

Occupational Licensing Review Act.

Model Legislation

June 19, 2020

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; establishing canons of statutory interpretation; creating a process to review criminal history to reduce offenders' disqualifications from state recognition; comply with federal and state antitrust laws; 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. (OPTIONAL) 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. **Government certification.** "Government certification" means a voluntary, government-granted, and nontransferable recognition to an individual who meets personal qualifications related to a lawful occupation. Upon the government's initial and continuing approval, the individual may use "government certified" or "state certified" as a title. A non-certified individual also may perform the lawful occupation for compensation but may not use the title "government certified" or "state certified." In this chapter, the term "government certification" is not synonymous with "occupational license." It also is not intended to include credentials, such as those used for medical-board certification or held by a certified public accountant, that are prerequisites to working lawfully in an occupation.

Subd. 3. **Government registration.** “Government 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. “Government registration” does not include personal qualifications and is not transferable but it may require a bond or insurance. Upon the government’s receipt of notice, the individual may use “government registered” as a title. A non-registered individual may not perform the occupation for compensation or use “government registered” as a title. In this chapter, “government registration” is not intended to be synonymous with “occupational license.” It also is not intended to include credentials, such as those held by a registered nurse, which are prerequisites to working lawfully in an occupation.

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

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

⁴ A facility requirement may ensure that equipment, such as an eyewash station, is available to address accidents or emergencies.

⁵ Periodic inspections protect consumers from unsanitary facilities.

⁶ Requiring bonding protects against a provider’s failure to fulfill contractual obligations.

⁷ Requiring insurance protects against a provider’s damaging a consumer or third party.

⁸ Registering with the secretary of state or other agency protects against fly-by-night providers.

⁹ Government certification is a voluntary signal that addresses the concern of asymmetrical information.

¹⁰ Specialty certification allows for medical reimbursement without disputes over scope of practice.

Subd. 6. **Occupational license.** “Occupational license” means 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 that allows an individual to use an occupational title or work in a lawful occupation. It includes government registration, government 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” mean criteria related to an individual’s personal background and characteristics. They may include one or more of the following: completion of an approved educational program, satisfactory performance on an examination, work experience, apprenticeship, other evidence of attainment of requisite knowledge and skills, passing a review of the individual’s criminal record, and completion of continuing education.

Subd. 9. **Private certification.** “Private certification” means a voluntary program in which a private organization grants nontransferable recognition to an individual who meets personal qualifications and standards relevant to performing the occupation as determined by the private organization. The individual may use a designated title of “certified” or other title conferred by the private organization.

Subd. 10. **Scope of practice.** “Scope of practice” means the procedures, actions, processes and work that an individual may perform under an occupational regulation.

Subd. 11. **Specialty occupational certification solely for medical reimbursement.** “Specialty occupational certification solely for medical reimbursement” means an authorization in law for an individual to qualify for governmental reimbursement for non-exclusive provision of new or niche medical services based on meeting personal qualifications. A private health insurer and others may recognize this credential. Notwithstanding this specialty certification, it is legal for a licensed or certified individual to provide similar services if allowed by that occupational regulation. It is also legal for an individual who does not hold this specialty certification to provide the same services for compensation, but the non-certified individual will not qualify for reimbursement from a government agency.

¹¹ Only occupational licensing exposes board members to antitrust litigation. The 15 alternatives to licensing do not include that risk.

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 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 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.

(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 state agencies that contract with individuals in regulated occupations and others knowledgeable of the occupation, labor-market economics, or other factors, costs and benefits.

(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 5 (1)-(4). The staff will give added consideration to the use of private certification programs that allow a provider to give consumers information about the provider’s knowledge, skills and association with a private certification organization.

(e) The staff may rebut the presumption in (d) if it finds both credible empirical evidence of present, significant and substantiated harm, and that consumers do not have the information and means to protect themselves against such harm. If evidence of such unmanageable harm is found, the staff will recommend the least restrictive government regulation to address the harm, as listed in Section 100.02 subdivision 5 (5)-(16).

¹² There are many places in state government for legislators to give 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.

(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;
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 in the consumer's knowledge about the good or service relative to the provider's knowledge (asymmetrical information), staff may recommend enacting 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 certification solely 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. This may include a government regulation combined with a private remedy including third-party or consumer-created ratings and reviews, or private certification.

(g) 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.

(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, including the occupation's scope of practice that other states use, the personal qualifications other states require; and the penalties that other states impose for violating the occupation regulation.

(i) The staff's analysis in (e) also will include a recommendation about the proper scope of practice for the lawful occupation. The recommended scope of practice should maximize the worker's use of skills learned from formal and on-the-job training and minimize the rigidity of job classifications and the requirement of direct or indirect supervision of the worker.

(j) 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;
3. the scope of practice; and
4. penalties for violating the proposed regulation.

(k) The staff also may comment on whether and how much responsibility the legislation delegates to a licensing board to promulgate administrative rules, particularly rules relating to establishing (a) the occupation's scope of practice or (b) the personal qualifications required to work in the occupation. The comment may make legislators aware of exposure to antitrust litigation that the legislation may cause because of excessive or ambiguous delegation of authority to licensing boards to engage in administrative rulemaking.

(l) The staff shall submit its report to the chair of each relevant committee no less than nine months after the staff receives the request for analysis.

(m) The staff will make its report publicly available and post it on a state website.

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.

Subd. 4. **Limitations.** Nothing in section 100.03 shall be construed (1) to preempt federal regulation or (2) to require a private certification organization to grant or deny private certification to any individual.

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 committee of the legislature will assign to the _____ staff (hereafter “staff”) the responsibility to analyze existing occupational licenses.

(b) Each relevant 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 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)-(i) to analyze existing occupational licenses. The staff also may consider research or other credible evidence whether an existing regulation directly helps consumers to avoid present, significant and recognizable harm.

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 each relevant committee, 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 5,
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;
6. changes the penalties for violating an occupational license; or
7. reflects other recommendations to the legislature.

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

(c) The staff will make its report publicly available and post it on a state website.

Subd. 4. **Limitations.** Nothing in section 100.04 shall be construed (1) to preempt federal regulation, (2) to authorize the staff to review the means that a private certification organization uses to issue, deny or revoke a private certification to any individual, or (3) to require a private certification organization to grant or deny private certification to any individual.

100.05 Interpretation of Statutes and Rules. In construing any governmental regulation of occupations, 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 only have an attenuated relationship to the goods and services they provide.

100.06-A 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. **Application.** Notwithstanding any other law, a board, agency, department or other state agency (hereafter “board”) will use only this chapter to deny, diminish, suspend, revoke, withhold or otherwise limit state recognition because of a criminal conviction.

Subd. 3. **No automatic bar.** A board will not automatically bar an individual from state recognition because of a criminal record but will provide individualized consideration.

Subd. 4. **Information from a criminal record to be considered.** A board may consider only a conviction of a non-excluded crime that is a felony or violent misdemeanor.

Subd. 5. **Excluded information from a criminal record.** A board will not consider:

1. a deferred adjudication, participation in a diversion program, or an arrest not followed by a conviction;
2. a conviction for which no sentence of incarceration can be imposed;
3. a conviction that has been sealed, annulled, dismissed, expunged or pardoned;

4. a juvenile adjudication;
5. a non-violent misdemeanor; or
6. a conviction for which the individual's incarceration ended more than two years before the date of the board's consideration except for a conviction of:
 - a. a felony crime of violence pursuant to statute section _____;
 - b. a felony related to a criminal sexual act pursuant to statute section _____; or
 - c. a felony related to a criminal fraud or embezzlement pursuant to statute section _____.

Subd. 6. **Rule of lenity.** (a) Any 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 a vague term in its consideration and decision including:

1. good moral character;
2. moral turpitude; or
3. character and fitness

Subd. 7. **Included information.** The board will consider the individual's current circumstances including:

1. the age of the individual when the individual committed the offense;
2. the time since the offense;
3. the completion of the criminal sentence;
4. a certificate of rehabilitation or good conduct;
5. completion of, or active participation in, rehabilitative drug or alcohol treatment;
6. testimonials and recommendations including a progress report from the individual's probation or parole officer;
7. other evidence of rehabilitation;
8. education and training;
9. employment history;

10. employment aspirations;
11. the individual's current family responsibilities;
12. whether the individual will be bonded in the occupation; and
13. other information that the individual submitted to the board.

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. **Totality of the circumstances test.** (a) The board may deny, diminish, suspend, revoke, withhold or otherwise limit state recognition only if the board determines:

1. the state has an important interest in the regulation of a lawful occupation that is directly, substantially and adversely impaired by the individual's non-excluded criminal record as mitigated by the individual's current circumstances in subdivision 7, and
2. the state's interest outweighs the individual's fundamental right to pursue a lawful occupation.

(b) The board has the burden of making its decision by clear and convincing evidence.

Subd. 10. **Appeal.** The individual may appeal the board's decision as provided for in section _____ of the state's administrative procedure act.

100.06-B Petition for Board Determination Prior to Obtaining Personal Qualifications.

Subd. 1. **Petition.** An individual with a criminal record may petition a board at any time, including before obtaining any required personal qualifications, for a decision whether the individual's criminal record will disqualify the individual from obtaining state recognition.

Subd. 2. **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. 3. **Determination.** The board will make its decision using the criteria and process in section 100.03.

Subd. 4. **Decision.** The board will issue its decision no later than 60 days after the board receives the petition or no later than 90 days after the board receives the petition if a hearing is held. The decision will be in writing and include the criminal record, findings of fact and conclusions of law.

Subd. 5. **Binding effect.** A decision concluding that state recognition should be granted or granted under certain conditions is binding on the board in any later ruling on state recognition of the petitioner unless there is a relevant, material and adverse change in the petitioner's criminal record.

Subd. 6. **Alternative advisory decision.** If the board decides that state recognition should not be granted, the board may advise the petitioners of actions the petitioner may take to remedy the disqualification.

Subd. 7. **Reapplication.** The petitioner may submit a revised petition reflecting completion of the remedial actions before a deadline the board sets in its alternative advisor decision.

Subd. 8. **Appeal.** The petitioner may appeal the board's decision as provided for in section _____ of the state's administrative procedure act.

Subd. 9. **Reapply.** The petitioner may submit a new petition to the board not before one year following a final judgment on the initial petition or upon obtaining the required personal qualifications, whichever is earlier.

Subd. 10. **Cost.** The board may charge a fee to the petitioner to recoup its costs not to exceed \$100 for each petition.

100.06-C Reporting. (a) The Department of _____ will establish an annual reporting requirement of the:

1. number of times that each board acted to deny, diminish, suspend, revoke, withhold or otherwise limit state recognition from a licensed individual because of a criminal conviction;
2. offenses for which each board acted in subparagraph 1;
3. number of applicants petitioning each board under section 100.04,
4. numbers of each board's approvals and denials under section 100.04,
5. offenses for which each board approved or denied petitions under section 100.04, and
6. other data the Department determines.

(b) The Department will compile and publish annually a report on a searchable public website.

100.06-D Limitations. (a) Nothing in this chapter shall be construed to change a board's authority to enforce other conditions of state recognition, including the personal qualifications required to obtain recognition or compliance with other regulations.

(b) Nothing in this chapter shall be construed to require a private certification organization to grant or deny private certification to any individual.

(OPTIONAL)

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 (a) benefit predominantly consumers and (b) do not benefit unreasonably or serve merely 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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