STATE OF OKLAHOMA

1st Session of the 53rd Legislature (2011)

SENATE BILL 324 By: Brown

AS INTRODUCED

An Act relating to boating safety; amending 63 O.S. 2001, Sections 4210, as last amended by Section 2, Chapter 95, O.S.L. 2008 and 4210A, as renumbered by Section 9, Chapter 393, O.S.L. 2003 (63 O.S. Supp. 2010, Sections 4210 and 4210.8), which relate to vessel operation; clarifying reference; limiting certain vessel usage; modifying exception; modifying alcohol concentration amounts; allowing for certain tests to determine substance concentration; providing implied consent; defining term; allowing officer to direct or administer test; providing arrest procedure; providing implied consent; allowing officer to direct or administer test; providing arrest procedure; authorizing test type; specifying testing methods; allowing for medical exceptions; authorizing use of test specimens; specifying persons authorized to administer tests; providing testing procedures; limiting liability; providing for independent test analysis; specifying time to retain specimens; limiting access to specimens; directing payment of costs; specifying rules for validity of tests; allowing for independent testing; requiring written report; allowing admission of test results in civil actions; allowing for exceptions to test refusal; authorizing use of laboratory findings; requiring certain procedure; requiring hearing; providing for continuance; allowing admission of test results in criminal actions; defining levels of alcohol concentration for evidence purposes; allowing for use of all evidence; providing for codification; providing an effective date; and declaring an emergency.

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

SECTION 1. AMENDATORY 63 O.S. 2001, Section 4210, as last amended by Section 2, Chapter 95, O.S.L. 2008 (63 O.S. Supp. 2010, Section 4210), is amended to read as follows:

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

B. No person shall lease or otherwise give permission to another person 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 2-101 et seq. of this title,~~ or any combination of alcohol and such substance.

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 passengers or gear so as to exceed the posted capacity

plate, United States Coast Guard standards, or the vessel manufacturer's recommended capacity.

E. No person shall operate or give permission to operate any vessel on the waters of this state for which the manufacturer has affixed a maximum horsepower capacity plate so as to exceed the posted capacity plate or to exceed the United States Coast Guard standards for maximum horsepower capacity; provided, this provision shall not apply to vessels operating in sanctioned events.

F. No person shall operate, drive or be in actual physical control of any vessel on any waters of this state, except privately owned waters, at speeds in excess of the speed limits established for those waters.

G. No person shall operate on the waters of this state, except privately owned waters, any vessel, including personal watercraft, within fifty (50) feet in proximity to another vessel when running at speeds of over ten (10) miles per hour; provided, this prohibition shall not apply to vessels operating in sanctioned events.

H. No person shall cause, allow, authorize, or permit any child under twelve (12) years of age to operate and no child under twelve (12) years of age shall operate any vessel powered by a motor or combination of motors in excess of ten (10) horsepower, any personal watercraft, or any sail-powered vessel sixteen (16) feet or greater in length on any waters of this state, ~~unless accompanied on the~~

~~vessel by another person sixteen (16) years of age or older; provided, this subsection shall not apply on privately owned waters~~ except as otherwise provided in Section 4233 of this title.

I. Any violation of the provisions of this section shall constitute a misdemeanor and shall be punishable, upon conviction, by a fine of not less than Fifty Dollars ($50.00) nor more than Two Hundred Fifty Dollars ($250.00) and shall be subject to imprisonment in the county jail for a period not to exceed six (6) months.

SECTION 2. AMENDATORY 63 O.S. 2001, Section 4210A, as renumbered by Section 9, Chapter 393, O.S.L. 2003 (63 O.S. Supp. 2010, Section 4210.8), is amended to read as follows:

Section 4210.8 A. It shall be unlawful for any person to operate or be in actual physical control of a vessel upon the waters of this state, except privately owned waters, who:

1. Has a blood or breath alcohol concentration of ~~ten-hundredths (0.10)~~ eight-hundredths (0.08) or more at the time of a test of the person's blood or breath;

2. Is under the influence of any other intoxicating substance to a degree which renders such person incapable of safely operating a vessel upon the waters of this state; or

3. Is under the influence of alcohol and any other intoxicating substance to a degree which renders such person incapable of safely operating a vessel upon the waters of this state.

As used in this section, ~~the term~~ "other intoxicating substance" ~~shall mean~~ means any controlled dangerous substance as defined in the Uniform Controlled Dangerous Substances Act or any other 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.

B. 1. Any person operating a vessel upon the waters of this state, except privately owned waters, shall be deemed to have given consent to a test or tests of such person's blood, breath, saliva or urine for the purpose of determining the presence and concentration of alcohol or any other intoxicating substance. Such tests shall be performed within two (2) hours of an arrest and in the same manner as provided for in Section 752 of Title 47 of the Oklahoma Statutes.

2. Evidence that the person has refused to submit to a test or tests as required by this section shall be admissible upon the trial of any criminal action or proceeding arising out of acts alleged to have been committed in violation of the provisions of this section.

3. Any person refusing to submit to such test or tests shall be in violation of this section and subject to the fines provided for herein.

C. 1. Any person convicted of a violation of this section shall be guilty of a misdemeanor and fined in an amount not to exceed One Thousand Dollars ($1,000.00). Any second or subsequent

conviction shall be punishable by a fine in an amount of not less than One Thousand Dollars ($1,000.00), nor more than Two Thousand Five Hundred Dollars ($2,500.00).

2. A person arrested by a law enforcement officer for a violation of this section may be allowed to post a cash bail in an amount set by the arresting law enforcement officer not to exceed the maximum fine provided by this section, or deposit a valid license to operate a motor vehicle in exchange for an official receipt issued by the arresting officer as provided for in Section 1111 et seq. of Title 22 of the Oklahoma Statutes.

SECTION 3. 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. 1. Any person who operates a vessel upon the waters of this state shall be deemed to have given consent to a test or tests of the blood or breath of the person, for the purpose of determining the alcohol concentration as defined in Section 7 of this act, and the blood, saliva or urine of the person, for the purpose of determining the presence or concentration of any other intoxicating substance as defined in this section, if arrested for any offense arising out of acts alleged to have been committed while the person was operating or in actual physical control of a vessel upon the waters of this state while under the influence of alcohol or other intoxicating substance, or the combined influence of alcohol and any

other intoxicating substance, or if the person is involved in a boating collision that resulted in the immediate death or serious injury of any person and is removed from the scene of the collision to a hospital or other health care facility outside this state before a law enforcement officer can effect an arrest.

2. A law enforcement officer, having reasonable grounds to believe that such person was operating or in actual physical control of a vessel while under the influence may direct the administration of or administer the test or tests.

3. As used in this section, "other intoxicating substance" means any controlled dangerous substance as defined in the Uniform Controlled Dangerous Substances Act and any other 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.

B. 1. 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, 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 or concentration of any other intoxicating substance therein.

2. 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 such breath test for any other reason cannot be administered in accordance with the rules of the Board.

3. 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 or concentration of any other intoxicating substance or the combination of alcohol and any other intoxicating substance.

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

2. 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 must 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.

3. 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 by the arresting officer on the recognizance of the person for medical reasons. The arresting officer who releases an arrested person on the recognizance of the person must indicate the release on the face of the citation. Any person released on his or her 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 may also designate any additional test to be administered to determine the concentration of alcohol, or the presence or concentration of any other intoxicating substance or the combination of alcohol and any other intoxicating substance. The cost of such 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. Such specimens shall be treated in accordance with the rules applicable to the specimens obtained by an arresting officer.

F. When a law enforcement officer has determined that the blood alcohol content of an individual is to be tested for the presence or concentration of alcohol, other intoxicating substance, or the combination of alcohol and any other intoxicating substance, the law enforcement officer shall inform the individual to be tested that the withdrawal of blood shall only be performed by certain medical personnel as provided for in Section 4 of this act.

SECTION 4. 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. Only a licensed medical doctor, licensed osteopathic physician, licensed chiropractic physician, registered nurse, licensed practical nurse, 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 the presence or concentration of other intoxicating substance. Only qualified persons authorized by the

Board of Tests for Alcohol and Drug Influence may collect breath, saliva or urine, or administer tests of breath under the provisions of this section.

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 the person has been involved in a boating collision and has been removed from the scene of the collision that resulted in the death or great bodily injury of any person, as defined in subsection B of Section 646 of Title 21 of the Oklahoma Statutes, to a hospital or other health care facility outside the State of Oklahoma before the law enforcement officer was able to effect an arrest for such offense; 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 such a 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 by the provisions of Section 3 or 5 of this act, or when acting in reliance upon a signed statement or court order as provided in this section, if the act 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 3 or 5 of this act or when acting pursuant to a court order.

D. The blood, breath, saliva or urine specimens obtained shall be tested by the appropriate test as determined by the Board of Tests for Alcohol and Drug Influence, or tested by a laboratory that

is exempt from the Board rules pursuant to Section 759 of Title 47 of the Oklahoma Statutes, to determine the alcohol concentration thereof, or the presence and concentration of any other intoxicating substance 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 testing of its alcohol concentration or other intoxicating substance presence or 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 his or her own option and expense, to have an independent analysis made of such specimen. The excess blood, saliva or urine specimen shall be retained by a laboratory approved by the Board of Tests for Alcohol and Drug Influence, in accordance with the rules and regulations of the Board, or by a laboratory that is exempt from the Board rules pursuant to Section 759 of Title 47 of the Oklahoma Statutes, for sixty (60) days from the date of collection. At any time within that period, the tested person or his or her attorney may direct that such blood, saliva or urine specimen be sent or delivered to a laboratory of his or her own choosing and approved by the Board for an independent analysis. Neither the tested person, nor any agent of such 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 such test is performed by means of an automated analyzer as designated by the Board of Tests for Alcohol and Drug Influence, 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 and regulations of the Board to enable the tested person, at his or her own option and expense, 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 and regulations of the Board, for sixty (60) days from the date of collection. At any time within that period, the tested person, or his or her attorney, may direct that such specimen be sent or delivered to a laboratory of his or her own choosing and approved by the Board for an independent analysis. Neither the tested person, nor any agent of such 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 alcohol or other

intoxicating substance thereof, by or at the direction of a law enforcement officer, shall be borne by the law enforcement agency employing such 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 shall also be borne by such law enforcement agency. The cost of the independent analysis of such specimen of blood, breath, saliva or urine shall be borne by the tested person at whose option such analysis is performed. The tested person, or his or her agent, shall make all necessary arrangements for the performance of such independent analysis other than the forwarding or delivery of such specimen.

H. Tests of blood or breath for the purpose of determining the alcohol concentration thereof, and tests of blood, saliva or urine for the purpose of determining the presence or concentration of any other intoxicating substance therein, under the provisions of this section, 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 such person's blood, breath, saliva or urine, to be considered valid and admissible in evidence under the provisions of this section, shall have been administered or performed in accordance with the rules and regulations of the Board of Tests for Alcohol and Drug Influence, or

performed by a laboratory that is exempt from the Board rules pursuant to Section 759 of Title 47 of the Oklahoma Statutes.

I. Any person who has been arrested for any offense arising out of acts alleged to have been committed while the person was operating or in actual physical control of a vessel while under the influence of alcohol, any other intoxicating substance or the combined influence of alcohol and any other intoxicating substance, who is not requested by a law enforcement officer to submit to a test, shall be entitled to have an independent test of his or her blood, breath, saliva or urine, which is appropriate as determined by the Board of Tests for Alcohol and Drug Influence for the purpose of determining its alcohol concentration or the presence or concentration of any other intoxicating substance therein, performed by a person of his or her own choosing who is qualified as stipulated in this section. The arrested person shall bear the responsibility for making all necessary arrangements for the administration of such 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 such person was under the influence of alcohol, or any other intoxicating substance or the combined influence of alcohol and any other intoxicating substance.

J. Any agency or laboratory certified by the Board of Tests for Alcohol and Drug Influence or any agency or laboratory that is exempt from the Board rules pursuant to Section 759 of Title 47 of the Oklahoma Statutes, which analyzes breath, blood, or urine shall make available a written report of the results of the test administered by or at the direction of the law enforcement officer to:

1. The tested person, or his or her attorney;

2. The Commissioner of Public Safety; and

3. The Fatality Analysis Reporting System (FARS) analyst of the state, upon request.

The results of the tests provided for in this section shall be admissible in civil actions.

SECTION 5. 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:

If a conscious person under arrest refuses to submit to testing of his or her blood or breath for the purpose of determining the alcohol concentration thereof, or to a test of his or her blood, saliva or urine for the purpose of determining the presence or concentration of any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance, none 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 that 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 or tests. The sample shall be taken in a medically acceptable manner at a hospital or other suitable health care facility.

SECTION 6. 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:

A. At any proceeding held relevant to this act, a report of the findings of the laboratory of the Oklahoma State Bureau of Investigation, the medical examiner's report of investigation or autopsy report, or a laboratory report from a forensic laboratory operated by the State of Oklahoma or any political subdivision thereof, which has been made available by the Oklahoma Tax Commission to the person or an authorized representative at least five (5) days prior to the hearing, with reference to all or part of the evidence submitted, when certified as correct by the persons making the report shall be received as evidence of the facts and findings stated, if relevant and otherwise admissible in evidence. If the report is deemed relevant by either party, the court shall admit the report without the testimony of the person making the report, unless the court, pursuant to this subsection, orders the person to appear.

B. When any alleged controlled dangerous substance has been submitted to the laboratory of the Oklahoma State Bureau of Investigation for analysis, and the analysis shows that the submitted material is a controlled dangerous substance, the distribution of which constitutes a felony under the laws of this state, no portion of the substance shall be released to any other person or laboratory absent an order of a district court. The defendant shall additionally be required to submit to the court a procedure for transfer and analysis of the subject material to ensure the integrity of the sample and to prevent the material from being used in any illegal manner.

C. The court, upon motion of either party, shall order the attendance of any person preparing a report submitted as evidence in the hearing when it appears there is a substantial likelihood that material evidence not contained in the report may be produced by the testimony of any person having prepared a report. The hearing shall be held and, if sustained, an order issued not less than five (5) days prior to the time when the testimony shall be required.

D. If within five (5) days prior to the hearing or during a hearing, a motion is made pursuant to this section requiring a person having prepared a report to testify, the court may hear a report or other evidence but shall continue the hearing until such time notice of the motion and hearing is given to the person making

the report, the motion is heard, and, if sustained, the testimony ordered can be given.

SECTION 7. 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 or in actual physical control of a vessel while under the influence of alcohol or any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance, 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 Section 4 of this act and Section 759 of Title 47 of the Oklahoma statutes or evidence of the presence or concentration of any other intoxicating substance as shown by analysis of such person's blood, breath, saliva, or urine specimens in accordance with the provisions of Section 4 of this act and Section 759 of Title 47 of the Oklahoma Statutes shall be admissible. Evidence that the person has refused to submit to either of said analyses is also admissible. For the purpose of this section, when the person is under the age of twenty-one (21) years, evidence that there was, at the time of the test, any measurable quantity of alcohol is prima facie evidence that the person was

under the influence of alcohol in violation of Section 3 of this act. For persons twenty-one (21) years of age or older:

1. Evidence that there was, at the time of the test, an alcohol concentration of seven-hundredths (0.07) or less is prima facie evidence that the person was not under the influence of alcohol; and

2. Evidence that there was, at the time of the test, an alcohol concentration of eight-hundredths (0.08) or more shall be admitted as prima facie evidence that the person was under the influence of alcohol.

B. For purposes of this section, "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.

C. To be admissible in a proceeding, the evidence shall first be qualified by establishing that the test was administered to the person within two (2) hours after the arrest of the person.

SECTION 8. 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 3 through 7 of this act do not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of alcohol or any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance.

SECTION 9. This act shall become effective July 1, 2011.

SECTION 10. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

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