Occupational Licensing Review Act.
Model Legislation
September 30, 2018

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. Legislative leaders will assign the responsibility to review legislation and laws related to occupational regulations.

4. The governor will establish an office of antitrust and active supervision of occupational boards. The office is responsible for actively supervising the state's occupational boards.

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 private organization or the state government grants nontransferable recognition to an individual who meets personal qualifications established by the private organization or 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." [1]

[1] "Certification" in this chapter will not be construed to mean the use of the term "certification" or "certified" by either (1) an individual who possesses all lawful requirements to engage ***exclusively*** in a lawful

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,[2]
7. mandatory disclosure of attributes of the specific good or service,[3]
8. regulation of the process of providing the specific good or service,[4]
9. regulation of the facility where the specific good or service is sold,[5]
10. inspection,[6]
11. bonding,[7]
12. insurance,[8]
13. registration,[9]
14. government certification,[10]
15. specialty occupational license for medical reimbursement,[11] and
16. occupational license.[12]

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.

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occupation either individually, under the supervision of a licensed practitioner, or otherwise as prescribed by an occupational regulation (e.g. certified public accountant) or (2) a licensed practitioner to represent expert qualifications when lawfully authorized in an occupational regulation (e.g. board certified plastic surgeon). For the sunrise and sunset reviews herein, the term certified as it relates to grants of the exclusive privilege of providing such services will be treated as an "occupational license."

[2] Deceptive trade practices acts are an effective means to protect consumers from fraud.

[3] 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.

[4] A housing/building code is an example of a regulation of a process; it may be more effective than enacting occupational licensing of tradesmen.

[5] A facility requirement may ensure that equipment, such as an eyewash station, is available to address accidents or emergencies.

[6] Periodic inspections protect consumers from unsanitary facilities.

[7] Requiring bonding protects against a provider's failure to fulfill contractual obligations.

[8] Requiring insurance protects against a provider's damaging a consumer or third party.

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

[10] Certification is a voluntary signal that addresses the concern of asymmetrical information.

[11] Specialty licenses allows for medical reimbursement without disputes over scope of practice.

[12] Only occupational licensing exposes board members to antitrust litigation. The 15 alternatives to licensing do not include that risk.

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 evidence of attainment of requisite skills or knowledge, moral character, 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 will not qualify for payment or reimbursement from a government agency.

100.03 Sunrise Review of Occupational Regulations.

Subdivision 1. **Sunrise analysis of legislation involving occupational regulations.** The Speaker of the House of Representatives, the President of the Senate and the chair each relevant standing committee of the Legislature will assign to the _____ staff (hereafter "staff") the responsibility to analyze proposals and legislation (1) to create new occupational regulations or (2) modify existing occupational regulations.

(*See footnote [13] for a discussion of the legislature giving the responsibility to analyze occupational licenses to a staff in*

[13] 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 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.

(b) The staff will require proponents to submit evidence of present, significant, and substantiated harms to consumers in the state. The staff also may request information from (1) state departments that contract with regulated professions and (2) individuals 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(2) of using the least restrictive regulation necessary to protect consumers from present, significant, and substantiated harms.

(d) The staff's analysis in (c) will employ a rebuttable presumption that consumers are sufficiently protected by market competition and private remedies, as listed in Section 100.02 subdivision 4 (1)-(4).

(e) The staff may rebut the presumption in (d) if it finds credible empirical evidence of present, significant and substantiated harm to consumers that warrants enacting a regulation to protect consumers. If evidence of such harm is found, the staff will recommend the least restrictive government regulation to address the harm, as listed in Section 100.02 subdivision 4 (5)-(16).

(f) The staff will use the following guidelines to form its recommendation in (e). If the harm arises from:

1. contractual disputes, including pricing disputes, staff may recommend enacting a specific civil cause of action in small-claims court or district court to remedy consumer harm. This cause of action may provide for reimbursement of the attorney's fees or court costs, if a consumer's claim is successful;

2. fraud, staff may recommend strengthening powers under the state's deceptive trade practices acts or requiring disclosures that will reduce misleading attributes of the specific good or service;

3. general health and safety risks, staff may recommend enacting a regulation on the related process or requiring a facility license;

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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.

4. unclean facilities, staff may recommend requiring periodic facility inspections;

5. a provider's failure to complete a contract fully or to standards, staff may recommend requiring the provider to be bonded;

6. a lack of protection for a person who is not a party to a contract between providers and consumers, staff may recommend requiring the provider have insurance;

7. transactions with transient, out-of-state, or fly-by-night providers, staff may recommend requiring the provider register its business with the secretary of state;

8. a shortfall or imbalance of knowledge about the good or service relative to the seller's knowledge (asymmetrical information), staff may recommend enacting voluntary private or government certification;

9. an inability to qualify providers of new or highly-specialized medical services for reimbursement by the state, staff may recommend enacting a specialty license for medical reimbursement;

10. a systematic information shortfall in which a reasonable consumer of the service is permanently unable to distinguish between the quality of providers and there is an absence of institutions that provide guidance to consumers, staff may recommend enacting an occupational license; and

11. the need to address multiple types of harm, staff may recommend a combination of regulations.

(g) The staff's analysis of the need for regulation in (e) will include the effects of legislation, including the legislation's scope of practice and personal qualifications, on opportunities for workers, consumer choices, consumer costs, general unemployment, market competition, innovation, interstate mobility, governmental costs, and other effects.

(h) 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.

(i) The staff will report its findings and recommendations to the initial and subsequent committees that will hear the legislation. The report will include recommendations addressing:

1. the type of regulation, if any;

2. the requisite personal qualifications, if any; and

3. the scope of practice, if applicable.

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 and recommendations in subdivision 2 prior to voting on the legislation.

100.04 Sunset Review of Occupational Licenses.

Subd. 1. **Sunset analysis of existing occupational licenses.** (a) Starting on January 1, 20_ _, the Speaker of the House of Representatives, the President of the Senate and the chair of each relevant standing committee of the legislature will assign to the _____ staff (hereafter "staff") the responsibility to analyze existing occupational licenses.

(b) Each relevant standing committee of the legislature is responsible for reviewing annually approximately 20 percent of the current occupational licenses under the committee's jurisdiction. The committee chair will select the occupational licenses to be reviewed annually.

(c) Each relevant standing committee of the legislature will review all occupational licenses under the committee's jurisdiction within the subsequent five years and will repeat such review processes in each five-year period thereafter.

Subd. 2. **Criteria.** The staff will use the criteria in section 100.03 paragraphs 2(b)-(h) to analyze existing occupational licenses.

Subd. 3. **Sunset reports**. (a) 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, Chairs of the relevant standing committees, the Governor, and the Attorney General. In its report, the staff will recommend the legislature enact new legislation that:

1. repeals the occupational licenses,

2. converts the occupational licenses to less restrictive regulations in section 100.02 subdivision 4,

3. instructs the relevant licensing board or agency to promulgate revised regulations reflecting the legislature's decision to use a less restrictive alternatives to occupational licenses;

4. changes the requisite personal qualifications of an occupational license;

5. redefines the scope of practice in an occupational license; or

6. reflects other recommendations to the legislature.

(b) The staff also may recommend that no new legislation is enacted.

100.05 Petition for Review of a Criminal Record.

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

Subd. 2. **Scope of right**. The fundamental right of an individual to pursue a lawful occupation includes the right of the individual with a criminal record to petition the state to obtain a certification, occupational license, or other state recognition of the individual's personal qualifications (hereafter "state recognition").

Subd. 3. **No automatic bar.** A board, agency, department or other state agency (hereafter "board") will not automatically bar an individual from state recognition because of a criminal record but will offer a process to petition the board for individualized consideration.

Subd. 4. **Petition.** An individual with a criminal record may petition a board at any time, including before obtaining any required education or training, for a decision of whether the individual's criminal record will disqualify the individual from obtaining state recognition.

Subd. 5. **Content.** The individual will include in the petition the individual's criminal record or authorize the board to obtain the individual's criminal record.

Subd. 6. **Additional content.** The individual may include additional information about the individual's current circumstances, including the (a) time since the offense, (b) completion of the criminal sentence, (c) a certificate of rehabilitation or good conduct, (d) completion of, or active participation in, rehabilitative drug or alcohol treatment, (e) testimonials and recommendations including a progress report from the individual's probation or parole officer, (f) other evidence of rehabilitation, (g) training, (h) employment history, (i) employment aspirations, and (j) personal information including the age of the individual when the individual committed the offense and the individual's current family responsibilities.

Subd. 7. Excluded information. The board will not consider:

1. Non-conviction information including information related to a deferred adjudication, participation in a diversion program, or an arrest not followed by a conviction;

2. A conviction that has been sealed, dismissed, expunged or pardoned;

3. A juvenile adjudication;

4. A non-violent misdemeanor; or

5. A conviction that occurred more than three years before the date of the petition except for a conviction of:

    a. A felony crime of violence as defined by statute section _____; or

b. A felony related to a criminal sexual act as defined by statute section _____.

Subd. 8. **Hearing.** The board will hold a public hearing, should the individual request one, pursuant to section _____ of the state's administrative procedure act.

Subd. 9. **Board action.** The board will decide whether the individual's criminal record disqualifies the individual from obtaining state recognition

Subd. 10. **Test.** (a) In making its decision on the petition, the board will consider the individual's current circumstances in subdivision 6.

(b) The board will find the individual's criminal record disqualifies the individual from state recognition only if the board determines the state has an important interest in protecting public safety by denying the petition that is superior to the individual's fundamental right to pursue a lawful occupation.

(c) The board may deny the petition only if it establishes by clear and convincing evidence that:

1. The individual was convicted of a felony or violent misdemeanor, not excluded by subdivision 7, which is directly, substantially and adversely related to the state's interest in protecting public safety; and

2. The granting of state recognition will put the individual in a position where the individual is more likely than not to reoffend and cause harm.

Subd. 11. **Rule of Lenity.** (a) An ambiguity in an occupational regulation relating to a board's use of an individual's criminal record will be resolved in favor of the individual.

(b) The board will not use an undefined term in an occupational regulation relating to the individual's moral character, including (i) a crime of moral turpitude or (ii) character and fitness, to disqualify an individual from state recognition.

Subd. 12. **Decision.** The board will issue its decision no later than 90 days after the board receives the petition. The decision will be in writing and include the criminal record, findings of fact and conclusions of law.

Subd. 13. **Alternative advisory decision.** If the board decides the state's interest in protecting public safety is superior to the individual's fundamental right to pursue a lawful occupation, the board may advise the individual of actions the individual may take to remedy the disqualification. The individual may submit a revised petition reflecting completion of the remedial actions before a deadline the board sets in its alternative advisory decision.

Subd. 14. **Appeal.** The individual may appeal the board's decision in subdivision 12 as provided for in the state's administrative procedure act.

Subd. 15. **Reapply.** The individual may submit a new petition to the board not before one year following a final judgment on the initial petition.

Subd. 16. **Reversal.** The board may rescind a favorable decision at any time if the individual is convicted of an additional offense that causes the Board to change its decision in subdivision 9.

Subd. 17. **Cost.** The board may charge a fee to recoup its costs not to exceed $100 for each petition.

Subd. 18. **Reporting.** 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:

1. Occupational regulations will be construed and applied to increase economic opportunities, promote competition, and encourage innovation;

2. Any ambiguities in occupational regulations will be construed in favor of workers and aspiring workers to work; and

3. The scope of practice in occupational regulations is to be construed narrowly to avoid burdening individuals with regulatory requirements that are only partially related to the goods and services they provide.

100.07 Office of Antitrust and 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 Antitrust and 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 who the boards regulate.

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. 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 will 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 will 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.

100.08 Effective date. This chapter is effective on _____.

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