

**STATUTES AND ADMINISTRATIVE RULES  
GOVERNING BAIID INSTALLATION AND USE  
WHILE ON A RESTRICTED DRIVING PERMIT**

Larry A. Davis  
Davis and LaScola, Ltd.  
191 Waukegan Road  
Ste. 350  
Northfield, IL. 60093  
847-390-8500  
larry@davislascola.com

(c) 2013 Larry A. Davis  
All Rights Reserved  
Reproduction prohibited without permission of the author

## A. Overview

The Secretary of State's office is responsible for the promulgation of rules governing the administration of breath alcohol ignition interlock device (BAIID) requirements for those whose Restricted Driving Permits (RDPs) issue pursuant to 625 ILCS 5/6-205(c)(1) and 625 ILCS 5/6-206(c)(3) are conditioned upon the installation and use of these devices. Rules governing implementation of the BAIID program are at 92 Ill.Admin.Code secs. 1001.441 – 1001.443. Note that the rules governing the use of the BAIID are separate and distinct from the rules governing the Monitored Device Driving Program (MDDP) see 92 Ill.Admin.Code sec. 1001.444.

RDP petitioners who are required to have a BAIID device installed include those:

1. whose license has been revoked or suspended due to two or more convictions of violating 625 ILCS 5/11-501 (DUIs), a similar provision of a local ordinance, a similar out-of-state offense, or reckless homicide (or similar out-of-state offense) when the use of alcohol or drugs or any combination thereof was an element of the offense or any combination of these offenses, arising out of separate occurrences;

2. whose license has been revoked or suspended two or more times within a ten-year period due to a conviction of violating 625 ILCS 5/11-501, a similar provision of a local ordinance, a similar out-of-state offense, a statutory summary suspension (625 ILCS 5/11-501.1), a suspension entered as a result of an out-of-state DUI based on refusal to submit to chemical testing (625 ILCS 5/6-203.1), reckless homicide (or similar out-of-state offense) when the use of alcohol or drugs was an element of the offense or any combination thereof;

3. who has been convicted of driving while license is revoked (625 ILCS 5/6-303) if the revocation was based on a conviction of reckless homicide or a similar out-of-state offense where the use of alcohol or other drugs is recited as an element of the offense.

4. whose license has been suspended two or more times pursuant to 625 ILCS 5/6-203.1 (chemical test refusal in another state), 625 ILCS 5/6-205(c)(2), 625 ILCS 5/6-205(c)(3), 625 ILCS 5/6-206(c)(3)(A) and 625 ILCS 5/6-206(c)(3)(B).

A person whose license is revoked due to multiple DUI convictions (see #1 above) is required to install the BAIID on all vehicles he or she owns. 625 ILCS 5/6-205(h). While this provision, by its terms, does not apply if the violation was for a similar out-of-state offense, the Secretary of State, in practice, includes out-of-state offenses in determining BAIID eligibility.

The Secretary of State is authorized to collect a DUI Administration Fund fee in an amount not to exceed \$30 per month for drivers subject to BAIID requirements and currently assesses the fee at the maximum amount. See 625 ILCS 5/6-205(c)(4), 5/6-205(d)(4), 5/6-206(c)(3) and 92 Ill.Admin.Code sec. 1001.441(a)1).

A list of BAIID providers will be sent to the person at the time of issuance of the RDP who is then allowed 14 days from date of issuance of the RDP to have the device installed. During this 14-day period, the person may only drive for the purpose of having

the device installed. Following installation, the BAIID installer must then notify the Secretary of State within 7 days that installation has been completed. Failure to comply will result in a cancellation of the RDP. 92 Ill.Admin.Code sec. 1001.441(g).

## **B. Driving With the BAIID**

A person subject to BAIID requirements must: 1) only operate vehicles with an installed, authorized BAIID device; 2) take the vehicle to the BAIID provider within the first 30 days of installation for an initial monitor report and, thereafter, no longer than every 60 days for the purpose of calibration and preparation of a monitor report which is sent to the Secretary of State by the installer; 3) take the vehicle to the provider or send the appropriate portion of the device to the provider within 5 working days after any service or inspection notification; 4) maintain a journal of events (for each vehicle if multiple vehicles are used) of any unsuccessful vehicle starts, running retests or any other problems, recording the name of the driver at the time of the event; and 5) not remove or de-install the device without previous notice to the Secretary of State as well as surrender the RDP. 92 Ill.Admin.Code sec 1001.441(h).

## **C. BAIID Violations**

Violations include: 1) 10 or more unsuccessful attempts to start the vehicle after the initial 30-day monitoring period; 2) a failure to successfully complete a running retest after the initial 30-day monitoring period; 3) a BrAC of .05 or more or a pattern of BrAC readings consistent with the use of alcohol; 4) a report is received indicating that the driver was stopped by the police for an alcohol/drug related offense, failure to successfully complete a running retest, or a police report indicating the use of alcohol and/or drugs; or 5) a monitoring report or report by the BAIID provider is received showing any tampering with or unauthorized circumvention of the BAIID device.

During the first 30 days of monitoring, 10 or more unsuccessful attempts to start the vehicle, or failure to successfully complete a rolling retest will not be considered a violation and the driver will only be sent a warning letter. 92 Ill.Admin.Code sec. 1001.441(i).

## **D. Notice of Violation to the Driver**

Upon receipt of a potential violation, the person will be sent a request for explanation by the Secretary of State who is then required to send a written response within 21 days of the date of the letter. If the response satisfies the Secretary of State that no violation occurred then no further action is taken. With the exception of: 1) alleged violations involving tampering or unauthorized circumvention or; 2) a person who was classified as High Risk-Dependent (and is therefore required to remain abstinent) and who registered a BrAC or .05 or more or whose readings show a BrAC pattern consistent with alcohol consumption which will result in cancellation of the permit, the failure to provide an acceptable response will be made part of the person's record of performance. 92 Ill.Admin.Code secs. 1001.441(i)-1001.441(j).

If a review of the images at the time of the violation show that the BAIID camera was prevented from taking clear and accurate photos of the driver blowing into the BAIID

mouthpiece then any explanation will be automatically rejected and the sanction for that particular violation as discussed below will be entered. 92 Ill.Admin.Code sec. 1001.441(i)7).

### **E. Sanctions for Violations**

The possible sanctions for a BAIID violation range from rejection of the driver's explanation and recording it as part of the person's record of performance may then be addressed at any future hearing, including a hearing seeking renewal/extension of a RDP, reinstatement or cancellation of the RDP.

Generally, the only sanction is that a violation will be made part of the record of performance to be used at future hearings for driving relief. However, more serious violations will result in a cancellation of the RDP. Such violations include: 1) a monitor report which show a BrAC of .05 or more or readings show a BrAC pattern consistent with alcohol consumption (only applicable) in the case of a High Risk (Dependent) driver who is required to maintain abstinence; 2) a monitor report or report from the BAIID provider indicating any tampering with or unauthorized circumvention of the BAIID device; 3) a law enforcement report showing operation of a vehicle without a BAIID device as required by the RDP; 4) a report from the BAIID provider indicating that the device has been removed due to non-payment of lease/rental fees or is no longer being used – unless the driver has previously notified and has surrendered the RDP to the Secretary of State; 5) a failure to submit the BAIID device for preparation of a monitor report in a timely manner; or 6) a law enforcement report indicating a DUI arrest. 92 Ill.Admin.Code sec. 1001.441(j).

If the person has been fully reinstated after which a violation is reported to the Secretary of State, the person's driving privileges may be cancelled. 92 Ill.Admin.Code sec. 1001.441(j)5).

A RDP, which has been cancelled as a result of a BAIID violation, may not be granted a hearing for further driving relief for a period of 1-year from the date of cancellation except for the purpose of a hearing to contest the cancellation. 92 Ill.Admin.Code Sec. 1001.441(l).

As noted, violations of the BAIID program while on a RDP may negatively affect a future application for further relief, particularly reinstatement. See *McDougall v. White*, 355 Ill.App.3d 483, 823 N.E.2d 589, 291 Ill Dec. 297 (4<sup>th</sup> D. 2005). All RDP BAIID violations (except those resulting in a cancellation of the RDP) will be sent to the Department of Administrative Hearings for consideration at the time of a formal hearing for reinstatement.

Where a reasonable explanation for a violation is not provided as determined by the Secretary of State, it is prudent to amend the request from one seeking only reinstatement to one seeking relief in the alternative, i.e. another RDP or reinstatement. This will prevent an all or nothing situation (i.e. seeking reinstatement only) that could result in the denial of any further relief.

### **F. Contesting Orders of Cancellation**

If an order of cancellation is entered, a request for a hearing to contest the cancellation may be filed. The request for hearing must be filed with the Secretary of State within 60 days of the effective date of the cancellation together with a fee in the amount of \$50.00. The only exception to the right to a hearing to challenge a cancellation is where the driver is classified as High Risk (Dependent) and therefor required to abstain and has admitted (in a response to a request for explanation for the BAIID violation) to consuming alcohol. 625 ILCS 5/2-118, 92 Ill.Admin.Code sec. 1001.441(k).

Cancellation hearings are conducted as formal hearings. Typically, the only evidence to be offered by the Secretary of State will consist of the monitor reports, the response to a request for explanation and the Secretary of State's BAIID Division's reason for rejecting the explanation.

## **E. Exemptions**

### *1. Employment*

If the RDP is issued for employment purposes, the BAIID requirement is waived if the vehicle is owned or leased by the employer and is used solely for employment purposes. The term 'employer' does not include an entity owned or controlled in whole or in part by the person or any member of the person's immediate family, unless the entity is a corporation of which the person or the person's immediate family own 5% or less of the outstanding shares. Note that 'immediate family' includes spouse, children, children's spouses, parents, spouses parents, siblings, siblings' spouses and spouse's siblings.

The exemption also does not apply where the employer's vehicle is assigned exclusively to the person and is used solely for commuting to and from employment.

See 625 ILCS 5/6-205((d)(5); 625 ILCS 5/6-206((3)(D); and 92 Ill.Admin.Code sec. 1001.441(q).

### *2. Medical*

The Secretary of State may, in its discretion, make a medical or physical BAIID modification or waiver. 92 Ill.Admin.Code sec. 1001.441(p).

## **G. Due Process Considerations**

Counsel should be mindful that it is difficult, if not impossible, to contest the print out from a BAIID machine. However, a cancellation hearing, which seeks to terminate the protected property interest in a permit, is 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 upon the printed record of a BAIID monitor report. In the author's opinion, once the person has presented a credible prima facie case that he/she was not consuming alcohol at the time in question, the state should be required to present foundational

evidence that the machine was certified, calibrated and otherwise properly working at the time of the incident before being allowed to cancel the RDP.

(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.)

---