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## Law and Justice Interim Committee

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### 62nd Montana Legislature

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DAVID NISS, Staff Attorney  
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TO: Law and Justice Interim Committee

FROM: David Niss, Staff Attorney

RE: Department of Justice Rulemaking Notice 23-4-228

DATE: May 29, 2012

The Montana Department of Justice (DOJ) filed a rulemaking notice with the Secretary of State for publication in the April 12, 2012, edition of the Montana Administrative Register for the purpose of adopting permanent rules relating to drug and alcohol testing for the purposes of DUI arrests. These rules would, among other things, replace the temporary emergency rules previously adopted by the DOJ as a result of Judge Langton's suppression of breath test results in State v. Selzler, DA-110576, because the breath test machine had not been properly certified. In addition to proposing a permanent version of ARM 23.4.217, the rulemaking notice also proposed amendments to 10 other rules.

Under the proposed language of ARM. 23.4.212, breath analysis instrumentation or preliminary alcohol screening test devices must be approved by the DOJ. Committee staff suggested to the DOJ that a rule be adopted reflecting which instrumentation or devices are actually approved and that without such a rule, it is likely that screenings based upon the use of approved machines could again be successfully challenged. Staff also suggested that statements of reasonable necessity could be improved in order to strengthen the legality of rules.

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