

**Enrolled**  
**House Bill 2681**

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Judiciary for Oregon State Bar Business Law Section)

CHAPTER .....

AN ACT

Relating to claims of directors in connection with proceedings; creating new provisions; amending ORS 60.391, 60.397, 62.464, 62.468, 65.391 and 65.397; and declaring an emergency.

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

**SECTION 1.** ORS 60.391 is amended to read:

60.391. (1) Except as provided in subsection (4) of this section, a corporation may indemnify an individual **against liability incurred in a proceeding to which the individual was** made a party [to a proceeding] because the individual is or was a director [against liability incurred in the proceeding] if:

- (a) The conduct of the individual was in good faith;
- (b) The individual reasonably believed that the individual's conduct was in the best interests of the corporation, or at least **was** not opposed to [its] **the corporation's** best interests; and
- (c) In the case of [any] a criminal proceeding, the individual [had no] **did not have** reasonable cause to believe the individual's conduct was unlawful.

(2) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (1)(b) of this section.

(3) [The termination of] **Terminating** a proceeding by judgment, order, settlement[,] or conviction or upon a plea of nolo contendere or [its equivalent is] **the equivalent of nolo contendere does** not, of itself, [determinative] **determine** that the director did not meet the standard of conduct described in this section.

(4) A corporation may not indemnify a director under this section **in connection with:**

(a) [In connection with] A proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

[b) In connection with any other proceeding charging improper personal benefit to the director in which the director was adjudged liable on the basis that personal benefit was improperly received by the director.]

**(b) A proceeding that charged the director with and adjudged the director liable for improperly receiving a personal benefit.**

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

**(6)(a) A corporation that provides indemnification to a director in accordance with the corporation's articles of incorporation or bylaws may not amend the articles of incorporation**

or bylaws so as to eliminate or impair the director's right to indemnification after an act or omission occurs that subjects the director to a proceeding or to liability for which the director seeks indemnification under the terms of the articles of incorporation or bylaws.

(b) Notwithstanding the prohibition set forth in paragraph (a) of this subsection, a corporation may eliminate or impair a director's right to indemnification if at the time the act or omission occurred the corporation's articles of incorporation or bylaws explicitly authorized the corporation to eliminate or impair the right after an act or omission occurs.

**SECTION 2.** ORS 60.397 is amended to read:

60.397. (1) A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

(a) The director furnishes the corporation a written affirmation of the director's good faith belief that the director has met the standard of conduct described in ORS 60.391; and

(b) The director furnishes the corporation a written undertaking, executed personally or on the director's behalf, to repay the advance if *[it is ultimately determined that the director did not meet]* **the director is ultimately determined not to have met** the standard of conduct.

(2) The undertaking required by subsection (1)(b) of this section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(3) *[Any]* **An** authorization of payments under this section may be made by provision in the articles of incorporation[,] or bylaws, by a resolution of the shareholders or board of directors or by contract.

(4)(a) **A corporation that authorizes payments in accordance with subsection (3) of this section may not amend or rescind the articles of incorporation, bylaws or resolution that authorizes the payments so as to eliminate or impair a director's right to payments after an act or omission occurs that subjects the director to a proceeding for which the director seeks payment.**

(b) Notwithstanding the prohibition set forth in paragraph (a) of this subsection, a corporation may eliminate or impair a director's right to payments if at the time the act or omission occurred the corporation's articles of incorporation, bylaws or resolution explicitly authorized the corporation to eliminate or impair the right after an act or omission occurs.

**SECTION 3.** ORS 62.464 is amended to read:

62.464. (1) Except as provided in subsection (4) of this section, a cooperative may indemnify an individual **against liability incurred in a proceeding to which the individual was** made a party *[to a proceeding]* because the individual is or was a director *[against liability incurred in the proceeding]* if:

(a) The conduct of the individual was in good faith;

(b) The individual reasonably believed that the individual's conduct was in the best interests of the cooperative, or at least **was** not opposed to *[its]* **the cooperative's** best interests; and

(c) In the case of *[any]* **a** criminal proceeding, the individual *[had no]* **did not have** reasonable cause to believe the individual's conduct was unlawful.

(2) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (1)(b) of this section.

(3) *[The termination of]* **Terminating** a proceeding by judgment, order, settlement or conviction or upon a plea of nolo contendere or *[its equivalent is]* **the equivalent of nolo contendere does** not, of itself, *[determinative]* **determine** that the director did not meet the standard of conduct described in this section.

(4) A cooperative may not indemnify a director under this section **in connection with:**

(a) *[In connection with]* A proceeding by or in the right of the cooperative in which the director was adjudged liable to the cooperative; or

*[(b) In connection with any other proceeding charging improper personal benefit to the director in which the director was adjudged liable on the basis that personal benefit was improperly received by the director.]*

**(b) A proceeding that charged the director with and adjudged the director liable for improperly receiving a personal benefit.**

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the cooperative is limited to reasonable expenses incurred in connection with the proceeding.

**(6)(a) A cooperative that provides indemnification to a director in accordance with the cooperative's articles of incorporation or bylaws may not amend the articles of incorporation or bylaws so as to eliminate or impair the director's right to indemnification after an act or omission occurs that subjects the director to a proceeding or to liability for which the director seeks indemnification under the terms of the articles of incorporation or bylaws.**

**(b) Notwithstanding the prohibition set forth in paragraph (a) of this subsection, a cooperative may eliminate or impair a director's right to indemnification if at the time the act or omission occurred the cooperative's articles of incorporation or bylaws explicitly authorized the cooperative to eliminate or impair the right after an act or omission occurs.**

*[(6)]* (7) If a cooperative indemnifies or advances expenses to a director under this section or ORS 62.466, 62.468 or 62.472 in connection with a proceeding by or in the right of the cooperative, the cooperative shall report the indemnification or advance in writing to the members with or before the notice of the next membership meeting.

**SECTION 4.** ORS 62.468 is amended to read:

62.468. (1) A cooperative may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

(a) The director furnishes the cooperative a written affirmation of the director's good faith belief that the director has met the standard of conduct described in ORS 62.464; and

(b) The director furnishes the cooperative a written undertaking, executed personally or on the director's behalf, to repay the advance if *[it is ultimately determined that the director did not meet]* **the director is ultimately determined not to have met** the standard of conduct.

(2) The undertaking required by subsection (1)(b) of this section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(3) *[Any]* **An** authorization of payments under this section may be made by provision in the articles of incorporation[,] or bylaws, by a resolution of the members or board of directors or by contract.

**(4)(a) A cooperative that authorizes payments in accordance with subsection (3) of this section may not amend or rescind the articles of incorporation, bylaws or resolution that authorizes the payments so as to eliminate or impair a director's right to payments after an act or omission occurs that subjects the director to a proceeding for which the director seeks payment.**

**(b) Notwithstanding the prohibition set forth in paragraph (a) of this subsection, a cooperative may eliminate or impair a director's right to payments if at the time the act or omission occurred the cooperative's articles of incorporation, bylaws or resolution explicitly authorized the cooperative to eliminate or impair the right after an act or omission occurs.**

**SECTION 5.** ORS 65.391 is amended to read:

65.391. (1) Except as provided in subsection (4) of this section, a corporation may indemnify an individual **against liability incurred in a proceeding to which the individual was** made a party *[to a proceeding]* because the individual is or was a director *[against liability incurred in the proceeding]* if:

(a) The conduct of the individual was in good faith;

(b) The individual reasonably believed that the individual's conduct was in the best interests of the corporation, or at least **was** not opposed to *[its]* **the corporation's** best interests; and

(c) In the case of *[any]* a criminal proceeding, the individual *[had no]* **did not have** reasonable cause to believe the conduct of the individual was unlawful.

(2) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirements of subsection (1)(b) of this section.

(3) *[The termination of]* **Terminating** a proceeding by judgment, order, settlement[,] or conviction or upon a plea of nolo contendere or *[its equivalent is]* **the equivalent of nolo contendere does** not, of itself, *[determinative]* **determine** that the director did not meet the standard of conduct described in this section.

(4) A corporation may not indemnify a director under this section **in connection with:**

(a) *[In connection with]* A proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

*[(b) In connection with any other proceeding charging improper personal benefit to the director in which the director was adjudged liable on the basis that personal benefit was improperly received by the director.]*

**(b) A proceeding that charged the director with and adjudged the director liable for improperly receiving a personal benefit.**

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

**(6)(a) A corporation that provides indemnification to a director in accordance with the corporation's articles of incorporation or bylaws may not amend the articles of incorporation or bylaws so as to eliminate or impair the director's right to indemnification after an act or omission occurs that subjects the director to a proceeding or to liability for which the director seeks indemnification under the terms of the articles of incorporation or bylaws.**

**(b) Notwithstanding the prohibition set forth in paragraph (a) of this subsection, a corporation may eliminate or impair a director's right to indemnification if at the time the act or omission occurred the corporation's articles of incorporation or bylaws explicitly authorized the corporation to eliminate or impair the right after an act or omission occurs.**

**SECTION 6.** ORS 65.397 is amended to read:

65.397. (1) A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

(a) The director furnishes the corporation a written affirmation of the director's good faith belief that the director has met the standard of conduct described in ORS 65.391; and

(b) The director furnishes the corporation a written undertaking, executed personally or on the director's behalf, to repay the advance if *[it is ultimately determined that the director did not meet]* **the director is ultimately determined not to have met** the standard of conduct.

(2) The undertaking required by subsection (1)(b) of this section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(3) *[Any]* **An** authorization of payments under this section may be made by provision in the articles of incorporation or bylaws, by a resolution of the members or board of directors or by contract.

**(4)(a) A corporation that authorizes payments in accordance with subsection (3) of this section may not amend or rescind the articles of incorporation, bylaws or resolution that authorizes the payments so as to eliminate or impair a director's right to payments after an act or omission occurs that subjects the director to a proceeding for which the director seeks payment.**

**(b) Notwithstanding the prohibition set forth in paragraph (a) of this subsection, a corporation may eliminate or impair a director's right to payments if at the time the act or omission occurred the corporation's articles of incorporation, bylaws or resolution explicitly authorized the corporation to eliminate or impair the right after an act or omission occurs.**

**SECTION 7.** The amendments to ORS 60.391, 60.397, 62.464, 62.468, 65.391 and 65.397 by sections 1 to 6 of this 2011 Act apply to claims for indemnification or payment in connection with proceedings that occur on or after the effective date of this 2011 Act.

**SECTION 8.** This 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage.

**Passed by House March 22, 2011**

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Ramona Kenady Line, Chief Clerk of House

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Bruce Hanna, Speaker of House

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Arnie Roblan, Speaker of House

**Passed by Senate May 18, 2011**

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Peter Courtney, President of Senate

**Received by Governor:**

.....M.,....., 2011

**Approved:**

.....M.,....., 2011

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John Kitzhaber, Governor

**Filed in Office of Secretary of State:**

.....M.,....., 2011

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Kate Brown, Secretary of State