

Substitute for HOUSE BILL No. 2289

By Committee on Judiciary

2-2

Proposed Amendments
Senator King
Senate Judiciary
March 10, 2016
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Office of Revisor of Statutes

1 AN ACT concerning driving; relating to driving under the influence of
2 alcohol or drugs; test refusal or failure; suspension of license;
3 administrative hearing; procedure; amending K.S.A. 2015 Supp. 8-
4 1002 and 8-1020 and repealing the existing sections.

5
6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. K.S.A. 2015 Supp. 8-1002 is hereby amended to read as
8 follows: 8-1002. (a) Whenever a test is requested pursuant to this act and
9 results in either a test failure or test refusal, a law enforcement officer's
10 certification shall be prepared. If the person had been driving a
11 commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments
12 thereto, a separate certification pursuant to K.S.A. 8-2,145, and
13 amendments thereto, shall be prepared in addition to any certification
14 required by this section. The certification required by this section shall be
15 signed by one or more officers to certify:

16 (1) With regard to a test refusal, that: (A) There existed reasonable
17 grounds to believe the person was operating or attempting to operate a
18 vehicle while under the influence of alcohol or drugs, or both, or to believe
19 that the person had been driving a commercial motor vehicle, as defined in
20 K.S.A. 8-2,128, and amendments thereto, or is under 21 years of age while
21 having alcohol or other drugs in such person's system; (B) the person had
22 been placed under arrest, was in custody or had been involved in a vehicle
23 accident or collision; (C) a law enforcement officer had presented the
24 person with the oral and written notice required by K.S.A. 8-1001, and
25 amendments thereto; ~~and~~ (D) the person refused to submit to and complete
26 a test as requested by a law enforcement officer; *and (E) the test refusal*
27 *occurred pursuant to a lawful encounter by law enforcement. For*
28 *purposes of this section, a lawful encounter is any encounter permissible*
29 *under section 15 of the bill of rights of the constitution of the state of*
30 *Kansas and the fourth amendment to the constitution of the United States*
31 *relating to unreasonable searches and seizures.*

32 (2) With regard to a test failure, that: (A) There existed reasonable
33 grounds to believe the person was operating a vehicle while under the
34 influence of alcohol or drugs, or both, or to believe that the person had
35 been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128,
36 and amendments thereto, or is under 21 years of age while having alcohol

1 or other drugs in such person's system; (B) the person had been placed
2 under arrest, was in custody or had been involved in a vehicle accident or
3 collision; (C) a law enforcement officer had presented the person with the
4 oral and written notice required by K.S.A. 8-1001, and amendments
5 thereto; ~~and~~ (D) the result of the test showed that the person had an alcohol
6 concentration of .08 or greater in such person's blood or breath; *and (E)*
7 *the test failure occurred pursuant to a lawful encounter by law*
8 *enforcement. For purposes of this section, a lawful encounter is any*
9 *encounter permissible under section 15 of the bill of rights of the*
10 *constitution of the state of Kansas and the fourth amendment to the*
11 *constitution of the United States relating to unreasonable searches and*
12 *seizures.*

13 (3) With regard to failure of a breath test, in addition to those matters
14 required to be certified under subsection (a)(2), that: (A) The testing
15 equipment used was certified by the Kansas department of health and
16 environment; (B) the testing procedures used were in accordance with the
17 requirements set out by the Kansas department of health and environment;
18 and (C) the person who operated the testing equipment was certified by the
19 Kansas department of health and environment to operate such equipment.

20 (b) For purposes of this section, certification shall be complete upon
21 signing, and no additional acts of oath, affirmation, acknowledgment or
22 proof of execution shall be required. The signed certification or a copy or
23 photostatic reproduction thereof shall be admissible in evidence in all
24 proceedings brought pursuant to this act, and receipt of any such
25 certification, copy or reproduction shall accord the department authority to
26 proceed as set forth herein. Any person who signs a certification submitted
27 to the division knowing it contains a false statement is guilty of a class B
28 nonperson misdemeanor.

29 (c) When the officer directing administration of the testing
30 determines that a person has refused a test and the criteria of subsection (a)
31 (1) have been met or determines that a person has failed a test and the
32 criteria of subsection (a)(2) have been met, the officer shall serve upon the
33 person notice of suspension of driving privileges pursuant to K.S.A. 8-
34 1014, and amendments thereto. If the determination is made while the
35 person is still in custody, service shall be made in person by the officer on
36 behalf of the division of vehicles. In cases where a test failure is
37 established by a subsequent analysis of a breath, blood or urine sample, the
38 officer shall serve notice of such suspension in person or by another
39 designated officer or by mailing the notice to the person at the address
40 provided at the time of the test.

41 (d) In addition to the information required by subsection (a), the law
42 enforcement officer's certification and notice of suspension shall contain
43 the following information: (1) The person's name, driver's license number

1 and current address; (2) the reason and statutory grounds for the
2 suspension; (3) the date notice is being served and a statement that the
3 effective date of the suspension shall be the 30th day after the date of
4 service; (4) the right of the person to request an administrative hearing;
5 and (5) the procedure the person must follow to request an administrative
6 hearing. The law enforcement officer's certification and notice of
7 suspension shall also inform the person that: ~~(1) Constitutional issues are~~
8 ~~not decided at the administrative hearing, but are preserved for the person~~
9 ~~to raise upon filing a petition for review of the hearing as provided in~~
10 ~~subsections (o) and (p); and (2) all correspondence will be mailed to the~~
11 person at the address contained in the law enforcement officer's
12 certification and notice of suspension unless the person notifies the
13 division in writing of a different address or change of address. The address
14 provided will be considered a change of address for purposes of K.S.A. 8-
15 248, and amendments thereto, if the address furnished is different from
16 that on file with the division.

17 (e) If a person refuses a test or if a person is still in custody when it is
18 determined that the person has failed a test, the officer shall take any
19 license in the possession of the person and, if the license is not expired,
20 suspended, revoked or canceled, shall issue a temporary license effective
21 until the 30th day after the date of service set out in the law enforcement
22 officer's certification and notice of suspension. If the test failure is
23 established by a subsequent analysis of a breath or blood sample, the
24 temporary license shall be served together with the copy of the law
25 enforcement officer's certification and notice of suspension. A temporary
26 license issued pursuant to this subsection shall bear the same restrictions
27 and limitations as the license for which it was exchanged. Within seven
28 days after the date of service of a copy of the law enforcement officer's
29 certification and notice of suspension the officer's certification and notice
30 of suspension, along with any licenses taken, shall be forwarded to the
31 division.

32 (f) Upon receipt of the law enforcement officer's certification, the
33 division shall review the certification to determine that it meets the
34 requirements of subsection (a). Upon so determining, the division shall
35 proceed to suspend the person's driving privileges in accordance with the
36 notice of suspension previously served. If the requirements of subsection
37 (a) are not met, the division shall dismiss the administrative proceeding
38 and return any license surrendered by the person.

39 (g) The division shall prepare and distribute forms for use by law
40 enforcement officers in giving the notice required by this section.

41 (h) The provisions of K.S.A. 60-206, and amendments thereto,
42 regarding the computation of time shall be applicable in determining the
43 effective date of suspension set out in subsection (d).

cannot be decided at the administrative hearing,
but may be preserved and raised in a petition for
review of the hearing as provided in K.S.A.
8-1020(o) and (p), and amendments thereto

1 affirming the order of suspension or suspension and restriction of driving
2 privileges, the suspension or suspension and restriction shall begin on the
3 30th day after the effective date of the order of suspension or suspension
4 and restriction. If the person whose privileges are suspended is a
5 nonresident licensee, the license of the person shall be forwarded to the
6 appropriate licensing authority in the person's state of residence if the
7 result at the hearing is adverse to such person or if no timely request for a
8 hearing is received.

9 (n) The representative of the director may issue an order at the close
10 of the hearing or may take the matter under advisement and issue a hearing
11 order at a later date. If the order is made at the close of the hearing, the
12 licensee or the licensee's attorney shall be served with a copy of the order
13 by the representative of the director. If the matter is taken under
14 advisement or if the hearing was by telephone conference call, the licensee
15 and any attorney who appeared at the administrative hearing upon behalf
16 of the licensee each shall be served with a copy of the hearing order by
17 mail. Any law enforcement officer who appeared at the hearing also may
18 be mailed a copy of the hearing order. The effective date of the hearing
19 order shall be the date upon which the hearing order is served, whether
20 served in person or by mail.

21 (o) The licensee may file a petition for review of the hearing order
22 pursuant to K.S.A. 8-259, and amendments thereto. Upon filing a petition
23 for review, the licensee shall serve the secretary of revenue with a copy of
24 the petition and summons. Upon receipt of a copy of the petition for
25 review by the secretary, the temporary license issued pursuant to
26 subsection (b) shall be extended until the decision on the petition for
27 review is final.

28 (p) Such review shall be in accordance with this section and the
29 Kansas judicial review act. To the extent that this section and any other
30 provision of law conflicts, this section shall prevail. The petition for
31 review shall be filed within 14 days after the effective date of the order.
32 Venue of the action for review is the county where the person was arrested
33 or the accident occurred, or, if the hearing was not conducted by telephone
34 conference call, the county where the administrative proceeding was held.
35 The action for review shall be by trial de novo to the court and the
36 evidentiary restrictions of subsection (l) shall not apply to the trial de
37 novo. The court shall take testimony, examine the facts of the case and
38 determine whether the petitioner is entitled to driving privileges or
39 whether the petitioner's driving privileges are subject to suspension or
40 suspension and restriction under the provisions of this act. ~~The court shall~~
41 ~~also determine constitutional issues, including, but not limited to, the~~
42 ~~lawfulness of the law enforcement encounter if raised by the petitioner.~~ If
43 the court finds that the grounds for action by the agency have been met,

Notwithstanding K.S.A. 77-617, and amendments thereto, the court: (1) May also consider and determine any constitutional issue, including, but not limited to, the lawfulness of the law enforcement encounter, even if such issue was not raised before the agency; and (2) shall also consider and determine any constitutional issue, including, but not limited to, the lawfulness of the law enforcement encounter, if such issue is raised by the petitioner during the action for review, even if such issue was not raised before the agency.

1 ~~[including any constitutional issues raised by the petitioner]~~ the court shall
2 affirm the agency action.

3 (q) Upon review, the licensee shall have the burden to show that the
4 decision of the agency should be set aside.

5 (r) Notwithstanding the requirement to issue a temporary license in
6 K.S.A. 8-1002, and amendments thereto, and the requirements to extend
7 the temporary license in this section, any such temporary driving
8 privileges are subject to restriction, suspension, revocation or cancellation
9 as provided in K.S.A. 8-1014, and amendments thereto, or for other cause.

10 (s) Upon motion by a party, or on the court's own motion, the court
11 may enter an order restricting the driving privileges allowed by the
12 temporary license provided for in K.S.A. 8-1002, and amendments thereto,
13 and in this section. The temporary license also shall be subject to
14 restriction, suspension, revocation or cancellation, as set out in K.S.A. 8-
15 1014, and amendments thereto, or for other cause.

16 (t) The facts found by the hearing officer or by the district court upon
17 a petition for review shall be independent of the determination of the same
18 or similar facts in the adjudication of any criminal charges arising out of
19 the same occurrence. The disposition of those criminal charges shall not
20 affect the suspension or suspension and restriction to be imposed under
21 this section.

22 (u) All notices affirming or canceling a suspension under this section,
23 all notices of a hearing held under this section and all issuances of
24 temporary driving privileges pursuant to this section shall be sent by first-
25 class mail and a United States post office certificate of mailing shall be
26 obtained therefor. All notices so mailed shall be deemed received three
27 days after mailing, except that this provision shall not apply to any
28 licensee where such application would result in a manifest injustice.

29 (v) The provisions of K.S.A. 60-206, and amendments thereto,
30 regarding the computation of time shall be applicable in determining the
31 time for requesting an administrative hearing as set out in subsection (a)
32 and to the time for filing a petition for review pursuant to subsection (o)
33 and K.S.A. 8-259, and amendments thereto.

34 Sec. 3. K.S.A. 2015 Supp. 8-1002 and 8-1020 are hereby repealed.

35 Sec. 4. This act shall take effect and be in force from and after its
36 publication in the statute book.