

Enrolled Senate Bill 609

Sponsored by COMMITTEE ON BUSINESS, LABOR, AND ECONOMIC DEVELOPMENT (at the request of State Farm Insurance Company)

CHAPTER

AN ACT

Relating to insurance compliance audits.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 to 8 of this 2001 Act are added to and made a part of ORS chapter 731.

SECTION 2. As used in sections 2 to 8 of this 2001 Act:

(1) "Insurance compliance audit" means a voluntary internal evaluation, review, assessment, audit or investigation that is undertaken to identify or prevent noncompliance with, or promote compliance with, laws, regulations, orders or industry or professional standards, and that is conducted by or on behalf of an insurer regulated under the Insurance Code.

(2) "Insurance compliance self-evaluative audit document" means a document prepared as a result of or in connection with an insurance compliance audit. "Insurance compliance self-evaluative audit document" includes, but is not limited to:

(a) A written response to the findings of an insurance compliance audit.

(b) Field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits, computer-generated or electronically recorded information, phone records, maps, charts, graphs and surveys, provided this supporting information is collected or developed solely for the purpose of an insurance compliance audit.

(c) An insurance compliance audit report prepared by an auditor, who may be an employee of the insurer or an independent contractor, which may include the scope of the audit, the information gained in the audit and conclusions and recommendations, with exhibits and appendices.

(d) Memoranda and documents analyzing portions or all of the insurance compliance audit report and discussing potential implementation issues.

(e) An implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance.

(f) Analytic data generated in the course of conducting the insurance compliance audit, not including any analytic data that exists independently of the audit or existed before the audit was conducted.

SECTION 3. (1) Except as provided in sections 2 to 8 of this 2001 Act, an insurance compliance self-evaluative audit document is privileged information and is not discoverable, or admissible as evidence, in any civil, criminal or administrative proceeding.

(2) Except as provided in sections 2 to 8 of this 2001 Act, any person who performs or directs the performance of an insurance compliance audit, any officer, employee or agent of an insurer who is involved with an insurance compliance audit and any consultant who is hired for the purpose of performing an insurance compliance audit may not be examined in any civil, criminal or administrative proceeding about the insurance compliance audit or any insurance compliance self-evaluative audit document.

SECTION 4. (1) Section 3 of this 2001 Act does not limit the authority of the Director of the Department of Consumer and Business Services to acquire any insurance compliance self-evaluative audit document or to examine any person in connection with the document. If the director determines that the actions of an insurer are egregious, the director may introduce and use the document in any administrative proceeding or civil action under the Insurance Code. The director may require that an insurer submit an insurance compliance self-evaluative audit document for the purpose of an examination or investigation conducted under this chapter. An insurer may also voluntarily submit an insurance compliance self-evaluative audit document to the director.

(2) Any insurance compliance self-evaluative audit document submitted to the director under this section and in the possession of the director remains the property of the insurer and is not subject to disclosure or production under ORS 192.410 to 192.505.

(3)(a) The director shall consider the corrective action taken by an insurer to eliminate problems identified in the insurance compliance self-evaluative audit document as a mitigating factor when determining a civil penalty or other action against the insurer.

(b) The director may, in the director's sole discretion, decline to impose a civil penalty or take other action against an insurer based on information obtained from an insurance compliance self-evaluative audit document if the insurer has taken reasonable corrective action to eliminate the problems identified in the document.

(4) Disclosure of an insurance compliance self-evaluative audit document to a governmental agency, whether voluntarily or pursuant to compulsion of law, does not constitute a waiver of the privilege set forth in section 3 of this 2001 Act for any other purpose.

(5) The director may not be compelled to produce an insurance compliance self-evaluative audit document.

SECTION 5. (1) The privilege set forth in section 3 of this 2001 Act does not apply to the extent that the privilege is expressly waived by the insurer that prepared or caused to be prepared the insurance compliance self-evaluative audit document.

(2) The privilege set forth in section 3 of this 2001 Act does not apply in any civil, criminal or administrative proceeding commenced by the Attorney General relating to Medicaid fraud, without regard to whether the proceeding is brought on behalf of the state, a state agency or a federal agency. An insurer may request an in camera review of any document or other evidence to be released or used under this subsection and may request that appropriate protective orders be entered governing release and use of the material.

(3) In any civil proceeding a court of record may, after an in camera review, require disclosure of material for which the privilege set forth in section 3 of this 2001 Act is asserted if the court determines that the material is not subject to the privilege, or that the privilege is asserted for a fraudulent purpose, including but not limited to an assertion of the privilege for an insurance compliance audit that was conducted for the purpose of concealing a violation of any federal, state or local law or rule. Nothing in this subsection shall be construed to limit the authority of the Director of the Department of Consumer and Business Services to acquire, examine and use insurance compliance self-evaluative audit documents under section 4 of this 2001 Act.

(4) In a criminal proceeding, a court of record may, after an in camera review, require disclosure of material for which the privilege set forth in section 3 of this 2001 Act is asserted if the court determines that:

(a) The privilege is asserted for a fraudulent purpose, including but not limited to an assertion of the privilege for an insurance compliance audit that was conducted for the purpose of concealing a violation of any federal, state or local law or rule;

(b) The material is not subject to the privilege; or

(c) The material contains evidence relevant to commission of a criminal offense, and:

(A) A district attorney or the Attorney General has a compelling need for the information;

(B) The information is not otherwise available; or

(C) The district attorney or Attorney General is unable to obtain the substantial equivalent of the information by any other means without incurring unreasonable cost and delay.

SECTION 6. (1) Within 30 days after a district attorney or the Attorney General serves on an insurer a written request by certified mail for disclosure of an insurance compliance self-evaluative audit document, the insurer that prepared or caused the document to be prepared may file in circuit court a petition requesting an in camera hearing on whether the insurance compliance self-evaluative audit document or portions of the document are privileged under section 3 of this 2001 Act or subject to disclosure. Failure by the insurer to file a petition waives the privilege only with respect to the specific request.

(2) A petition filed by an insurer under this section must contain the following information:

(a) The date of the insurance compliance self-evaluative audit document.

(b) The identity of the person that conducted the audit.

(c) The general nature of the activities covered by the insurance compliance audit.

(d) An identification of the portions of the insurance compliance self-evaluative audit document for which the privilege is being asserted.

(3) Within 45 days after the filing of a petition by an insurer under this section, the court shall schedule an in camera hearing to determine whether the insurance compliance self-evaluative audit document or portions of the document are privileged under section 3 of this 2001 Act.

(4) The court, after an in camera review pursuant to this section, may require disclosure of material for which the privilege established by section 3 of this 2001 Act is asserted if the court determines that any of the conditions set forth in section 5 of this 2001 Act are met. Upon making such a determination, the court may compel the disclosure of only those portions of an insurance compliance self-evaluative audit document relevant to issues in dispute in the underlying proceeding. Any disclosure that is compelled by the court will not be considered to be a public document or be deemed to be a waiver of the privilege for any other civil, criminal or administrative proceeding. A party unsuccessfully opposing disclosure may apply to the court for an appropriate order protecting the document from further disclosure.

(5) An insurer asserting the privilege established under section 3 of this 2001 Act has the burden of establishing that the privilege applies. If the insurer establishes that the privilege applies, a party seeking disclosure under section 5 of this 2001 Act has the burden of proving the elements set forth in section 5 of this 2001 Act.

SECTION 7. The privilege established under section 3 of this 2001 Act does not apply to any of the following:

(1) Documents, communications, data, reports or other information expressly required to be collected, developed, maintained or reported to a regulatory agency under the Insurance Code or other state or federal law;

(2) Information obtained by observation or monitoring by any regulatory agency; or

(3) Information obtained from a source other than the insurance compliance audit.

SECTION 8. Nothing in sections 2 to 8 of this 2001 Act, or in the release of any insurance compliance self-evaluative audit document under sections 2 to 8 of this 2001 Act, shall limit, waive or abrogate the scope or nature of any statutory or common law privilege or other

limitation on admissibility of evidence including, but not limited to, the work product doctrine, the lawyer-client privilege under ORS 40.225 or the subsequent remedial measures exclusion provided by ORS 40.185.

SECTION 9. Sections 2 to 8 of this 2001 Act apply only to civil, criminal or administrative proceedings commenced on or after the effective date of this 2001 Act.

Passed by Senate April 2, 2001

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Secretary of Senate

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President of Senate

Passed by House May 21, 2001

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Speaker of House

Received by Governor:

.....M.,....., 2001

Approved:

.....M.,....., 2001

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Governor

Filed in Office of Secretary of State:

.....M.,....., 2001

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Secretary of State