

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Originating

Senate Bill 738

By Senators Hamilton, Stover, Deeds, Phillips, Smith,

Stuart, Swope, Taylor, and Woodrum

[Originating in the Committee on Agriculture and
Natural Resources; reported on February 25, 2023]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §19-39-1, §19-39-2, §19-39-3, §19-39-4, §19-39-5, §19-39-6, §19-39-7, §19-
3 39-8, §19-39-9, and §19-39-10, all relating to creation of the Right to Repair Act; creating a
4 short title; defining terms; establishing jurisdiction of the Commissioner of Agriculture;
5 establishing requirements; establishing limitations; establishing prohibitions; providing for
6 rulemaking; establishing violations; imposing civil penalties; authorizing civil actions,
7 penalties, and injunctive relief; and providing for applicability and effective date of article.

Be it enacted by the Legislature of West Virginia:

ARTICLE 19. EQUIPMENT RIGHT TO REPAIR ACT.

§19-39-1. Short title.

1 This article shall be known and cited as the Equipment Right to Repair Act.

§19-39-2. Definitions.

1 As used in this article:

2 (a) "Authorized repair provider" means a person or entity that has an arrangement for a
3 definite or indefinite period in which a manufacturer grants, to a separate person or entity, a license
4 to use a tradename, service mark, or related characteristic for purposes of offering the services of
5 diagnosis, maintenance, or repair of equipment under the name of the original equipment
6 manufacturer. An original equipment manufacturer who offers the services of diagnosis,
7 maintenance, or repair of its own equipment, and who does not have an arrangement described in
8 this subsection with an unaffiliated individual or business, shall be considered an authorized repair
9 provider with respect to such equipment.

10 (b) "Commissioner" means the Commissioner of the Department of Agriculture.

11 (c) "Documentation" means any manual, diagram, reporting output, service code
12 description, schematic diagram, security codes, passwords, or other guidance or information used
13 in effecting the services of diagnosis, maintenance, or repair of equipment.

14 (d) "Embedded software" means any programmable instructions provided on firmware,

15 and all relevant patches and fixes made by the manufacturer, delivered with equipment and used
16 for its operation. "Embedded software" includes a basic internal operating system, an internal
17 operating system, a machine code, an assembly code, a root code, a microcode, and other similar
18 components.

19 (e) "Equipment" means:

20 (1) For farm equipment: Equipment that is used or intended for use in a farm or ranch
21 operation, including, but not limited to, a combine, farm tractor, trailer, sprayer, tillage implement,
22 baler, engine, motor, other equipment used to plant, cultivate, irrigate, or harvest agricultural
23 products or to ranch, and attachments and repair parts for farm equipment, but excluding a motor
24 vehicle designed primarily for transporting persons or property on public roadways.

25 (2) For forestry equipment: Equipment that includes, but is not limited to, sawmill
26 operations, heavy forestry vehicles used in logging operations for felling, delimiting, skidding, and
27 processing logs, and includes attachments and repair parts for forestry equipment.

28 (3) For lawn and garden equipment: equipment that includes, but is not limited to, lawn
29 mowers and tractors, yard power equipment, lawn and garden care equipment, and any tool or
30 equipment used for landscaping or working in gardens or yards.

31 (f) "Fair and reasonable terms" means, with respect to a part, tool, software, or
32 documentation offered by an original equipment manufacturer:

33 (1) For parts:

34 (A) Costs that are fair to both parties, considering the agreed-upon conditions, promised
35 quality, and timeliness of delivery. "Fair and reasonable" costs are subject to statutory and
36 regulatory limitations; and

37 (B) On terms that:

38 (i) Do not impose on an owner or an independent repair provider any substantial obligation
39 to use or any restriction on the use of the part to diagnose, maintain, or repair equipment sold,
40 leased, or otherwise supplied by the original equipment manufacturer, including a condition that

41 the owner or independent repair provider become an authorized repair provider of the original
42 equipment manufacturer, or a requirement that a part be registered, paired with, or approved by
43 the original equipment manufacturer or an authorized repair provider before such part is
44 operational; and

45 (ii) Prohibit an original equipment manufacturer from imposing any additional cost or
46 burden that is not reasonably necessary or is designed to be an impediment on the owner or
47 independent repair provider.

48 (2) For tools and documentation:

49 (A) Costs that are equivalent to the lowest actual cost for which the original equipment
50 manufacturer offers the tool, software, or documentation to an authorized repair provider, including
51 any discount, rebate, or other financial incentive offered to an authorized repair provider; and

52 (B) On terms that:

53 (i) Are equivalent to the most favorable terms under which an original equipment
54 manufacturer offers the part, tool, software, or documentation to an authorized repair provider,
55 including the methods and timeliness of delivery of the part, tool, software, or documentation;

56 (ii) Do not impose on an owner or an independent repair provider any substantial obligation
57 to use or any restriction on the use of the tool, software, or documentation to diagnose, maintain,
58 or repair equipment sold, leased, or otherwise supplied by the original equipment manufacturer,
59 including a condition that the owner or independent repair provider become an authorized repair
60 provider of the original equipment manufacturer, or a requirement that a tool be registered, paired
61 with, or approved by the original equipment manufacturer or an authorized repair provider before
62 such part or tool is operational; and

63 (iii) Prohibit an original equipment manufacturer from imposing any additional cost or
64 burden that is not reasonably necessary or is designed to be an impediment on the owner or
65 independent repair provider.

66 (3) For documentation: "Fair and reasonable terms" also means that the documentation is

67 made available by the original equipment manufacturer at no charge, except that, when the
68 documentation is requested in physical printed form, a charge may be included for the reasonable
69 actual costs of preparing and sending the copy.

70 (g) "Firmware" means a software program or set of instructions programmed on a
71 hardware device to allow the device to communicate with other computer hardware.

72 (h) "Independent repair provider" means a person or business operating in the state that is
73 not affiliated with an original equipment manufacturer, or its authorized repair provider, other than
74 through an arrangement with the manufacturer, whether for a definite or indefinite period, which is
75 engaged in the services of diagnosis, maintenance, or repair of equipment, and related
76 attachments and repair parts.

77 (i) "Original equipment manufacturer" or "manufacturer" means a business engaged in the
78 business of selling, leasing, or otherwise supplying new equipment manufactured by or on behalf
79 of itself, to any individual or business.

80 (j) "Owner" means an individual or business who owns or leases equipment purchased or
81 used in this state.

82 (k) "Part" means any replacement part, whether new or used, made available by an original
83 equipment manufacturer to an authorized repair provider for purposes of effecting the services of
84 maintenance or repair of equipment manufactured by or on behalf of, sold, or otherwise supplied
85 by the original equipment manufacturer.

86 (l) "Tools" means any software program, hardware implement, or other apparatus used for
87 diagnosis, maintenance, or repair of equipment, including software or other mechanisms that
88 provision, program, or pair a new part, calibrate functionality, or perform any other function
89 required to bring the product back to fully functional condition, including any updates.

90 (m) "Trade Secret" means the same as defined in 18 U.S.C. § 1839(3).

§19-39-3. Jurisdiction of the commissioner.

1 The commissioner is vested with jurisdiction over all aspects of this article and has

2 exclusive authority to perform all acts necessary to implement this article.

§19-39-4. Requirements.

1 (a) A manufacturer of equipment sold or leased, offered for sale or lease, or used in this
2 state, shall make available to any independent repair provider and owner of equipment, on fair and
3 reasonable terms, any documentation, parts, and tools, required for the diagnosis, maintenance,
4 or repair of the equipment, inclusive of any technical updates and corrections to embedded
5 software or information. This requirement also applies to any attachments or parts for the
6 equipment. The documentation, parts, and tools shall be made available to any independent repair
7 provider and owner of equipment on the same conditions, and in the same timeframe, as the
8 manufacturer makes diagnostic, service, or repair documentation available to an authorized repair
9 provider.

10 (b) For equipment, attachments, or parts that contain an electronic security lock or other
11 security-related function, the original equipment manufacturer shall make available to any owner
12 and independent repair provider, on fair and reasonable terms, any special documentation, tools,
13 and parts needed to access and reset the lock or function when disabled in the course of
14 diagnosis, maintenance, or repair of such equipment, attachments, or parts. Such documentation,
15 tools, and parts may be made available through appropriate secure release systems.

§19-39-5. Limitations.

1 (a) Nothing in this article shall require a manufacturer to divulge any trade secret to any
2 owner or independent repair provider.

3 (b) Nothing in this article shall abrogate, interfere with, contradict, or alter the terms of any
4 authorized repair agreement executed and in force between an authorized repair provider and
5 manufacturer, including, but not limited to, the performance or provision of warranty or recall repair
6 work by an authorized repair provider on behalf of a manufacturer pursuant to the agreement,
7 except that any provision in the agreement purporting to waive, avoid, restrict, or limit the
8 manufacturer's or authorized repair provider's compliance with this article shall be void.

9 (c) A manufacturer or authorized repair provider shall not be required to provide an owner
10 or independent repair provider access to non-diagnostic and repair documentation provided by the
11 manufacturer to an authorized repair provider pursuant to the terms of an authorizing agreement.

12 (d) No original equipment manufacturer or authorized repair provider shall be liable for any
13 damage or injury caused to any equipment, attachments, or parts by an independent repair
14 provider or owner which occurs during the course of repair, diagnosis, or maintenance.

§19-39-6. Prohibitions.

1 Independent repair providers and owners may not modify or disable any:

2 (1) Software for horsepower or emission control systems installed on any new
3 equipment, attachments, or parts sold, leased, or used in this state; or

4 (b) Safety features installed on any new equipment, attachments, or parts sold, leased, or
5 used in this state.

§19-39-7. Rulemaking.

1 The commissioner shall propose rules for legislative approval and promulgate emergency
2 rules in accordance with the provisions of §29A-3-1 et seq. of this code to implement this article,
3 including establishing a mechanism for the administrative resolution of violations of this article and
4 the assessment and collection of civil penalties by consent order or agreement as an alternative to
5 instituting a civil action.

§19-39-8. Violations; civil penalties; injunctive relief.

1 (a) Any manufacturer, authorized repair provider, independent repair provider, or owner
2 that violates any provision of this article or rule promulgated hereunder, is liable for a civil penalty
3 of not less than \$1,000 for each violation. Each day a violation continues after notice by the
4 commissioner constitutes a separate violation. The penalty may be recovered by a civil action
5 brought by the commissioner, in the name of the state, in the circuit court of Kanawha County or in
6 the circuit court of the county in which the violation occurred or is occurring.

7 (b) Upon application by the commissioner, the circuit courts of the state or the judges

8 thereof in vacation may by injunction, compel compliance with, and enjoin any violation of this
9 article or rule promulgated hereunder or the terms and conditions of any consent order or
10 agreement. The court or the judge thereof in vacation may issue a temporary or preliminary
11 injunction in any case pending a decision on the merits of any injunction application filed.
12 Notwithstanding any other provision of this code to the contrary, the state is not required to furnish
13 bond as a prerequisite to obtaining injunctive relief under this article. An application for an
14 injunction under the provisions of this section may be filed and injunctive relief granted
15 notwithstanding that all the administrative remedies provided for in this article or rule have not
16 been pursued or invoked against the person or persons against whom such relief is sought.

17 (c) Legal counsel and services for the commissioner in all civil penalty and injunction
18 proceedings in the circuit court and in the Supreme Court of Appeals of this state shall be provided
19 by the Attorney General or his or her assistants and by the prosecuting attorneys of the several
20 counties as well, all without additional compensation, or the commissioner, with the written
21 approval of the Attorney General, may employ counsel to represent him or her in a particular
22 proceeding.

§19-39-9. **Applicability.**

1 This bill applies to equipment, attachments, and parts sold, leased, or in use in this state on
2 and after the effective date of this article.

§19-39-10. **Effective** **date.**

1 This article shall take effect on July 1, 2023.