

# **WEST VIRGINIA LEGISLATURE**

**2018 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 368**

BY SENATORS JEFFRIES, BEACH, AND RUCKER

[Originating in the Committee on the Judiciary;

Reported on February 7, 2018]



1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
2 designated §46A-6N-1, §46A-6N-2, §46A-6N-3, §46A-6N-4, §46A-6N-5, and §46A-6N-6,  
3 all relating to automatic purchase renewal offers and continuous service offers; stating  
4 legislative intent; defining terms; setting notice and disclosure requirements for automatic  
5 purchase renewal offers and continuous service offers; providing that a business may not  
6 charge the consumer for an automatic renewal or continuous services without first  
7 obtaining the consumer's affirmative consent; providing acknowledgement requirements;  
8 providing that the business shall disclose how to cancel the automatic renewal or  
9 continuous service before the consumer pays if the offer includes a free gift or trial;  
10 providing that a business shall provide certain mechanism for cancellation of the automatic  
11 renewal or continuous offer in the acknowledgement; providing means for terminating the  
12 automatic renewal or continuous service offer online; providing notice requirements in the  
13 case of material changes in the terms of the automatic renewal or continuous service;  
14 providing that the business shall provide to the consumer a reminder of the recurring  
15 charge and information on how the consumer may cancel at least 30 days prior to the  
16 charge in the case of automatic renewal or continuous service offers of certain frequency;  
17 providing a period of application; providing that goods, wares, merchandise, or products  
18 shall be deemed an unconditional gift to the consumer when the business sends any  
19 goods, wares, merchandise, or products to a consumer without first obtaining the  
20 consumer's affirmative consent under a continuous service agreement or automatic  
21 renewal of a purchase; providing a civil cause of action; providing statutory penalties;  
22 providing that no action may be brought until written notice is provided by the consumer,  
23 or his or her representative, to the business; providing written notice requirements;  
24 providing mailing requirements; providing the business an opportunity to cure the alleged  
25 violation; providing for expiration of the cure offer and cure period; providing a period for  
26 the business to remit payment, if any, as specified in the accepted cure offer; providing

27 that a claim may be brought for failure of the business to timely effect the accepted cure  
28 offer; providing that the written notice is a jurisdictional prerequisite to bringing a cause of  
29 action; providing the court discretion to award to plaintiff costs of the action, including  
30 reasonable attorneys' fees; providing that plaintiff is not entitled to costs and attorneys'  
31 fees under certain circumstances; providing a statute of limitations; providing that the  
32 statute of limitations shall be tolled; and stating exemptions.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 6N. AUTOMATIC PURCHASE RENEWALS.**

**§46A-6N-1. Legislative intent.**

1 It is the intent of the Legislature to end the practice of ongoing charging of consumer credit  
2 or debit cards or third-party payment accounts without the consumer's explicit consent for ongoing  
3 shipments of a product or ongoing deliveries of service.

**§46A-6N-2. Definitions.**

1 As used in this article:

2 "Automatic renewal" means a plan or arrangement in which a paid subscription or  
3 purchasing agreement is automatically renewed at the end of a definite term for a subsequent  
4 term.

5 "Automatic renewal offer terms" means the following clear and conspicuous disclosures:

6 (1) That the subscription or purchasing agreement will continue until the consumer  
7 cancels.

8 (2) The description of the cancellation policy that applies to the offer.

9 (3) The recurring charges that will be charged to the consumer's credit or debit card or  
10 payment account with a third party as part of the automatic renewal plan or arrangement, and that  
11 the amount of the charge may change, and the amount to which the charge will change, if known.

12 (4) The length of the automatic renewal term or that the service is continuous, unless the  
13 length of the term is chosen by the consumer.

14 (5) The minimum purchase obligation, if any.

15 “Clear and conspicuous” or “clearly and conspicuously” means in larger type than the  
16 surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or  
17 set off from the surrounding text of the same size by symbols or other marks, in a manner that  
18 clearly calls attention to the language. In the case of an audio disclosure, “clear and conspicuous”  
19 and “clearly and conspicuously” means in a volume and cadence sufficient to be readily audible  
20 and understandable.

21 “Consumer” means any individual who seeks or acquires, by purchase or lease, any  
22 goods, services, money, or credit for personal, family, or household purposes.

23 “Continuous service” means a plan or arrangement in which a subscription or purchasing  
24 agreement continues until the consumer cancels the service.

**§46A-6N-3. Automatic renewal or continuous service offers; prohibited activities;**  
**cancellation mechanism; notice of material change in terms; application of**  
**requirements.**

1 (a) It shall be unlawful for any business that makes an automatic renewal offer or  
2 continuous service offer to a consumer in this state to do any of the following:

3 (1) Fail to present the automatic renewal offer terms or continuous service offer terms in  
4 a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and  
5 in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the  
6 request for consent to the offer: *Provided*, That if the offer also includes a free gift or trial, the offer  
7 shall include a clear and conspicuous explanation of the price that will be charged after the trial  
8 ends or the manner in which the subscription or purchasing agreement pricing will change upon  
9 conclusion of the trial.

10 (2) Charge the consumer’s credit or debit card, or the consumer’s account with a third  
11 party, for an automatic renewal or continuous service without first obtaining the consumer’s  
12 affirmative consent to the agreement containing the automatic renewal offer terms or continuous

13 service offer terms, including the terms of an automatic renewal offer or continuous service offer  
14 that is made at a promotional or discounted price for a limited period of time.

15 (3) Fail to provide an acknowledgment that includes the automatic renewal offer terms or  
16 continuous service offer terms, cancellation policy, and information regarding how to cancel in a  
17 manner that is capable of being retained by the consumer: *Provided*, That if the automatic renewal  
18 offer or continuous service offer includes a free gift or trial, the business shall also disclose in the  
19 acknowledgment how to cancel, and allow the consumer to cancel the automatic renewal or  
20 continuous service before the consumer pays for the goods or services.

21 (b) A business that makes an automatic renewal offer or continuous service offer shall  
22 provide a toll-free telephone number, electronic mail address, a postal address if the seller directly  
23 bills the consumer, or it shall provide another mechanism for cancellation that shall be described  
24 in the acknowledgment specified in §46A-6N-3(a)(3) of this code.

25 (c) In addition to the requirements of §46A-6N-3(b) of this code, a consumer who accepts  
26 an automatic renewal or continuous service offer online shall be allowed to terminate the  
27 automatic renewal or continuous service exclusively online, which may include a termination email  
28 formatted and provided by the business that a consumer can send to the business without  
29 additional information.

30 (d) In the case of a material change in the terms of the automatic renewal or continuous  
31 service that has been accepted by a consumer in this state, the business shall provide the  
32 consumer with a clear and conspicuous notice of the material change and provide information  
33 regarding how to cancel in a manner that is capable of being retained by the consumer.

34 (e) In the case of an automatic renewal or continuous service offer that charges once a  
35 year or less frequently, the business shall provide to the consumer a reminder of the recurring  
36 charge and information on how the consumer may cancel at least 30 days prior to the charge.

37 (f) The requirements of this article shall apply only prior to the completion of the initial  
38 order for the automatic renewal or continuous service, except as follows:

39           (1) The requirement in §46A-6N-3(a)(3) of this code may be fulfilled after completion of  
40 the initial order.

41           (2) The requirement in §46A-6N-3(d) of this code shall be fulfilled prior to implementation  
42 of the material change.

**§46A-6N-4. Goods sent without affirmative consent as unconditional gifts.**

1           In any case in which a business sends any goods, wares, merchandise, or products to a  
2 consumer, under a continuous service agreement or automatic renewal of a purchase, without  
3 first obtaining the consumer's affirmative consent as described in this article, the goods, wares,  
4 merchandise, or products shall for all purposes be deemed an unconditional gift to the consumer,  
5 who may use or dispose of the same in any manner he or she sees fit without any obligation  
6 whatsoever on the consumer's part to the business, including, but not limited to, bearing the cost  
7 of, or responsibility for, shipping any goods, wares, merchandise, or products to the business.

**§46A-6N-5. Civil action permitted.**

1           (a) If a business violates the provisions of this article, the consumer has a cause of action  
2 to recover actual damages and, in addition, a right to recover from the business a penalty in an  
3 amount of \$1,000 per violation: *Provided*, That no action may be brought pursuant to this section  
4 until the consumer, or a representative of the consumer, has notified the business of the alleged  
5 violation and the factual basis for the violation, in writing and by certified mail, return receipt  
6 requested, to the business' registered agent identified by it at the office of the West Virginia  
7 Secretary of State or, if not registered with the West Virginia Secretary of State, then to its principal  
8 place of business.

9           (b) The business shall have 10 days from receipt of the notice of the alleged violation by  
10 its agent or at its principal place of business to make a cure offer, which shall be provided to the  
11 consumer's counsel or, if unrepresented, to the consumer by certified mail, return receipt  
12 requested.

13 (c) The consumer has 10 days from receipt of the cure offer to accept the cure offer or it  
14 is deemed refused and withdrawn. If a cure offer is accepted, unless otherwise agreed to by the  
15 parties, the business has seven days to remit payment, if any, as specified in the cure offer.  
16 Nothing in this section prevents a consumer that has accepted a cure offer from bringing an action  
17 under this section against a business for failing to timely effect the cure offer.

18 (d) The written notice required under §46A-6N-6(a) of this code is a jurisdictional  
19 prerequisite to any action brought under this section for claims accruing on or after the effective  
20 date of this section.

21 (e) The court in any action brought under this section may, in the event that any judgment  
22 is awarded to the plaintiff, assess costs of the action, including reasonable attorney fees against  
23 the defendant: *Provided*, That the plaintiff shall not be awarded costs and attorneys' fees if the  
24 plaintiff rejected the business' cure offer and judgment is awarded to the plaintiff in an amount not  
25 more than 105 percent of the amount offered in the cure offer.

26 (f) No action may be brought under this section more than two years after the date upon  
27 which the violation occurred: *Provided*, That any applicable statute of limitations is tolled for a 20-  
28 day period beginning the day the business or its agent receives the notice of the alleged violation  
29 under §46A-6N-6(a) of this code, or for the period the effectuation of the cure offer is being  
30 performed, whichever is longer.

**§46A-6N-6. Exemptions.**

1 The following are exempt from the requirements of this article:

2 (1) Any service provided by a business or its affiliate where either the business or its  
3 affiliate is doing business pursuant to a franchise issued by a political subdivision of the state or  
4 a license, franchise, certificate, or other authorization issued by the Public Service Commission;

5 (2) Any service provided by a business or its affiliate where either the business or its  
6 affiliate is licensed or regulated by the Public Service Commission, the Federal Communications  
7 Commission, or the Federal Energy Regulatory Commission;



8           (3) Any entity regulated by the Insurance Commission; and

9           (4) A bank, bank holding company, or the subsidiary or affiliate of either, or a credit union

10 or other financial institution, licensed under state or federal law.