECTION 8. ORS 137.109 is amended to read:

137.109. (1) Nothing in ORS 137.103 to 137.109, 137.540, 144.102, 144.275, 161.675 and 161.685 limits or impairs the right of a person injured by a defendant's commission of a crime, [or] by a defendant's commission of a violation described in ORS 153.008, or by a defendant's commission of an act that has brought the defendant before the court for the purpose of entering into a driving while under the influence of intoxicants diversion agreement, to sue and recover damages from the defendant in a civil action. Evidence that the defendant has paid or been ordered to pay restitution pursuant to ORS 137.103 to 137.109, 137.540, 144.102, 144.275, 161.675 and 161.685 may not be introduced in any civil action arising out of the facts or events that were the basis for the restitution. However, the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in such civil action.

(2) If conviction in a criminal trial necessarily decides the issue of a defendant's liability for economic damages of a victim, that issue is conclusively determined as to the defendant if it is involved in a subsequent civil action.

SECTION 9. Section 1, chapter 670, Oregon Laws 2011, is amended to read:

Sec. 1. (1) The Department of Justice shall establish a restitution collection pilot program in geographically dispersed counties or regions of this state to increase the collection of restitution ordered under ORS 137.106 and 137.107 **and section 7 of this 2013 Act.**

(2)(a) The department shall make grants from the Restitution Collection Pilot Program Fund established under section 2 [of this 2011 Act], **chapter 670, Oregon Laws 2011**, to enable the district attorney's office of each county, or a district attorney's office located in a region, participating in the pilot program to employ at least one restitution clerk on at least a part-time basis.

(b) In addition to the grants required under paragraph (a) of this subsection, the department may make grants from the fund to fund other positions, activities and expenses related to the collection of restitution.

(3)(a) Each restitution clerk shall:

(A) Investigate evidence of the nature and amount of the damages suffered by victims of crime pursuant to ORS 137.106;

(B) Investigate and compile information regarding the defendant's ability to pay restitution; and

(C) Provide the evidence and information obtained pursuant to this paragraph to the prosecuting attorney before any hearing on the issue of restitution.

(b) Pursuant to **Article I**, section 42, [Article I] of the Oregon Constitution, and ORS 137.106 **and section 7 of this 2013 Act**, the district attorney shall present the information and evidence obtained by the restitution clerk to the court.

(c) The recipient of a grant made pursuant to subsection (2) of this section is authorized to per-

form the activities set out in the grant agreement and in rules adopted by the department pursuant to this section.

(4)(a) The department shall employ and assign collection agents to each county or region participating in the restitution collection pilot program.

(b) Each collection agent shall:

(A) Notwithstanding ORS 137.118, conduct collections and collection investigation work to collect restitution from offenders and liable third parties;

(B) Coordinate the collection investigation work with the respective restitution clerk in the participating county or region; and

(C) Be available to present the results of the collection investigation work in judicial proceedings, including sentencing hearings, parole revocation hearings, judgment debtor examinations and contempt proceedings.

(5) The department shall adopt rules to carry out the provisions of this section.

SECTION 10. Sections 3 and 7 of this 2013 Act and the amendments to ORS 137.109, 813.200, 813.210 and 813.255 and section 1, chapter 670, Oregon Laws 2011, by sections 1, 4, 5, 8 and 9 of this 2013 Act apply to diversion agreements entered into on or after the effective date of this 2013 Act.

SECTION 11. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

Approved by the Governor May 9, 2013

Filed in the office of Secretary of State May 9, 2013

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