

LEGISLATIVE BILL 568

Approved by the Governor April 16, 1982

Introduced by Haberman, 44; Hoagland, 6

AN ACT relating to criminal offenses; to amend sections 28-106, 29-2219, 29-2260, 39-669.08, 39-669.16, and 39-669.34, Reissue Revised Statutes of Nebraska, 1943, and section 39-669.07, Revised Statutes Supplement, 1980; to create a new class of misdemeanor; to limit pretrial diversion; to change provisions relating to driving under the influence of alcoholic liquor or drugs; to change provisions relating to submission to chemical tests; to restrict the issuance of employment driving permits; to change certain probation provisions; to provide for penalties; to provide severability; and to repeal the original sections, and also sections 39-669.31 and 39-669.32, Reissue Revised Statutes of Nebraska, 1943.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 28-106, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

28-106. (1) For purposes of this code and any statute passed by the Legislature after the date of passage of this code, misdemeanors are divided into six seven classes which are distinguished from one another by the following penalties which are authorized upon conviction:

- Class I misdemeanor..... Maximum-not more than one year imprisonment, or one thousand dollars fine, or both
Minimum-none
- Class II misdemeanor..... Maximum-six months imprisonment, or one thousand dollars fine, or both
Minimum-none
- Class III misdemeanor..... Maximum-three months imprisonment, or five hundred dollars fine, or both
Minimum-none
- Class IIIA misdemeanor..... Maximum-seven days imprisonment, five hundred

	dollars fine, or both
	Minimum-none
Class IV misdemeanor.....	Maximum-no imprisonment, five hundred dollars fine
	Minimum-one hundred dollars
Class V misdemeanor.....	Maximum-no imprisonment, one hundred dollars fine
	Minimum-none
<u>Class W misdemeanor....</u>	<u>Driving while intoxicated -</u>
	<u>implied consent refusal</u>
	<u>First conviction</u>
	<u>mandatory seven days</u>
	<u>imprisonment and two hundred</u>
	<u>dollars fine</u>
	<u>Second conviction</u>
	<u>mandatory thirty days</u>
	<u>imprisonment and five hundred</u>
	<u>dollars fine</u>
	<u>Third or subsequent</u>
	<u>conviction</u>
	<u>Maximum - six months</u>
	<u>imprisonment and five hundred</u>
	<u>dollars fine</u>
	<u>Minimum-three months</u>
	<u>imprisonment and five hundred</u>
	<u>dollars fine</u>

(2) Sentences of imprisonment in misdemeanor cases shall be served in the county jail, except that in the following circumstances the court may, in its discretion, order that such sentences be served in institutions under the jurisdiction of the Department of Correctional Services:

(a) If the sentence is for a term of one year upon conviction of a Class I misdemeanor, or for a combined term of one year or more in the event of conviction of more than one misdemeanor offense;

(b) If the sentence is to be served concurrently with a term for conviction of a felony; or

(c) If the Department of Correctional Services has certified as provided in section 28-105 as to the availability of facilities and programs for short-term prisoners and the sentence is for a term or combined terms of six months or more.

Sec. 2. That section 29-2219, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

29-2219. (1) A municipal court may suspend sentence, place a defendant on probation and determine the conditions and period of probation, which period shall not exceed, in the case of any defendant convicted of an offense less than a felony, two years for the first offense and five years for a second or subsequent offense.

(2) Except as provided in subsection (5) of this section, the conditions of probation, as referred to in subsection (1) of this section, shall be such as the court shall in its discretion prescribe. Such probationary conditions may include, among other conditions, any or several of the following: That the probationer shall: (a) Indulge in no unlawful, disorderly, injurious, or vicious habits; (b) avoid places or persons of disreputable or harmful character; (c) report to the probation officer as directed by the court or probation officer; (d) permit the probation officer to visit him or her in a reasonable manner at his or her place of abode or elsewhere; (e) answer any reasonable inquiries on the part of the probation officer concerning his or her conduct or condition; (f) work faithfully at suitable employment; (g) remain or reside within a specified place or locality; (h) abstain from the use of alcoholic beverages if the use of the same contributed to his or her offense; (i) pay in one or several sums a fine imposed at the time of being placed on probation; (j) make reparation or restitution to the aggrieved parties for actual damage or losses caused by his or her offense; and (k) support his or her wife spouse or children; and (l) he confined periodically in the city or county jail or return to custody after specified hours, not to exceed thirty days.

(3) The court or a magistrate thereof may (a) modify the conditions and the period of probation referred to in subsections (1) and (2) of this section, (b) in case of the violation of such probationary conditions, upon motion and showing by affidavit of the prosecuting attorney, issue a warrant for the arrest of the probationer, (c) at any time discharge the probationer, and (d) in case of the violation of such probationary conditions, impose any penalty which it might have imposed before placing the defendant on probation; Provided, if committed, he or she be committed to an institution authorized by law to receive commitments.

(4) If a probationer without permission disappears, or departs from the jurisdiction of the court, the time during which he or she keeps his or her whereabouts hidden or remains away from the jurisdiction

of the court may be added to the original period of probation provided for by subsection (1) of this section.

(5) In all cases in which the offender is guilty of assault or battery and the victim is the offender's spouse, a condition of probation shall be mandatory counseling as provided by sections 42-901 to 42-927.

Sec. 3. That section 29-2260, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

29-2260. (1) Whenever a person is adjudicated delinquent or in need of special supervision as defined in section 43-201, his or her disposition shall be governed by the provisions of Chapter 43, article 2.

(2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:

(a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;

(b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or

(c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

(3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) The crime neither caused nor threatened serious harm;

(b) The offender did not contemplate that his or her crime would cause or threaten serious harm;

(c) The offender acted under strong provocation;

(d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish

a defense;

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

(4) When an offender who has been convicted of a crime is not sentenced to imprisonment, the court may sentence him or her to probation.

Sec. 4. No person charged with a violation of section 39-669.07 or 39-669.08 shall be eligible for pretrial diversion under a program established pursuant to Chapter 29, article 36.

Sec. 5. That section 39-669.07, Revised Statutes Supplement, 1980, be amended to read as follows:

39-669.07. It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or when that person has ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine. Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or while having ten-hundredths of one per cent by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine shall be deemed guilty of a crime and, upon conviction thereof, shall be

punished as follows:

(1) If such conviction-is-for-a-first-offense person (a) has not had a previous conviction under this section since the effective date of this act, (b) was not convicted under this section prior to the effective date of this act, or (c) has not been convicted under a city or village ordinance enacted pursuant to this section either prior or subsequent to the effective date of this act, such person shall be guilty of a Class IIIA W misdemeanor and the court may shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of six months from the date of his or her final-discharge-from the county-jail, or the date of payment--or--satisfaction of such fine, whichever-is--the--later conviction, and shall order that the operator's license of such person be revoked for a like period. ;-Provided, in the event that the court shall suspend the proceedings--and--place--such person on probation as provided by law; the court as--one of the conditions of probation shall order If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle for any purpose for a period of thirty sixty days from the date of the order; ; except as provided for in section 39-669.32;-(2)-if--such conviction-is-for-a-second-offense-such-person--shall-be guilty-of-a-Class-III

(2) If such person (a) has had one previous conviction under this section since the effective date of this act, (b) has been convicted once under this section as it existed prior to the effective date of this act, or (c) has been convicted once under a city or village ordinance enacted pursuant to this section either prior or subsequent to the effective date of this act, such person shall be guilty of a Class W misdemeanor and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of one year from the date of his or her final-discharge-from-the-county-jail, or the date--of payment-or-satisfaction-of-such-fine,--whichever-is--the inter conviction, and shall order that the operator's license of such person be revoked for a like period.

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of six months from the date of the order and such order of probation shall include as one of its conditions

~~confinement in the city or county jail for forty-eight hours; and 7 and if the motor vehicle which such person was operating or was actually physically controlling, while under the influence of alcoholic liquor or any drug, is registered in the name of such person, the motor vehicle shall be impounded in a reputable garage by the court for a period of not less than two months nor greater than one year at the expense and risk of the owner thereof; Provided, any motor vehicle so impounded shall be released to the holder of a bona fide lien thereon, executed prior to such impounding, when possession of such motor vehicle is requested in writing by such lienholder for the purpose of foreclosing and satisfying his or her lien thereon; and (3) if such conviction is for a third offense, or subsequent offense thereafter, such person shall be guilty of a Class IV felony~~

(3) If such person (a) has had two or more convictions under this section since the effective date of this act, (b) has been convicted two or more times under this section as it existed prior to the effective date of this act, (c) has been convicted two or more times under a city or village ordinance enacted pursuant to this section either prior or subsequent to the effective date of this act, or (d) has been convicted as described in subdivisions (3) (a) to (3) (c) of this section a total of two or more times, such person shall be guilty of a Class W misdemeanor and the court shall, as part of the judgment of conviction, order such person not to never again drive any motor vehicle for a period of one year from the date of his or her final discharge from the Nebraska Penal and Correctional Complex in the State of Nebraska for any purpose from the date of his or her conviction, and shall order that the operator's license of such person be permanently revoked, for a like period. Such penalties as provided for in subdivisions (2) and (3) of this section shall be applicable regardless of whether the prior conviction or convictions was or were based upon violation of this section or upon violation of a city or village ordinance enacted pursuant to this section, or both.

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of one year, and such order of probation shall include as one of its conditions confinement in the city or county jail for seven days.

For each conviction under this section, the court shall as part of the judgment of conviction make a finding on the record as to the number of the defendant's prior convictions under this section prior or subsequent to the effective date of this act, and the defendant's prior convictions under a city or village ordinance enacted pursuant to this section either prior or subsequent to the effective date of this act. The defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.

Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been permanently revoked pursuant to this section shall be guilty of a Class IV felony.

Any city or village may enact ordinances in conformance with this section and section 39-669.08. Upon conviction of any person of a violation of such a city or village ordinance, the provisions of this section with respect to the license of such person to operate a motor vehicle shall be applicable the same as though it were a violation of this section.

At the discretion of the court, any person convicted of violating this section, or violating any city or village ordinance adopted in conformance with this section, may be required to attend, at the convicted person's expense, an alcoholism treatment program as a term of probation. ~~Such--program--shall--be--certified pursuant to sections 39-669.31 and 39-669.32.~~

Sec. 6. That section 39-669.08, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

39-669.08. (1) Any person who operates or has in his or her actual physical control a motor vehicle upon a public highway in this state shall be deemed to have given his or her consent to submit to a chemical test of his or her blood, urine, or breath, for the purpose of determining the amount of alcoholic content in his or her body fluid.

(2) Any law enforcement officer who has been duly authorized to make arrests for violations of traffic laws of this state or of ordinances of any city or village may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor

vehicle while under the influence of alcoholic liquor to submit to a chemical test of his or her blood, breath, or urine for the purpose of determining the alcoholic content of his or her body fluid, when the officer has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor.

(3) Any law enforcement officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city or village may require any person who operates or has in his or her actual physical control a motor vehicle upon a public highway in this state to submit to a preliminary test of his or her breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his or her body, or has committed a moving traffic violation, or has been involved in a traffic accident. Any person who refuses to submit to such preliminary breath test or whose preliminary breath test results indicate an alcohol content of ten-hundredths of one per cent or more shall be placed under arrest. Any person who refuses to submit to such preliminary breath test shall be guilty of a Class V misdemeanor, ~~and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars.~~

(4) Any person arrested as provided in this section may, upon the direction of a law enforcement officer, be required to submit to a chemical test of his or her blood, breath, or urine for a determination of the alcohol content. Any person who refuses to submit to a chemical blood, breath, or urine test required pursuant to this section shall be ~~guilty of a crime and, upon conviction thereof, shall be punished in the same manner as he would be if convicted for a violation of section 39-669.07 and shall be~~ subject to the administrative revocation procedures of the Director of Motor Vehicles provided in sections 39-669.07, 39-669.08, 39-669.09, and 39-669.14 to 39-669.19; and shall be guilty of a crime and, upon conviction thereof, shall be punished as follows:

(a) If such person (i) has not had a previous conviction under this subsection since the effective date of this act, (ii) was not convicted under this subsection prior to the effective date of this act, or (iii) has not been convicted under a city or village ordinance enacted pursuant to this subsection as authorized by section 39-669.07, either prior or subsequent to the effective date of this act, such person shall be guilty of a Class

W misdemeanor, and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of six months from the date of his or her conviction, and shall order that the operator's license of such person be revoked for a like period.

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of sixty days;

(b) If such person (i) has had one previous conviction under this subsection since the effective date of this act, (ii) has been convicted once under this subsection as it existed prior to the effective date of this act, or (iii) has been convicted once under a city or village ordinance enacted pursuant to this subsection as authorized by section 39-669.07 either prior or subsequent to the effective date of this act, such person shall be guilty of a Class W misdemeanor and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of one year from the date of his or her conviction, and shall order that the operator's license of such person be revoked for a like period.

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of six months from the date of the order and such order of probation shall include as one of its conditions confinement in the city or county jail for forty-eight hours; and

(c) If such person (i) has had two or more convictions under this subsection since the effective date of this act, (ii) has been convicted two or more times under this subsection as it existed prior to the effective date of this act, (iii) has been convicted two or more times under a city or village ordinance enacted pursuant to this subsection as authorized by section 39-669.07 either prior or subsequent to the effective date of this act, or (iv) has been convicted as described in subdivisions (c)(i) to (c)(iii) of this subsection a total of two or more times, such person shall be guilty of a Class W misdemeanor and the court shall, as part of the judgment of conviction, order such person to never

again drive any motor vehicle in the State of Nebraska for any purpose from the date of his or her conviction and shall order that the operator's license of such person be permanently revoked.

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of one year, and such order of probation shall include as one of its conditions confinement in the city or county jail for seven days.

For each conviction under this subsection, the court shall, as part of the judgment of conviction, make a finding on the record as to the number of the defendant's prior convictions under this subsection prior or subsequent to the effective date of this act, and the defendant's prior convictions under a city or village ordinance enacted pursuant to this subsection or section 39-669.07 either prior or subsequent to the effective date of this act. The defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.

Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been permanently revoked pursuant to this section shall be guilty of a Class IV felony.

Any city or village may enact ordinances in conformance with this subsection. Upon conviction of any person of a violation of such city or village ordinance, the provisions of this subsection with respect to the license of such person to operate a motor vehicle shall be applicable the same as though it were a violation of this subsection.

(5) Any person who is required to submit to a preliminary breath test, or to a chemical blood, breath, or urine test pursuant to this section shall be advised of the consequences of refusing to submit to such test.

Sec. 7. That section 39-669.16, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

39-669.16. Upon receipt of the officer's report of such refusal, the Director of Motor Vehicles shall notify such person of a date for hearing before him or

her as to the reasonableness of the refusal to submit to the test. The notice of hearing shall be served by the director by mailing it to such person by certified or registered mail to the last-known residence address of such person, or, if such address is unknown, to the last-known business address of such person at least ten days before the hearing. After granting the person an opportunity to be heard on such issue, if it is not shown to the director that such refusal to submit to such chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license or nonresident operating privilege of such person for a period of ~~six months~~ one year from the date of such order. For the purpose of such hearing, the director may appoint an examiner who shall have power to preside at such hearing, to administer oaths, examine witnesses and take testimony, and thereafter report the same to the director.

Sec. 8. That section 39-669.34, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

39-669.34. (1) Individuals whose permits to operate a motor vehicle are revoked under the provisions of sections 39-669-46~~7~~, 39-669.27~~7~~ and 39-669.30 shall be eligible to operate a motor vehicle in this state under an employment driving permit, valid for the period of revocation.

(2) Any person whose motor vehicle operator's license or privilege to operate a motor vehicle in this state has been suspended or revoked pursuant to any law of this state, except sections 39-669-46~~7~~, 39-669.27~~7~~ and 39-669.30, shall not be eligible to receive an employment driving permit during the period of such suspension or revocation.

(3) An individual who is issued an employment driving permit may operate a motor vehicle (a) from his or her residence to his or her place of employment and return, and (b) during the normal course of employment, if the use of a motor vehicle is necessary in the course of such employment. Such permit shall indicate for which purposes the permit may be used.

(4) The operation of a motor vehicle by the holder of an employment driving permit, except as provided in this section, shall be unlawful. Any person who violates the provisions of this section shall be guilty of a Class IV misdemeanor.

Sec. 9. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 10. That original sections 28-106, 29-2219, 29-2260, 39-669.08, 39-669.16, and 39-669.34, Reissue Revised Statutes of Nebraska, 1943, and section 39-669.07, Revised Statutes Supplement, 1980, and also sections 39-669.31 and 39-669.32, Reissue Revised Statutes of Nebraska, 1943, are repealed.