

ENGROSSED HOUSE
BILL NO. 2957

By: Staggs and Langmacher of
the House

and

Easley of the Senate

An Act relating to the Oklahoma Boating Safety Regulation Act; amending 63 O.S. 1991, Sections 4210 and 4218, as amended by Sections 43 and 57, Chapter 284, O.S.L. 1992 (63 O.S. Supp. 1995, Sections 4210 and 4218), which relate to improper operation of a vessel and penalties for violation of the Oklahoma Boating Safety Regulation Act; modifying scope of crime of operating vessel while under the influence of certain substances; modifying general penalty provision of Oklahoma Boating Safety Regulation Act to provide for specific penalties; providing for crime of operation of a vessel by a person whose ability to operate the vessel is impaired by alcohol; providing penalties; providing that offense is not bailable; prohibiting certain acts by persons under the influence of intoxicants; defining term; providing for certain evaluation; providing penalties; providing for implied consent for testing for intoxicants; providing procedures and requirements for testing; providing for rules; providing for payment for testing; providing for immunity for persons or facilities administering testing; requiring certain written report;

providing for refusal to submit to testing;
providing that refusal to submit to testing is
admissible as evidence; providing for the
introduction of other competent evidence of
intoxication; providing for codification; and
providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 63 O.S. 1991, Section 4210, as amended by Section 43, Chapter 284, O.S.L. 1992 (63 O.S. Supp. 1995, Section 4210), is amended to read as follows:

Section 4210. A. No person shall operate or give permission to operate any vessel or manipulate or give permission to manipulate any parasails, water skis, surfboard, or similar device in a reckless or negligent manner so as to endanger the life or property of any person.

B. No person shall operate or give permission to operate any vessel on any waters of this state, except privately owned waters, while the operator is under the influence of ~~alcohol or any substance included in the Uniform Controlled Dangerous Substances Act, Section 2-104 et seq. of this title~~ an intoxicant, as defined by Section 4 of this act.

C. Upon the immediate approach of an authorized emergency vessel making use of an audible or a visual signal or a combination thereof, the operator of every other vessel shall immediately stop his or her vessel whenever or wherever practical or otherwise yield the right-of-way until such authorized emergency vessel has passed, except when otherwise directed by a duly authorized peace officer of this state.

D. No person shall overload or give permission to overload a vessel with persons or gear so as to exceed the posted capacity plate or to exceed United States Coast Guard standards.

E. Any violation of the provisions of this section shall constitute a negligent act in the operation of the vessel or motor or parasails.

SECTION 2. AMENDATORY 63 O.S. 1991, Section 4218, as amended by Section 57, Chapter 284, O.S.L. 1992 (63 O.S. Supp. 1995, Section 4218), is amended to read as follows:

Section 4218. A. Except as otherwise provided by the provisions of this section or other provision of the Oklahoma Boating Safety Regulation Act, any person violating the provisions of the Oklahoma Boating Safety Regulation Act, Section 4201 et seq. of this title, upon conviction thereof, shall be guilty of a misdemeanor and shall be subject to a fine not to exceed Fifty Dollars (\$50.00) for each such violation.

B. Any person who violates subsection A, C or D of Section 4210 or Section 4213 of this title, upon conviction thereof, shall be guilty of a misdemeanor and shall be subject to a fine of not less than Two Hundred Dollars (\$200.00) and not more than One Thousand Dollars (\$1,000.00).

C. ~~Any~~ Except as otherwise provided by Sections 3 through 10 of this act, any person who violates any provision of Sections 4206 through 4212 of this title, upon conviction thereof, shall be guilty of a misdemeanor and shall be subject to a fine of not to exceed One Hundred Dollars (\$100.00) for each such violation.

D. In addition to any fines levied pursuant to this section, any person who violates any provision of subsection A, C or D of Section 4210 of this title, upon conviction thereof, shall be guilty of a misdemeanor and shall be subject to imprisonment in the county jail for a period not to exceed six (6) months.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4210.8 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Any person who operates a vessel while the ability of that person to operate the vessel is impaired by the consumption of alcohol or any substance other than alcohol, which is capable of being ingested, inhaled, injected or absorbed into the human body and is capable of adversely affecting the central nervous system, vision, hearing or other sensory or motor functions, shall be subject to a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

B. The violations as set out in this section shall not be bondable under Section 1115.3 of Title 22 of the Oklahoma Statutes.

C. Any person who is found guilty of a violation of the provisions of this section or who pleads guilty or nolo contendere for a violation of any provision of this section shall be ordered, prior to sentencing, to participate in an alcoholism evaluation program offered by a facility or qualified practitioner certified by the Department of Mental Health and Substance Abuse Services for the purpose of evaluating the receptivity to treatment and prognosis of the person. The court shall order the person to reimburse the facility or qualified practitioner for the evaluation. The Department of Mental Health and Substance Abuse Services shall establish a fee schedule, based upon a person's ability to pay, but the fee for an evaluation shall not exceed Seventy-five Dollars (\$75.00). The evaluation shall be conducted at a certified facility, the office of a qualified practitioner or at another location as ordered by the court. Within seventy-two (72) hours after the person is assessed, the facility or qualified practitioner shall submit a written report to the court for the purpose of

assisting the court in its final sentencing determination. No person, agency or facility operating an alcohol and drug substance abuse evaluation program certified by the Department of Mental Health and Substance Abuse Services shall solicit or refer any person evaluated pursuant to this subsection for any treatment program or alcohol and drug substance abuse service in which such person, agency or facility has a vested interest. This provision shall not be construed to prohibit the court from ordering participation in or any person from voluntarily utilizing a treatment program or alcohol and drug substance abuse service offered by such person, agency or facility. Any evaluation report submitted to the court pursuant to this subsection shall be handled in a manner which will keep the report confidential. The report shall not be subject to the Oklahoma Open Records Act. Nothing contained in this subsection shall be construed to prohibit the court from ordering judgment and sentence and any other sanction authorized by law for failure or refusal to comply with an order of the court. As used in this subsection, "qualified practitioner" means a person with at least a bachelor's degree in substance abuse treatment, mental health or a related health care field and at least two (2) years of experience in providing alcohol treatment, other drug abuse treatment, or both alcohol and other drug abuse treatment who is certified each year by the Department of Mental Health and Substance Abuse Services to provide these assessments.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4210.9 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. It is unlawful and punishable as provided in subsection D of this section for any person to operate a vessel within this state who:

1. Has a blood or breath alcohol concentration, as defined in Section 8 of this act, of ten-hundredths (0.10) or more within two (2) hours after the arrest of the person; or

2. Is under the influence of any intoxicant.

B. The fact that any person charged with a violation of this section is or has been lawfully entitled to use an intoxicant shall not constitute a defense against any charge of violating this section.

C. As used in Sections 1 through 9 of this act:

1. "Intoxicant" means:

- a. any beverage containing alcohol,
- b. any controlled dangerous substance as defined in the Uniform Controlled Dangerous Substances Act,
- c. any substance which is capable of being ingested, inhaled, injected or absorbed into the human body and is capable of adversely affecting the central nervous system, vision, hearing or other sensory or motor functions of the human body, and
- d. any combination of alcohol, controlled dangerous substances, and substances capable of being ingested, inhaled, injected or absorbed into the human body and capable of adversely affecting the central nervous system, vision, hearing or other sensory or motor functions of the human body; and

2. "Operate" means manipulating any of the levers, the starting mechanism, or other mechanism or device of a vessel, setting in motion any vessel, or operating any vessel.

D. Every person who is convicted of a violation of the provisions of this section shall be guilty of a misdemeanor for the first offense and shall be punished by imprisonment in the county jail for not less than ten (10) days nor more than one (1) year, and a fine of not more than One Thousand Dollars (\$1,000.00). Any

person who within ten (10) years after a previous conviction of a violation of this section is convicted of a second or subsequent offense pursuant to the provisions of this section or has a prior conviction within ten (10) years prior to the conviction pursuant to the provisions of this section, in a municipal criminal court of record for the violation of a municipal ordinance prohibiting the offense provided for in subsection A of this section shall be guilty of a felony and shall be sentenced to the custody of the Department of Corrections for not less than one (1) year and not more than five (5) years, and a fine of not more than Two Thousand Five Hundred Dollars (\$2,500.00). When a sentence of incarceration is imposed, the person shall be processed through the Lexington Assessment and Reception Center. If the person is evaluated to be receptive to treatment and not deemed by the Department of Corrections to be a security risk, the person shall be assigned to the Department of Mental Health and Substance Abuse Services for substance abuse treatment. The inmate shall be required to reimburse the Department of Mental Health and Substance Abuse Services for all or part of the actual cost incurred for treatment of the inmate while the inmate was assigned to the Department of Mental Health and Substance Abuse Services, if at the time the sentence of incarceration was imposed, the court determined that the convicted person has the ability to pay for all or part of the cost of treatment. The court shall determine the amount of reimbursement the convicted person shall pay. While assigned to such a Department of Mental Health and Substance Abuse Services treatment program, the inmate shall comply with the rules agreed upon by the Department of Mental Health and Substance Abuse Services and the Department of Corrections. Any infraction of the rules may result in the reassignment of the inmate to a correctional facility of the Department of Corrections. Upon successful completion of the treatment program the inmate shall be properly reassigned by the Department of Corrections for the

completion of the sentence imposed by the court. Prior to discharge from the treatment facility, the treatment facility shall forward to the Department of Corrections a report and discharge summary including arrangements and recommendations for further disposition and follow-up treatment. If the inmate is evaluated not to be receptive to treatment or is evaluated to be a security risk, the inmate shall be assigned to a state correctional facility according to normal Department of Corrections classification procedures. If a felony conviction does not result in a sentence of incarceration as provided for in this subsection, the person shall be required to serve not less than ten (10) days of community service, or to undergo inpatient rehabilitation or treatment in a public or private facility with at least minimum security for a period of not less than forty-eight (48) consecutive hours.

E. Any person who is found guilty of a violation of the provisions of this section may be referred, prior to sentencing, to an alcoholism evaluation facility designated by the Department of Mental Health and Substance Abuse Services for the purpose of evaluating the receptivity to treatment and prognosis of the person. The court shall order the person to reimburse the facility for the evaluation in an amount not to exceed Seventy-five Dollars (\$75.00). Within seventy-two (72) hours after the evaluation, the facility shall submit a written report to the court for the purpose of assisting the court in its final sentencing determination.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4210.10 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Any person who operates a vessel within this state shall be deemed to have given consent to a test or tests of the person's blood or breath, for the purpose of determining the alcohol concentration as defined in Section 8 of this act, and the person's blood, saliva or urine for determining the presence and

concentration of any other intoxicant therein as defined in Section 4 of this act, if arrested for any offense arising out of acts alleged to have been committed while the person was operating a vessel within this state while the person was under the influence of an intoxicant. The test shall be administered by or at the direction of a law enforcement officer after having arrested the person and having reasonable grounds to believe that the person was operating a vessel within this state while under the influence of an intoxicant.

B. The law enforcement agency by which the arresting officer is employed may designate, in accordance with the rules of the Board of Tests for Alcohol and Drug Influence, hereinafter referred to as the Board, whether blood or breath is to be tested for the alcohol concentration thereof, and whether blood, saliva or urine is to be tested for the presence and concentration of any other intoxicant therein. In the event the law enforcement agency does not designate the test to be administered, breath shall be the substance tested for alcohol concentration. Blood may also be tested to determine the alcohol concentration thereof in the event that breath cannot be tested to determine the alcohol concentration thereof because of the lack of an approved device or qualified person to administer a breath test or because the breath test for any other reason cannot be administered in accordance with the rules of the Board. In the event the law enforcement agency does not designate the test to be administered, blood, saliva or urine shall be the substance tested for the presence and concentration of any other intoxicant or the combination of alcohol and any other intoxicant therein.

C. In the event the person is incapable of submitting to and successfully completing, by reason of illness or injury or other physical disability, the test to be administered, an alternate test may be administered in accordance with the rules of the Board.

D. Any person who is unconscious or otherwise incapable of refusing to submit to a test of the person's blood or breath to determine the alcohol concentration thereof, or to a test of the person's blood, saliva or urine to determine the presence and concentration of any other intoxicant therein, shall be deemed not to have withdrawn the consent provided by subsection A of this section, and the test may be administered as provided in this section.

An unconscious person who has been issued a citation by a law enforcement officer for one of the offenses listed in subsection A of this section is arrested for purposes of this section. The arresting officer shall leave a copy of the citation with the arrested person which may be accomplished by handing it to the arrested person, or by leaving it with the personal effects of the arrested party, so as to inform the unconscious person of the arrest. Any person who has been arrested for one of the offenses listed in subsection A of this section who is unconscious or injured and who requires immediate medical treatment as determined by a treating physician, may be released on the person's own recognizance for medical reasons by the arresting officer. The arresting officer who releases an arrested person on the person's own recognizance shall indicate that the officer has done so on the face of the citation. Any person released on their own recognizance for medical reasons shall remain at liberty pending the filing of charges.

E. In addition to any test designated by the arresting officer, the arrested person also may designate any additional test to be administered to determine the concentration of alcohol, any other intoxicant or the combination of alcohol and any other intoxicant. The cost of the additional test shall be at the expense of the arrested person.

A sufficient quantity of any specimen obtained at the designation of the arrested person shall be available to the law

enforcement agency employing the arresting officer. The specimens shall be treated in accordance with the same rules applicable to the specimens obtained by an arresting officer.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4210.11 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Only a licensed medical doctor, licensed osteopathic physician, licensed chiropractic physician, registered nurse, licensed practical nurse or physician's assistant, certified by the State Board of Medical Licensure and Supervision, an employee of a hospital or other health care facility authorized by the hospital or health care facility to withdraw blood, or other qualified person authorized by the Board of Tests for Alcohol and Drug Influence, acting at the request of a law enforcement officer, may withdraw blood for purpose of having a determination made of its concentration of alcohol or other intoxicant. Only qualified persons authorized by the Board may collect breath, saliva or urine, or administer tests of breath pursuant to the provisions of Sections 3 through 9 of this act.

B. If the person authorized to withdraw blood, as specified in subsection A of this section, is presented with a written statement:

1. Authorizing blood withdrawal signed by the person whose blood is to be withdrawn;

2. Signed by a duly authorized peace officer that the person whose blood is to be withdrawn has agreed to the withdrawal of blood;

3. Signed by a duly authorized peace officer that the person whose blood is to be withdrawn has been placed under arrest and that the officer has probable cause to believe that the person, while intoxicated, has operated a vessel in such manner as to have caused the death or serious physical injury of another person; or

4. In the form of an order from a district court that blood be withdrawn, the person authorized to withdraw the blood and the hospital or other health care facility where the withdrawal occurs may rely on the statement or order as evidence that the person has consented to or has been required to submit to the clinical procedure and shall not require the person to sign any additional consent or waiver form. In such a case, the person authorized to perform the procedure, the employer of such person, and the hospital or other health care facility shall not be liable in any action alleging lack of consent or lack of informed consent.

C. No person specified in subsection A of this section, no employer of such a person, and no hospital or other health care facility where blood is withdrawn, shall incur any civil or criminal liability as a result of the proper withdrawal of blood when acting at the request of a law enforcement officer pursuant to the provisions of Section 5 or 7 of this act, or when acting in reliance upon a signed statement or court order as provided in this section, if the withdrawal of blood is performed in a reasonable manner according to generally accepted clinical practice. No person specified in subsection A of this section shall incur any civil or criminal liability as a result of the proper collection of breath, saliva or urine when acting at the request of a law enforcement officer under the provisions of Section 5 or 7 of this act or when acting pursuant to court order.

D. The blood, breath, saliva or urine specimens obtained shall be tested by the appropriate test as determined by the Board to determine the alcohol concentration thereof, or the presence and concentration of any other intoxicant which might have affected the ability of the person tested to operate a vessel safely.

E. When blood is withdrawn or saliva or urine is collected for the appropriate test as determined by the Board of its alcohol or other intoxicant concentration, at the request of a law enforcement

officer, a sufficient quantity of the same specimen shall be obtained to enable the tested person, at the option and expense of the tested person, to have an independent analysis made of the specimen. The excess blood, saliva or urine specimen shall be retained by a laboratory approved by the Board, in accordance with the rules of the Board, for sixty (60) days from the date of collection. At any time within that period, the tested person or the attorney of the tested person may direct that the blood, saliva or urine specimen be sent or delivered to a laboratory chosen by the tested person and approved by the Board for an independent analysis. Neither the tested person, nor any agent of the tested person, shall have access to the additional blood, saliva or urine specimen prior to the completion of the independent analysis, except the analyst performing the independent analysis and agents of the analyst.

F. When a test of breath is performed for the purpose of determining the alcohol concentration thereof, except when the test is performed by means of an automated analyzer as designated by the Board, a sufficient quantity of breath, or of the alcohol content of a fixed or measured quantity of breath, shall be obtained, in accordance with the rules of the Board, to enable the tested person, at the option and expense of the tested person, to have an independent analysis made of such specimen. The excess specimen of breath, or of its alcohol content, shall be retained by the law enforcement agency employing the arresting officer, in accordance with the rules of the Board, for sixty (60) days from the date of collection. At any time within that period, the tested person, or attorney of the tested person, may direct that the specimen be sent or delivered to a laboratory chosen by the tested person and approved by the Board for an independent analysis. Neither the tested person, nor any agent of the tested person, shall have access to the additional specimen of breath, or of its alcohol content, prior to the completion of the independent analysis thereof, except

the analyst performing the independent analysis and agents of the analyst.

G. The costs of collecting blood, breath, saliva or urine specimens for the purpose of determining the concentration of alcohol or other intoxicant thereof, by or at the direction of a law enforcement officer, shall be borne by the law enforcement agency employing the officer. The cost of collecting, retaining and sending or delivering to an independent laboratory the excess specimens of blood, breath, saliva or urine for independent analysis at the option of the tested person also shall be borne by the law enforcement agency. The cost of the independent analysis of the specimen of blood, breath, saliva or urine shall be borne by the tested person at whose option the analysis is performed. The tested person, or agent of the tested person, shall make all necessary arrangements for the performance of the independent analysis other than the forwarding or delivery of the specimen.

H. Tests conducted pursuant to the provisions of Sections 3 through 9 of this act, whether administered by or at the direction of a law enforcement officer or administered independently, at the option of the tested person, on the excess specimen of the person's blood, breath, saliva or urine, to be considered valid and admissible in evidence under the provisions of this section and Section 8 of this act, shall have been administered or performed in accordance with the rules of the Board.

I. Any person who has been arrested for any offense arising out of acts alleged to have been committed while the person was under the influence of an intoxicant and was operating a vessel, who is not requested by a law enforcement officer to submit to a test, shall be entitled to have an independent test of the person's blood, breath, saliva or urine, whichever is appropriate as determined by the Board, for the purpose of determining its alcohol concentration or of any other intoxicant therein, performed by a person chosen by

the arrested person and who is qualified as provided in this section. The arrested person shall bear the responsibility for making all necessary arrangements for the administration of the independent test and for the independent analysis of any specimens obtained and bear all costs thereof. The failure or inability of the arrested person to obtain an independent test shall not preclude the admission of other competent evidence bearing upon the question of whether the person was under the influence of an intoxicant.

J. A written report of the results of the test administered by or at the direction of the law enforcement officer shall be made available to the tested person, or attorney of the arrested person, to the law enforcement agency employing the arresting officer, and the district attorney of the county in which the alleged violation of Section 4 of this act occurred. The results of the tests provided for in this act shall be admissible in civil actions.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4210.12 of Title 63, unless there is created a duplication in numbering, reads as follows:

If a conscious person under arrest refuses to submit to testing of that person's blood or breath for the purpose of determining the alcohol concentration thereof, or to a test of that person's blood, saliva or urine for the purpose of determining the concentration of any other intoxicant, no test shall be given, unless the investigating officer has probable cause to believe that the person under arrest, while intoxicated, has operated a vessel in such a manner as to have caused the death or serious physical injury of any other person or persons. In such event, the test otherwise authorized by law may be made in the same manner as if a search warrant had been issued for the test. The sample shall be taken in a medically acceptable manner at a hospital or other suitable health care facility.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4210.13 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Upon the trial of any criminal action or proceeding arising out of acts alleged to have been committed by any person while operating a vessel while the person was under the influence of an intoxicant, evidence of the alcohol concentration in the blood or breath of the person as shown by analysis of the blood or breath of the person performed in accordance with the provisions of Sections 5 and 7 of this act or evidence of the presence and concentration of any other intoxicant as shown by analysis of such person's blood, breath, saliva, or urine specimens in accordance with the provisions of Sections 5 and 7 of this act is admissible. Evidence that the person has refused to submit to either of said analyses is also admissible.

B. For the purpose of Sections 3 through 9 of this act:

1. Evidence that there was, at the time of the test, an alcohol concentration of five-hundredths (0.05) or less is prima facie evidence that the person was not under the influence of alcohol;

2. Evidence that there was, at the time of the test, an alcohol concentration in excess of five-hundredths (0.05) but less than ten-hundredths is relevant evidence that the person's ability to operate a vessel was impaired by alcohol in violation of Section 3 of this act. However, no person shall be convicted of the offense of operating or being in actual physical control of a vessel while such person's ability to operate the vessel was impaired by alcohol solely because there was, at the time of the test, an alcohol concentration in excess of five-hundredths (0.05) but less than ten-hundredths (0.10) in the blood or breath of the person in the absence of additional evidence that the person's ability to operate the vessel was affected by alcohol to the extent that the public

health and safety was threatened or that the person violated a state statute or local ordinance in the operation of the vessel;

3. Evidence that there was, at the time of the test, an alcohol concentration ten-hundredths (0.10) or more shall be admitted as prima facie evidence that the person was under the influence of alcohol.

C. As used in Sections 4 through 9 of this act, "alcohol concentration" means grams of alcohol per one hundred (100) milliliters of blood if the blood was tested, or grams of alcohol per two hundred ten (210) liters of breath if the breath was tested.

D. To be admissible in a criminal action or proceeding, evidence of alcohol concentration shall first be qualified by establishing that such test was administered to the person within two (2) hours after the arrest of the person.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4210.14 of Title 63, unless there is created a duplication in numbering, reads as follows:

The provisions of Sections 1 through 9 of this act shall not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of an intoxicant.

SECTION 10. This act shall become effective November 1, 1996.

Passed the House of Representatives the 29th day of February, 1996.

Speaker of the House of
Representatives

Passed the Senate the ____ day of _____, 1996.

President

of the Senate