

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

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*An Act to amend and reenact §§ 18.2-268.3 and 46.2-391.2 of the Code of Virginia, relating to refusal of tests; restricted license.*

[H 34]

Approved

**Be it enacted by the General Assembly of Virginia:**  
**1. That §§ 18.2-268.3 and 46.2-391.2 of the Code of Virginia are amended and reenacted as follows:**

**§ 18.2-268.3. Refusal of tests; penalties; procedures.**

A. It is unlawful for a person who is arrested for a violation of § 18.2-266 or 18.2-266.1 or subsection B of § 18.2-272 or of a similar ordinance to unreasonably refuse to have samples of his breath taken for chemical tests to determine the alcohol content of his blood as required by § 18.2-268.2, and any person who so unreasonably refuses is guilty of a violation of this subsection, which is punishable as follows:

1. A first violation is a civil offense. For a first offense, the court shall suspend the defendant's privilege to drive for a period of one year. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

2. If a person is found to have violated this subsection and within 10 years prior to the date of the refusal he was found guilty of any of the following: a violation of this section, a violation of § 18.2-266, or a violation of any offense listed in subsection E of § 18.2-270 arising out of separate occurrences or incidents, he is guilty of a Class 1 misdemeanor. A conviction under this subdivision shall of itself operate to deprive the person of the privilege to drive for a period of three years from the date of the judgment of conviction. This revocation period is in addition to the suspension period provided under § 46.2-391.2.

B. It is unlawful for a person who is arrested for a violation of § 18.2-266 or 18.2-266.1 or subsection B of § 18.2-272 or of a similar ordinance to unreasonably refuse to have samples of his blood taken for chemical tests to determine the alcohol or drug content of his blood as required by § 18.2-268.2 and any person who so unreasonably refuses is guilty of a violation of this subsection, which is a civil offense and is punishable as follows:

1. For a first offense, the court shall suspend the defendant's privilege to drive for a period of one year. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

2. If a person is found to have violated this subsection and within 10 years prior to the date of the refusal he was found guilty of any of the following: a violation of this section, a violation of § 18.2-266, or a violation of any offense listed in subsection E of § 18.2-270 arising out of separate occurrences or incidents, such violation shall of itself operate to deprive the person of the privilege to drive for a period of three years from the date of the judgment. This revocation period is in addition to the suspension period provided under § 46.2-391.2.

C. When a person is arrested for a violation of § 18.2-51.4, 18.2-266, or 18.2-266.1 or subsection B of § 18.2-272 or of a similar ordinance and such person refuses to permit blood or breath or both blood and breath samples to be taken for testing as required by § 18.2-268.2, the arresting officer shall advise the person, from a form provided by the Office of the Executive Secretary of the Supreme Court (i) that a person who operates a motor vehicle upon a highway in the Commonwealth is deemed thereby, as a condition of such operation, to have consented to have samples of his blood and breath taken for chemical tests to determine the alcohol or drug content of his blood, (ii) that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial, (iii) that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of the Commonwealth, (iv) of the civil penalties for unreasonable refusal to have blood or breath or both blood and breath samples taken, and (v) of the criminal penalty for unreasonable refusal to have breath samples taken within 10 years of a prior conviction for driving while intoxicated or unreasonable refusal, which is a Class 1 misdemeanor. The form from which the arresting officer shall advise the person arrested shall contain a brief statement of the law requiring the taking of blood or breath samples, a statement that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial, and the penalties for refusal. The Office of the Executive Secretary of the Supreme Court shall make the form available on the Internet and the form shall be considered an official publication of the Commonwealth for the purposes of § 8.01-388.

D. The arresting officer shall, under oath before the magistrate, execute the form and certify (i) that

57 the defendant has refused to permit blood or breath or both blood and breath samples to be taken for  
58 testing; (ii) that the officer has read the portion of the form described in subsection C to the arrested  
59 person; (iii) that the arrested person, after having had the portion of the form described in subsection C  
60 read to him, has refused to permit such sample or samples to be taken; and (iv) how many, if any,  
61 violations of this section, § 18.2-266, or any offense described in subsection E of § 18.2-270 the arrested  
62 person has been convicted of within the last 10 years. Such sworn certification shall constitute probable  
63 cause for the magistrate to issue a warrant or summons charging the person with unreasonable refusal.  
64 The magistrate shall attach the executed and sworn advisement form to the warrant or summons. The  
65 warrant or summons for a first offense under subsection A or any offense under subsection B shall be  
66 executed in the same manner as a criminal warrant or summons. If the person arrested has been taken to  
67 a medical facility for treatment or evaluation of his medical condition, the arresting officer may read the  
68 advisement form to the person at the medical facility, and issue, on the premises of the medical facility,  
69 a summons for a violation of this section in lieu of securing a warrant or summons from the magistrate.  
70 The magistrate or arresting officer, as the case may be, shall forward the executed advisement form and  
71 warrant or summons to the appropriate court.

72 *E. A defendant who is found guilty of a first offense and whose license is suspended pursuant to*  
73 *subdivision A 1 or B 1 may petition the court 30 days after the date of conviction for a restricted*  
74 *license and the court may, for good cause shown, provide that the defendant is issued a restricted*  
75 *license during the remaining period of suspension, or any portion thereof, for any of the purposes set*  
76 *forth in subsection E of § 18.2-271.1. No restricted license issued pursuant to this subsection shall*  
77 *permit any person to operate a commercial motor vehicle as defined in the Virginia Commercial*  
78 *Driver's License Act (§ 46.2-341.1 et seq.). If the court grants such petition and issues the defendant a*  
79 *restricted license, the court shall order (i) that reinstatement of the defendant's license to drive be*  
80 *conditioned upon (a) the installation of an ignition interlock system on each motor vehicle, as defined in*  
81 *§ 46.2-100, owned by or registered to the person, in whole or in part, for a period of time not to exceed*  
82 *the period of license suspension and restriction, not less than six consecutive months without*  
83 *alcohol-related violations of the interlock requirements and (b) the requirement that such person not*  
84 *operate any motor vehicle that is not equipped with such a system for the period of time that the*  
85 *interlock restriction is in effect and (ii) that, as a condition of probation or otherwise, the defendant*  
86 *enter into and successfully complete an alcohol safety action program in the judicial district in which*  
87 *such charge is brought or in any other judicial district upon such terms and conditions as the court may*  
88 *set forth. However, upon motion of a person convicted of any such offense following an assessment of*  
89 *the person conducted by an alcohol safety action program, the court, for good cause, may decline to*  
90 *order participation in such a program if the assessment conducted by the alcohol safety action program*  
91 *indicates that intervention is not appropriate for such person. In no event shall such persons be*  
92 *permitted to enter any such program that is not certified as meeting minimum standards and criteria*  
93 *established by the Commission on the Virginia Alcohol Safety Action Program (VASAP) pursuant to this*  
94 *section and to § 18.2-271.2. The court shall require the person entering such program under the*  
95 *provisions of this section to pay a fee of no less than \$250 but no more than \$300. A reasonable*  
96 *portion of such fee, as may be determined by the Commission on VASAP, but not to exceed 10 percent,*  
97 *shall be forwarded monthly to be deposited with the State Treasurer for expenditure by the Commission*  
98 *on VASAP, and the balance shall be held in a separate fund for local administration of driver alcohol*  
99 *rehabilitation programs. Upon a positive finding that the defendant is indigent, the court may reduce or*  
100 *waive the fee. In addition to the costs of the proceeding, fees as may reasonably be required of*  
101 *defendants referred for intervention under any such program may be charged.*

102 *If the court grants a restricted license to any person pursuant to this section, the court shall order*  
103 *such person to surrender his driver's license to be disposed of in accordance with the provisions of*  
104 *§ 46.2-398 and shall forward to the Commissioner of the Department of Motor Vehicles a copy of its*  
105 *order entered pursuant to this subsection. This order shall specifically enumerate the restrictions*  
106 *imposed and contain such information regarding the person to whom such a permit is issued as is*  
107 *reasonably necessary to identify such person. The court shall also provide a copy of its order to such*  
108 *person who may operate a motor vehicle on the order until receipt from the Commissioner of the*  
109 *Department of Motor Vehicles of a restricted license, but only if the order provides for a restricted*  
110 *license for that period. A copy of the order and, after receipt thereof, the restricted license shall be*  
111 *carried at all times by such person while operating a motor vehicle. The period of time during which*  
112 *the person is prohibited from operating a motor vehicle that is not equipped with an ignition interlock*  
113 *system shall be calculated from the date the person is issued a restricted license by the court; however,*  
114 *such period of time shall be tolled upon the expiration of the restricted license issued by the court until*  
115 *such time as the person is issued a restricted license by the Department of Motor Vehicles. Any person*  
116 *who operates a motor vehicle in violation of any restrictions imposed pursuant to this section shall be*  
117 *guilty of a violation of § 18.2-272. The provisions of subsection F of § 18.2-271.1 shall apply to this*

118 *subsection mutatis mutandis, except as herein provided.*

119 *F. Notwithstanding any other provisions of this section or of § 18.2-271.1, nothing in this section*  
 120 *shall permit the court to suspend, reduce, limit, or otherwise modify any disqualification from operating*  
 121 *a commercial motor vehicle imposed under the provisions of the Virginia Commercial Driver's License*  
 122 *Act (§ 46.2-341.1 et seq.).*

123 **§ 46.2-391.2. Administrative suspension of license or privilege to operate a motor vehicle.**

124 A. If a breath test is taken pursuant to § 18.2-268.2 or any similar ordinance or § 46.2-341.26:2 and  
 125 (i) the results show a blood alcohol content of 0.08 percent or more by weight by volume or 0.08 grams  
 126 or more per 210 liters of breath, or (ii) the results, for persons under 21 years of age, show a blood  
 127 alcohol concentration of 0.02 percent or more by weight by volume or 0.02 grams or more per 210  
 128 liters of breath or (iii) the person refuses to submit to the breath or blood test in violation of  
 129 § 18.2-268.3 or any similar ordinance or § 46.2-341.26:3, and upon issuance of a petition or summons,  
 130 or upon issuance of a warrant by the magistrate, for a violation of § 18.2-51.4, 18.2-266, or 18.2-266.1,  
 131 or any similar ordinance, or § 46.2-341.24 or upon the issuance of a warrant or summons by the  
 132 magistrate or by the arresting officer at a medical facility for a violation of § 18.2-268.3, or any similar  
 133 ordinance, or § 46.2-341.26:3, the person's license shall be suspended immediately or in the case of (a)  
 134 an unlicensed person, (b) a person whose license is otherwise suspended or revoked, or (c) a person  
 135 whose driver's license is from a jurisdiction other than the Commonwealth, such person's privilege to  
 136 operate a motor vehicle in the Commonwealth shall be suspended immediately. The period of  
 137 suspension of the person's license or privilege to drive shall be seven days, unless the petition, summons  
 138 or warrant issued charges the person with a second or subsequent offense. If the person is charged with  
 139 a second offense the suspension shall be for 60 days. If not already expired, the period of suspension  
 140 shall expire on the day and time of trial of the offense charged on the petition, summons or warrant,  
 141 except that it shall not so expire during the first seven days of the suspension. If the person is charged  
 142 with a third or subsequent offense, the suspension shall be until the day and time of trial of the offense  
 143 charged on the petition, summons or warrant.

144 A law-enforcement officer, acting on behalf of the Commonwealth, shall serve a notice of suspension  
 145 personally on the arrested person. When notice is served, the arresting officer shall promptly take  
 146 possession of any driver's license held by the person and issued by the Commonwealth and shall  
 147 promptly deliver it to the magistrate. Any driver's license taken into possession under this section shall  
 148 be forwarded promptly by the magistrate to the clerk of the general district court or, as appropriate, the  
 149 court with jurisdiction over juveniles of the jurisdiction in which the arrest was made together with any  
 150 petition, summons or warrant, the results of the breath test, if any, and the report required by subsection  
 151 B. A copy of the notice of suspension shall be forwarded forthwith to both (1) the general district court  
 152 or, as appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was  
 153 made and (2) the Commissioner. Transmission of this information may be made by electronic means.

154 The clerk shall promptly return the suspended license to the person at the expiration of the  
 155 suspension. Whenever a suspended license is to be returned under this section or § 46.2-391.4, the  
 156 person may elect to have the license returned in person at the clerk's office or by mail to the address on  
 157 the person's license or to such other address as he may request.

158 B. Promptly after arrest and service of the notice of suspension, the arresting officer shall forward to  
 159 the magistrate a sworn report of the arrest that shall include (i) information which adequately identifies  
 160 the person arrested and (ii) a statement setting forth the arresting officer's grounds for belief that the  
 161 person violated § 18.2-51.4, 18.2-266, or 18.2-266.1, or a similar ordinance, or § 46.2-341.24 or refused  
 162 to submit to a breath or blood test in violation of § 18.2-268.3 or a similar ordinance or § 46.2-341.26:3.  
 163 The report required by this subsection shall be submitted on forms supplied by the Supreme Court.

164 C. Any person whose license or privilege to operate a motor vehicle has been suspended under  
 165 subsection A may, during the period of the suspension, request the general district court or, as  
 166 appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was made to  
 167 review that suspension. The court shall review the suspension within the same time period as the court  
 168 hears an appeal from an order denying bail or fixing terms of bail or terms of recognizance, giving this  
 169 matter precedence over all other matters on its docket. If the person proves to the court by a  
 170 preponderance of the evidence that the arresting officer did not have probable cause for the arrest, that  
 171 the magistrate did not have probable cause to issue the warrant, or that there was not probable cause for  
 172 issuance of the petition, the court shall rescind the suspension, or that portion of it that exceeds seven  
 173 days if there was not probable cause to charge a second offense or 60 days if there was not probable  
 174 cause to charge a third or subsequent offense, and the clerk of the court shall forthwith, or at the  
 175 expiration of the reduced suspension time, (i) return the suspended license, if any, to the person unless  
 176 the license has been otherwise suspended or revoked, (ii) deliver to the person a notice that the  
 177 suspension under § 46.2-391.2 has been rescinded or reduced, and (iii) forward to the Commissioner a  
 178 copy of the notice that the suspension under § 46.2-391.2 has been rescinded or reduced. Otherwise, the

179 court shall affirm the suspension. If the person requesting the review fails to appear without just cause,  
180 his right to review shall be waived.

181 The court's findings are without prejudice to the person contesting the suspension or to any other  
182 potential party as to any proceedings, civil or criminal, and shall not be evidence in any proceedings,  
183 civil or criminal.

184 D. If a person whose license or privilege to operate a motor vehicle is suspended under subsection A  
185 is convicted under § 18.2-36.1, 18.2-51.4, 18.2-266, or 18.2-266.1 *or subdivision A 1 or B 1 of*  
186 *§ 18.2-268.3*, or any similar ordinance, or § 46.2-341.24 during the suspension imposed by subsection A,  
187 and if the court decides to issue the person a restricted permit under subsection E of § 18.2-271.1 *or*  
188 *subsection E of § 18.2-268.3*, such restricted permit shall not be issued to the person before the  
189 expiration of the first seven days of the suspension imposed under subsection A.