

HOUSE BILL NO. 1305

Introduced by

Representative M. Nelson

1 A BILL for an Act to create and enact a new chapter to title 51 of the North Dakota Century
2 Code, relating to product repair practices; and to provide a penalty.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** A new chapter to title 51 of the North Dakota Century Code is created and
5 enacted as follows:

6 **Definitions.**

7 As used in this chapter:

- 8 1. "Authorized repair provider" means a person that has an oral or written arrangement
9 for a definite or indefinite period in which a manufacturer or distributor transfers to a
10 separate business organization or to an individual, a license to use a trade name,
11 service mark, or relative characteristic for the purpose of offering repair services under
12 the name of the manufacturer.
- 13 2. "Digital electronic product" means a part or machine containing a microprocessor
14 originally manufactured for distribution and sale in the United States. The term does
15 not include a class III medical device as established by 21 U.S.C. 360c.
- 16 3. "Documentation" means manuals, diagrams, reporting output, or service code
17 descriptions provided to the authorized repair provider for the purposes of repair.
- 18 4. "Embedded software" means programmable instructions provided on firmware
19 delivered with the digital electronic product for the purpose of product operation,
20 including all relevant patches and fixes made by the manufacturer for this purpose,
21 including a basic internal operating system, internal operating system, machine code,
22 assembly code, root code, and microcode.
- 23 5. "Fair and reasonable terms" means an equitable price in light of relevant factors,
24 including:

- 1 a. The net cost to the authorized repair provider for similar information obtained
- 2 from manufacturers, less any discounts, rebates, or other incentive programs;
- 3 b. The cost to the manufacturer for preparing and distributing the information,
- 4 excluding any research and development costs incurred in designing and
- 5 implementing, upgrading, or altering the product, but including amortized capital
- 6 costs for the preparation and distribution of the information;
- 7 c. The price charged by other manufacturers for similar information;
- 8 d. The price charged by other manufacturers for similar information prior to the
- 9 launch of manufacturer websites;
- 10 e. The ability of aftermarket technicians or shops to afford the information;
- 11 f. The means by which the information is distributed;
- 12 g. The extent to which the information is used, including the number of users, and
- 13 frequency, duration, and volume of use; and
- 14 h. Inflation.
- 15 6. "Firmware" means a software program or set of instructions programmed on a
- 16 hardware device allowing the device to communicate with other computer hardware.
- 17 7. "Independent repair provider" means an individual or business operating in the state
- 18 which is not affiliated with a manufacturer or a manufacturer's authorized repair
- 19 provider and which is engaged in the diagnosis, service, maintenance, or repair of
- 20 equipment. A manufacturer is considered an independent repair provider if the
- 21 manufacturer engages in the diagnosis, service, maintenance, or repair of equipment
- 22 not affiliated with the manufacturer.
- 23 8. "Manufacturer" means a person that in the ordinary course of business, sells or leases
- 24 new products or service parts used in this state, and is engaged in the diagnosis,
- 25 service, maintenance, or repair of the product.
- 26 9. "Motor vehicle" means a vehicle designed for transporting an individual or property on
- 27 a street or highway.
- 28 a. The term includes a:
- 29 (1) Self-propelled vehicle;
- 30 (2) Vehicle propelled by electric power obtained from overhead trolley wires, but
- 31 not operated upon rails; and

1 (3) Motorized bicycle.

2 b. The term does not include:

3 (1) A motorcycle;

4 (2) A recreational vehicle;

5 (3) A manufactured home equipped for habitation;

6 (4) A vehicle moved by human power; or

7 (5) A vehicle used exclusively upon stationary rails or tracks.

8 10. "Motor vehicle dealer" means a person that, in the ordinary course of business, is
9 engaged in the business of selling or leasing new motor vehicles and is engaged in
10 the diagnosis, service, maintenance, or repair of motor vehicles or motor vehicle
11 engines.

12 11. "Motor vehicle manufacturer" means a person engaged in the business of
13 manufacturing or assembling new motor vehicles, or imports and sells new motor
14 vehicles to new motor vehicle dealers for resale in the state.

15 12. "Owner" means a person that lawfully acquires and possesses a new product sold and
16 used in this state.

17 13. "Product" means a tangible device or machinery that is susceptible to service,
18 maintenance, or repair.

19 14. "Service parts" means new or used replacement parts, made available by a
20 manufacturer to an authorized repair provider for purposes of repair.

21 15. "Trade secret" means anything tangible or intangible or electronically stored or kept
22 which constitutes, represents, evidences, or records intellectual property, including
23 secret or confidentially held designs; processes; procedures; formulas; inventions;
24 improvements; or secrets of confidentially held scientific, technical, merchandising,
25 production, financial, business, or management information, or anything within the
26 definition of 18 U.S.C. 1839(3).

27 **Requirements.**

28 1. A manufacturer shall:

29 a. Make available to independent repair providers and owners of products
30 manufactured by the manufacturer the same diagnostic and repair information,
31 including repair technical updates, diagnostic software, service access

1 passwords, updates and corrections to firmware, and related documentation, free
2 of charge and in the same manner the manufacturer makes available to its
3 authorized repair providers.

4 b. Make service parts, including updates to the firmware of the parts, available for
5 purchase on fair and reasonable terms by the product owner or the authorized
6 agent of the owner.

7 2. Subsection 1 does not require a manufacturer to sell parts if the parts are no longer
8 available to the manufacturer or the authorized repair channel of the manufacturer.

9 3. A manufacturer selling diagnostic, service, or repair information to an independent
10 repair provider or a third-party provider in a format standardized with other
11 manufacturers, and on terms and conditions more favorable than the manner and the
12 terms and conditions pursuant to which an authorized repair provider obtains the same
13 diagnostic, service, or repair information, may not require an authorized repair provider
14 to continue purchasing diagnostic, service, or repair information in a proprietary
15 format, unless the proprietary format includes diagnostic, service, repair, or dealership
16 operations information or functionality not available in a standardized format.

17 4. A manufacturer shall make available for purchase by owners and independent repair
18 providers all diagnostic repair tools, incorporating the same diagnostic repair and
19 remote diagnostic capabilities that the manufacturer makes available to its own repair
20 or engineering staff or any authorized repair providers, upon fair and reasonable
21 terms.

22 5. If the manufacturer provides diagnostic repair documentation to aftermarket diagnostic
23 tool manufacturers, diagnostics providers, or service information publications and
24 systems, the manufacturer is not responsible for the content and functionality of
25 aftermarket diagnostic tools, diagnostics, or service information systems and fully
26 satisfies its obligations under this section.

27 6. A manufacturer may not exclude diagnostic, service, or repair information necessary to
28 reset a security-related electronic function from the information provided to an owner
29 or an independent repair provider for products or parts providing security-related
30 functions. If necessary for security purposes, a manufacturer may provide the
31 information necessary to reset and unlock system- or security-related electronic

1 modules to an owner and independent repair providers through an appropriate secure
2 data release system.

3 **No requirement to divulge trade secret.**

4 This chapter may not be construed to require a manufacturer to divulge a trade secret.

5 **Abrogation of contract.**

6 1. This chapter may not be construed to abrogate, interfere with, contradict, or alter the
7 terms of an agreement executed between an authorized repair provider and a
8 manufacturer, including performing warranty or recall repair work by an authorized
9 repair provider on behalf of a manufacturer pursuant to the authorized repair
10 agreement, except a provision in such an authorized repair agreement purporting to
11 waive, avoid, restrict, or limit an original equipment manufacturer's compliance with
12 this section is void.

13 2. In the case of a dispute arising between a manufacturer and its authorized repair
14 provider related to either party's compliance with an existing repair agreement, an
15 authorized repair provider has all the rights and remedies provided in this section.

16 **Access to certain information.**

17 This chapter may not be construed to require a manufacturer or an authorized repair
18 provider to provide an owner or independent repair provider access to nondiagnostic or
19 nonrepair information provided by a manufacturer to an authorized repair provider pursuant to
20 the terms of an authorizing agreement.

21 **Application.**

22 This chapter does not apply to a motor vehicle manufacturer, a product or service of a
23 motor vehicle manufacturer, or a motor vehicle dealer.

24 **Right to cure - Penalty.**

25 1. An independent repair provider or owner that believes a manufacturer has failed to
26 provide information, including documentation, updates to firmware, safety and security
27 corrections, diagnostics, documentation, or a tool required by this chapter shall notify
28 the manufacturer in writing and give the manufacturer thirty days from the time the
29 manufacturer receives the complaint to cure the failure. If the manufacturer cures the
30 complaint within thirty days, damages are limited to actual damages in any
31 subsequent litigation.

- 1 2. If the manufacturer fails to respond to the notice provided in subsection 1 or if an
2 independent repair provider or owner is not satisfied with the manufacturer's cure, the
3 independent repair provider or owner may file a complaint in district court. The
4 complaint must include:
- 5 a. Written information confirming the complainant has attempted to acquire and use,
6 through the then-available standard support function provided by the
7 manufacturer, all relevant diagnostics, tools, service parts, documentation, and
8 updates to embedded software, including communication with customer
9 assistance via the manufacturer's then-standard process, if made available by
10 the manufacturer.
- 11 b. Evidence of manufacturer notification as required in subsection 1.
- 12 3. A violation of this chapter is an unfair method of competition and an unfair act or
13 deceptive act or practice in the conduct of trade or commerce. The court shall assess
14 a civil penalty of one thousand dollars for each violation of this chapter and may
15 assess against the manufacturer reasonable attorney's fees and any other litigation
16 costs and expenses, reasonably incurred by the complainant.