

Occupational Licensing Review Act.

Model Legislation

October 20, 2017

A bill for an act relating to occupational regulations; establishing the state policy for the regulation of occupations, specifying criteria for government regulation to increase opportunities, promote competition, encourage innovation, protect consumers, comply with federal and state antitrust laws; creating a process to review criminal history to reduce offenders' disqualifications from state recognition; establishing canons of statutory interpretation; and proposing coding for new law as _____, chapter _____.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF _____:

100.01 Policy. For occupational regulations and their boards, it is the policy of the state that:

1. The right of an individual to pursue a lawful occupation is a fundamental right.
2. Where the state finds it is necessary to displace competition, it will use the least restrictive regulation to protect consumers from present, significant, and substantiated harms that threaten public health and safety.
3. The governor will establish an office of active supervision of occupational boards. The office is responsible for actively supervising the state's occupational boards.
4. Legislative leaders will assign the responsibility to review legislation and laws related to occupational regulations.

100.02 Definitions.

Subdivision 1. **Scope.** For the purposes of this chapter, the words defined in this section have the meaning given.

Subd. 2. **Certification.** "Certification" is a voluntary program in which (a) a private organization or (b) the state government grants nontransferable recognition to an individual who meets personal qualifications established by (a) the private organization or (b) the legislature. Upon approval, the individual may use "certified" as a designated title. A non-certified individual may also perform the lawful occupation for compensation but may not use the title "certified."

Subd. 3. **Lawful occupation.** "Lawful occupation" means a course of conduct, pursuit or profession that includes the sale of goods or services that are not themselves illegal to sell irrespective of whether the individual selling them is subject to an occupational regulation.

Subd. 4. Least restrictive regulation. “Least restrictive regulation” means, from least to most restrictive,

1. market competition,
2. third-party or consumer-created ratings and reviews,
3. private certification,
4. voluntary bonding or insurance,
5. specific private civil cause of action to remedy consumer harm,
6. deceptive trade practice act,¹
7. mandatory disclosure of attributes of the specific good or service,²
8. regulation of the process of providing the specific good or service,
9. inspection,³
10. bonding,⁴
11. insurance,⁵
12. registration,⁶
13. government certification,⁷
14. specialty occupational license for medical reimbursement,⁸ and
15. occupational license.⁹

Subd. 5. Occupational license. “Occupational license” is a nontransferable authorization in law for an individual to perform exclusively a lawful occupation for compensation based on meeting personal qualifications established by the legislature. In an occupation for which a license is required, it is illegal for an individual who does not possess a valid occupational license to perform the occupation for compensation.

Subd. 6. Occupational regulation. “Occupational regulation” means a statute, rule, practice, policy, or other state law that allows an individual to use an occupational title or work in a lawful occupation. It includes registration, certification and occupational license. It excludes a business license, facility license, building permit, or zoning and land use regulation except to the extent those state laws regulate an individual’s personal qualifications to perform a lawful occupation.

Subd. 7. Personal qualifications. “Personal qualifications” are criteria related to an individual’s personal background and characteristics including completion of an approved educational program, satisfactory performance on an examination, work experience, other

¹ Deceptive trade practices acts are an effective means to protect consumers from fraud.

² Mandatory disclosures may reduce misleading or confusing attributes. Disclosures that favor certain goods or services, such as a country-of-origin label, should not be used.

³ Periodic inspections protect consumers from unsanitary facilities.

⁴ Requiring bonding protects against a provider’s failure to fulfill contractual obligations.

⁵ Requiring insurance protects against a provider’s damaging a consumer or third party.

⁶ Registering with the secretary of state or other agency protects against fly-by-night providers.

⁷ Certification is a voluntary signal that addresses the concern of asymmetrical information.

⁸ Specialty licenses allows for medical reimbursement without disputes over scope of practice.

⁹ Only occupational licensing exposes board members to antitrust litigation. The 12 alternatives to licensing do not include that risk.

evidence of attainment of requisite skills or knowledge, moral standing, criminal history and completion of continuing education.

Subd. 8. **Registration.** “Registration” means a requirement to give notice to the government that may include the individual's name and address, the individual's agent for service of process, the location of the activity to be performed, and a description of the service the individual provides. “Registration” does not include personal qualifications but may require a bond or insurance. Upon the government’s receipt of notice, the individual may use “registered” as a designated title. A non-registered individual may not perform the occupation for compensation or use “registered” as a designated title. “Registration” is not transferable.

Subd. 9. **Specialty occupational license for medical reimbursement.** “Specialty occupational license for medical reimbursement” means a non-transferable authorization in law for an individual to qualify for payment or reimbursement from a government agency for the non-exclusive provision of medical services based on meeting personal qualifications established by the legislature. A private company may recognize this credential. Notwithstanding this specialty license, it is legal for a person regulated under another occupational regulation to provide similar services as defined in that statute for compensation and reimbursement. It is also legal for an individual who does not possess this specialty license to provide the identified medical services for compensation but the non-licensed individual shall not qualify for payment or reimbursement from a government agency.

100.03 Office of Active Supervision of Occupational Boards

Subdivision 1. **Antitrust law.** By establishing and executing the policies in section 100.01, the state intends to ensure that occupational boards and board members will avoid liability under federal antitrust laws.

Subd. 2. **Active Supervision.** To help execute the policies, the governor will establish the Office of Active Supervision of Occupational Boards.

Subd. 3. **Responsibility.** The office is responsible for the active supervision of the state’s occupational boards to ensure compliance with section 100.01, the applicable licensing statutes, and federal and state antitrust laws. Active supervision requires the office to play a substantial role in the development of boards’ rules and policies to ensure they benefit consumers and not serve private interests of providers of goods and services who the boards regulate.¹⁰

¹⁰ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634–635 (1992) (stating the purpose of active supervision is to determine “whether the State has played a substantial role in determining the specifics of the . . . policy” and that the policy was “established as a product of deliberate state intervention, not simply by agreement among private parties”). See *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985) (“Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the

Subd. 4. **Approval.** The office will exercise control over boards' processes and substantive actions to ensure they are consistent with section 100.01, the applicable licensing statutes, and federal and state antitrust laws.¹¹ The office must review, and approve or reject any proposed board rule, policy, enforcement, or other regulatory action prior to it being adopted or implemented. The office's approval must be explicit; silence or failure to act shall not be deemed approval.

Subd. 5. **Personnel.** The office personnel must be independent of boards. A government or private attorney who provides general counsel to a board shall not also serve in the office.

Subd. 6. **Cost Allocation.** The office may assess its costs on each board for the services of active supervision. Each board may recoup the assessment by increasing the fees paid by license holders.

100.04 Sunrise and Sunset Reviews of Occupational Regulations

Subdivision 1. **Analysis of occupational regulations.** The Speaker of the House of Representatives and the President of the Senate will assign to the _____ staff (hereafter "staff") the responsibility to analyze occupational regulations.

(See footnote ¹² for a discussion of the legislature giving the responsibility to analyze occupational licenses to a staff in the legislative or executive branch. This responsibility may also be assigned to an ad hoc commission or interim study committee.)

Subd. 2. **Sunrise reviews.** (a) The staff is responsible for reviewing legislation to enact or modify an occupational regulation to ensure compliance with the policies in section 100.01.

governmental interests of the state.") and *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791–792 (1975) (denying immunity to a state agency that "joined in what is essentially a private anticompetitive activity" for "the benefit of its members").

¹¹ *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1112 (2015) (holding active supervision "require[s] the State to review and approve interstitial policies made by the entity claiming immunity" to provide "realistic assurance that a private party's anticompetitive conduct promotes state policy . . .") (quoting *Patrick*, 486 U.S. at 101). *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.").

¹² There are many places in state government for legislative leaders to place the responsibility to perform the analysis needed for Sunrise and Sunset reviews. It could be given to a subcommittee of the legislature or the legislature's non-partisan staff. Another possibility is to give the responsibility to an agency or department in the executive branch. For example, Colorado is recognized for doing these reviews well. The state puts the responsibility to perform both reviews in the executive branch. Specifically, the responsibility is with the Colorado Office of Policy, Research & Regulatory Reform (COPRRR) in the Department of Regulatory Agencies (DORA). The key features are (1) the analysts doing the analysis are insulated to the greatest extent possible from lobbying and political pressure by industry advocates and (2) the agency or staff must issue its recommendations prior to the initial committee in the legislature voting on the proposed legislation.

(b) The staff will require proponents to submit evidence of present, significant and substantiated harms to consumers in the state. The staff also may require information from others knowledgeable of the occupation, labor-market economics or other factors.

(c) The staff will determine if the proposed regulation meets the state's policy in section 100.01(3) of using the least restrictive regulation necessary to protect consumers from present, significant and empirically substantiated harms.

(d) The staff's analysis in (c) will employ a rebuttable presumption that market competition and private remedies are sufficient to protect consumers.

(e) The presumption in (d) may be rebutted if the staff finds credible empirical evidence of a systematic problem that warrants enactment of a government regulation to protect consumers. If such a problem is present in the state, the staff will recommend the least restrictive government regulation that addresses the problem. The staff will use the following guideline to form its recommendation:

i. if the need is to protect consumers against fraud, the staff's presumptive recommendation will be to strengthen powers under the state's deceptive trade practices acts or require disclosures that will reduce misleading attributes of the specific good or service;

ii. if the need is to protect consumers against uncleanly facilities or to promote general health and safety, the staff's presumptive recommendation will be to require periodic inspections of the provider's facility;

iii. if the need is to protect consumers against potential damages from a provider's failure to complete a contract fully or to standards, the staff's presumptive recommendation will be to require the provider is bonded;

iv. if the need is to protect a person who is not party to a contract between the provider and consumer (externalities), the staff's presumptive recommendation will be to require the provider have insurance;

v. if the need is to protect consumers against potential damages by a transient or fly-by-night provider, the staff's presumptive recommendation will be to require the provider register the provider's business with the secretary of state;

vi. if the need is to protect consumers against a shortfall or imbalance of knowledge about the good or service relative to the seller's knowledge (asymmetrical information), the staff's presumptive recommendation will be to enact voluntary private or government certification; and

vii. if the need is to qualify providers of new or highly-specialized medical services for reimbursement by the state, the staff's presumptive recommendation will be to

enact a specialty license for medical reimbursement.

(f) The staff's analysis of the need for regulation in (e) will include the effects of legislation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs, and other effects.

(g) The staff's analysis of the need for regulation in (e) also will compare the legislation to whether and how other states regulate the occupation.

(h) The staff will report its findings to the initial and subsequent committees that will hear the legislation.

Subd. 3. **Rule.** The House of Representatives and the Senate will each adopt a rule requiring a committee considering legislation to enact or modify an occupational regulation to receive the staff's analysis in subdivision 2 prior to voting on the legislation.

Subd. 4. **Sunset reviews.** Starting on January 1, 20___, the staff will use the criteria in paragraphs 2(b)-(g) to review annually approximately 20 percent of the state's occupational regulations. The staff will review all occupational regulations over a period of five years.

Subd. 5. **Sunset reports.** Starting on January 1, 20___, the staff will report annually the findings of its reviews to the Speaker of the House of Representatives, the President of the Senate, the Governor and the Attorney General. In its report, the staff will recommend the legislature enact new legislation that (a) repeals the occupational regulations, (b) converts the occupational regulations to less restrictive regulations in section 100.02 subdivision 4, (c) instructs the relevant licensing board or agency to promulgate revised regulations reflecting the legislature's decision to use a less restrictive regulation or (d) reflects other recommendations to the legislature. The staff also may recommend that no new legislation be enacted.

100.05 Petition for Review of a Criminal Record

Subdivision 1. The right of an individual to pursue a lawful occupation is a fundamental right.

Subd. 2. The right of an individual to pursue a lawful occupation includes (a) the right of an individual with a criminal record to petition the state to obtain a certification, occupational license, specialty occupational license for medical reimbursement or other state recognition of the individual's personal qualifications (hereafter "state recognition") and (b) the state not using a criminal record as an automatic or mandatory permanent bar to an individual's receiving state recognition.

Subd. 3. An individual with a criminal record may petition a licensing board, agency, department or other state or local issuer of occupational licenses (hereafter "board") at any time, including before obtaining any required education or training, for a determination of

whether the individual's criminal record will disqualify the individual from obtaining state recognition.

Subd. 4. The individual shall include in the petition the individual's criminal record or authorize the board to obtain the individual's criminal record.

Subd. 5. The individual may include additional information about the individual's current circumstances, including the time since the offense, completion of the criminal sentence, other evidence of rehabilitation, testimonials, employment history and employment aspirations.

Subd. 6. The board is authorized to determine whether the individual's criminal record disqualifies the individual from obtaining state recognition.

Subd. 7. Notwithstanding any other statute or rule, the board may find the individual's criminal record disqualifies the individual from obtaining state recognition only if:

- (a) the individual's criminal record includes a conviction for a felony or violent misdemeanor; and
- (b) the board concludes the state has an important interest in protecting public safety that is superior to the individual's right. The board may make this conclusion only if it determines, by clear and convincing evidence at the time of the petition, that:
 - (1) the specific offense for which the individual was convicted is substantially related to the state's interest;
 - (2) the individual, based on the nature of the specific offense for which the individual was convicted and the individual's current circumstances in subdivision 5, is more likely to reoffend by virtue of having the license than if the individual did not have the license; and
 - (3) a re-offense will cause greater harm than it would if the individual did not have the license.

Subd. 8. The board shall issue its determination within 90 days after the board receives the petition. The determination shall be in writing and include the criminal record, findings of fact and conclusions of law.

Subd. 9. If the board determines the state's interest is superior to the individual's right, the board may advise the individual of actions the individual may take to remedy the disqualification. The individual may submit a revised petition reflecting the completion of the remedies at any time after 90 days following the board's judgment.

Subd. 10. The individual may appeal the board's determination in subdivision 8 as provided for in the state's administrative procedure act.

Subd. 11. The individual may submit a new petition to the board at any time after two years following a final judgment in the initial petition.

Subd. 12. The board may rescind its determination at any time if the individual is convicted of an additional offense that the Board determines meets the elements in subdivision 7.

Subd. 13. The board may charge a fee to recoup its costs not to exceed \$100 for each petition.

Subd. 14. The Department of _____ will establish an annual reporting requirement of the (a) number of applicants petitioning each board, (b) the numbers of each board's approvals and denials, (c) the type of offenses for which each board approved or denied the petitions and (d) other data the Department determines. The Department will compile and publish annually a report on a searchable public website.

100.06 Interpretation of Statutes and Rules

Subdivision 1. In construing any occupational regulation, including an occupational licensing statute, rule, policy or practice, the following canons of interpretation are to govern, unless the regulation is unambiguous:

- (a) Occupational regulations shall be construed and applied to increase economic opportunities, promote competition and encourage innovation;
- (b) Any ambiguities in occupational regulations shall be construed in favor of workers and aspiring workers to work; and
- (c) The scope of practice in occupational regulations is to be construed narrowly so as to avoid its application to individuals who would be burdened by regulatory requirements that are only partially related to the goods and services they provide.

100.07 Effective date. This chapter is effective on _____.

Contact information:

Lee McGrath
Senior Legislative Counsel
Institute for Justice
520 Nicollet Mall-Suite 550
Minneapolis MN 55402-2626
Office: (612) 435-3451
Email: lmcgrath@ij.org

Web: <http://www.ij.org/activism/legislation/>