

# The Occupational Board Reform Act

## Model Legislation

August 24, 2016

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, and comply with federal antitrust law; 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. Occupational regulations shall be construed and applied to increase economic opportunities, promote competition and encourage innovation.
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. An occupational regulation may be enforced against an individual only to the extent the individual sells goods and services that are included explicitly in the statute that defines the occupation's scope of practice.
4. The governor will establish an office of supervision of occupational boards. The office is responsible for actively supervising state occupational boards.
5. The legislature will establish a position in its nonpartisan research staff to analyze occupational regulations. The position is responsible for reviewing legislation and laws related to occupational regulations.

**100.02 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.

### 100.03 Definitions.

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

Subd. 2. **Active supervision.** (a) “Active supervision” means the Office of Supervision of Occupational Boards will independently:

1. play a substantial role in the development of an occupational board’s rules and policies to ensure they benefit consumers and not serve private interests of providers of goods and services who the board regulates;<sup>1</sup>
2. disapprove the use of any board rule or policy and terminate any enforcement action outstanding at the time of this act’s enactment and subsequently that fails to accord with section 100.01;<sup>2</sup>
3. exercise control over each of the boards by reviewing and affirmatively approving only rules, policies and enforcement actions that are consistent with section 100.01;<sup>3</sup> and
4. use the nonpartisan research staff’s analysis in section 100.06 and conduct reasonable investigations to gain additional information, including about less restrictive regulatory approaches, to reduce exposure to antitrust litigation.

(b) A government or private attorney providing general counsel to a board does not meet the requirement for active supervision.

Subd. 3. **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-

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<sup>1</sup> *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 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”).

<sup>2</sup> *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.”).

<sup>3</sup> *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).

certified individual may also perform the lawful occupation for compensation but may not use the title “certified.”

**Subd. 4. 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. 5. 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. specific private civil cause of action to remedy consumer harm,
5. deceptive trade practice act,<sup>4</sup>
6. regulation of the process of providing the specific goods or services to consumers,
7. inspection,<sup>5</sup>
8. bonding or insurance,<sup>6</sup>
9. registration,<sup>7</sup>
10. government certification,<sup>8</sup>
11. specialty occupational license for medical reimbursement,<sup>9</sup> and
12. occupational license.

**Subd. 6. 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. 7. Occupational regulation.** “Occupational regulation” means a statute, rule, practice, policy or other state law requiring an individual to possess certain personal qualifications 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. 8. 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

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<sup>4</sup> Deceptive trade practices acts are an effective means to protect consumers from fraud.

<sup>5</sup> Periodic inspections protect consumers from unsanitary facilities.

<sup>6</sup> Requiring insurance protects third parties from externalities.

<sup>7</sup> Registering with the secretary of state or other agency protects against fly-by-night providers.

<sup>8</sup> Certification is a voluntary signal that addresses the concern of asymmetrical information.

<sup>9</sup> Specialty licenses allows for medical reimbursement without disputes over scope of practice.

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

**Subd. 9. 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. 10. 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.

**100.04 Statutory interpretation.** For the purposes of this chapter, the following statutory interpretations apply.

Subdivision 1. The terms “certification” and “registration” are not synonymous with an “occupational license” in this chapter.

Subd. 2. The use of the words “certification” and “certified” in other statutes to mean requiring an individual to meet certain personal qualifications to work legally (e.g., a certified public accountant must become certified before working legally) shall be interpreted for the purposes of this chapter as requiring an individual to meet the requirements of an “occupational license.”

Subd. 3. The use of the words “registration” and “registered” in other statutes to mean requiring an individual to meet certain personal qualifications to work legally (e.g., a registered nurse must become registered before working legally) shall be interpreted for the purposes of this chapter as requiring an individual to meet the requirements of an “occupational license.”

## **100.05 Office of Supervision of Occupational Boards**

Subdivision 1. **Office of Supervision of Occupational Boards.** The governor will establish the Office of Supervision of Occupational Boards.

Subd. 2. **Responsibility.** The office is responsible for actively supervising state occupational boards to ensure compliance with the policies in section 100.01. This requires the office to be staffed by one or more attorneys who do not provide general counsel to any board and exercise control over a board's processes and substantive actions.

Subd. 3. **Approval.** 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. 4. **Complaint.** A person may file a complaint to the office about a board's rule, policy or enforcement action that the person believes is inconsistent with section 100.01. Within 90 days, the office will investigate the complaint, identify remedies to the complaint, instruct the board to take action, where appropriate, and respond in writing to the person. There is no administrative appeal available to the person of the office's decision under the state's administrative procedure act.

Subd. 5. **Attorney general's review.** A state legislator may ask the attorney general to review (a) a board's rule, policy or enforcement action that the state legislator believes is inconsistent with section 100.01, (b) the office's active supervision of a board or (c) the office's response to a complaint filed under subdivision 4.

## **100.06 The Legislature's Analysis of Occupational Regulations**

Subdivision 1. **Legislature's analysis of occupational regulations.** The Speaker of the House of Representatives and the President of the Senate will establish a position in the nonpartisan research staff to analyze occupational regulations.

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

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

(c) The position will determine if legislation meets the state policy of using the least restrictive regulation necessary to protect consumers from present, significant and substantiated harms.

(d) The position will evaluate the effects of legislation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs, and other effects.

(e) The position will compare the legislation to whether and how other states regulate the occupation.

(f) The position will issue a report to relevant committees about legislation on a timely basis.

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 position's analysis of the legislation prior to voting on the legislation.

Subd. 4. **Sunset reviews.** Starting on January 1, 20\_\_ \_\_, the position will review annually regulations of approximately 20 percent of occupations subject to state regulation to improve compliance with this chapter. The position will review all occupational regulations over a period of five years. The position may require information be submitted by a board, its members, and others.

Subd. 5. **Sunset reports.** Starting on January 1, 20\_\_ \_\_, the position will report annually the findings of its reviews to the Speaker of the House of Representatives, the President of the Senate and the Attorney General. The position will suggest changes to occupational regulations to improve compliance with this chapter.

**100.07 Preemption.** This chapter preempts laws by township, municipal, county and other governments in the state which regulate the same occupations regulated by the State of \_\_\_\_\_.

**100.08 Effective date.** This chapter is effective on \_\_\_\_\_.

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