

House Bill 2970

Sponsored by Representative CLEM

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**.

Requires prosecuting attorney to identify person subject to investigative demand and specify basis for belief that person has engaged in, is engaging in or is about to engage in unlawful trade practice.

Specifies certain procedures that prosecuting attorney must follow and showings that prosecuting attorney must make in bringing action to compel response to investigative demand.

Specifies requirements for bringing action to enjoin alleged unlawful trade practice. Requires prosecuting attorney to have good cause for rejecting assurance of voluntary compliance. Requires request for monetary penalty or restitution to demonstrate that amount is reasonably related to nature of unlawful trade practice and to harm that unlawful trade practice caused.

Requires court to award attorney fees and costs to prevailing defendant in specified circumstances.

A BILL FOR AN ACT

1
2 Relating to investigative demands in connection with violations of Unlawful Trade Practices Act;
3 creating new provisions; and amending ORS 646.618, 646.626 and 646.632.

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

5 **SECTION 1.** ORS 646.618 is amended to read:

6 646.618. (1)(a) Except as provided in ORS 646.633, [*when it appears to the*] **if a** prosecuting at-
7 torney **believes** that a person has engaged in, is engaging in[,] or is about to engage in any act or
8 practice [*declared to be unlawful by*] **that is unlawful under** ORS 646.607 or 646.608, the prosecut-
9 ing attorney may execute in writing and cause to be served an investigative demand upon any per-
10 son who [*is believed*] **the prosecuting attorney believes** to have information, documentary material
11 or physical evidence relevant to the alleged or suspected violation. The investigative demand [*shall*
12 *require such person, under oath or otherwise, to appear and testify, to answer written interrogatories,*
13 *or to produce relevant documentary material or physical evidence for examination, at such reasonable*
14 *time and place as may be stated in the investigative demand, or to do any of the foregoing, concerning*
15 *conduct of any trade or commerce which is the subject matter of the investigation.*] **must:**

16 (A) **Identify the person that the prosecuting attorney believes has engaged in, is engaging**
17 **in or is about to engage in the unlawful act or practice;**

18 (B) **Set forth the basis for the prosecuting attorney's belief; and**

19 (C) **Require the person, with respect to the conduct of any trade or commerce that is the**
20 **subject of the investigation, to answer the investigative demand by:**

21 (i) **Appearing and testifying;**

22 (ii) **Answering written interrogatories; or**

23 (iii) **Producing relevant documents or physical evidence.**

24 (b) **An investigative demand may not require a person to answer as provided in paragraph**
25 **(a)(C) of this subsection before 30 days after the date on which the prosecuting attorney**
26 **caused the investigative demand to be served, unless a court orders a shorter time for the**

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.

1 **person’s response. If a prosecuting attorney requests a court to issue an order for a shorter**
 2 **response time, the prosecuting attorney shall notify the person and the court shall give the**
 3 **person an opportunity for a hearing.**

4 (2) At any time before the *[return date specified in an investigative demand, or within 20 days*
 5 *after the demand has been served, whichever period is shorter]* **date by which a person is required**
 6 **to answer an investigative demand under subsection (1)(b) of this section,** a petition to extend
 7 the return date¹, *or to modify or set aside the demand, stating good cause including privileged mate-*
 8 *rial,* may be filed in the appropriate court.

9 (3) **A person that receives an investigative demand may apply to an appropriate court to:**

10 (a) **Modify or set aside the investigative demand at any time during the investigation.**
 11 **The person must state good cause to modify or set aside the investigative demand and may**
 12 **provide privileged material. A court may not issue an order with respect to the person under**
 13 **ORS 646.626 while an application under this subsection is pending.**

14 (b) **Challenge the prosecuting attorney’s basis for issuing the investigative demand. If the**
 15 **person alleges that the prosecuting attorney’s basis for issuing the investigative demand is**
 16 **not supported by credible evidence, the court shall conduct an evidentiary hearing. Unless**
 17 **the court finds that good cause and credible evidence exists for the prosecuting attorney’s**
 18 **belief that the person has engaged in, is engaging in or is about to engage in an act or**
 19 **practice that is unlawful under ORS 646.607 or 646.608, the court shall modify or set aside the**
 20 **investigative demand.**

21 (4) **A court that reviews the scope of an investigative demand, or the documents or**
 22 **physical evidence that a person produces in response to an investigative demand, shall apply**
 23 **the standards the court would apply to the scope of, or materials obtained from, a demand**
 24 **for discovery in a civil action.**

25 (5) **A person that receives an investigative demand may recover reasonable attorney fees**
 26 **and costs the person incurs in responding to the investigative demand under subsection**
 27 **(1)(a)(C) of this section or in applying to a court under subsection (3) of this section if the**
 28 **court modifies or sets aside the investigative demand.**

29 **SECTION 2.** ORS 646.626 is amended to read:

30 646.626. *[(1) If any person, after being served with an investigative demand under ORS 646.622,*
 31 *fails or refuses to obey an investigative demand issued by the prosecuting attorney, the prosecuting*
 32 *attorney may, after notice, apply to an appropriate court and, after hearing thereon, request an*
 33 *order:]*

34 *[(a) Granting injunctive relief to restrain the person from engaging in conduct of any aspect of the*
 35 *trade or commerce that is involved in the alleged or suspected violation; or]*

36 *[(b) Granting such other relief as may be required, until the person obeys the investigative*
 37 *demand.]*

38 *[(2) Any disobedience of any final order of a court under this section shall be punished as a con-*
 39 *tempt of court.]*

40 (1) **If a person fails or refuses to obey an investigative demand that a prosecuting attor-**
 41 **ney issues and causes to be served under ORS 646.622, the prosecuting attorney may apply**
 42 **to an appropriate court and, after a hearing at which the prosecuting attorney shows good**
 43 **cause to believe that the person has engaged in, is engaging in or is about to engage in an**
 44 **act or practice that is unlawful under ORS 646.607 or 646.608, may request an order to:**

45 (a) **Enjoin the person from conducting any aspect of trade or commerce that is involved**

1 **in the alleged or suspected violation; or**

2 **(b) Grant other appropriate relief until the person obeys the investigative demand.**

3 **(2) A court shall punish a person's disobedience of an order under subsection (1) of this**
 4 **section as a contempt of court.**

5 **(3) A person may recover reasonable attorney fees and costs if the court denies the**
 6 **prosecuting attorney's request for an order under subsection (1) of this section.**

7 **SECTION 3.** ORS 646.632 is amended to read:

8 646.632. (1) Except as provided in ORS 646.633, a prosecuting attorney who has [*probable*] **good**
 9 **cause to believe that a person is engaging in, has engaged in, or is about to engage in an unlawful**
 10 **trade practice may bring [*suit*] an action** in the name of the State of Oregon in the appropriate
 11 **court to restrain [*such*] the person from engaging in the alleged unlawful trade practice.**

12 **(2)(a) Except as provided in subsections (5) and (6) of this section, before [*filing a suit*] bringing**
 13 **an action** under subsection (1) of this section, the prosecuting attorney shall in writing notify the
 14 **person charged of the alleged unlawful trade practice and the relief to be sought.**

15 **(b) In the notice, the prosecuting attorney shall specify each unlawful trade practice in**
 16 **which the prosecuting attorney has good cause to believe that the person has engaged, is**
 17 **engaging or is about to engage and the evidence for the prosecuting attorney's belief. [*Such*]**
 18 **The notice [*shall*] must be served in the manner set forth in ORS 646.622 for the service of inves-**
 19 **tigative demands.**

20 **(c) If the prosecuting attorney seeks in the action a monetary penalty or restitution, the**
 21 **prosecuting attorney must show that the amount of the penalty or restitution is reasonably**
 22 **related to the nature of the unlawful trade practice and the ascertainable harm that the**
 23 **unlawful trade practice caused. The prosecuting attorney may not seek reimbursement for**
 24 **the costs of any investigation or any action that the prosecuting attorney brings under this**
 25 **section.**

26 **(d) The person [*charged thereupon shall have*] named in the action has 10 days within which**
 27 **to execute and deliver to the prosecuting attorney an assurance of voluntary compliance[. *Such as-***
 28 ***urance shall set*] that sets forth what actions, if any, the person [*charged*] intends to take with**
 29 **respect to the alleged unlawful trade practice. The assurance of voluntary compliance [*shall not be***
 30 ***considered*] is not an admission of a violation for any purpose. [*If*] The prosecuting attorney **may**
 31 **submit for the court's approval an assurance of voluntary compliance with which the pros-**
 32 **ecuting attorney is satisfied [*with the assurance of voluntary compliance, it may be submitted to an***
 33 ***appropriate court for approval and if approved shall thereafter be filed with the clerk of the court*].**
 34 **An approved assurance of voluntary compliance must be filed with the clerk of the court.****

35 **(e) If an approved assurance of voluntary compliance provides for [*the payment of*] **paying** an**
 36 **amount of money, as restitution or otherwise, and if the amount is not paid within 90 days of the**
 37 **date the court approves the assurance, or, if the assurance of voluntary compliance requires periodic**
 38 **payments and if any periodic payment is not paid within 30 days of the date specified in the assur-**
 39 **ance of voluntary compliance for [*any*] **the** periodic payment, then the prosecuting attorney may**
 40 **submit [*that*] to the court the portion of the assurance of voluntary compliance [*which*] **that** pro-**
 41 **vides for the payment of money [*to the court*] with a certificate stating the unpaid balance in a form**
 42 **[*which*] **that** fully complies with the requirements of ORS 18.038 and 18.042. Upon submission of**
 43 **an assurance of voluntary compliance under this subsection, the court shall sign the assurance of**
 44 **voluntary compliance and [*it shall*] **cause the assurance of voluntary compliance to be entered**
 45 **in the register of the court. [*and*] The clerk of the court shall note in the register that [*it*] **the as-******

1 **assurance of voluntary compliance** creates a lien. **Once entered into the register**, the assurance
 2 of voluntary compliance [*shall thereupon constitute*] **constitutes** a judgment in favor of the State of
 3 Oregon and may be enforced as provided in ORS chapter 18. The notice of the prosecuting attorney
 4 under this subsection [*shall not be deemed*] **is not** a public record until [*the expiration of*] 10 days
 5 [*from*] **after** the service of the notice.

6 (3)(a) The prosecuting attorney may reject as unsatisfactory any assurance **that does not**:

7 [(a)] **(A)** [*Which does not contain a*] Promise to make restitution in specific amounts or through
 8 arbitration for persons who suffered any ascertainable loss of money or property as a result of the
 9 alleged unlawful trade practice; or

10 [(b)] **(B)** [*Which does not contain any*] **Have a** provision, including but not limited to [*the keeping*
 11 *of*] **a requirement to keep** records, [*which*] **that** the prosecuting attorney reasonably believes [*to*
 12 *be*] **is** necessary to ensure the continued cessation of the alleged unlawful trade practice, if [*such*]
 13 **the** provision was included in a proposed assurance attached to the notice served [*pursuant to*]
 14 **under** this section.

15 **(b) If a prosecuting attorney rejects an assurance of voluntary compliance under para-**
 16 **graph (a) of this subsection, the person that submitted the assurance of voluntary compli-**
 17 **ance may apply to an appropriate court for an order to require the prosecuting attorney to**
 18 **accept the assurance of voluntary compliance. In a hearing before the court, the prosecuting**
 19 **attorney must show good cause for the rejection.**

20 (4) Violation of any of the terms of an assurance of voluntary compliance [*which*] **that** has been
 21 approved by and filed with the court [*shall constitute*] **constitutes** a contempt of court.

22 (5) The prosecuting attorney need not serve notice [*pursuant to*] **under** subsection (2) of this
 23 section before [*filing a suit*] **bringing an action** if, within two years [*of the filing of such suit*] **before**
 24 **the prosecuting attorney brings the action**, the person [*charged with the alleged unfair*] **alleged**
 25 **to have engaged in the unlawful** trade practice submitted to any prosecuting attorney an assur-
 26 ance of voluntary compliance [*which*] **that** was accepted by and filed with an appropriate court. The
 27 prosecuting attorney shall in such case serve notice on the defendant in the manner set forth in
 28 ORS 646.622 for [*the service of*] **servicing** investigative demands, on the 10th or earlier day [*previous*
 29 *to the filing of suit*] **before bringing the action.**

30 (6) If the prosecuting attorney alleges that the prosecuting attorney has reason to believe that
 31 the delay caused by complying with the provisions of subsection (2) or (5) of this section would cause
 32 immediate harm to the public health, safety or welfare, the prosecuting attorney may immediately
 33 [*institute a suit*] **bring an action** under subsection (1) of this section.

34 (7)(a) **A court may grant a** temporary restraining order [*may be granted*] without prior notice
 35 to the person if the court finds there is a threat of immediate harm to the public health, safety or
 36 welfare. [*Such a temporary restraining order shall expire by its terms within such time after entry, not*
 37 *to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown,*
 38 *is extended for a like period or unless the person restrained consents that it may be extended for a*
 39 *longer period.*]

40 **(b) A temporary restraining order granted under paragraph (a) of this subsection expires**
 41 **not later than 10 days after the court issues the order, unless the court, for good cause**
 42 **shown, extends the order for an additional 10 days or unless the person that is subject to the**
 43 **order agrees to an extension for a longer period.**

44 **(c) A person that is subject to a temporary restraining order may apply to the court to**
 45 **dissolve the order. If the court agrees to the dissolution, the court shall award the person**

1 **reasonable attorney fees and costs.**

2 (8) The court may award reasonable attorney fees **and costs** to [*the prevailing party*] **a pre-**
3 **vailing defendant** in an action under this section. [*If the defendant prevails in such suit and the*
4 *court finds that the defendant had in good faith submitted to the prosecuting attorney a satisfactory*
5 *assurance of voluntary compliance prior to the institution of the suit or that the prosecuting attorney,*
6 *in a suit brought under subsections (5) and (6) of this section, did not have reasonable grounds to*
7 *proceed under those subsections, the court shall award reasonable attorney fees at trial and on appeal*
8 *to the defendant.*]

9 **SECTION 4. The amendments to ORS 646.618, 646.626 and 646.632 by sections 1 to 3 of this**
10 **2017 Act apply to investigative demands that a prosecuting attorney issues on or after the**
11 **effective date of this 2017 Act.**

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