

House Bill 2430

Sponsored by COMMITTEE ON BUSINESS, LABOR AND CONSUMER AFFAIRS (at the request of Richard McHale)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Allows obligor under service contract to prove financial stability by establishing reserve account and making partial deposit with Department of Consumer and Business Services. Limits state regulation of service agreements to agreements for service of tangible personal property obtained by individual primarily for personal, family or household purposes.

A BILL FOR AN ACT

1
2 Relating to service agreements; creating new provisions; amending ORS 646.265, 646.267, 646.269,
3 646.271, 646.273, 646.275, 646.277, 646.279, 646.281, 646.285 and 742.390; and repealing ORS
4 646.263.

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

6 **SECTION 1.** ORS 646.265 is amended to read:

7 646.265. As used in ORS 646.263 to 646.285:

8 *[(1) "Maintenance agreement" means a contract of limited duration that provides for scheduled*
9 *maintenance only.]*

10 **(1) "Customer" means the individual to whom the obligor has agreed to provide services**
11 **or indemnification under a service contract.**

12 (2) "Obligor" means *[the]* a person who:

13 **(a)** Is contractually obligated to *[the]* **provide services under a service contract** *[holder to*
14 *provide service under a service contract];* and *[who:]*

15 *[(a)]* **(A)** Sold the *[merchandise]* **tangible personal property** covered by the service contract;

16 *[(b)]* **(B)** Sells *[merchandise]* **tangible personal property that is similar to** *[that]* **the tangible**
17 **personal property** covered by the service contract; or

18 *[(c)]* **(C)** Is acting through or with the written consent of the manufacturer, importer or seller
19 of the *[merchandise]* **tangible personal property** covered by the service contract.

20 *[(3) "Person" means an individual, partnership, corporation, incorporated or unincorporated asso-*
21 *ciation, joint stock company, reciprocal, syndicate or any similar entity or combination of entities acting*
22 *in concert.]*

23 **(3) "Reimbursement insurance policy" has the meaning given that term in ORS 742.390.**

24 **(4)(a) "Service contract" [is a contract described in ORS 646.267.] means an agreement with**
25 **an individual for a specific duration that:**

26 **(A) Requires the obligor to:**

27 **(i) Repair, replace or maintain tangible personal property that the individual obtained**
28 **primarily for personal, family or household purposes; or**

29 **(ii) Indemnify the individual for repairing, replacing or maintaining the tangible personal**
30 **property;**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

(B) Applies to occurrences of:

(i) Operational or structural failure due to a defect in materials, workmanship or normal wear and tear; or

(ii) Damage resulting from lightning, power surges or accidental damage from handling; and

(C) If provided together with the sale of the tangible personal property, states the consideration for the agreement separately from the price of the tangible personal property.

(b) “Service contract” does not mean:

(A) An insurance policy issued by an insurer under the Insurance Code; or

(B) An agreement of limited duration that provides only for scheduled maintenance.

[(5) “Service contract holder” or “contract holder” means a person who is the purchaser or holder of a service contract.]

[(6) “Service contract seller” means a person who markets, sells or offers to sell a service contract.]

*[(7) (5) “Warranty” means a [warranty] **promise:***

*(a) Made [solely] **without charge** by the manufacturer, importer or seller of **tangible personal property** [or services, without charge,];*

*(b) That is not negotiated or separated from the sale of the [product] **tangible personal property** and is incidental to the sale of the [product,] **tangible personal property**; and [that guarantees indemnity]*

*(c) **To indemnify the individual who acquired the tangible personal property** for defective parts, mechanical or electrical breakdown, labor or other remedial measures, such as repair or replacement of the property or repetition of services.*

SECTION 2. ORS 646.267 is amended to read:

646.267. [(1) For the purposes of this section, a service contract is a contract or agreement to perform or indemnify for a specific duration the repair, replacement or maintenance of property for operational or structural failure due to a defect in materials, workmanship or normal wear and tear, with or without additional provision for incidental payment of indemnity under limited circumstances, including but not limited to rental and emergency road service. A service contract may also provide for the repair, replacement or maintenance of property for damage resulting from lightning, power surges or accidental damage from handling. Consideration for a service contract must be stated separately from the price of the consumer product. The term “service contract” does not include insurance policies issued by insurers under the Insurance Code, or maintenance agreements.]

*[(2) (1) [An obligor shall] **A person may** not issue, sell or offer for sale a service contract in this state unless the [obligor] **person** has complied with [the provisions of this section and] ORS [646.269 and 646.271] **646.281.***

[(3) All obligors of service contracts issued, sold or covering property located in this state shall file a registration with the Director of the Department of Consumer and Business Services on a form, at a fee and at a frequency prescribed by the director pursuant to ORS 646.281.]

[(4) (2) An obligor shall keep accurate accounts, books and records concerning transactions involving service contracts.

*[(5) (3) [In order] To ensure the faithful performance of an obligor’s obligations [to its contract holders] **under a service contract**, [each] **the** obligor shall [provide] **file one of the following with** the Director of the Department of Consumer and Business Services [with one of the following as proof of financial stability]:*

1 (a) **If the obligor filed financial statements with a Form 10-K with the Securities and**
 2 **Exchange Commission within the previous calendar year and the Form 10-K shows a net**
 3 **worth of at least \$100 million, a copy of the obligor’s [or,] financial statements.**

4 (b) If the obligor’s financial statements are consolidated with *[those]* **the financial statements**
 5 of *[its]* a parent company, *[the obligor’s parent company’s most recent Form 10-K filed with the Secu-*
 6 *rities and Exchange Commission which]* **the parent company has filed a Form 10-K with the Se-**
 7 **curities and Exchange Commission within the previous calendar year and the Form 10-K**
 8 shows a net worth *[of the obligor or its parent company]* of at least \$100 million *[provided the Form*
 9 *10-K was filed with the Securities and Exchange Commission within the last calendar year]*, **a copy**
 10 **of the parent company’s financial statements.** If the obligor’s parent company’s Form 10-K is
 11 filed *[to meet the obligor’s financial stability requirement]*, then the parent company shall *[agree to]*
 12 guarantee the obligations of the obligor *[relating to]* **under** service contracts sold by the obligor in
 13 this state.

14 *[(b)]* (c) Evidence **satisfactory to the director** of a reimbursement insurance policy *[described*
 15 *in ORS 742.390]* that is obtained by the obligor and issued by an authorized insurer that insures all
 16 service contracts issued by the obligor.

17 (d)(A) Evidence **satisfactory to the director of a reserve account in an amount not less**
 18 **than 40 percent of the gross consideration received by the obligor less claims paid on the**
 19 **obligor’s current service contracts in the state; and**

20 (B) A deposit in the amount of \$25,000 or five percent of the gross consideration received
 21 by the obligor less claims paid on the obligor’s current service contracts in the state that
 22 are in force as of the date of the deposit, whichever is less, in the form of:

23 (i) A security bond or irrevocable letter of credit issued by an insured institution as de-
 24 fined in ORS 706.008;

25 (ii) Money, bank or savings and loan savings certificates, bonds, negotiable by delivery,
 26 of the State of Oregon, school districts in this state, or any county in this state, obligations
 27 of the United States, or obligations for which the faith of the United States is pledged for the
 28 payment of both the principal and interest; or

29 (iii) Securities acceptable to the director.

30 *[(6) Filing requirements are as follows:]*

31 *[(a) The obligor shall file with the director proof of financial stability as required by subsection (5)*
 32 *of this section.]*

33 *[(b)]* (4)(a) The director may adopt rules concerning the procedure for filing the proof of finan-
 34 cial stability **under subsection (3) of this section.**

35 (b) **An obligor shall allow the director or an agent of the director to inspect all records**
 36 **relating to a reserve account established under subsection (3) of this section.**

37 *[(c)]* (5) *[No]* A person *[shall]* **may not** file or cause to be filed with the director any article,
 38 certificate, report, statement, application or any other information required or permitted to be filed
 39 under this *[subsection known]* **section that the person knows** to *[such person to]* be false or mis-
 40 leading in any material respect.

41 *[(7)]* (6)(a) **A person who sells or offers to sell a service contract** *[sellers and their employees*
 42 *marketing, selling or offering to sell service contracts for obligors]* **for an obligor** who *[comply]*
 43 **complies** with this section and ORS 646.269 and 646.271 *[are]* **is** exempt from the *[requirements of*
 44 *the]* Insurance Code including, but not limited to, the requirement to belong to the Oregon Insurance
 45 Guaranty Association.

1 [(8)] (b) [Obligors complying] **An obligor who complies** with ORS 646.269 and 646.271 [are] is
 2 not required to comply with the Insurance Code including, but not limited to, the requirement to
 3 belong to the Oregon Insurance Guaranty Association.

4 [(9)] (7) If a **person who sells a** service contract [seller] is not the [same person as the] obligor
 5 under the service contract, the [service contract seller] **person** shall remit the [agreed-upon
 6 consumer] purchase price of the service contract to the obligor within 30 days of the sale of [such]
 7 **the** service contract or upon [such] **the** terms and conditions [as may be] agreed to in writing be-
 8 tween the [service contract seller] **person** and **the** obligor.

9 **SECTION 3.** ORS 646.269 is amended to read:

10 646.269. A **person who sells or offers to sell a** service contract [issued, sold or offered for
 11 sale] in this state shall [meet the following requirements] **ensure that the service contract:**

12 (1) [The service contract shall be] **Is** written in **language that is** clear[,] **and** understandable
 13 [language] **to the customer.**

14 (2) [The service contract shall identify] **Identifies** the obligor and the **person who sold the** ser-
 15 vice contract [seller].

16 (3) If prior approval of repair work is required, [the service contract shall state] **states** the pro-
 17 cedure for obtaining prior approval and for making a claim, including a toll-free telephone number
 18 for claim service and a procedure for obtaining reimbursement for emergency repairs performed
 19 outside of normal business hours.

20 (4) [The service contract shall] Conspicuously [state] **states** the existence of any deductible
 21 amount.

22 (5) [The service contract shall specify the merchandise] **Specifies the tangible personal property**
 23 covered, **the** services to be provided and any limitations, exceptions or exclusions.

24 (6) [The service contract shall state] **States** any terms, restrictions or conditions governing the
 25 transferability of the service contract by the [service contract holder] **customer.**

26 (7) [The service contract shall state] **States** the terms, restrictions or conditions governing ter-
 27 mination of the service contract by the [service contract holder] **customer.**

28 **SECTION 4.** ORS 646.271 is amended to read:

29 646.271. (1) [A service contract seller or obligor shall] **Obligors and persons who sell or offer**
 30 **to sell service contracts may** not in a misleading or deceptive manner use in [its] **the obligor's**
 31 **or person's** name, contracts or literature[.];

32 (a) The words insurance, casualty, guaranty, surety, mutual; or

33 (b) Any other words descriptive of the insurance, casualty, guaranty, surety or mutual business.

34 (2) In the offer or sale of any service contract, a person may not:

35 (a) Make, issue, circulate or cause to be made, issued or circulated, any estimate, illustration,
 36 circular or statement misrepresenting the terms of any service contract sold or to be sold or the
 37 benefits or advantages [therein] **of the service contract.**

38 (b) Employ any device, scheme or artifice to defraud.

39 (c) Obtain money or property by means of any untrue statement of a material fact or any
 40 omission to state a material fact necessary in order to make the statement made, in light of the
 41 circumstances under which [it] **the statement** was made, not misleading.

42 (d) Engage in any other transaction, practice or course of business [which] **that** operates as a
 43 fraud or deceit upon the [service contract holder] **customer.**

44 (3) In providing required services under a service contract, [a person may not] **an obligor**
 45 **shall:**

1 (a) *[Fail to acknowledge and act]* **Respond** within a reasonable time *[upon communications re-*
 2 *questing]* **to a request for** services under a service contract. Unless the service contract provides
 3 otherwise, *[a person shall be deemed to have acted]* **an obligor responds** within a reasonable time
 4 if the *[person]* **obligor** responds to *[a communication received from a service contract holder]* **the re-**
 5 **quest for services** within 30 days of **the obligor's** receipt of the *[communication]* **request**.

6 (b) *[Fail to]* Act in good faith *[in]* **when:**

7 (A) Reviewing a request for services under a service contract and advising the *[service contract*
 8 *holder]* **customer** whether the request is covered under the terms and conditions of the service
 9 contract[.]; **and**

10 *[(c)]* (B) *[Fail to act in good faith in]* Providing *[covered]* services *[under]* **covered by** a service
 11 contract.

12 **SECTION 5.** ORS 646.273 is amended to read:

13 646.273. (1) An obligor is *[considered to be]* the agent of the insurer that issued *[the]* a re-
 14 imbursement insurance policy **that covers the service contract to which the obligor is a party**.
 15 If a *[service contract seller acts as]* **person who sells or offers to sell a service contract** is an
 16 obligor and **the person** enlists other *[service contract sellers]* **persons to sell or to offer to sell**
 17 **service contracts**, the *[service contract seller]* **person** acting as the obligor shall notify the insurer
 18 of the existence and identities of the other *[service contract sellers]* **persons who are selling or**
 19 **offering to sell service contracts**.

20 (2) *[An insurer that issues a reimbursement insurance policy may seek indemnification or*
 21 *subrogation against a service contract seller if the issuer]* **If an insurer under a reimbursement**
 22 **insurance policy** pays or is obligated to pay *[the service contract holder]* **a customer** sums that the
 23 *[service contract seller]* **obligor** was obligated to pay *[pursuant to the provisions of the]* **under a ser-**
 24 **vice contract [or under a contractual agreement], the insurer may seek indemnification or**
 25 **subrogation from the obligor**.

26 **SECTION 6.** ORS 646.275 is amended to read:

27 646.275. (1) The Director of the Department of Consumer and Business Services may, upon a
 28 reasonable belief that a violation of ORS 646.267, 646.269 or 646.271 has occurred, *[make necessary*
 29 *public and private]* **undertake** investigations *[within or without]*, **including investigations outside**
 30 **this state, to determine whether any person has violated [those provisions] ORS 646.267, 646.269 or**
 31 **646.271**.

32 (2) In connection with any investigation conducted pursuant to subsection (1) of this section,
 33 *[a service contract seller or]* **an obligor or person who sells or offers to sell a service contract**
 34 **shall**, upon written request of the director, *[shall]* make available to the director *[its service contract*
 35 *records]* for inspection and copying[.] the records *[that must be made available in accordance with this*
 36 *section shall be only those records]* necessary to enable the director to reasonably determine **the**
 37 **obligor's or person's** compliance with ORS 646.267, 646.269 and 646.271.

38 (3) *[For the purpose of]* **In** an investigation *[or proceeding]* under subsection (1) of this section,
 39 the director may administer oaths and affirmations, *[subpoena witnesses,]* compel *[their]* **the** attend-
 40 **ance of witnesses**, take evidence and require the production of books, papers, correspondence,
 41 memoranda, agreements or other documents or records that are relevant or material to the inquiry.
 42 Each witness who appears before the director under a subpoena shall receive the fees and mileage
 43 provided for witnesses in ORS 44.415 (2).

44 (4) If a person fails to comply with a subpoena issued under subsection (3) of this section, or a
 45 party or witness refuses to testify on any matters, the judge of the circuit court for any county, on

1 the application of the director, shall compel obedience by proceedings for contempt as in the case
 2 of disobedience of the requirements of a subpoena issued from *[such]* **the court** or a refusal to testify
 3 *[therein]* **in the court**.

4 (5) The director may, upon a reasonable belief that a person is or is about to be in violation of
 5 ORS 646.267, 646.269 or 646.271, issue an order, directed to the person, to discontinue or desist from
 6 the violation or threatened violation. The *[copy of the]* order *[forwarded to the person involved]* shall
 7 set forth a statement of the specific charges and the fact that the person may request a hearing
 8 within 20 days of the date of mailing **of the order. The order becomes final 20 days after the**
 9 **date of mailing unless within the 20-day period after the date of mailing the person files with**
 10 **the director a written request for a hearing.** *[Where]* **When a person requests** a hearing *[is*
 11 *requested]*, the director shall *[set a date for]* **hold** the hearing *[to be held]* within 30 days after receipt
 12 of the request, and shall give the person *[involved]* written notice of the hearing date at least seven
 13 days prior *[thereto]* **to the hearing.** The person requesting the hearing must establish to the satis-
 14 faction of the director that the order should not be complied with. *[The order shall become final 20*
 15 *days after the date of mailing unless within the 20-day period the person to whom it is directed files*
 16 *with the director a written request for a hearing. To the extent applicable and not inconsistent with the*
 17 *foregoing, the provisions of]* ORS chapter 183 *[shall govern]* **governs** the hearing *[procedure]* and any
 18 judicial review *[thereof. Where the]*. **When a person requests** a hearing *[has been requested]*, the
 19 director's order *[shall become]* **becomes** final *[at such time as]* **when** the right to further hearing or
 20 review has expired or been exhausted.

21 (6) A person who is found to have violated ORS 646.267, 646.269 or 646.271 may be ordered to
 22 pay to the General Fund a civil penalty in an amount determined by the director of not more than:

- 23 (a) \$2,000 for the first violation.
- 24 (b) \$5,000 for the second violation.
- 25 (c) \$10,000 for any subsequent violation.

26 (7) For purposes of this section, a violation consists of a single course of conduct *[which]* **that**
 27 is determined by the director to be untrue or misleading.

28 **SECTION 7.** ORS 646.277 is amended to read:

29 646.277. (1)(a) *[Except as provided in subsection (3) of this section,]* A complaint made to the Di-
 30 rector **of the Department of Consumer and Business Services** against any person regulated by
 31 ORS 646.263 to 646.285, 742.390 and 742.392, and the record *[thereof, shall be]* **of the complaint are**
 32 confidential., *and shall not be disclosed or]*

33 **(b) The director may not:**

34 **(A) Disclose the complaint or record;**

35 **(B) Make the complaint or record** available for public inspection or review[.]; **or**

36 **(C)** *[No such complaint, or the record thereof, shall be used]* **Use the complaint or record** in any
 37 action[, *suit*] or proceeding except to the extent *[it]* **that the use** is essential to the prosecution of
 38 *[apparent]* **alleged** violations of ORS 646.263 to 646.285, 742.390 and 742.392.

39 (2)(a) *[Except as provided in subsection (3) of this section, data gathered pursuant to any]* **Infor-**
 40 **mation that the director obtains in an** investigation *[by the director shall be]* **of a complaint**
 41 **against any person regulated by ORS 646.263 to 646.285, 742.390 and 742.392** is confidential.,
 42 *and shall not be disclosed or]*

43 **(b) The director may not:**

44 **(A) Disclose the information;**

45 **(B) Make the information** available for public inspection or review[.]; **or**

1 (C) *[The data shall not be used]* **Use the information** in any action[, *suit*] or proceeding except
 2 to the extent *[it]* **that the use** is essential *[in]* **to** the investigation or prosecution of *[apparent]* **al-**
 3 **leged** violations of ORS 646.263 to 646.285, 742.390 and 742.392.

4 (3) Notwithstanding subsections (1) and (2) of this section, the director may disclose any com-
 5 plaint and any *[data gathered pursuant to]* **information obtained under** ORS 646.263 to 646.285,
 6 742.390 and 742.392 to any state, federal or local enforcement agency. The *[recipient]* agency may
 7 use the complaint and *[data]* **information** for any official purpose, including the *[civil]* enforcement
 8 of **civil** laws *[subject to the agency jurisdiction]*.

9 **SECTION 8.** ORS 646.279 is amended to read:

10 646.279. The Director of the Department of Consumer and Business Services may refuse to
 11 continue or may suspend or revoke an obligor’s registration if the director finds after a hearing that:

12 (1) The obligor has intentionally engaged in a pattern or practice of failing to comply with any
 13 lawful order of the director relating to a prior violation of ORS 646.271 *[(3)(c)]* **(3)(b)(B)**.

14 (2) The obligor fails to meet or maintain the financial stability requirements set forth in ORS
 15 646.267.

16 **SECTION 9.** ORS 646.281 is amended to read:

17 646.281. (1) Each obligor that issues a service contract to a resident of this state shall pay an
 18 assessment not to exceed \$1,000 to the Director of the Department of Consumer and Business Ser-
 19 vices for the purpose of supporting the legislatively authorized budget of the department for ad-
 20 ministering ORS 646.263 to 646.285, 742.390 and 742.392. The director shall determine by rule the
 21 basis of assessment, the amount or rate of assessment and when assessments shall be paid.

22 (2) **Each obligor of a service contract issued, sold or covering property located in this**
 23 **state shall file a registration with the director on a form, at a fee and at a frequency pre-**
 24 **scribed by the director by rule.** The fee *[prescribed by the director for registration under ORS*
 25 *646.267 shall]* **may** not exceed \$200 per obligor per year.

26 **SECTION 10.** ORS 646.285 is amended to read:

27 646.285. (1) The Director of the Department of Consumer and Business Services may adopt rules
 28 necessary to implement ORS 646.263 to 646.285.

29 (2) The director may by rule exempt certain obligors *[or]*, **persons who sell or offer to sell**
 30 service *[contract sellers or]* **contracts and** specific classes of service contracts *[that are not otherwise*
 31 *exempt under ORS 646.263 (2)]* from any provision of ORS 646.263 to 646.285, 742.390 and 742.392*.[.]*
 32 **if** the director *[may include]* **includes** in the rules substitute requirements on a finding that *[a]* **the**
 33 particular provision of ORS 646.263 to 646.285, 742.390 and 742.392 is not necessary for the pro-
 34 tection of the public or that the substitute requirement is reasonably certain to provide equivalent
 35 protection to the public.

36 **SECTION 11.** ORS 742.390 is amended to read:

37 742.390. (1) A reimbursement insurance policy insuring service contracts issued, sold or offered
 38 for sale in this state shall conspicuously state that, upon failure of the obligor to perform under the
 39 contract, the insurer that issued the policy shall pay on behalf of the obligor any sums the obligor
 40 is legally obligated to pay or shall provide the service that the obligor is legally obligated to per-
 41 form according to the obligor’s contractual obligations under the service contracts issued by the
 42 obligor.

43 (2) For purposes of this section and ORS 742.392:

44 (a) “Obligor” has the meaning given **that term** in ORS 646.265.

45 (b) A “reimbursement insurance policy” is a policy of insurance providing reimbursement cov-

1 erage for all obligations and liabilities under the terms of the service contract issued by the obligor
2 including claims against the obligor for return of the unearned purchase price of the service con-
3 tract.

4 (c) "Service contract" has the meaning given [*in ORS 646.267*] **that term in ORS 646.265.**

5 **SECTION 12. ORS 646.263 is repealed.**

6 **SECTION 13. The amendments to ORS 646.265, 646.267, 646.269, 646.271, 646.273, 646.275,
7 646.277, 646.279, 646.281, 646.285 and 742.390 by sections 1 to 11 of this 2005 Act apply to ser-
8 vice contracts offered for sale or entered into on or after the effective date of this 2005 Act.**

9