

**STATUTORY AND ADMINISTRATIVE RULES GOVERNING
THE BREATH ALCOHOL IGNITION DEVICE (BAIID)
FOR
MONITORED DEVICE DRIVING PERMITS**

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STATUTORY AND ADMINISTRATIVE RULES GOVERNING BAIID INSTALLATION AND USE WHILE ON A MONITORED DEVICE DRIVING PERMIT

A. Generally

A person issued a monitored device driving permit (MDDP) during the period of the statutory summary suspension may only drive a vehicle equipped with a breath alcohol ignition interlock device (BAIID) with certain exceptions (see (G) below). Commercial driver's license holders are prohibited from driving commercial vehicles on an MDDP. See 625 ILCS 5/6-206.1(a-1).

B. Eligibility for Issuance of a MDDP

In order to be eligible for a MDDP, a person must be a first offender as defined under 625 ILCS 5/11-500. If the person is a statutory summary suspension second offender, he or she is not eligible for any form of driving relief. The Secretary of State may not grant the MDDP if:

1. the person does not otherwise have a valid driver's license;
2. the current arrest for DUI involves death or great bodily harm;
3. the person has previously been convicted of reckless homicide or aggravated DUI involving death; or
4. the person is less than 18 years of age. 625 ILCS 5/6-206.1(a).

If a person is issued a MDDP and their driving privileges are thereafter suspended, revoked, cancelled, or otherwise become invalid, the MDDP also becomes invalid and it must be surrendered to the Secretary of State. If the person then wishes to seek any driving relief, a petition must be filed with the Secretary of State for a restricted driving permit (RDP) and comply with all applicable rules. If granted an RDP, the person will be subject to BAIID requirements.

Note that this includes individuals who would otherwise *not* have been required to have a BAIID while driving on a RDP. Accordingly, when representing a client who is not otherwise required to have a BAIID RDP, it is advisable to continue the DUI matter to a date after the SSS ends (and the MDDP has therefore expired) or to first surrender the MDDP to the Secretary of State in order to avoid a revocation and cancellation while

the MDDP is still in effect, which would otherwise subject the person to BAIID requirements unnecessarily.

This policy appears to be contrary to the provisions of 625 ILCS 5/6-206.1(c-1), which provides for cancellation for offenses “other than the one for which the MDDP is issued.”

If the “invalidation” is removed, the person may obtain another MDDP for the balance of the period of suspension unless the MDDP has been cancelled for a traffic violation as provided in 625 ILCS 5/6-206.1(c-1). See 92 Ill.Admin.Code sec. 1001.444(a)(4); 92 Ill.Admin.Code sec. 1001.444(5).

C. Application Process

The issuance process for a monitoring device driving permit is largely automatic. Unless the Secretary of State receives a form indicating that the person has opted-out of the MDDP program from the court of venue, then at the time of (or shortly after) the mailing of the confirmation of the statutory summary suspension, the Secretary of State will forward a notice describing the MDDP program to the person. The notice will contain a tear-off section entitled “MDDP Program Application” that the must be returned to the Secretary of State. If the Secretary of State does not receive this document, it will send a follow-up reminder notice to the person. If the form is not returned, the MDDP will not be issued. See 625 ILCS 5/6-206.1(a); 92 Ill.Admin.Code sec. 1001.444(a)(1).

D. Procedure Upon Issuance

Upon issuance of the MDDP the Secretary of State will:

1. request a BAIID administration fee of \$30 per month; and
2. require that the person shall have the BAIID installed within 14 days of the issuance of the MDDP.

Failure to comply with these requirements will result in cancellation of the BAIID. See 625 ILCS 5/6-206.1(a); 92 Ill.Admin.Code sec. 1001.444(b)(1).

The MDDP is not effective until the 31st day of the statutory summary suspension. No relief is available for the first 30 days of the SSS. 625 ILCS 5/6-206.1(a).

E. Declining the MDDP

In order to decline issuance of the MDDP, the person must file a petition with the court of venue. The court is then required to advise the person of the penalties for driving while suspended. The person must then, in writing, decline issuance of the permit which is then filed and forwarded by the clerk of the court to the Secretary of State. 625 ILCS 5/6-206.1(a).

However, note that where one wishes to decline issuance of the MDDP, this procedure avoids, in practice, the need to appear in court despite the provisions of the statute that provide otherwise. Specifically, if the person does not send in the MDDP

application, the permit will not be issued. Although the notice sent by the Secretary of State states that the person is automatically enrolled in the program, enrollment does not actually occur unless the application is returned, thereby obviating the necessity for a court order declining issuance.

Query: Since the statute requires that a person who does not wish to use a MDDP be admonished by the court that if he or she is arrested for the offense of driving while suspended, they may be charged with aggravated driving while suspended, and the Secretary of State's procedure short-circuits the need for such an admonishment, may the lack of a statutorily required admonishment be the basis for challenging an enhancement? See 625 ILCS 5/6-206.1(a); 625 ILCS 5/6-303(c-3).

A person may also voluntarily terminate participation in the MDDP program after the permit has been issued by written notification and surrender of the permit to the Secretary of State. Likewise, the person may resume participation during the period of the statutory summary suspension by notifying the BAIID Division of the Secretary of State in writing. However, after terminating participation, a person may reenroll only once. 92 Ill.Admin.Code sec. 1001.444(a)(6).

F. Indigents

Financially disadvantaged persons seeking issuance of a MDDP may qualify for indigence status if his or her monthly income is 150 percent or less of the federal poverty guidelines, as evidenced by a copy of his or her federal or state tax return for the most recent calendar year;

If the person has not filed a federal or state tax return, such person may obtain indigence status if:

1. currently receiving Temporary Assistance for Needy Families as demonstrated by documentation from the Illinois Department of Human Services (IDHS); or
2. currently receiving Supplemental Nutrition Assistance Program benefits as demonstrated by documentation from the IDHS.

See 92 Ill.Admin. Code Sec. 1001.444(1)(4).

Indigence status is valid for a period of 12 months. If the suspension is extended beyond 12 months and the person desires to continue driving on the MDDP then a reapplication as an indigent is required. 92 Ill.Admin.Code sec. 1001.444(1)(5).

BAIID providers are required to install the device without charge for a person with indigence status. The provider may then seek reimbursement from the Indigent BAIID Fund administered by the Secretary of State. This fund receives its monies from the BAIID providers in the form of 5% of gross revenues collected by them. 625 ILCS 5/6-206.1(c-5); 92 Ill.Admin.Code sec.1001.444(1)(1).

The provider is prohibited from charging a person any fees with the exception of a security deposit that does not exceed the cost of one month's rental (limited to one vehicle per person). See 92 Ill.Admin.Code sec. 1001.444(b)(2)(C).

G. Exceptions to the BAID Requirement for MDDP Applicants

1. Employment Exemption

A person who operates an employer-owned vehicle in the course of his or her employment may be allowed to drive such vehicle without a BAID if the Secretary of State approves such a use. This exemption includes test-driving vehicles within a five-mile radius of the place of employment. (The most common example would be a person engaged in the car repair business.) However, this exemption will not apply if the person drives:

- a. a school bus or school vehicle;
- b. a vehicle designed to transport more than 15 passengers;
- c. an employer-owned vehicle that is owned by an entity that is wholly or partially owned by the person or a family member of the person holding the MDDP (including an entity that is a corporation of which the person or the person's immediate family own five percent or more of the outstanding shares);
- d. an employer-owned vehicle that is made available to the MDDP holder for personal use; or
- e. a vehicle assigned exclusively to the person for commuting to and from employment, i.e., not also used for work-related driving purposes during work. 625 ILCS 5/6-206.1(a-2); 92 Ill.Admin.Code sec.1001.444(j)

Note that in practice as established by the Secretary of State, reference to an employer "owned" vehicle also applies to employer-leased vehicles.

A person may not drive a vehicle which has been granted a BAID exemption for more than six days a week, 12 hours a day. 625 ILCS 5/6-206.1(a-2).

The Secretary of State may terminate an exemption if it receives credible evidence that the person is driving the vehicle for other than employment purposes. If the Secretary of State receives such evidence, it will request an explanation, which the person must provide within 21 days. If no response is received or the response does not reasonably assure the Secretary of State that no violation occurred, the exemption will be terminated. A request for hearing will be granted to challenge a termination of exemption but the request will not stay the termination of the exemption. 92 Ill.Admin.Code sec. 1001.444(j)(3).

2. Medical Exemption

A person may seek a waiver of the BAIID requirement by submitting a medical report which demonstrates an inability to utilize the device to the Secretary of State. However, as a condition of granting a waiver, the person must satisfy the Secretary of State's alcohol/drug evaluation, risk education and treatment requirements (as applicable). 92 Ill.Admin.Code secs. 1001.400 – 1001.490. This would include the requirement of a hearing to demonstrate that the person would not be a risk to the public safety and welfare if granted the privilege to drive without a BAIID. See 92 Ill.Admin.Code sec.1001.444(i).

3. Farm Exemption

A person may also seek a waiver from BAIID requirements if driving a farm tractor to and from a farm and/or within 50 miles of the originating farm provided that it is being used exclusively for farm operations. 625 ILCS 5/6-206.1(a-3).

H. Traffic Violations Resulting in Cancellation of the MDDP

A conviction or court supervision for the following violations will result in cancellation of the MDDP:

1. 625 ILCS 5/6-206.2 (violations relating to an ignition interlock device);
2. 625 ILCS 5/6-303 (driving while suspended);
3. 625 ILCS 5/11-204 (fleeing or attempting to elude a peace officer);
4. 625 ILCS 5/11-204.1 (aggravated fleeing or attempting to elude a peace officer);
5. 625 ILCS 5/11-401 (leaving the scene of an accident involving death or personal injury);
6. 625 ILCS 5/11-501 (DUI);
7. 625 ILCS 5/11-503 (reckless driving);
8. 625 ILCS 5/11-506 (street racing or aggravated street racing); or
9. any offense of which alcohol or drugs is an element.

Note that these offences do not include offenses alleged as part of the occurrence for which the MDDP was issued. The offenses cited above include similar provisions of local ordinances or out-of-state offenses.

625 ILCS 5/6-201.1(c-1).

I. Other Basis For Cancellation of the MDDP

If the person causes the BAIID to be removed without prior authorization from the Secretary of State, the permit shall also be cancelled. 625 ILCS 5/6-206.1(c-1). See also 92 Ill.Admin. Code sec. 1001.444(e)5).

J. BAIID Violations

The Secretary of State is charged with the promulgation of administrative rules to implement the MDDP law. The Secretary of State also has the statutory authority conduct hearings challenging an alleged violation that results in an extension of the statutory summary suspension or cancellation of the MDDP. In order to request a hearing, the person must submit the request in writing together with a fee of \$50. Hearings will be held under the rules found at 92 Ill.Admin. Code sec. 1001.10, et seq. See also 625 ILCS 5/2-118, 5/6-206.1(g), 5/6-206.1(j).

There are several general areas defined by the statute that may be the basis for MDDP violations, including:

1. tampering or attempting to tamper with or circumvent the BAIID;
2. providing valid breath sample that register blood alcohol levels in excess of the number of times allowed under Secretary of State rules;
3. failure to provide evidence to the Secretary of State that the BAIID has been installed in the person's vehicle(s); and
4. failure to follow any applicable rule adopted by the Secretary of State. 625 ILCS 5/6-206.1(h).

The Secretary of State rules governing violations provide that the following will constitute a violation of the BAIID program:

1. a conviction or court supervision for any of the offenses listed in 625 ILCS 5/6-206.1(c-1) (including violations of similar provisions of a local ordinance, a similar out-of-state offense, or any offense involving a motor vehicle for which alcohol or drugs is an element of the offense other than an offense for which the MDDP was issued). See paragraph (H) above;
2. tampering or attempting to tamper with or unauthorized circumvention of the BAIID, including the use of any product intended to prevent accurate readings by the BAIID;
3. a violation of 625 ILCS 5/6-206.2;
4. 10 or more unsuccessful attempts to start the vehicle with a BAIID installed within a 30-day period, excluding a BrAC reading of 0.05 or more;

5. 5 or more unsuccessful attempts to start the vehicle within a 24-hour period excluding a BrAC reading of 0.05 or more;
6. a BrAC reading of 0.05 or more;
7. failing a running retest or failing to take a running retest;
8. removing the BAIID without authorization from the Secretary of State;
9. failing to utilize the BAIID as required;
10. failing to submit a BAIID for a monitor report in a timely manner;
11. preventing the camera from taking clear and accurate photos of the person blowing into the mouthpiece. See 92 Ill.Admin.Code sec.1001.444(d)

K. Sanctions for BAIID Violations

1. Extension of Suspension

If the Secretary of State determines that a BAIID violation has occurred (other than a violation resulting in cancellation of the MDDP - see (H-I) above - the Secretary of State will enter an extension of the statutory summary suspension for a period of 3-months beyond the termination date of the original suspension. If the suspension has already terminated at the time of such determination, then the person will be re-suspended for a period of 3-months.

A suspension may be extended or re-suspended in 3-month increments without limit. However, multiple violations occurring within one monitoring period will not result in extensions of suspension or re-suspensions totaling more than six months, except for violations relating to using a product to prevent accurate readings or preventing the camera from taking a clear and accurate picture (in which case there is no limitation on the number of extensions of suspension). 92 Ill.Admin.Code sec. 1001.444(e)(8).

During any period of suspension (including an extension or re-suspension), the only driving relief available is a MDDP subject to BAIID requirements. See 625 ILCS 5/6-206.1(j). However, under the Secretary of State's rules, a person may obtain another MDDP only once during any period of a suspension extension or re-suspension. 92 Ill.Admin.Code sec. 1001.444(a)(6).

2. Cancellation

If a person's MDDP has been cancelled as a result of a traffic violation listed in 625 ILCS 5/6-206.1(c-1) – paragraph (H) above - or as the result of an unauthorized de-installation, reinstatement is not automatic when the statutory summary suspension terminates. Instead, the person is first required to apply for a RDP by means of an administrative hearing and, once granted, must drive on the RDP for a period not less than twice the original summary suspension period or for the length of any extensions of suspension, whichever is longer, subject to BAIID requirements. The practitioner should

note that as a condition of being granted a RDP, the person will to comply with additional requirements including a Secretary of State formal hearing, an alcohol/drug evaluation as well as completion of requirements for the evaluation classification. 625 ILCS 5/6-206.1(l); 92 Ill.Admin.Code sec.1001.444(a)(4).

L. Impoundment, Seizure, and Forfeiture

A person who has violated the law governing the BAIID while on a MDDP which results in three extensions of the person's summary suspension, shall have his or her vehicle impounded for a period of 30 days at the person's own expense. A violation resulting in a fourth extension will subject the person to seizure and forfeiture of the vehicle. The Secretary of State is required to notify the prosecuting authority of third and fourth violations, upon which the prosecuting authority is required to impound or seize and forfeit the vehicle, as applicable. 625 ILCS 5/6-206.1(k).

M. Reciprocity With Other States

If an Illinois driver commits an offense in a foreign state and that state imposes BAIID requirements on such driver or if a foreign state driver imposes BAIID requirements on its own licensed driver for an offense committed in another state, Illinois will give reciprocal recognition to such requirements. 92 Ill.Admin.Code sec. 1001.444(m).

N. Confidentiality

A record of issuance of the MDDP will not appear on the person's public driving record. This is consistent with the confidentiality provision that the statutory summary suspension for a first offender will not appear on the public driving record. 625 ILCS 5/6-206.1(d); 625 ILCS 5/11-501.1(e).

O. Other Provisions Governing MDDPs

Upon issuance of the MDDP, the BAIID must be installed within 14 days. Until the device is installed, the person cannot operate a vehicle for any purpose other than to have the device installed. The installer must then notify the Secretary of State within 7 days that the device has been installed in the vehicle. See 625 ILCS 5/6-206.1(a); 92 Ill.Admin.Code sec. 1001.444(b)(2)(B).

As state above, the person can only operate vehicles with a BAIID installed, including vehicles that are owned, rented, leased, loaned, etc. The BAIID provider must download the device every 60 days unless the person's suspension has been extended or he or she has been re-suspended as a result of a violation of the program, in which case the download period is reduced to 30 days. 92 Ill.Admin.Code sec. 1001.444(c)(2).

If the person fails to submit a BAIID monitor report as required, then all future reports must be submitted within 37 days thereafter. Failure to submit the monitor report

(without reasonable explanation from the person or the BAIID provider) will result in a notice requiring the report to be submitted within 10 days of the date of the letter. Failure to comply will result in a 3-month extension of the statutory summary suspension. If the person does not respond or cannot be located, the permit will be cancelled. If the MDDP has already expired, then the person shall be re-suspended for twice the length of the original SSS and cannot receive any further driving relief during such time except through a hearing with the Secretary of State. 92 Ill.Admin.Code sec.1001.444(e)(7).

The person must comply with any service or inspection notification within five working days. 92 Ill.Admin. Code Sec.1001.444(c)(3); and must keep a separate journal for each vehicle of unsuccessful attempts to start the vehicle, test failures, retest problems, or other problems with the BAIID. See 92 Ill.Admin.Code sec. 1001.444(c)(4).

P. Secretary of State Action Upon Determination of a Violation

If the person commits a violation under 625 ILCS 5/6-206.1(c-1), the MDDP will be cancelled. If the person's MDDP has already expired prior to receipt of notice of the violation, then the person's privileges will be re-suspended, and the person will thereafter be required to seek relief before the Secretary of State as noted above. See Section K(2) above. Also see 92 Ill.Admin.Code sec. 1001.444(e)(1).

If evidence shows sufficient reason to believe that a violation of 625 ILCS 5/6-206.2 (relating to operation of a vehicle not equipped with a BAIID, requesting another person to start a vehicle with a BAIID to enable the offender to operate the vehicle, or tampering with or circumventing a BAIID) has occurred, the Secretary of State will cancel the MDDP. If the statutory summary suspension has already terminated when the Secretary of State receives the report of a violation, the Secretary of State will re-suspend the person for 3-months. 625 ILCS 5/6-206.1(h); 92 Ill.Admin.Code sec. 1001.444(e)(1).

If there is a violation of the provisions relating to 10 or more unsuccessful attempts to start the vehicle within a 30-day period, five or more unsuccessful attempts to start the vehicle within a 24-hour period, or a single BrAC reading of 0.05 or more, the Secretary of State will extend the suspension or re-suspend the person for 3-months. If the evidence shows multiple violations, each determined violation will require a separate three-month extension of suspension or re-suspension. See 625 ILCS 5/6-206.1(h); 92 Ill.Admin. Code sec. 1001.444(e)(3).

As stated above, multiple violations occurring within one monitoring period will not result in extensions of suspension or re-suspensions totaling more than six months except for violations relating to using a product to prevent accurate readings or preventing the camera from taking a clear and accurate picture (in which case there is no limitation on the number of extensions of suspension). 92 Ill.Admin.Code sec. 1001.444(e)(8).

If there is a violation §6-206.1 relative to completion of a running retest, the Secretary of State will extend the suspension or re-suspend the person for 3-months. See 625 ILCS 5/6-206.1(h); 92 Ill.Admin.Code sec.1001.444(e)(4).

In all of the above cases, the Secretary of State will send a letter requesting an explanation of the specified violation. The Secretary of State must receive a response that

reasonably assures the Secretary of State that no violation occurred within 21 days of the notice date. If the response does not so reasonably assure the Secretary of State that no violation occurred, the above-specified sanctions will be imposed. See 92 Ill.Admin. Code secs. 1001.444(e)(2) – 1001.444(e)(4).

Q. Other MDDP Violations and Sanctions

If the person fails to pay lease or rental fees due the BAIID provider, resulting in removal of the device, the Secretary of State will cancel the monitoring device driving permit. 92 Ill.Admin.Code sec. 1001.444(e)(5).

If the monitor report shows a failure to utilize the BAIID as required or if the person fails to submit a BAIID for a monitor report, the Secretary of State will extend the suspension or re-suspend the person for 3-months. 92 Ill.Admin.Code sec. 1001.444(e)(6).

R. Hearing to Contest Cancellation of MDDP, Extension of the Summary Suspension or Re-suspension

Any MDDP holder whose permit is cancelled or whose summary suspension is extended may request a formal hearing to contest to be filed within 30 days of the effective date of such cancellation, extension or re-suspension. A filing fee in the amount of \$50.00 must be submitted at the time of the request. 625 ILCS 5/2-118, 92 Ill.Admin.Code Sec. 1001.444(f).

Typically, the evidence to be offered by the Secretary of State at the time of the hearing will consist of the BAIID monitor reports, the driver's response to a request for explanation and the Secretary of State's BAIID Division's reason for rejecting the explanation.

A MDDP cancellation, extension of a summary suspension or re-suspension constitutes a proceeding wherein the state seeks to deprive a person's property interest in a permit or further loss of driving privileges and is therefore subject to due process requirements. This begs the question of how due process is satisfied if the state is allowed to terminate this interest based only upon the printed record of a BAIID monitor report. In the author's opinion, once the driver has presented a credible prima facie case that he/she was not consuming alcohol at the time in question or the BrAC result was not accurate based on what was consumed, the state should be required to present foundational evidence that the machine was properly certified, calibrated and otherwise properly working at the time of the incident before being allowed to take any action against the person. See *People v. Orth*, 124 Ill.2d 326, 530 N.E.2d 210 (1988). Also see Justice Clark's comments in *Orth* as to what type of evidence would be sufficient to establish a prima facie case in the case of a petition to rescind a statutory summary suspension.