

SESSION OF 2022

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2387

As Amended by Senate Committee on Judiciary

Brief*

HB 2387 would create the crime of operating an aircraft under the influence, provide for testing related to the crime, and repeal current statutes prohibiting the operation of aircraft under influence of alcohol or drugs and providing for related testing.

Operating an Aircraft Under the Influence

The bill would define “operating an aircraft under the influence” as operating or attempting to operate any aircraft within Kansas while:

- The alcohol concentration in the person’s blood or breath, as shown by any competent evidence, including other competent evidence, is 0.04 or more;
- The alcohol concentration in the person’s blood or breath, as measured within four hours of the time of operating or attempting to operate an aircraft, is 0.04 or more;
- Under the influence of alcohol to a degree that renders the person incapable of safely operating an aircraft;
- Under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely operating an aircraft; or

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely operating an aircraft.

The offense would be a class A nonperson misdemeanor, unless it occurred while the person convicted is prohibited from operating an aircraft by a court order pursuant to the bill or because the person's pilot license is revoked or suspended by order of the Federal Aviation Administration for a prior alcohol or drug-related conviction, in which case it would be a severity level 6, nonperson felony.

For misdemeanor offenses, the following provisions would apply:

- On a first conviction, the person convicted would be sentenced to no less than 48 consecutive hours nor more than 6 months' imprisonment or, in the court's discretion, 100 hours of public service, and fined not less than \$750; and
- On a second or subsequent conviction, the person convicted would be sentenced to no less than 90 days nor more than 1 year's imprisonment and fined not less than \$1,250, and the following conditions would apply:
 - As a condition of any probation granted, the person would be required to serve at least 120 hours of confinement, including at least 48 hours' imprisonment. The remainder could be served by a combination of imprisonment, work release (if the work release program requires the person to return to confinement at the end of each day), or a house arrest program;
 - The person would receive hour-for-hour credit for time served in work release or house arrest until the minimum 120 hours' confinement is met. If required to serve more

than the minimum 120 hours' confinement, the person would receive day-for-day credit for time served once the minimum 120 hours' confinement is met, unless otherwise ordered by the court; and

- When in work release, the person would only be given credit for time served in confinement at the end of and continuing to the beginning of the person's work day. When under house arrest, the person would be monitored by an electronic monitoring device verifying the person's location, and the person could only be given credit for the time served within the boundaries of the person's residence.

For felony offenses, the following provisions would apply:

- As a condition of any probation granted, the person would be required to serve at least 30 days of confinement, including at least 48 consecutive hours' imprisonment. The remainder could be served by a combination of imprisonment, work release (if the work release program requires the person to return to confinement at the end of each day), or a house arrest program;
- The person would receive hour-for-hour credit for time served in work release or house arrest for the first 240 hours of confinement so served, and would then receive day-for-day credit for time so served, unless otherwise ordered by the court; and
- When in work release, the person would only be given credit for time served in confinement at the end of and continuing to the beginning of the person's work day. When under house arrest, the person would be monitored by an electronic monitoring device verifying the person's location,

and the person could only be given credit for the time served within the boundaries of the person's residence.

As part of the judgment of conviction, the court would be required to order the person convicted not to operate an aircraft for any purposes for six months from the date of final discharge from the county jail, or the date of payment or satisfaction of a fine, whichever is later, or one year from such date on a second conviction. If the court suspends the sentence and places the person on probation, the court would be required to order as a condition of probation that the person not operate an aircraft for any purpose for a period of 30 days from the date of the order on a first conviction or 60 days from the date of the order on a second conviction.

In determining the number of occurrences of the offense, a conviction would include entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging commission of operating an aircraft under the influence, and it would be irrelevant whether an offense occurred before or after conviction or diversion for a previous offense.

If a person is charged with a violation of the offense involving drugs, the fact that the person is or has been entitled to use the drug under Kansas law would not constitute a defense against the charge.

Related Testing Provisions

The bill would authorize a request to a person operating or attempting to operate an aircraft in Kansas to submit to one or more tests of the person's blood, breath, urine, or other bodily substance to determine the presence of alcohol or drugs, administered at the direction of a law enforcement officer. The procedural requirements and related provisions would reflect current law for such testing for the crimes being repealed by the bill or in the context of driving under the

influence (DUI) offenses, except for certain oral and written notice requirements in the DUI procedure.

Similarly, the bill would include provisions allowing a law enforcement officer to request a person operating or attempting to operate an aircraft in Kansas to submit to a preliminary screening of the person's breath or oral fluid, or both, if the officer has reasonable suspicion to believe the person has been operating or attempting to operate an aircraft while under the influence of alcohol, drugs, or a combination of both. The procedural requirements and related provisions would reflect current law for such preliminary screenings in the DUI context.

The bill would add references to the testing provisions for this crime to continuing references to DUI testing provisions in the following statutory locations:

- In the Kansas Code of Criminal Procedure, regarding admissibility in any hearing or trial;
- In the Kansas Rules of Evidence, regarding the physician-patient privilege;
- In a statute allowing the Secretary of Health and Environment to adopt rules and regulations regarding approved preliminary screening devices; and
- In a statute authorizing the Director of the Kansas Bureau of Investigation to adopt rules and regulations regarding a list of preliminary screening devices approved for testing of oral fluid.

Background

The bill was introduced by the House Committee on Judiciary at the request of Representative Ralph.

House Committee on Judiciary

In the House Committee hearing on February 16, 2021, a representative of the Judicial Council's DUI Advisory Committee testified as a **proponent** of the bill, stating it was based on a recommendation from the Committee's study, which was originally requested in 2018 by Representative Finch, as then-chairperson of the House Judiciary Committee. The conferee stated Kansas' current statutes governing operating an aircraft under the influence of drugs or alcohol were enacted in 1981 and have not been updated, and the bill would provide consistency for law enforcement officers and protect constitutional rights by making the process and penalties for this crime closely resemble the DUI process and penalties.

A representative of the Kansas Association of Criminal Defense Lawyers provided written-only neutral testimony.

A representative of the Kansas Agricultural Aviation Association (KAAA) provided written-only **opponent** testimony. [*Note:* The House Committee chairperson indicated during House Committee action on the bill that the KAAA representative has communicated that his organization no longer opposes the bill.]

On February 24, 2021, the House Committee amended the bill to clarify the application of the felony provision, remove certain conditions of sentencing for the felony provision, and add testing provisions and references to further align the provisions of the bill with continuing DUI provisions. [*Note:* The Senate Committee restored conditions of sentencing for the felony provision similar to those removed by the House Committee.]

Senate Committee on Judiciary

In the Senate Committee hearing on March 24, 2021, the same **proponent** testified as before the House Committee. No neutral or **opponent** testimony was provided.

On January 18, 2022, the Senate Committee amended the bill by:

- Restoring conditions of sentencing for the felony provisions similar to those removed by the House Committee; and
- Making technical updates to ensure consistency in statutory references and wording.

Fiscal Information

According to the February 23, 2021, revised fiscal note prepared by the Division of the Budget on the bill, as introduced, the Kansas Sentencing Commission estimates enactment of the bill may have an impact on prison admissions and bed space, but the effect cannot be determined at this time. The current estimated available bed capacity is 9,420 for males and 948 for females. Based upon the Commission's most recent ten-year prison population projection, it is estimated the year-end population for available male capacity will be under capacity by 1,287 inmates in FY 2021 and 1,241 inmates in FY 2022.

The Department of Corrections indicates enactment of the bill would have a minimal fiscal effect on probation or facility caseloads, which could be absorbed within existing resources.

The Office of Judicial Administration indicates enactment of the bill could result in additional cases being filed and could affect the complexity of the cases, resulting in additional time spent by judges and court staff. The bill also could result in

the collection of additional docket fees, fines, and other costs, but a fiscal effect cannot be determined because the number of additional cases cannot be estimated.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2022 Governor's Budget Report*.

Crimes; operating an aircraft under the influence; penalties; testing