

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2115

BY DELEGATE HOWELL

[Introduced January 9, 2019; Referred
to the Committee on Technology and Infrastructure
then the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §17A-16F-1, §17A-16F-2, §17A-16F-3, §17A-16F-4, §17A-16F-5, and
3 §17A-16F-6, all related to creating the Right to Repair Act; requiring a manufacturer of
4 motor vehicles sold in the state to make diagnostic and repair information available to
5 owners independent repair facilities that the manufacturer makes available to its dealers
6 through the manufacturer's Internet-based diagnostic and repair information system;
7 providing exceptions; providing additional remedies; and defining terms.

Be it enacted by the Legislature of West Virginia:

ARTICLE 16F. RIGHT TO REPAIR ACT.

§17A-16F-1. Definitions.

1 As used in this article, the following words, unless the context clearly indicates a different
2 meaning, have the following meanings:

3 “Dealer,” any person or business who, in the ordinary course of its business, is engaged
4 in the business of selling or leasing new motor vehicles to consumers or other end users pursuant
5 to a franchise agreement and is engaged in the diagnosis, service, maintenance or repair of motor
6 vehicles or motor vehicle engines pursuant to said franchise agreement.

7 “Franchise agreement,” an oral or written arrangement for a definite or indefinite period in
8 which a manufacturer or distributor grants to a motor vehicle dealer a license to use a trade name,
9 service mark or related characteristic and in which there is a community of interest in the
10 marketing of new motor vehicles or services related thereto at wholesale, retail, leasing or
11 otherwise.

12 “Fair and Reasonable Terms.” In determining whether a price is on “fair and reasonable
13 terms,” consideration may be given to relevant factors, including, but not limited to, the following:

14 (A) The net cost to the manufacturer franchised dealerships for similar information
15 obtained from manufacturers, less any discounts, rebates, or other incentive programs.

16 (B) The cost to the manufacturer for preparing and distributing the information, excluding

17 any research and development costs incurred in designing and implementing, upgrading or
18 altering the onboard computer and its software or any other vehicle part or component. Amortized
19 capital costs for the preparation and distribution of the information may be included.

20 (C) The price charged by other manufacturers for similar information.

21 (D) The price charged by manufacturers for similar information prior to the launch of
22 manufacturer web sites.

23 (E) The ability of aftermarket technicians or shops to afford the information.

24 (F) The means by which the information is distributed.

25 (G) The extent to which the information is used, which includes the number of users, and
26 frequency, duration, and volume of use.

27 (H) Inflation.

28 “Immobilizer system,” an electronic device designed for the sole purpose of preventing the
29 theft of a motor vehicle by preventing the motor vehicle in which it is installed from starting without
30 the correct activation or authorization code.

31 “Independent repair facility,” a person or business operating in the state that is not affiliated
32 with a manufacturer or manufacturer’s authorized dealer of motor vehicles, which is engaged in
33 the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines;
34 provided, however, that, for the purposes of this chapter, a dealer, notwithstanding its affiliation
35 with any manufacturer, is considered to be an independent repair facility for purposes of those
36 instances when said dealer engages in the diagnosis, service, maintenance or repair of motor
37 vehicles or motor vehicle engines that are not affiliated with the dealer’s franchise manufacturer.

38 “Manufacturer,” any person or business engaged in the business of manufacturing or
39 assembling new motor vehicles.

40 “Motor vehicle,” a vehicle, originally manufactured for distribution and sale in the United
41 States, driven or drawn by mechanical power and manufactured primarily for use on public
42 streets, roads and highways, but excluding: (A) A vehicle that may be operated only on a rail line;

43 (B) a recreational vehicle or auto home equipped for habitation; (C) an ambulance; (D) a bus,
44 motor coach or trackless trolley designed for the carriage of persons for hire or for school-related
45 purposes; (E) vehicles used exclusively for the building, repair and maintenance of highways or
46 designed primarily for use elsewhere than on the traveled part of ways; (F) any vehicle with a
47 gross vehicle weight rating of more than 10,000 pounds; (G) any vehicle that is not a “motor
48 vehicle” as defined in §17A-1-1 of this code; and (viii) a motorcycle, as defined in that section.

49 “Owner,” a person or business who owns or leases a motor vehicle registered in the
50 commonwealth.

51 “Trade secret,” anything, tangible or intangible or electronically stored or kept, which
52 constitutes, represents, evidences or records intellectual property including secret or
53 confidentially held designs, processes, procedures, formulas, inventions, or improvements, or
54 secret or confidentially held scientific, technical, merchandising, production, financial, business or
55 management information, or anything within the definition of 18 U.S.C. §1839(3).

§17A-16F-2. Availability of diagnostic and repair information; independent repair facilities;
exceptions.

1 (a) Except as provided in §17A-16F-2(e) of this code, for Model Year 2002 motor vehicles
2 and thereafter, a manufacturer of motor vehicles sold in the state shall make available for
3 purchase by owners of motor vehicles manufactured by the manufacturer and by independent
4 repair facilities the same diagnostic and repair information, including repair technical updates, that
5 the manufacturer makes available to its dealers through the manufacturer’s Internet-based
6 diagnostic and repair information system or other electronically accessible manufacturer’s repair
7 information system. All content in any the manufacturer’s repair information system shall be made
8 available to owners and to independent repair facilities in the same form and manner and to the
9 same extent as is made available to dealers utilizing the diagnostic and repair information system.
10 Each manufacturer shall provide access to the manufacturer’s diagnostic and repair information
11 system for purchase by owners and independent repair facilities on a daily, monthly and yearly

12 subscription basis and upon fair and reasonable terms.

13 (b) Any manufacturer that sells any diagnostic, service, or repair information to any
14 independent repair facility or other third party provider in a format that is standardized with other
15 manufacturers, and on terms and conditions more favorable than the manner and the terms and
16 conditions pursuant to which the dealer obtains the same diagnostic, service or repair information,
17 is prohibited from requiring any dealer to continue purchasing diagnostic, service, or repair
18 information in a proprietary format, unless the proprietary format includes diagnostic, service,
19 repair or dealership operations information or functionality that is not available in the standardized
20 format.

21 (c)(1) For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor
22 vehicles sold in the state shall make available for purchase by owners and independent repair
23 facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless
24 capabilities that the manufacturer makes available to its dealers. The tools shall incorporate the
25 same functional repair capabilities that the manufacturer makes available to dealers. Each
26 manufacturer shall offer the tools for sale to owners and to independent repair facilities upon fair
27 and reasonable terms.

28 (2) Any diagnostic tool or information necessary to diagnose, service or repair a motor
29 vehicle that a manufacturer sells to any independent repair facility in a manner and on terms and
30 conditions more favorable than the manner and the terms and conditions pursuant to which the
31 dealer obtains the same diagnostic tool or information necessary to diagnose, service or repair a
32 motor vehicle, shall also be offered to the dealer in the same manner and on the same terms and
33 conditions as provided to the independent repair facility.

34 (3) Any manufacturer that sells to any independent repair facility any diagnostic tool
35 necessary to diagnose, service or repair a motor vehicle and the diagnostic tool communicates
36 with the vehicle using the same nonproprietary interface used by other manufacturers, the
37 manufacturer delivering the diagnostic tool is prohibited from requiring any dealer from continuing

38 to purchase that manufacturer's proprietary tool and interface unless the proprietary interface has
39 a capability not available in the non-proprietary interface.

40 (4) Each manufacturer shall provide diagnostic repair information to each aftermarket scan
41 tool company and each third-party service information provider with whom the manufacturer has
42 appropriate licensing, contractual or confidentiality agreements for the sole purpose of building
43 aftermarket diagnostic tools and third-party service information publications and systems. Once
44 a manufacturer makes the information available pursuant to this section, the manufacturer will
45 have fully satisfied its obligations under this section and thereafter not be responsible for the
46 content and functionality of aftermarket diagnostic tools or service information systems.

47 (d)(1) Commencing in Model Year 2020, except as provided in §17A-16F-2(e) of this code,
48 manufacturers of motor vehicles sold in the state shall provide access to their onboard diagnostic
49 and repair information system, as required under this section, using an off-the-shelf personal
50 computer with sufficient memory, processor speed, connectivity and other capabilities as
51 specified by the vehicle manufacturer and: (A) A nonproprietary vehicle interface device that
52 complies with the Society of Automotive Engineers SAE J2534, the International Standards
53 Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or
54 published by the Society of Automotive Engineers or the International Standards Organizations;
55 (B) an on-board diagnostic and repair information system integrated and entirely self-contained
56 within the vehicle including, but not limited to, service information systems integrated into an
57 onboard display; or (C) a system that provides direct access to on-board diagnostic and repair
58 information through a nonproprietary vehicle interface such as Ethernet, Universal Serial Bus or
59 Digital Versatile Disc. Each manufacturer shall provide access to the same on-board diagnostic
60 and repair information available to their dealers, including technical updates to the on-board
61 systems, through the nonproprietary interfaces as referenced in this paragraph.

62 (2) Nothing in this article may be construed to require a dealer to use the nonproprietary
63 vehicle interface (i.e., SAE J2534 or ISO 22900 vehicle interface device) specified in this

64 subsection, nor may this article be construed to prohibit a manufacturer from developing a
65 proprietary vehicle diagnostic and reprogramming device: *Provided*, That: (A) The manufacturer
66 also complies with §17A-16F-2(d)(1) and §17A-16F-2(d)(2) of this code; and (B) the manufacturer
67 also makes this device available to independent repair facilities upon fair and reasonable terms,
68 and otherwise complies with §17A-16F-2(a) of this code.

69 (3) No manufacturer may be prohibited from making proprietary tools available to dealers
70 if the tools are for a specific specialized diagnostic or repair procedure developed for the sole
71 purpose of a customer service campaign meeting the requirements set out in 49 CFR §579.5, or
72 performance of a specific technical service bulletin or recall after the vehicle was produced, and
73 where original vehicle design was not originally intended for direct interface through the
74 nonproprietary interface set out in §17A-16F-2(d)(1) of this code. Provision of the proprietary tools
75 under this subdivision does not constitute a violation of this article even if the tools provide
76 functions not available through the interface set forth in §17A-16F-2(d)(1) of this code: *Provided*,
77 That the proprietary tools are also available to the aftermarket upon fair and reasonable terms.
78 Nothing in this subdivision authorizes manufacturers to exclusively develop proprietary tools,
79 without a nonproprietary equivalent as set forth in §17A-16F-2(d)(1) of this code, for diagnostic or
80 repair procedures that fall outside the provisions of this subdivision or to otherwise operate in a
81 manner inconsistent with the requirements of §17A-16F-2(d)(1) of this code.

82 (e) Manufacturers of motor vehicles sold in the state may exclude diagnostic, service and
83 repair information necessary to reset an immobilizer system or security-related electronic modules
84 from information provided to owners and independent repair facilities. If excluded under this
85 paragraph, the information necessary to reset an immobilizer system or security-related electronic
86 modules shall be obtained by owners and independent repair facilities through the secure data
87 release model system as currently used by the National Automotive Service Task Force or other
88 known, reliable and accepted systems.

89 (f) With the exception of telematics diagnostic and repair information that is provided to

90 dealers, necessary to diagnose and repair a customer's vehicle, and not otherwise available to
91 an independent repair facility via the tools specified in §17A-16F-2(c)(1) and §17A-16F-2(d)(1) of
92 this code, nothing in this article applies to telematics services or any other remote or information
93 service, diagnostic or otherwise, delivered to or derived from the vehicle by mobile
94 communications; provided, however, that nothing in this article may be construed to abrogate a
95 telematics services or other contract that exists between a manufacturer or service provider, a
96 motor vehicle owner, and/or a dealer. For purposes of this chapter, telematics services include
97 but are not limited to automatic airbag deployment and crash notification, remote diagnostics,
98 navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle
99 location information to public safety answering points as well as any other service integrating
100 vehicle location technology and wireless communications. Nothing in this article requires a
101 manufacturer or a dealer to disclose to any person the identity of existing customers or customer
102 lists.

§17A-16F-3. Trade secrets.

1 Nothing in this article may be construed to require a manufacturer to divulge a trade secret.

§17A-16F-4. Franchise agreements.

1 Notwithstanding any general or special law or any rule or regulation to the contrary, no
2 provision in this article may be read, interpreted or construed to abrogate, interfere with, contradict
3 or alter the terms of any franchise agreement executed and in force between a dealer and a
4 manufacturer including, but not limited to, the performance or provision of warranty or recall repair
5 work by a dealer on behalf of a manufacturer pursuant to the franchise agreement: *Provided, That*
6 any provision in the franchise agreement that purports to waive, avoid, restrict or limit a
7 manufacturer's compliance with this article is void and unenforceable.

§17A-16F-5. Access to nondiagnostic and repair information.

1 Nothing in this article may be construed to require manufacturers or dealers to provide an
2 owner or independent repair facility access to nondiagnostic and repair information provided by a

3 manufacturer to a dealer, or by a dealer to a manufacturer pursuant to the terms of a franchise
4 agreement.

§17A-16F-6. Additional remedies.

1 (a) In addition to any other remedies that may be available under law, a violation of this
2 article is an unfair method of competition and an unfair or deceptive act or practice in the conduct
3 of trade or commerce in violation of this code.

4 (b) An independent repair facility or owner who believes that a manufacturer has failed to
5 provide information or a tool required by this article must notify the manufacturer in writing through
6 the National Automotive Service Task Force (NASTF) Service Information Request process or its
7 successor organization or process, and give the manufacturer 30 days from the time the
8 manufacturer receives the complaint to cure the failure. If the manufacturer cures said complaint
9 within the cure period, damages are limited to actual damages in any subsequent unfair method
10 of competition and an unfair or deceptive act or practice in the conduct of trade or commerce
11 litigation.

12 (c) If the manufacturer fails to respond to the notice provided pursuant to §17A-16F-6(b)
13 of this code, or if an independent repair facility or owner is not satisfied with the manufacturer's
14 cure, the independent repair facility or owner may file a complaint in the superior court, or if
15 applicable in the federal district court for the district of Massachusetts. The complaint must
16 include, but not be limited to, the following: (1) Written information confirming that the complainant
17 has visited the relevant manufacturer website and attempted to effect a proper repair utilizing
18 information provided on the website, including communication with customer assistance via the
19 manufacturer's toll-free call-in assistance, if made available by the manufacturer; (2) written
20 information confirming that the complainant has obtained and utilized the relevant manufacturer's
21 scan or diagnostic tool necessary for the repair; and (3) evidence of manufacturer notification as
22 set out in §17A-16F-6(b) of this code.

23 (d) Except in the instance of a dispute arising between a franchisor manufacturer and its

- 24 franchisee dealer related to either party's compliance with an existing franchise agreement a
25 dealer has all the rights and remedies provided in this chapter, including, but not limited to, in the
26 instance when exercising rights and remedies as allowed as an independent repair facility.

NOTE: The purpose of this bill is to create the Right to Repair Act. The bill requires a manufacturer of motor vehicles sold in the state to make diagnostic and repair information available to owners independent repair facilities that the manufacturer makes available to its dealers through the manufacturer's Internet-based diagnostic and repair information system. The bill provides exceptions. The bill provides additional remedies. The bill defines terms.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.