OCCUPATIONAL LICENSING

A LICENSE TO LABOR

States are re-examining the way they regulate a variety of occupations.

BY SUZANNE WEISS

In 2003, bright blue-and-white kiosks offering $99 teeth-whitening treatments began popping up in shopping malls, spas and other locations across North Carolina.

The growing number of outlets, and the brisk business they were doing, soon attracted the attention of dentists—who typically charge upwards of $500 for teeth whitening—and eventually the North Carolina Board of Dental Examiners, eight of whose 10 members were practicing dentists themselves.

Citing a state law it interpreted as prohibiting anyone but licensed dentists from bleaching teeth, the board issued cease and desist letters in 2006 to more than 50 kiosk operators and their landlords. Within a year, all of the cut-rate teeth-whitening businesses in North Carolina had shut down.

But far from settling the matter, the board's actions generated a legal battle fought all the way up to the U.S. Supreme Court, culminating in 2015 in a landmark decision with complex ramifications for states' traditional approaches to regulating a wide variety of occupations.

The battle began when the cease and desist letters were brought to the attention of the Federal Trade Commission, which, after investigation, filed a complaint against the board, accusing it of anticompetitive behavior. "Without any legitimate justification or defense," the complaint charged, the board had prevented non-dentists from offering a service that reduced prices and expanded consumer choice.

The dental board argued that its conduct was shielded by what is called the "state-action doctrine"—a New Deal-era legal principle that renders federal antitrust laws inapplicable to economic regulations adopted by a state in its sovereign capacity.

But the Fourth Circuit, and ultimately the Supreme Court, sided with the FTC's contention that an entity like the dental board—controlled by market participants who are elected by other market participants—is a non-sovereign "private actor," not automatically exempt from antitrust challenges.

In *North Carolina Board of Dental Examiners v. FTC,* handed down in February 2015, the high court established a new standard: When a state delegates control over a market to a non-sovereign actor, the state-action immunity doctrine applies only if the state itself "actively supervises" and accepts political responsibility for the private actor's decisions. The need for supervision, the court ruled, "turns on the risk that active market participants will pursue private interests in restraining trade."

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What It Means for States

For governors, legislators and other policymakers, the ruling has raised the specter of a tide of lawsuits against licensing boards, which oversee occupations ranging from doctors and lawyers to barbers, locksmiths, beekeepers and auctioneers. Among the most common complaints against such boards, according to the FTC: difficult entry requirements, arbitrary restrictions on offering innovative services and unclear definitions of the "boundaries" of a given occupation.

A regulatory board of accountants, for example, may decide, for whatever reason, to limit the number of new licenses awarded each year, or a licensing board of attorneys may adopt a rule or code of ethics that prohibits attorneys from advertising. It's how we ended up with hair braiders—in 26 states across the country—needing a cosmetology license that typically costs $22,000 and involves more than 2,000 hours of training.

Protecting Consumers

Those serving on boards, however, would remind us that licensing, regulatory boards and all kinds of other regulations were created for a reason—to protect consumers from fraudulent, negligent, unqualified or otherwise unscrupulous practitioners. They would contend that oversight, rules and regulations guarantee high standards, so consumers receive quality work and fairly priced services.

Professional licensing also protects the reputation of the occupation itself, supporters say, protecting it from un- or under-trained tricksters capable of doing great harm.

The Supreme Court ruling has triggered about a dozen suits against state licensing boards over the past year—brought not by the FTC, but by current or prospective licensees. Nearly all of them have been settled or dismissed, having been found not to involve "a credible underlying antitrust claim," says Sarah Allen, a senior assistant attorney general in Virginia who has been closely tracking the fallout from the high court's decision.

One notable exception is a suit filed in April 2015 against the Texas Medical Board by Teladoc Inc., a company that uses telephone and videoconferencing technology to provide on-demand remote medical care. Teladoc is challenging a board rule that requires physicians to meet with patients in person before treating them remotely. The company alleges that the rule restricts its ability to compete, resulting in higher prices and less access to doctors for the state's residents.

Last December, a federal judge rejected the medical board's request to dismiss the case, declaring that there had been "no active supervision to establish state-action immunity," Allen says.

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And there's the rub: What constitutes "active supervision," and who or what is best suited to provide it?

Lisa Sorenon, executive director of the State and Local Legal Center, points out that state licensing boards take many thousands of regulatory actions every year, the large majority of which do not involve market manipulation. But there are certainly instances in which boards can and do "go rogue," as she put it, tilting the regulatory framework in favor of private interests.

So, Sorenon says, every state must now reassess the structure and operations of its licensing boards with an eye to reducing the risk of antitrust claims—"and there is no one-size-fits-all way of doing so."

Where to Begin?

As a starting point, state officials can look at a 13-page guidance paper issued by FTC staff in the wake of the 2015 Supreme Court decision in the dental board case.

The paper begins by noting that states may avoid conflict with federal antitrust laws altogether by creating regulatory boards that serve only in an advisory capacity, or staffing them exclusively with individuals who have no financial interest in the occupation being regulated.

But the vast majority of state licensing boards are, in fact, dominated by active members of the occupations they oversee, the paper acknowledges—and states thus "must accept responsibility for their conduct by actively supervising them."

The paper follows with the essential components of good supervision: a substantive review of a potentially anticompetitive board decision, the development of a factual record and the power to veto or modify particular decisions to ensure they agree with state policy.

The big question is who should do the supervising?

- An executive-branch official or agency? Colorado's Department of Regulatory Agencies has long had authority over all state licensing boards, and over the past year Alabama, Delaware and Maryland have moved in that direction.
- The attorney general's office? So far, only Oklahoma has taken this approach. Governor Mary Fallin (R) issued an executive order requiring boards controlled by market participants to submit a record of their actions to the attorney general's office for review, written analysis and possible modification. The drawbacks to this idea, both Sorenon and Allen say, are that attorneys general typically lack the resources to carry out such a task, and because they often advise multiple state boards on legal matters, they may have conflicts of interest. In addition, in many states, boards are not required to follow the advice of the attorney general.
- What about the legislature? In some states, legislative committees have the power to review board rules and regulations, but that can cause political problems for elected officials. "It forces them to take sides, and they don't want to be in that position," says Ken Levine, director of the Texas Sunset Advisory Commission, which was created by the Texas Legislature in 1977 to independently monitor the performance of state agencies, including licensing boards.

Seeking Better Supervision

Since the Supreme Court's decision, states are handling the supervision of licensing boards through executive orders, legislative proposals and opinions issued by the offices of attorneys general, according to recent NCSL research.

The Connecticut General Assembly passed a bill last year that makes any exercise of statutory functions, including licensing, subject to approval, rejection or modification by the commissioner of the state's Department of Consumer Protection.

Indiana lawmakers established a committee to make recommendations on reforming the way that appeals of decisions made by occupational licensing boards and other agencies are handled. The goal is to move away from traditional, patchwork administrative law models (with a single administrative law judge) toward panels of judges who hear appeals from several boards and agencies.

Governors in Alabama and Massachusetts issued executive orders. Alabama established the Office for Regulatory Oversight of Boards and Commissions to review, modify or veto the actions of boards and commissions.

In Massachusetts, the director of professional licensure, which oversees 28 boards, and the commissioner of public health must now conduct "a careful review" of any actions with the potential to be anticompetitive in the areas of licensing requirements, defining scope of practice, pricing, advertising and allocating territory. The order requires disapproval of any measure that doesn't advance "an important policy goal of the Commonwealth."

In 2015, the Arkansas Legislature passed a bill requiring that all proposed board rules and regulations be approved by a subcommittee of the Legislative Council. Previously, the powers of the subcommittee, which consists of 22 legislators selected by the House and Senate leadership, did not go beyond simple review of proposed board actions.

"We needed a process with some teeth," says Senate President Pro Tempore Jonathan Dismang (R), who sponsored the bill. "In some cases, these boards have become a government unto themselves."

Removing Burdens

Senate President Pro Tempore Jonathan Dismang Arkansas

A particularly ambitious initiative is underway in Delaware, where Governor Jack Markell (D) formed a committee to do a top-to-bottom analysis of the composition, state oversight and licensing requirements of all boards and commissions.

The Delaware Professional Licensing Review Committee, whose members include legislative and gubernatorial appointees, is charged with comparing the state's licensing requirements with those of other states; identifying best practices; and recommending actions that will alleviate the risk of antitrust liability and eliminate unnecessary licensing/certification requirements.

A key goal, Markell says, is to "remove regulatory burdens that can dissuade individuals from entering into professions, and can represent a barrier to the disadvantaged and underemployed from improving their lot in life." The committee is set to issue its findings and recommendations soon.

Steven Ogle, general counsel to Texas' Sunset Advisory Commission staff, says the challenges facing states as a result of the Supreme Court decision are indisputable. "It's going to take substantial effort on the part of states to figure out the logistics of all this, and a lot of it will likely be trial and error," he says.

Although the FTC guidance provides some help, "there are a lot of unanswered questions, and it's probably going to take a test case to resolve them," Ogle says.

In a few states, "the attitude seems to be 'wait and see' or 'the feds won't bother us,' but most states are proactively taking steps to respond because they know that, absolutely, this will affect them," he says.

Soronen agrees. "This case is obscure, but it's important. And all levels of state government—from bill drafters to department heads to governors' legal counsels—have some interest in and responsibility for addressing it."

Jobs Requiring Licenses Way Up

Do licensing requirements restrict job opportunities or protect the public?

Once upon a time, all you needed to go into business and make a living was the know-how, resources and equipment necessary to keep your business afloat. But over the past few decades, the percentage of Americans who cannot work without obtaining a license or other form of government consent has grown significantly—from about 4 percent in the 1950s to nearly 25 percent today.

Occupational licensing laws were first passed to protect the public from negligent, unqualified and substandard practitioners, but increasingly they are seen as a mechanism designed not to protect consumers, but rather to insulate existing business interests from competition.

Critics charge that licensing requirements contribute to higher prices for goods and services, discourage specialization and innovation, restrict employment opportunities, and make it more difficult for workers to take their skills across state lines.

Today, roughly 1,100 occupations are regulated in at least one state, ranging from highly specialized professions like medicine, law and engineering to what once were considered "odd jobs"—and a whole lot of things in between, from elevator operators to casket sellers, hearing-aid dealers to upholsterers, lightning-rod installers to turtle farmers, interior decorators to reptile catchers.

"Most things that should be licensed, are licensed," says Ken Levine, director of the Texas Sunset Advisory Commission. "But there are some things that don't need to be. There is, really, over-regulation and over-licensing."

Levine's agency, created by the Texas Legislature in 1977 as an independent monitor of the performance of state agencies, has from time to time recommended removing licensing requirements for certain occupations, including dietitians, dyslexia therapists and radiologic technologists.

In all but a couple of instances, "the Legislature didn't agree with us," Levine says

The number of licensed job categories varies from a high of 177 in California to a low of 41 in Missouri, with the average among states in the mid-90s.

Licensing requirements vary widely from state to state, too. For example, Michigan mandates three years of education and training to become a licensed security guard, while most other states require only 11 days or less. South Dakota, Iowa and Nebraska require 16 months of education to become a licensed cosmetologist, while New York and Massachusetts require less than eight months.

Many states require twice as much training for X-ray technicians—and eight times as much training for dental assistants—as does the military. All the variations make it difficult for some workers to transfer their licenses across state borders. Military spouses, with their frequent moves, are especially hard hit.

The push to add occupations that need licenses continues. Most recently, private investigators in Mississippi, music therapists in Florida and elevator maintenance workers in New York have lobbied legislators for state-mandated licensing.

But over the past couple of years, sign-language interpreters in Idaho and substance-disorder counselors in Iowa, who managed to win legislative approval for their licensing proposals, were thwarted by a governor's veto. And in Arizona, the governor signed a package of bills that he pledged "will begin the elimination of burdensome regulations that are often designed to kill competition or keep out the little guy."

States' licensing arrangements were the focus of sweeping criticism in a report prepared by the Treasury Department's Office of Economic Policy, the Council of Economic Advisers and the Department of Labor, and issued by the White House in July 2015. They concluded that the expansion of occupational licenses has created a substantial drag on the economy by making it harder for people to start their own businesses and for the nation "to take full advantage of all of America's talented labor." Licensing restrictions "cost millions of jobs nationwide and raise consumer expenses by over $100 billion," the report said.

The report looked at the impact of licensing requirements on several populations—veterans and their families, immigrants, the underemployed and individuals with criminal records—and the options for institutional reform that "would promote a more careful and rational approach to occupational regulation."

Among other things, the report suggests, states could look at certification as an alternative to licensing. Unlike licensing, certification isn't mandatory. Another key recommendation is to consider the use of regional compacts to harmonize licensing requirements across states.

Morris Kleiner, an economics professor at the University of Minnesota and a leading critic of occupational licensing, has conducted research documenting the rise of licensure and its effects on the labor market. Being in a licensed profession is associated with as much as 15 percent higher wages, he found, and may slow employment growth in the field.

"With licensing, you're creating a monopoly, and it's very difficult for people in many places to enter these occupations," Kleiner says. "It's keeping people away from the American dream."

—Suzanne Weiss