

## **DUI Amendments (SB374 and HB2439)**

**Effective July 1, 2018**

[Links: SB374](#)    [Legislative Summary of SB374](#)    [HB2439](#)    [Legislative Summary of HB2439](#)

Amended statutes available at: <http://www.kscoplaw.com/vehcode/art10.html>

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### **Introduction [SB374]**

The 66-page bill amends 34 statutes, but it is not as ominous as that sounds. The amendments in 31 of those statutes are technical amendments primarily changing or deleting statute references, mostly due to the repeal of KSA 8-1025. That leaves the meaningful changes in only three sections of the bill amending KSA 8-2,144 (section 6 starting on page 8); 8-1001 (section 7 starting on page 12); and 8-1567 (section 13 starting on page 21); plus the repeal of KSA 8-1025. Most, if not all, of the amendments directly affecting law enforcement are in section 7 of the bill (pages 12-16) amending KSA 8-1001, testing procedures, and in the repeal of KSA 8-1025, the criminal violation for refusing a test.

### **Preliminary Tests [SB374 KSA 8-1012, not amended in the final bill]**

The bill does not amend nor repeal KSA 8-1012 governing preliminary testing. This leaves the existing statute in place and without change. It still includes the required notice and penalty for refusing the test. Prosecutors are telling me case law has ruled the criminal provision unconstitutional. Check with your local prosecutors for advice on using preliminary tests and the use of the notice when doing so.

### **Criminal and Administrative Penalties for Test Refusal [SB374 Repeal of KSA 8-1025, Section 35 of the bill]**

KSA 8-1025 is fully repealed (not amended). This is the statute enacted in 2012 that provided a criminal penalty for refusing an evidentiary test required in KSA 8-1001, DUI testing. This repeal is based on case law ruling the provisions unconstitutional. Administrative actions for evidentiary test refusal or failure provided in KSA 8-1014 remain unchanged. Evidentiary test refusal is still admissible as evidence in court as provided by KSA 8-1001 subsection (n).

### **Implied Consent [SB374 Section 7 of the bill]**

Implied consent is no longer applicable, based on recent case law. KSA 8-1001 is amended to remove any references to “consent” or “deemed consent” related to what has been known as implied consent and replacing it with the reference to “may be requested” and “may be required.” The result is all statutory references to a vehicle operator having deemed consent to testing by choosing to operate a vehicle and allowing the withdrawal of such consent are removed and replaced by statutory language specifying when a test may be required and allowing law enforcement officers to request the test when the test is required. Such request must be based on probable cause to believe the person has committed the crime of DUI. The term “reasonable grounds” is removed and replaced with “probable cause” throughout the bill as required to create consistency with the new “probable cause” standard. These changes were made to address recent case law requirements.

The provision in subsection (b)(1) that requires the person is either “arrested or otherwise taken into custody for any violation of statute, county resolution, or city ordinance” or “involved in a motor vehicle accident or collision resulting in property damage or personal injury” remains in the amended law. However, the several factors relating to traffic collisions are removed in the amended law as outlined below.

### **Request of Tests [SB374 Section 7, subsection (b) & striking subsections (p) & (w)]**

KSA 8-1001 subsection (b)(1) is amended by removing the phrase referring to the law enforcement officer requesting “a test. . . If, at the time of request. . . the officer has reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both. . .” and replacing it with, “One or more tests may be required of a person when, at the time of the request, a law enforcement officer has probable cause to believe the person has committed a violation of” DUI, is operating a commercial vehicle with any alcohol or drugs in their system [also see KSA 8-1001 subsection (m)] or the driver is under the age of 21 with any alcohol or drugs in their system.

#### Requests in Cases Involving Vehicle Collision

KSA 8-1001 subsection (b)(1) is also amended to delete references to varying degrees of injury and provisions about whether actions of the operator contributed to the accident are removed. Subsections

(p) and (w) of the original statute which provided that operating a vehicle in a manner to cause death or serious injury was probable cause to believe the person was under the influence, and the definition of serious injury are deleted. This results in requests for tests for persons involved in a collision must be based on being “involved in a motor vehicle accident or collision resulting in property damage or personal injury or death” and probable cause the person has committed a DUI offense. No longer can a test be requested solely on the basis the driver’s actions contributed to the collision, the driver could be cited for any traffic violation listed in KSA 8-2117, and the collision resulted in death or serious injury. Those factors no longer constitute probable cause for requesting a test without probable cause the driver committed a DUI violation.

Collective Knowledge of Law Enforcement Officers

KSA 8-1001 subsection (b)(2) which provides the officer requesting or directing the administration of a test may act on their personal knowledge or the collective knowledge of law enforcement officers involved in the investigation is amended. The limitation to “officers involved in the accident investigation or arrest” is changed to simply the “officers involved in the investigation or arrest.” This allows this provision to apply to the investigation of a non-collision DUI case.

**Test Advisories or Notices** [SB374 Section 7, new subsections (c) & (d); subsections (q) & (r); KSA 8-2,145; and removing old subsection (k)]

KSA 8-1001 is amended by removing all notices required prior to evidentiary testing in subsection (k) and replaces them with new notices. Those new notices are found in new subsection (c) for requesting a test of other than blood or urine; and in new subsection (d) for requesting a blood or urine test.

Additional Notices for Operators of a Commercial Vehicle and for any Vehicle Operator Under 21

In addition to the notices required in KSA 8-1001, the notices required in KSA 8-2,145 for commercial vehicle drivers and KSA 8-1567a for drivers under 21 being tested for DUI remain unchanged.

Effect of Not Providing the Notices

KSA 8-1001 subsections (q) and (r) are amended to reference the notices as “authorized” instead of “required.” (Note: Subsection (c) & (d) provide the notices “shall be given,” so they are not optional. It is just the impact of failing to give notice is mitigated for the purposes stated in these subsections.) The provision that test results cannot be suppressed in the criminal case of DUI because of “technical irregularities” is amended to “because of irregularities not affecting the substantial rights of the accused in the consent or notice authorized in subsection (c) or (d). . .” The new provision clarifies irregularities or not given the notice can still be used in defense of the “. . . administrative action regarding the subject’s driving privileges.”

Dept. of Revenue will be issuing revised DC27 and DC70 advisory forms.

**Test Sample by Search With or Without a Warrant** [SB374 Section 7, subsections (e), (f), & (s)]

KSA 8-1001 is amended by adding two new subsections and amending another regarding acquiring a test sample by a search with or without a warrant.

New subsection (e) clarifies the statute does not “limit the right of a law enforcement officer to conduct any search of a person’s breath or bodily substance, other than blood or urine, incident to a lawful arrest pursuant to the constitution of the United States, with or without providing the person the advisories authorized in subsection (c), nor limit the admissibility at any trial or hearing of alcohol or drug concentration testing results obtained pursuant to such a search.”

New subsection (f) clarifies the statute does not “limit the right of a law enforcement officer to conduct or obtain a blood or urine test of a person pursuant to a warrant under K.S.A. 22-2502, and amendments thereto, the constitution of the United States or a judicially recognized exception to the search warrant requirement, with or without providing the person the advisories authorized in subsection (d), nor limit the admissibility at any trial or hearing of alcohol or drug concentration testing results obtained pursuant to such a search.” Consent is the most common, among several “judicially recognized exceptions.”

Subsection (s) amends the existing provision that nothing in the statute “shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant” by adding “or other judicially recognized exception to the warrant requirement.”

## **Directing Blood Collection by a Medical Professional** [SB374 Section 7, KSA 8-1001, subsections (g) and (h)]

KSA 8-1001 has a new subsection (g) which provides a law enforcement officer may direct the sample of blood to be collected by “a medical professional” to draw “one or more samples of blood from a person to determine the blood’s alcohol or drug concentration: (1) If the person has given consent, with or without the advisories in subsection (d), and meets the requirements of subsection (b) [probable cause, etc.]; (2) if law enforcement has obtained a search warrant authorizing the collection of blood from the person; or (3) if the person refuses or is unable to consent to submit to and complete a test, and another judicially recognized exception to the warrant requirement applies.”

KSA 8-1001 subsection (h) defines which “medical professionals” may be directed to obtain the blood sample. This only includes: (1) A person licensed to practice medicine and surgery, licensed as a physician assistant, or a person acting under the direction of any such licensed person; (2) a registered nurse or a licensed practical nurse; (3) any qualified medical technician, including, but not limited to, an advanced emergency medical technician or a paramedic, as those terms are defined in K.S.A. 65-6112, authorized by medical protocol; or (4) a phlebotomist.” These provisions are different than prior statutory language that was in subsection (d) which was stricken from KSA 8-1001.

Subsection (i) of the amended KSA 8-1001 provides for a written statement from the officer to the medical professional. Upon being provided that written statement, the medical professional “shall withdraw the sample of blood as soon as practical and shall deliver the sample to the law enforcement officer or another law enforcement officer as directed by the requesting law enforcement officer as soon as practical, provided the collection of the sample does not jeopardize the person’s life, cause serious injury to the person or seriously impede the person’s medical assessment, care or treatment.” The subsection also provides, “The medical professional shall not require the person that is the subject of the test or tests to provide any additional consent or sign any waiver form.”

### Immunity of Civil Action for Medical Professional and Medical Care Facility

KSA 8-1024 and KSA 8-1001 subsection (j) provides immunity from civil liability for medical professionals and the medical care facility obtaining the sample based on the law enforcement request. (NOTE: The law enforcement officer submitting the request is responsible for assuring all legal requirements to request the test are met.) The amended KSA 8-1001 states: “The medical professional authorized herein to withdraw the blood and the medical care facility where the blood is drawn may act on good faith that the requirements have been met for directing the withdrawing of blood once presented with the written statement provided for under this subsection. . . In such a case, the person authorized to withdraw blood and the medical care facility shall not be liable in any action alleging lack of consent or lack of informed consent.” The amended KSA 8-1024 states, “No medical care facility, clinical laboratory, medical clinic, other medical institution, person licensed to practice medicine or surgery, person acting under the direction of any such licensed person, licensed physician assistant, registered nurse, licensed practical nurse, medical technician, paramedic, advanced emergency medical technician, phlebotomist, health care provider or person who participates in good faith in the obtaining, withdrawal, collection or testing of blood, breath, urine or other bodily substance at the direction of a law enforcement officer pursuant to K.S.A. 8-1001, and amendments thereto, or as otherwise authorized by law, shall incur any civil, administrative or criminal liability as a result of such participation, regardless of whether or not the patient resisted or objected to the administration of the procedure or test.”

**NOTE:** While the bill does not create a new crime for the medical professional declining to comply, nor does it address what to do if the medical professional declines to obtain the sample, I will offer my personal advice (not a legal opinion). First and foremost, follow your agency policy on this matter. If your agency does not have a policy, ask for clarification using your appropriate channels. If this is not successful, ask your prosecutor. I personally highly recommend you do not arrest the medical professional. (Remember, they are probably just following the directives of their employer and superiors much like law enforcement is required to do.) If you believe there has been a violation of law, I suggest you simply submit an offense report to your prosecutor. Your agency may minimize this problem by contracting with a medical professional or medical facility to provide this service.

**Collection of Urine** [SB374 Section 7, subsection (k)]

Procedures for collecting urine samples found in KSA 8-1001 subsection (k) are unchanged. There are some technical amendments made for consistency with other amendments, primarily due to changes in subsections (b) and (c) relating to collision investigations and probable cause for a DUI violation.

**Test results to defendant** [SB374 Section 7, subsection (t)]

The provision in KSA 8-1001 subsection (t) stating a report of the results of any test is to be made available on request to any person submitting to a test is amended by adding “when available.”

**Law Enforcement liability** [SB374 Section 7, subsection (l)]

The provision in KSA 8-1001 subsection (l) providing a law enforcement officer following the statute is not subject to civil or criminal liability for the action taken pursuant to the statute is retained unchanged.

**DUI, Involuntary Manslaughter** [HB2439 section 1, 2, 4 & 7]

A person who is DUI and involved in a fatality accident while their DL is revoked, suspended or restricted for a DUI related event, or is a habitual violator with at least one DUI violates the involuntary manslaughter statute, KSA 21-5405. If involved in a crash resulting in serious bodily harm while under the same DL sanctions violates aggravated battery statute KSA 21-5413 subsection (b)(4) which is a SL4 person felony. Juvenile records for this violation may not be expunged. [Section 9 amending KSA 38-3212] These violations also are included in future DUI convictions in determining 3rd or subsequent conviction penalty enhancements. [Sec. 4 amending KSA 8-2,144; Sec. 7 amending KSA 8-1567]

**Post-Conviction Supervision Violation Amendments** [SB374 Sections 6 and 13 of the bill]

KSA 8-2,144, Commercial Vehicle DUI, and 8-1567, DUI, are amended by adding two provisions involving post-conviction supervision violations. The first provides that an offender for whom a warrant has been issued by the court alleging a violation of supervision is considered a fugitive from justice if the warrant cannot be served and allows the court to determine if the time from issuance of the warrant to the court finds the person violated supervision will be counted as time served on supervision. The second addition provides the term of supervision may be extended by the court beyond one year, and any violation of the conditions of such extended term of supervision may subject such person to the revocation of supervision and imprisonment in jail of up to the remainder of the original sentence.

**Penalty Enhancement for Child in the Vehicle While DUI** [SB374 Sections 6 and 13 of the bill]

KSA 8-2,144, Commercial Vehicle DUI, and 8-1567, DUI, are amended by restricting the enhancement only to a driver age 18 or older, and by changing the maximum age of the child passenger to 18 from 14.

**Prior Comparable Convictions** [SB374 Bill preamble; Section 6, subsection (n); Section 13, subsection (i)]

The bill preamble stating legislative intention is added, and provides determination of comparable prior violations is to be construed liberally regardless of whether they are identical to or narrower than the Kansas offense. It also specifically states the laws of Missouri, Oklahoma, Colorado, Nebraska, and the Wichita city ordinance shall be included in prior offense calculations.

KSA 8-2,144 subsection (n), Commercial Vehicle DUI, and 8-1567 subsection (i), DUI, are amended by deleting the existing instructions on determining comparable offense and replacing it with “any law of another jurisdiction that would constitute an offense that is comparable to the” Kansas offense. A new subsection is also added providing further direction to the court to determine comparability.

**Court Reports to DMV** [SB374 Section 6, subsection (h); Section 13, subsection (h)]

KSA 8-2,144, subsection (h) is amended deleting the requirement for the court to submit any diversion agreement for a violation of this statute to DMV. KSA 8-1567 subsection (i) is amended by adding a requirement for the court to include the “finding regarding the alcohol concentration in the offender’s blood or breath” in the report to DMV of the conviction or diversion agreement.

The author of this document is not an attorney and this is not legal advice. It is a summary of legislation passed in the 2018 Kansas legislative session and based on explanations, observations, and studies of the bill and related documents.

Always follows your agency policies and utilize your agency protocol to refer to your local prosecutors and agency attorneys for legal interpretations and application of case law.