



TRANSCRIPT

Licensed to Work: How Occupational Licensing Shuts Down Honest Enterprise—and How to Stop It

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Megan Cook (MC): Hello everyone, and welcome to IJ's Partners Club Live call discussing occupational licensing and how IJ is working to broadly reform these laws. I'm Megan Cook, Partners Club coordinator here at the Institute for Justice. I'm pleased to have Melanie Hildreth, Vice President of External Relations, joining us again for another live call to talk with Lisa Knepper, IJ's Director of Strategic Research and one of the authors of the second edition of *License to Work*. Welcome, Melanie and Lisa.

Melanie Hildreth (MH): Thank you, Megan. Lisa and I are excited to be talking with our Partners today about occupational licensing. This is an issue where change will make a big difference to a lot of people.

Occupational licenses are some of the most pernicious barriers to honest enterprise out there, and, in fact, more people are impacted by licensing laws than by union requirements and minimum wage laws combined. As many of our Partners know, licensing is an issue IJ has been working on since we opened our doors 27 years ago. If you're wondering why we cared about it, even back then, the answer is Milton Friedman. In *Capitalism and Freedom* in 1962, he wrote about the overthrow of the medieval guild system and how important that was to the rise of freedom in the western world. It meant that individuals could finally pursue whatever trade or occupation they wanted to without needing to get permission first from the government or some kind of quasi-governmental authority.

But even in the 60s, he noted that a retrogression was happening—occupations were again becoming more closed, and the pattern for cartelization that he saw was almost always the same. Here's how he describes it in the book: He says “an occupation is faced with an influx of newcomers who compete with the established practitioners; soon, established businesses begin calling for ‘professionalizing’ the occupation or standardizing services; before long minimum standards are proposed and a trade association is formed; the association then calls for legislation to mandate and enforce qualifications. Legislation is enacted and entry into the occupation is conditioned or even closed.”

This sounds sadly familiar to all of us at IJ, and probably to many of you on the call as well. So, inspired by Milton Friedman, IJ's first case back in 1991 was an occupational licensing case. We litigated on behalf of African hair braiders here in Washington, D.C.,

and our clients just wanted to braid hair without getting a cosmetology license that didn't have a single thing to do with hair braiding. When we filed that case, licensing was absolutely an underappreciated threat to individual liberty. Now, it is a widely recognized problem, and there is a lot of interest in reform. A huge part of that is because of IJ and the different tools we bring to bear through our public interest strategy. One of those tools, and an absolutely critical part of changing the debate on licensing, is the *License to Work* report. So, let's dive right into that. Lisa, can you start by talking about how *License to Work* came to be?

Lisa Knepper (LK): Absolutely! So, this report, *License to Work*, really has its origins in the founding of IJ's strategic research program nearly 12 years ago. The strategic research program came from our founder Chip Mellor's insight that high quality social science and policy research could help us make stronger arguments for freedom in the court, in the court of public opinion, and before lawmakers.

Soon after the program got underway, my co-director, Dick Carpenter, identified an important gap in the research about occupational licensing. Other researchers had examined how common licensing laws are across the states, but no one had systematically measured how burdensome they are. That is, no one had documented what you have to do to get these licenses across all states, so that's what we did. And we did it for a sample of 102 lower-income occupations. For each occupation and for each state, we documented how many hours of training you have to undergo and how many years of schooling, how many exams you have to pass, how much in fees you have to pay. This is a ton of data that you have to collect, and it's often very hard to get. You have to dig through statutes and licensing board rules. Sometimes you have to look at the applications themselves.

So, the first edition of *License to Work*, which was released back in 2012, took us about four years to produce. The second edition, released just a few months back, took nearly three years of very detailed and difficult work. This is really the only licensing study to have this level of detail for such a large sample of occupations.

MH: So we've talked a lot about how IJ was the first to come up with this data, back when we first released *License to Work* and again now. As you were looking through that with your team, you must have made some discoveries. What were some of the most notable things or startling things that you found as you were putting together the report?

LK: Sure, the really great thing about having all this super detailed data is the ability to do comparisons across states and across occupations, and that's where things really get interesting. For example, in the second edition, we found that breaking into these 102 lower-income occupations takes, on average, nearly a year of training, passing one exam, and more than \$260 in fees. That's a lot of time and money spent earning a license instead of earning a living, and it doesn't account for other costs like tuition for required schooling or income foregone while training instead of working.

Another big finding is odd inconsistencies across states and across occupations. In fact, most of the occupations we studied, believe it or not, are *unlicensed* by at least one state—maybe

they don't need to be licensed elsewhere. To take one example, about 30 states license auctioneers. Some quite onerously, like Tennessee, which demands two years of experience, 110 hours of classes, two exams, and pretty hefty fees to get an auctioneer's license. Yet 20 states don't even license this occupation. California simply requires auctioneers to be bonded to provide consumers some assurance against financial losses. Maybe we don't actually need these steep barriers to entry for such occupations.

Another finding from these types of comparisons, and perhaps the most eye-popping, is the comparison between cosmetologists and EMTs. In most states, it takes 12 times more state-mandated training to get a license to cut hair as a cosmetologist than it does to get a license to administer life-saving care as an EMT. That doesn't make a whole lot of sense and inconsistencies like these really call into question the need for a lot of licensing.

MH: So, licensing is kind of a mess.

LK: (Laughs)

MH: Given that, it really invites the question of what can we do about it? IJ obviously, is as I mentioned earlier, comes at the problem from multiple angles, including, of course, litigation. But on the policy side, if you have a legislator or policy maker who's interested in doing better, what do you tell them? How can they make things better for people who are trying to earn an honest living?

LK: This is one of the more important features of the second edition of *License to Work*. We have a much deeper focus on alternatives to licensing and practical reforms. The key idea is that we should be reviewing licenses—both those that exist now and those that are proposed—before legislatures. We should be evaluating them, using actual evidence. Believe it or not, that would be huge shift from how licensing policy is done now, which is dominated by special-interest politics. What do I mean by evidence? I think it means asking two key questions. First, is there empirical proof of widespread, significant, and permanent harm from the practice of an occupation? Without such proof, we should leave it up to market forces. In the era of online reviews and social media, these market forces are more powerful than ever.

Now, if there is some proof—real proof of real harm from an occupation—then we move to the second question. Is there a less restrictive regulatory alternative to licensing? Oftentimes, these less restrictive alternatives can even be better targeted to the problem at hand. These are things like certification, registration, mandatory bonding, and insurance requirements—as I mentioned, the California requirement for auctioneers—or inspections. IJ's Senior Legislative Counsel, Lee McGrath, who does a lot of work with lawmakers, put all of these alternatives together into a great graphic that we call the "Inverted Pyramid." It lists these alternatives from least to most restrictive, with licensing being the most restrictive.

For an example of how this works, consider food service. Food safety is extremely important, but we don't demand that chefs attend two years of culinary school to get a license before opening a restaurant. Imagine if we did. How many restaurants would be forced to close tomorrow—or would never open in the first place? Instead, we opt for the less restrictive

regulation of sanitation inspections. It is more targeted to the actual public concern: food safety. The question of quality, or whether the food itself tastes any good, that we leave up to consumers to decide.

The core idea here is to consider evidence and to replace licensing, as much as possible, with less restrictive regulations—or none at all.

MH: That point about evidence is actually what we are also trying to accomplish in our litigation because economic rights are important, and protected by the Constitution. If the government is going to restrict them, it needs to have a very good reason.

LK: Absolutely!

MH: For Partners on the call who want to really dive into policy specifics and see for themselves the “Inverted Pyramid,” IJ produced a white paper that is called *The Inverted Pyramid: 10 Less Restrictive Alternatives to Occupational Licensing*. Megan will post that on the Partners Club LIVE archives with the recording and transcript of this call.

MC: Speaking of the archive, we’ll also be posting a link to *License to Work*’s website as well. IJ’s team has really built it out so that everyone can have access to our research. I would also like to give our Partners a reminder that if you have a question you would like to ask, please press star on your phone now and we’ll add you to the queue.

MH: Great, before we turn to questions, let’s talk about the future. I mentioned at the beginning of the call, we have a great consensus now that occupational licensing is a problem. In the final years of the Obama Administration, the White House Council on Economic Advisors released a report citing *License to Work* and basically making IJ’s key recommendations. The FTC just convened a task force on economic liberty, and that task force is going to study occupational licensing. Politicians—which we all know are a lagging indicator of public interest—across the spectrum they are jumping on board with us. In fact, the governor of Arizona in his State of the State just a few weeks ago, talked at length about licensing reform. Those are just a few examples, but Lisa, can you talk about our plans going forward and how we are going to build on this momentum?

LK: Absolutely! First, it’s been really rewarding to see growing awareness of the problem of licensing ever since we first published *License to Work* back in 2012. And it really is bipartisan. Licensing reform has now been endorsed by both the Obama and Trump administrations. This is an issue about economic opportunity and the freedom to work, and it’s an issue that truly transcends party and ideology.

We are working extremely hard to build on this momentum. We are sending *License to Work* and other reform materials, like our model legislation and the Inverted Pyramid paper, to lawmakers all across the country. Our legislative team is hitting state capitols, supporting reform efforts in a whole host of states: Arizona, Florida, Oklahoma, Ohio, New Hampshire, and Wisconsin, just to name a few. And lawmakers, and even state agencies, are responding to *License to Work* and the great media generated by our communications team. They are asking

us, “how can we improve our rankings?” We are all too happy to give them advice on how to do so and how to reform their laws.

MH: Healthy competition between states!

LK: Exactly! That’s right, that’s right. If you want to spur states to change, rank them!

All: (Laughter)

LK: Everyone wants to be better than California!

All: (Laughter)

LK: We’re working with a whole host of organizations. On the conservative side of things, we’re working with the American Legislative Exchange Council to promote our model legislation and reform among legislators. I’m also part of a project with the National Conference of State Legislatures, the National Governors Association, and the Council of State Governments. These three organizations are bringing together 11 states as part of a project to study licensing and seek ways to reduce or eliminate licensing barriers. There’s a lot of momentum and a lot of activity, and we’re very much in the thick of all of it. And of course, we’re IJ, so we’re continuing to do what we always do—finding great clients and bring strategic cases to restore the constitutional right to earn an honest living.

MC: You know, Lisa that is a great last point. No matter the department we are in, here at IJ, we are all working together to achieve a common goal. Our founders knew that, to take on the cases we do, we needed a staff of attorneys, researchers, activists, and more working together. However, the only reason we are able to do everything that we do today is our supporters, so thank you. I also want to remind our Partners that if you do have any questions for the call, please press star on your phone we’ll be able to put you into the queue. And with that, we’re going to get started answering questions that were pre-submitted from our Partners. We have Charles from Georgia, he asked, “what do you think of the idea of abolishing all occupational licensing?”

LK: It sure would be interesting to try. I would be especially interested to see how markets and private institutions would respond—respond to fill the gaps that licensing is supposed to be filling. Consumers want information about service providers’ quality and their credentials, and it would be really interesting to see how, in the absence of licensing, markets would respond. With that being said, the fact is, it’s not politically feasible, so I don’t think it’s on the horizon. But I think this question fits very well with the idea of the “Inverted Pyramid.” Because licensing is the most burdensome and restrictive way to regulate work, we should be using it as little as possible, and that’s what IJ is working toward.

MC: Thank you, Charles, for your question. We have Patrick from California. He wanted to know if there is anything that can be done at the national level so that these licensing schemes don't get enacted on the state level? And then, “do you see a way that can be done to promote freedom that doesn't infringe on state's rights?”

LK: That's a really good question, and especially the concern about federalism and not stepping on the prerogative of states, which is where most licensing is done. That's something we've thought a lot about, and there's actually now a bill now in Congress that IJ has helped write, that aims to encourage states to adopt better licensing policies without violating principles of federalism. It's called the Restoring Board Immunity Act. Instead of the federal government forcing states to adopt better licensing policies, this bill offers a carrot: Immunity from antitrust lawsuits. That's actually a fairly big deal, but it is kind of complicated, so let me take a minute and explain why.

A few years ago, the U.S. Supreme Court found that state licensing boards could be held liable for violating federal antitrust law for suppressing competition. Put more simply, they could be sued for a whole lot of money for using their government power to shut down competitors. And that's exactly what was happening in a case that was before the Supreme Court. The North Carolina Dental board, which is dominated by licensed dentists, was actively trying to shut down teeth-whitening businesses operated by non-dentists. Not because teeth whitening is dangerous—it's not—but because the non-dentists were offering better prices and cutting into dentists' bottom line. So the Supreme Court basically called a spade a spade, and said look, this isn't about protecting the public—you're just using government power to stifle competition, and you can be sued for it under antitrust law. By the way, that's how most licensing works. Licenses are typically overseen by boards stacked with licensees who have every incentive and often the power to thwart their competition if they can, so licensing boards are worried.

So here's where The Restoring Board Immunity Act, this bill before Congress, comes in. It would give licensing boards back immunity from these types of lawsuits, meaning they couldn't be sued for a lot of money for violating antitrust law—but *only* if they adopt better licensing policies. One way they can do that is by setting up a neutral oversight body in their state—no licensees! That neutral body would oversee licensing boards and try to keep their anti-competitive tendencies in check. It would also review current and proposed licenses using real evidence and the “Inverted Pyramid” to consider alternatives that are less restrictive.

Another thing states could do instead would be to adopt legislation that would make it easier to challenge unnecessary licensing laws in courts. If states were to do either of these things, their boards would no longer have to worry about antitrust lawsuits and the massive monetary damages that can come with them. From a federalism perspective, this bill gives states a choice—it doesn't force them to do anything. They can do nothing, and continue on as they are, risking antitrust lawsuits. Or they can adopt positive reform, and get immunity from antitrust lawsuits. So that's how we are trying to thread that needle.

It's worth noting, by the way, that IJ doesn't bring antitrust lawsuits. We sue licensing boards on constitutional grounds, and so this bill wouldn't affect our ability to do that. Although, if some states responded by adopting laws that made it easier to take licensing boards to court, then that could actually really help our work.

MC: Okay, we also have a question from Hardy in Utah. He wanted to know if there is any way to overcome the seemingly innate tendency to monopolize and erect barriers of entry to professions and companies? “Is the only remedy a frontal assault war?”

All: (Laughter)

MH: We’ll that’s what we specialize in, a full-out war.

LK: Hardy has really put his finger on the million-dollar question when it comes to licensing reform: How do we overcome the power of special interests? My colleague, Dick Carpenter, and IJ co-founder, Chip Mellor, wrote a whole book about it, called *Bottleneckers*. They documented how licensing laws and other regulations are really the result of concerted efforts by industry insiders to restrict entry into their fields. This is exactly what Milton Friedman was talking about. So, what’s the answer? I don’t think there’s a single silver bullet, unfortunately. We do have to fight on every front we can, as IJ is doing—in the courts, in the media, and in state legislatures.

With that said, I do think there is a common thread to everything that we are doing, and that is the demand for evidence. Arguments for licensing often fall apart when you demand credible evidence for establishing these high barriers to entry and when you start to consider if there is something less restrictive that would do as good or even better of a job. A few states have a process called “sunrise” review where they do just that whenever new licensing law is proposed—they conduct an independent analysis outside the political process that asks, “is there any evidence for this license? Could we do something less restrictive, or even nothing at all?” Often, this process results in recommendations *against* licensing, so the demand for evidence really can make a difference. It’s not perfect. Sometimes legislators ignore these recommendations, or the process falls prey to politics. But it can help, and we’re encouraging more states to undertake these kinds of reviews.

Our economic liberty litigation, as Melanie noted, really hinges on this idea of evidence and courts taking it seriously. This is the key insight behind our push for “judicial engagement,” which I imagine our Partners are familiar with. It’s the idea that courts should engage with the facts of cases challenging economic regulations, just as would in any other areas of the law. We’re arguing that they shouldn’t be afraid to examine the facts—even if it means striking down economic regulations. And we think the more judges are willing to engage with evidence, the more they will see that licensing and other types of anti-competitive regulations aren’t justified.

MC: Okay, so we are actually going to go to our first live question. We have a question from Michael in New Mexico. I am going to make you live now. Michael, can you hear us? Are you there, Michael?

Michael: I am here.

MC: Yay! What’s your question for us?

Michael: This kind of touches on the first question. The gentleman asked about the licensing and how hard or how far would you go? Basically, you know because doctors and medical type professionals that we, I guess, assume that the licensing laws should be there for them, but is it really necessary that they have them? I guess is my question. I mean, if someone was certified, I mean obviously I wouldn't go to a doctor that wasn't certified and hadn't gone to medical school and things like that, so would a certification be sufficient on that? Or would we still need licensing laws for things like medical professionals?

LK: That is a great question, Michael. You know, medical licensing has been around for so long that I don't think that it's going anywhere at this point. If we were ever get to the point where the total de-licensing of medical professionals... (Laughing)

MH: We've won! (Laughing)

LK: (Laughing) Yeah, we can all pack up and go home. But, I think it is a really fine question to ask. There is another spin on that question that I think is really important because, even when you said "okay, we have evidence that this occupation poses a threat to public safety and you need to license it." Even when you have reached that conclusion using evidence, that doesn't really put an end to the inquiry, and I think this is often forgotten about. The medical field provides a good example of this. You still have to take a look at how licensing is working in practice, and there are well-documented problems with current medical licensing. One of the biggest comes from rules in some states that prevent qualified nurse practitioners from offering basic medical care. Researchers have found that, when it comes to a range of basic services, trained nurse practitioners deliver the same quality of care as doctors, and they do so at lower prices. So, that means wider access to care. But a lot of states insist on shutting nurse practitioners out of the market. This doesn't help consumers, who face higher prices and fewer options for care, but it does help doctors keep out competition.

So, even where the case for licensing might be the strongest, there's still work to do to ensure that whatever rules that are adopted are not anti-competitive and anti-consumer. I think this really underscores the broader point that licensing should be a policy choice of very last resort—it's inherently anti-competitive and enables, and empowers, licensing boards to behave in anti-competitive ways.

MC: Thank you so much, Michael! It looks like we actually have another question. Her name is Renee and she's from Oregon. Renee, we are going to go ahead and make you live. Can you hear us, Renee?

MC: I've got you, you're live now!

Renee: Okay, yes, I had a question regarding the licensing by private organizations. In the entertainment industry, ASCAP, BMI, and CSAC do all the licensing for venues who they say, or claim, are playing music by people they represent. There's no law that says you have to buy this license, but the organizations will take you to court and sue you until you either are broke, or you buy the license. Has anyone looked at this situation and judged whether there is any prerogative for these people to do this?

LK: Wow, so that touches on issues, I think, of intellectual property that I am not familiar with, so it's a little outside the scope of things that I've studied which has more to do with occupational licensing and being legally allowed to work in a particular field. So, that's not one that I'm equipped to handle.

MC: Okay, thank you so much!

Renee: Alrighty, thank you.

MH: Lisa, I actually had a question for you. A couple of weeks ago, *The Wall Street Journal* ran on the editorial page a piece from I think it was the Governor of South Dakota and someone from the federal government talking about interstate compacts and how that might be something that is a solution that will solve the problem of licensing because then people can move around more easily given that certain states have different requirements than others, as you know so well from *License to Work*. What are your thoughts on that and how it might work in practice?

LK: Sure. Licensing compacts are a really hot topic right now, as are other types of agreements between states where states agree to accept each other's licenses as valid. These ideas are responding to a real problem, which is that licensing inhibits geographic mobility; it keeps people from moving across state lines. If I have a license from Virginia and I move to Tennessee and the relevant licensing board in Tennessee refuses to recognize my Virginia license, I'm out of luck; I can't work. Or, what if Virginia doesn't even license the occupation that I practice? Let's say that I'm an African-style hair braider—they're not licensed in Virginia—and I move to Tennessee where they are licensed. Now I have to go back to school, pass a test, and get a license that I never needed before for a trade that I already know how to practice. So that's a real barrier to work, a real barrier to moving across state lines, and it's particularly a problem for military spouses, who move frequently.

As *License to Work* shows, this whole patchwork quilt of inconsistent licensing laws across states are going to create real mobility problems and prohibit workers and entrepreneurs from moving to where there may be better economic opportunities. All that said, the first solution, in my view, is to ask whether we need these licenses in the first place and to get rid of those that we don't need. The most portable license, after all, is the one that doesn't exist. So, establishing compacts or other types of multistate agreements when licensing isn't needed in the first place just makes a bad problem worse. It just entrenches unjustified licensing rules. Policymakers thinking about these issues should first ask whether there's substantial proof that licensing is addressing a real problem. If not, tearing down licensing barriers is a better way to both improve worker mobility *and* expand economic opportunity.

MC: Okay. Well with that, we are out of time today. Thank you so much, Lisa and Melanie, for being with us and for providing such a great, comprehensive look at the second edition of *License to Work* and IJ's role in reforming occupational licensing laws.

I also want to thank all of our Partners for joining us as well.

If you missed any part of this conversation, we will have links to the audio recording and transcript of the call available on our Partners Club LIVE webpage later this week. If you have any further questions that we weren't able to get to, please just stay on the line to leave us a message, or you are welcome to email me directly at mcook@ij.org, and we will be sure to get back to you.

We look forward to keeping you updated on the many exciting developments in all areas of IJ's work. Thank you again for the important role you play in making our progress possible. We hope you have a great evening and thank you again for your support of IJ.