

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)

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**.

Prohibits corporation or cooperative from denying director indemnification or payments for expenses in connection with proceeding if corporation or cooperative previously granted indemnification or payments. Provides exception if, at time act or omission occurred that gave rise to proceeding, corporation's or cooperative's articles of incorporation, bylaws or resolution explicitly authorized corporation or cooperative to deny indemnification or payment after act or omission occurs.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to claims of directors in connection with proceedings; creating new provisions; amending
3 ORS 60.391, 60.397, 62.464, 62.468, 65.391 and 65.397; and declaring an emergency.

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

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

6 60.391. (1) Except as provided in subsection (4) of this section, a corporation may indemnify an
7 individual **against liability incurred in a proceeding to which the individual was** made a party
8 [*to a proceeding*] because the individual is or was a director [*against liability incurred in the pro-*
9 *ceeding*] if:

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

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

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

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

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

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

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

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

28 **(b) A proceeding that charged the director with and adjudged the director liable for im-**

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 **properly receiving a personal benefit.**

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

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

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

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

15 60.397. (1) A corporation may pay for or reimburse the reasonable expenses incurred by a di-
 16 rector who is a party to a proceeding in advance of final disposition of the proceeding if:

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

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

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

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

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

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

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

38 62.464. (1) Except as provided in subsection (4) of this section, a cooperative may indemnify an
 39 individual **against liability incurred in a proceeding to which the individual was** made a party
 40 *[to a proceeding]* because the individual is or was a director *[against liability incurred in the pro-*
 41 *ceeding]* if:

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

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

45 (c) In the case of *[any]* **a** criminal proceeding, the individual *[had no]* **did not have** reasonable

1 cause to believe the individual's conduct was unlawful.

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

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

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

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

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

15 **(b) A proceeding that charged the director with and adjudged the director liable for im-**
 16 **properly receiving a personal benefit.**

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

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

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

29 *[(6)]* (7) If a cooperative indemnifies or advances expenses to a director under this section or
 30 ORS 62.466, 62.468 or 62.472 in connection with a proceeding by or in the right of the cooperative,
 31 the cooperative shall report the indemnification or advance in writing to the members with or before
 32 the notice of the next membership meeting.

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

34 62.468. (1) A cooperative may pay for or reimburse the reasonable expenses incurred by a di-
 35 rector who is a party to a proceeding in advance of final disposition of the proceeding if:

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

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

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

44 (3) *[Any]* **An** authorization of payments under this section may be made by provision in the ar-
 45 ticles of incorporation[,] or bylaws, by a resolution of the members or board of directors or by con-

1 tract.

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

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

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

12 65.391. (1) Except as provided in subsection (4) of this section, a corporation may indemnify an
 13 individual **against liability incurred in a proceeding to which the individual was** made a party
 14 [*to a proceeding*] because the individual is or was a director [*against liability incurred in the pro-*
 15 *ceeding*] if:

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

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

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

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

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

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

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

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

34 (b) **A proceeding that charged the director with and adjudged the director liable for im-**
 35 **properly receiving a personal benefit.**

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

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

44 (b) **Notwithstanding the prohibition set forth in paragraph (a) of this subsection, a cor-**
 45 **poration may eliminate or impair a director’s right to indemnification if at the time the act**

1 **or omission occurred the corporation's articles of incorporation or bylaws explicitly author-**
 2 **ized the corporation to eliminate or impair the right after an act or omission occurs.**

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

4 65.397. (1) A corporation may pay for or reimburse the reasonable expenses incurred by a di-
 5 rector who is a party to a proceeding in advance of final disposition of the proceeding if:

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

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

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

14 (3) *[Any]* **An** authorization of payments under this section may be made by provision in the ar-
 15 ticles of incorporation or bylaws, by a resolution of the members or board of directors or by con-
 16 tract.

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

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

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

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

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