

Substitute for HOUSE BILL No. 2289

By Committee on Judiciary

2-2

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~~ **and** (D) the person refused to submit to and
26 complete a test as requested by a law enforcement officer; ~~and (E) the test~~
27 ~~refusal 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~~ *and* (D) the result of the test showed that the person had an
6 alcohol concentration of .08 or greater in such person's blood or breath;
7 ~~and (E) 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) cannot be decided at the administrative hearing,~~
11 ~~but may be preserved and raised in a petition for review of the hearing~~
12 ~~as provided in K.S.A. 8-1020(o) and (p), and amendments thereto; and~~
13 (2) all correspondence will be mailed to the person at the address
14 contained in the law enforcement officer's certification and notice of
15 suspension unless the person notifies the division in writing of a different
16 address or change of address. The address provided will be considered a
17 change of address for purposes of K.S.A. 8-248, and amendments thereto,
18 if the address furnished is different from that on file with the division.

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

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

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

43 (h) The provisions of K.S.A. 60-206, and amendments thereto,

1 regarding the computation of time shall be applicable in determining the
2 effective date of suspension set out in subsection (d).

3 Sec. 2. K.S.A. 2015 Supp. 8-1020 is hereby amended to read as
4 follows: 8-1020. (a) Any licensee served with an officer's certification and
5 notice of suspension pursuant to K.S.A. 8-1002, and amendments thereto,
6 may request an administrative hearing. Such request may be made either
7 by:

8 (1) Mailing a written request which is postmarked 14 days after
9 service of notice; or

10 (2) transmitting a written request by electronic facsimile which is
11 received by the division within 14 days after service of notice.

12 (b) If the licensee makes a timely request for an administrative
13 hearing and makes a timely payment of the required hearing fee, any
14 temporary license issued pursuant to K.S.A. 8-1002, and amendments
15 thereto, shall remain in effect until the 30th day after the effective date of
16 the decision made by the division.

17 (c) If the licensee fails to make a timely request for an administrative
18 hearing together with the required hearing fee, the licensee's driving
19 privileges shall be suspended or suspended and then restricted in
20 accordance with the notice of suspension served pursuant to K.S.A. 8-
21 1002, and amendments thereto.

22 (d) (1) Upon receipt of a timely request for a hearing together with
23 the required hearing fee, the division shall forthwith set the matter for
24 hearing before a representative of the director and provide notice of the
25 extension of temporary driving privileges. The hearing shall be held by
26 telephone conference call unless the hearing request includes a request that
27 the hearing be held in person before a representative of the director. The
28 officer's certification and notice of suspension shall inform the licensee of
29 the availability of a hearing before a representative of the director. Except
30 for a hearing conducted by telephone conference call, the hearing shall be
31 conducted in the county where the arrest occurred or a county adjacent
32 thereto.

33 (2) The division shall charge a fee of \$50 for a hearing, to be paid
34 within the time period for making a timely request for a hearing, whether
35 held by telephone or in person, to be applied by the division for
36 administrative costs to conduct the hearing. The division shall remit all
37 hearing fees to the state treasurer in accordance with the provisions of
38 K.S.A. 75-4215, and amendments thereto. Upon receipt of each such
39 remittance, the state treasurer shall deposit the entire amount in the state
40 treasury to the credit of the division of vehicles operating fund. The
41 hearing fee established in this section shall be the only fee collected or
42 moneys in the nature of a fee collected for such hearing. Such fee shall
43 only be established by an act of the legislature and no other authority is

1 established by law or otherwise to collect a fee.

2 (e) Except as provided in subsection (f), prehearing discovery shall be
3 limited to the following documents, which shall be provided to the
4 licensee or the licensee's attorney no later than seven days prior to the date
5 of hearing:

6 (1) The officer's certification and notice of suspension;

7 (2) in the case of a breath or blood test failure, copies of documents
8 indicating the result of any evidentiary breath or blood test administered at
9 the request of a law enforcement officer;

10 (3) in the case of a breath test failure, a copy of the affidavit showing
11 certification of the officer and the instrument; and

12 (4) in the case of a breath test failure, a copy of the Kansas
13 department of health and environment testing protocol checklist.

14 (f) At or prior to the time the notice of hearing is sent, the division
15 shall issue an order allowing the licensee or the licensee's attorney to
16 review any *law enforcement report* and video or audio tape record made of
17 the events upon which the administrative action is based. Such review
18 shall take place at a reasonable time designated by the law enforcement
19 agency and shall be made at the location where the *law enforcement report*
20 or video or audio tape is kept. The licensee may obtain a copy of any such
21 *law enforcement report* or video or audio tape upon request and upon
22 payment of a reasonable fee to the law enforcement agency, not to exceed
23 \$25 per tape or \$.25 per page of the *law enforcement report*.

24 (g) Witnesses at the hearing shall be limited to the licensee, to any
25 law enforcement officer who signed the certification form and to one other
26 witness who was present at the time of the issuance of the certification and
27 called by the licensee. The presence of the certifying officer or officers
28 shall not be required, unless requested by the licensee at the time of
29 making the request for the hearing. The examination of a law enforcement
30 officer shall be restricted to the factual circumstances relied upon in the
31 officer's certification.

32 (h) (1) If the officer certifies that the person refused the test, the scope
33 of the hearing shall be limited to whether:

34 (A) A law enforcement officer had reasonable grounds to believe the
35 person was operating or attempting to operate a vehicle while under the
36 influence of alcohol or drugs, or both, or had been driving a commercial
37 motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto,
38 while having alcohol or other drugs in such person's system or was under
39 the age of 21 years and was operating or attempting to operate a vehicle
40 while having alcohol or other drugs in such person's system;

41 (B) the person was in custody or arrested or was involved in a vehicle
42 accident or collision resulting in property damage, personal injury or
43 death;

1 (C) a law enforcement officer had presented the person with the oral
2 and written notice required by K.S.A. 8-1001, and amendments thereto;
3 and

4 (D) the person refused to submit to and complete a test as requested
5 by a law enforcement officer.

6 (2) If the officer certifies that the person failed a breath test, the scope
7 of the hearing shall be limited to whether:

8 (A) A law enforcement officer had reasonable grounds to believe the
9 person was operating a vehicle while under the influence of alcohol or
10 drugs, or both, or had been driving a commercial motor vehicle, as defined
11 in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other
12 drugs in such person's system or was under the age of 21 years and was
13 operating or attempting to operate a vehicle while having alcohol or other
14 drugs in such person's system;

15 (B) the person was in custody or arrested or was involved in a vehicle
16 accident or collision resulting in property damage, personal injury or
17 death;

18 (C) a law enforcement officer had presented the person with the oral
19 and written notice required by K.S.A. 8-1001, and amendments thereto;

20 (D) the testing equipment used was certified by the Kansas
21 department of health and environment;

22 (E) the person who operated the testing equipment was certified by
23 the Kansas department of health and environment;

24 (F) the testing procedures used substantially complied with the
25 procedures set out by the Kansas department of health and environment;

26 (G) the test result determined that the person had an alcohol
27 concentration of .08 or greater in such person's breath; and

28 (H) the person was operating or attempting to operate a vehicle.

29 (3) If the officer certifies that the person failed a blood test, the scope
30 of the hearing shall be limited to whether:

31 (A) A law enforcement officer had reasonable grounds to believe the
32 person was operating a vehicle while under the influence of alcohol or
33 drugs, or both, or had been driving a commercial motor vehicle, as defined
34 in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other
35 drugs in such person's system or was under the age of 21 years and was
36 operating or attempting to operate a vehicle while having alcohol or other
37 drugs in such person's system;

38 (B) the person was in custody or arrested or was involved in a vehicle
39 accident or collision resulting in property damage, personal injury or
40 death;

41 (C) a law enforcement officer had presented the person with the oral
42 and written notice required by K.S.A. 8-1001, and amendments thereto;

43 (D) the testing equipment used was reliable;

1 (E) the person who operated the testing equipment was qualified;

2 (F) the testing procedures used were reliable;

3 (G) the test result determined that the person had an alcohol
4 concentration of .08 or greater in such person's blood; and

5 (H) the person was operating or attempting to operate a vehicle.

6 (i) At a hearing pursuant to this section, or upon court review of an
7 order entered at such a hearing, an affidavit of the custodian of records at
8 the Kansas department of health and environment stating that the breath
9 testing device was certified and the operator of such device was certified
10 on the date of the test shall be admissible into evidence in the same
11 manner and with the same force and effect as if the certifying officer or
12 employee of the Kansas department of health and environment had
13 testified in person. A certified operator of a breath testing device shall be
14 competent to testify regarding the proper procedures to be used in
15 conducting the test.

16 (j) At a hearing pursuant to this section, or upon court review of an
17 order entered at such a hearing, in which the report of blood test results
18 have been prepared by the Kansas bureau of investigation or other forensic
19 laboratory of a state or local law enforcement agency are to be introduced
20 as evidence, the report, or a copy of the report, of the findings of the
21 forensic examiner shall be admissible into evidence in the same manner
22 and with the same force and effect as if the forensic examiner who
23 performed such examination, analysis, comparison or identification and
24 prepared the report thereon had testified in person.

25 (k) At the hearing, the licensee has the burden of proof by a
26 preponderance of the evidence to show that the facts set out in the officer's
27 certification are false or insufficient and that the order suspending or
28 suspending and restricting the licensee's driving privileges should be
29 dismissed.

30 (l) Evidence at the hearing shall be limited to the following:

31 (1) The documents set out in subsection (e);

32 (2) the testimony of the licensee;

33 (3) the testimony of any certifying officer;

34 (4) the testimony of any witness present at the time of the issuance of
35 the certification and called by the licensee;

36 (5) any affidavits submitted from other witnesses;

37 (6) any documents submitted by the licensee to show the existence of
38 a medical condition, as described in K.S.A. 8-1001, and amendments
39 thereto; and

40 (7) any video or audio tape record of the events upon which the
41 administrative action is based.

42 (m) After the hearing, the representative of the director shall enter an
43 order affirming the order of suspension or suspension and restriction of

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

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

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

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

1 ~~lawfulness of the law enforcement encounter if raised by the petitioner~~
2 **Notwithstanding K.S.A. 77-617, and amendments thereto, the court: (1)**
3 **May also consider and determine any constitutional issue, including, but**
4 **not limited to, the lawfulness of the law enforcement encounter, even if**
5 **such issue was not raised before the agency; and (2) shall also consider**
6 **and determine any constitutional issue, including, but not limited to, the**
7 **lawfulness of the law enforcement encounter, if such issue is raised by**
8 **the petitioner in the petition for review, even if such issue was not raised**
9 **before the agency.** If the court finds that the grounds for action by the
10 agency have been met, ~~including any constitutional issues raised by the~~
11 ~~petitioner.~~ the court shall affirm the agency action.

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

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

19 (s) Upon motion by a party, or on the court's own motion, the court
20 may enter an order restricting the driving privileges allowed by the
21 temporary license provided for in K.S.A. 8-1002, and amendments thereto,
22 and in this section. The temporary license also shall be subject to
23 restriction, suspension, revocation or cancellation, as set out in K.S.A. 8-
24 1014, and amendments thereto, or for other cause.

25 (t) The facts found by the hearing officer or by the district court upon
26 a petition for review shall be independent of the determination of the same
27 or similar facts in the adjudication of any criminal charges arising out of
28 the same occurrence. The disposition of those criminal charges shall not
29 affect the suspension or suspension and restriction to be imposed under
30 this section.

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

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

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

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