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Franklin County exempt from state patrol's switch of OVI-testing machines

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A controversial alcohol breath-testing machine that has faced legal challenges will become the standard for State Highway Patrol troopers — just not in Franklin County.

The patrol has been using both the Intoxilyzer 8000 and the DataMaster at posts across the state, but patrol district and section commanders were ordered in an Aug. 10 memo to begin using the Intoxilyzer “as the primary breath-testing instrument” at every patrol post except in Franklin County.

The reasons given by the patrol for the switch: age and service problems with the DataMaster. In an April memo, Maj. Joshua Swindell wrote that replacement parts for the DataMaster “are no longer available.”

The Intoxilyzer has been the subject of several legal challenges, with defense attorneys questioning the reliability of the machines the Ohio Department of Health bought for \$6.4 million in 2008.

Defense attorneys have long argued that the Intoxilyzer could be influenced by several factors, including temperature, which could produce false results. Until 2014, though, defendants charged with operating a vehicle while intoxicated could not challenge the accuracy and reliability of machines the state certifies.

That year, the Ohio Supreme Court ruled that defendants or their attorneys could obtain data from the Ohio Department of Health, which certifies the machines, about previous tests involving the same machine.

Columbus City Attorney Zach Klein said he worked with Gov. John Kasich to get an exemption for Franklin County. The city prosecutes about 6,000 OVI

cases a year, with nearly half of those coming from the patrol, and switching to the Intoxilyzer likely would have bogged down the county court system.

“He clearly recognized the concern of the Intoxilyzer 8000 and what it could mean to a large jurisdiction like Franklin County and a city like Columbus, where we do thousands of cases with a sophisticated defense bar,” Klein said.

Across the rest of the state, though, patrol posts that have an Intoxilyzer must begin using it immediately, according to the Aug. 10 memo. For posts where the Ohio Department of Health has not installed an Intoxilyzer, troopers can continue to use the DataMaster until it can be replaced.

“The decision to transition to the I-8000 was based upon machine availability,” Lt. Robert Sellers, a patrol spokesman, said in an emailed statement. “National Patent, the manufacturer of the DataMaster, no longer manufactures the devices.”

John Fusco, owner of National Patent, refuted the patrol’s contention about service problems with the DataMaster units.

“I don’t believe there has even been the first instance of us not being able to fix one,” he said. “There are plenty of spare parts around. There are a few components that, if in fact we should run out of, they will be a problem.”

Fusco added that the company won’t start running out of parts for another three to four years.

“They may be being penny-wise and pound-foolish in that they’re using a machine (the Intoxilyzer 8000) they’ve already paid for, even if it isn’t so reliable,” said Tim Huey, a Columbus defense attorney and president of the National DUI Defense Lawyers Association.

Huey said more litigation involving the Intoxilyzer is likely as more Ohio OVI cases are prosecuted using them.

In the memo to district commanders, Swindell wrote that the Intoxilyzer also has faced challenges of the health department’s ability to provide expert witnesses to testify to its reliability.

“The Ohio Department of Health has approved the I-8000 instrument as scientifically sound for use in Ohio,” J.C. Benton, department spokesman, said in an email.

Klein credited Kasich with recognizing the problems that could have emerged with prosecuting OVI cases in Franklin County. In exchange for the exemption, Klein said Franklin County will be the first to adopt the next wave of alcohol breath-testing machines and any potential legal challenges that come with them.

“He stuck his neck out and was aggressive in helping us in the short term,” Klein said. “The reality is new machines will always yield litigation.”

While Columbus will continue to prosecute cases using only the DataMaster, other cities across the state will see more cases using the Intoxilyzer.

“The city of Cleveland has prosecuted OVI cases where the Intoxilyzer 8000 was used, and we have had convictions and are aware that the Ohio Highway Patrol has been and will be utilizing them as well,” Barbara Langhenry, Cleveland law director, said in an email.

Asked if Kasich is concerned about reliability of the Intoxilyzer as it becomes the standard at patrol posts across the state, spokesman Jon Keeling said in an email, “I understand City Attorney Klein mentioned this issue briefly at the end of his meeting with the governor. (The departments of Public Safety and Health) staff have followed up with Mr. Klein’s office.”

It will be months before the successor to the Intoxilyzer is identified, because the Ohio Department of Health is in the “very early stages” of rule-making that will help identify that machine, Benton said.

“By pooling the ... DataMaster resources currently available, we can provide an inventory of operational machines where needed,” Sellers said. “Our department is willing to help any jurisdiction that requests support.”

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