

Operator mistakes blamed in Breathalyzer tests

BOSTON -- Operator error, and not machine malfunction, is responsible for the small percentage of "invalid" Breathalyzer tests among the 39,000 tests reviewed, the state Executive Office of Public Safety and Security said Tuesday.

The Massachusetts Bar Association, however, "strongly believes" an independent investigator should do a broad review of the Breathalyzer tests now that their accuracy has been questioned. "A number of questions remain and the public has a right to transparency that only an independent investigator can provide," said MBA Chief Legal Counsel Martin Healy. "The constitutional rights of our citizens are at stake as well as the opportunity for them to have a fair and equitable trial."

In a statement Tuesday afternoon, the Executive Office of Public Safety and Security said it found no evidence that Breathalyzer machines used by police across the state have malfunctioned.

"The review identified a small percentage of breath-test results that, due to operator error, were found to be invalid under Massachusetts regulations, which are more stringent than those set by the manufacturer. The invalid calibration test results did not stem from a malfunction with the breath-test instruments themselves," the statement reads.

Massachusetts regulations require instrument operators to validate the tests with a calibration range between .074 and .086.

This is more stringent than the setting assigned by the manufacturer of the Drager 9510, which is the breath-test instrument used by Massachusetts law enforcement.

The review by the Executive Office of Public Safety and Security found that in fewer than 150 cases, breath-test personnel should have deemed the test to be invalid. Values were found to be outside the acceptable tolerance set by Massachusetts regulations, even though they were within the manufacturer's calibration range, the state said.

"Motor vehicle operators and the law enforcement community must have faith that breath tests are accurate and reliable, and we have taken the steps necessary to make sure that is the case," office Secretary Daniel Bennett said in a statement.

But Lowell defense attorney Greg Oberhauser, a local expert in the Breathalyzer machine, described blaming operator error as "a quick fix" that doesn't solve many of the concerns about the machines. "They were trying to put out the fire, but they only poured more gasoline on it," he said.

The review also determined that when the state transitioned to the current breath-test model in 2011, it failed to ask Drager to customize its instruments to comply automatically with Massachusetts regulations. This required breath-test instrument operators to complete an additional manual step to validate results using the Massachusetts standards.

At Bennett's request, the manufacturer has agreed to update the instruments with a software patch so that the margin of error coded into the instrument is identical to that required under Massachusetts regulations, reducing the potential for operator error. In the meantime, all breath-test operators will be instructed again of proper breath-test calibration standards until the software changes take effect.

The Executive Office of Public Safety and Security is working with district attorneys to identify each individual whose breath test was affected by operator error. The state will make sure operator errors did not unfairly affect any drunken-driving cases, according to the press release. As a result of questions surrounding the test results, most district attorneys, including Middlesex District Attorney Marian Ryan, suspended use of Breathalyzer test results in court cases. After the Breathalyzer test results were released Tuesday, Ryan issued a statement, "We are awaiting further information from the Massachusetts Executive Office of Public Safety and Security and will continue to review cases as we move forward."

The Massachusetts Bar Association said incorrect calibration by police officers is "most troubling and insufficient" when questionable Breathalyzer machines are still being used as evidence in court and as a tool to persuade a defendant to plead guilty.

The MBA wants an independent investigator -- who cannot be perceived as having any stake in the outcome of the investigation or ties to the state's law-enforcement community -- to be appointed immediately by the attorney general.

But Oberhauser suggested a federal investigation is needed since the Drager 9511 is used in other states.

Fitchburg attorney Steve Panagiotes, who specializes in drunken-driving cases, challenged state officials to make public how they reviewed 39,000 drunken-driving cases. He claims state officials have been "hiding the truth" about the Breathalyzer machines and how operators are trained.

By Lisa Redmond