Professional Licensing Report

Licensing, testing, and discipline in the professions

May/June 2018
Vol. 29, Numbers 11/12

Highlights in this issue

Licensing

CSG study of licensing in two fields shows no impact on wages

Issue: Testing contention that licensing raises costs

Myriads of research reports, state governors' initiatives, lawsuits, legislation, court rulings, and federal programs in recent years have built a general consensus that the U.S. has excessive regulation of occupations, raising costs to consumers and barring qualified people from jobs.

But a new study by the Council of State Governments makes some findings that don't support the conventional wisdom. For two very different occupations, electricians and massage therapists, there was almost no difference in the occupation's average wages whether states licensed or did not license the occupation.

*See **Licensing**, page 10*

Discipline

Board erred in revoking felon's license after he served prison term for 2008 crimes

Issue: Suspension/revocation of felons' licenses after sentences served

The Commonwealth Court of Pennsylvania, in a May 10 ruling, reversed a decision by the state agency in charge of licensing vehicle salespeople to revoke the license of a man who, after serving a prison sentence for rape, had returned to working at a car dealership and re-activated his license (*Levengood v. Bureau of Professional and Occupational Affairs*).

The licensee, Eric Levengood, was a licensed vehicle salesperson, when, in 2008, he pled guilty to several serious felony charges after breaking into his ex-girlfriend's home and raping her and was sentenced to 5 to 10 years in prison and required to register as a sex offender. He later was convicted of a second felony after punching a corrections officer in the face.

Levengood, who claimed that his behavior stemmed from his abuse of drugs and alcohol, appears to have successfully availed himself of rehabilitative programs while in prison and was released in 2012.

He spent the next years without incident and, in April 2015, he successfully filed an application with the Board of Vehicle Manufacturers, Dealers and Salesperson to reactivate his license.

However, despite approving his application six months later, the board moved to discipline Levengood based on his 2008 felonies. After a hearing, an administrative law judge recommended that Levengood be indefinitely suspended and assessed a $7,000 fine, but also recommended that the suspension itself be suspended and Levengood allowed to continue working, holding that Levengood showed sufficient evidence of rehabilitation to overcome a presumption that he lacked the moral character to be a vehicle salesperson.

The board disagreed with the recommendation for leniency, revoking Levengood's license and imposing a $10,000 penalty. The board held that he had *not* provided sufficient evidence of his good character.

"We are troubled by how the Board reached and justified its draconian result," wrote Judge Bonnie Leadbetter. "As an initial matter, even though the crimes at issue were serious, the Board's approach seemingly assumes bad moral character forever and no possibility for rehabilitation such that permanent revocation becomes the only possible result."

The released criminal's crimes were not connected to the practice of selling vehicles, she stated. "While the public's protection is of great importance, the Board in its final adjudication did not make a rational connection between depriving licensee of his license and public safety."

The board reasoned that "a vehicle salesperson displaying this level of rage and violence toward anyone, let alone a woman and a corrections officer, presents untold dangers to customers and their families on the premises of the dealership, especially when not responding as he demands."

Levengood appealed and the case went up to the state Commonwealth Court, where he argued that the board erred by revoking his license and imposing such a large fine in the face of mitigatory evidence and the length of time since he committed his crimes.

Although Levengood acknowledged that the board had discretion over the determination of his sanction, he argued that the severity of those sanctions in the circumstances of his case was an abuse of that discretion. The court agreed, finding the board apparently assumed there was no possibility for rehabilitation on the part of the licensee.

The board also increased the recommended financial penalty by $3,000 over the administrative judge's recommendation without providing a reason, the judge pointed out. And she pointed to the board's initial reactivation of Levengood's license, despite the fact that he had disclosed his felony convictions in his applications.

"While it is true that a license reactivation or renewal is, for the most part, a ministerial act, and does not provide grounds for estopping a licensing board from taking disciplinary action," wrote Judge Leadbetter in reversing the decision and remanding the case for further action, "the reactivation in the present case is nonetheless indicative that the Board, presumably, did not consider licensee to present an immediate danger in practicing his licensed activity."

U.S. senators file bipartisan bill to stop state seizure of student loan defaulters' licenses

Issue: License denial/revocation imposed on student loan defaulters

The 19 states where licensing boards can seize licenses from residents who have defaulted on their education debts would have to halt the practice, under a bill (S. 3065) introduced in Congress June 14 by Sen. Marco Rubio (R-FL) and Sen. Elizabeth Warren (D-MA).

The bipartisan measure, dubbed the "Protecting Job Opportunities for Borrowers Act" or Protecting JOBS Act, would give states two years to stop denying, suspending, or revoking the driver's and professional licenses of anyone defaulting on federal student loans. Borrowers who find their licenses threatened by a state not complying with the Act would be allowed to file for prospective injunctive relief.

The bill was referred to the House Health, Education, Labor and Pensions Committee.

Controversy over the harsh punishment, which only applies to student loans and not other debts, surged following a November 2017 report in the *New York Times*, revealing that at least 8,700 borrowers are known to have lost their occupational licenses in recent years, while far more are suspected to have lost their licenses.

One state, Tennessee, reportedly took a particularly aggressive approach, reporting more than 5,400 student loan defaulters to professional licensing agencies between 2012 and 2017.

On the other hand, some states including Oklahoma, Washington, and New Jersey have changed course and already removed laws allowing license seizure over student loan defaulting, while others such as Hawaii have never enforced their law. The Hawaii Department of Commerce and Consumer Affairs reported that it had not removed licenses under the state's law because no state or federal agency had reported student loan defaulters.

In Texas, reported the *Texas Tribune* June 21, more than 4,215 licensees in the state, including security guards, cosmetologists, and pharmacists, were at risk of losing their license because of student loan default in 2017. Some 530 nurses were unable to renew their licenses because they were in default on their student loans, while 250 teachers had a license renewal application denied for the same reason over a five-year period.

The newspaper reported that when it tried to contact the members of the Texas state commission that helped pass the law in 1989, they were either deceased, could not be reached, or did not recall details about the bill's passage.

Licensee refusal to testify could justify inference of guilt, court rules

Issue: Constitutional protections and discipline process

A Florida appellate court ruled that state agencies could draw inferences from a licensee's refusal to testify in a license disciplinary case, affirming a sanction against a physician who had punctured the organs of two patients during liposuction procedures (*Omulepu v. Department of Health*).

The Oregon Department of Health filed a complaint against physician Osakatukei Omulepu in 2016 after four of his liposuction patients required hospitalization for post-surgery complications. Among other things, the charges alleged that Omulepu punctured the organs of two of his patients.

During his disciplinary hearing, Omulepu declined to testify as to how the organ puncture occurred and, partly based on that silence, the administrative law judge hearing the case made a finding of medical malpractice. Following the hearing, the state's Board of Medicine revoked Omulepu's license.

Omulepu appealed, arguing that the board had erred by accepting the administrative judge's adverse inference resulting from Omulepu's decision not to testify regarding the punctured organs, claiming that his right to do so was protected by the self-incrimination clause of the US Constitution, as silence in a criminal context cannot be considered as evidence of guilt.

The court acknowledged that Florida precedent applies the federal Constitution's protection against self-incrimination to professional license disciplinary cases, but noted that U.S. Supreme Court precedent allows a fact-finder to consider a defendant's refusal to testify as evidence in a civil case. Thus the board was within its authority to draw an inference from Omulepu's silence.

Florida Supreme Court precedent weighs the balance between public harm and the rights of a physician licensee to favor the public, with the Court stating, in the 1985 decision *Boedy v. Department of Professional Regulation*, "When a conflict arises between the right of a physician to pursue the medical profession and the right of the sovereignty to protect is citizenry, it follows that the rights of the physician must yield to the power of the state to prescribe reasonable rules and regulations which will protect the people from incompetent and unfit practitioners."

The court did indicate that the inference, by itself, could not be evidence supporting an adverse finding, noting the multiple pieces of evidence on the punctured organs considered by the board and the administrative judge.

Judge Scott Makar, in a concurring opinion, wrote that the court was holding—for the first time under Florida law—that invoking Fifth Amendment's protection against self-incrimination could be used as inference of guilt in a disciplinary decision, noting that such inferences were already the practice among administrative judges, but made without real legal guidance.

Judge Makar wrote that he believed important the distinction between using such an inference and using it as evidence of guilt, by itself, writing, "The point is that an inference must be rooted in and flow *directly* from record evidence establishing professional misconduct; an inference alone cannot establish liability."

Having rejected Omulepu's argument, the court upheld the board's revocation of his license.

Podcast of criminally convicted "Dr. Death" dramatizes flaws in physician regulation

Issue: Faults of state regulation as check on physician malpractice

A currently popular podcast known as "Dr. Death" recounts the shocking record of patient harm of neurosurgeon Christopher Duntsch during his years of practice in Texas beginning in 2011 and ending in 2017 when he was sent to prison.

Duntsch became the first doctor in the nation to be condemned to life in prison for his practice of medicine. A jury convicted him after an email to his ex-girlfriend, in which he confessed to having become or wanting to become a "cold blooded murderer," was admitted into evidence.

His story has helped draw attention to long-discussed reforms of the licensing and discipline system. "Dr. Death" dramatizes some of the holes in physician regulation that allowed him to continue practicing, since he was only stopped after behavior so egregious that he was criminally prosecuted.

Gaining operating privileges at different institutions proved easy for Duntsch, a personable and disarming surgeon who inspired confidence in his patients. The average neurosurgeon can add about $2.4 million a year to a hospital's revenue stream, according to the Pulitzer Prize-winning investigative journalism website ProPublica.

But, as ProPublica reports, Duntsch left a trail of badly injured patients throughout his relatively short career as a neurosurgeon. For example, during two years of practice in Dallas, he operated on 37 patients with 33 of those patients suffered injury, bizarre complications, and sometimes permanent nerve damage or death.

Several institutions where Duntsch had privileges forced him out, but in such a way that his departure was technically voluntary and not required to be reported to the National Practitioner Data Bank. (A report by the Health Research Group of Public Citizen found in 2009 that about half the hospitals in the country had never reported a doctor to the databank.)

That pattern continued until 2013 when Methodist Hospital in Dallas reported Duntsch after denying him privileges based on "substandard and inadequate care." But another hospital soon gave him privileges despite the report.

The state medical board investigated Duntsch over several months and first suspended, then permanently revoked the surgeon's license in December 2013. Police arrested Duntsch in July 2015 and prosecutors charged him with one count of injury to an elderly person and five counts of assault, based on his work on patients.

But ProPublica speculates that Duntsch might have been stopped earlier if not for 1) Texas's medical malpractice law, adopted in 2003, which, by limiting awards for pain and suffering in most cases to $250,000, has shrunk the number of suits filed and amounts paid out; and 2) the tendency of hospitals to ease a physician out rather than report incompetence or malpractice to the national databank.

"Multiple layers of safeguards are supposed to protect patients from doctors who are incompetent or dangerous, or to provide them with redress if they are harmed. Duntsch illustrates how easily those defenses can fail, even in egregious cases," writes ProPublica reporter Laura Beil.

Board can't reject hearing examiner's findings en masse

Issue: Due process in handling of hearing examiners' recommendations

A state licensing board erred when it rejected a large block of its hearing examiner's findings en masse, without addressing each one individually, a Montana state district held June 28, overturning a license revocation by the state's medical board (*Ibsen v. Montana State Board of Medical Examiners*).

The board began an investigation of physician Mark Ibsen after a former employee filed a complaint claiming that Ibsen had overprescribed narcotics to his patients. The state's Department of Labor and Industry eventually suspended Ibsen's license, but Ibsen appealed the decision to a state district court, arguing that the board made several procedural errors. The case went up to the Montana First Judicial District Court, Lewis and Clark County.

After the conclusion of Ibsen's hearing process, the board rejected the majority of the presiding hearing examiner's recommendations on the ground that the examiner was not a doctor and therefore not competent to make the findings he did. This resulted in the striking of 80 of the hearing examiner's findings without a discussion considering the individual merits of those findings.

Unfortunately for the board, Montana's Administrative Procedure Act requires that a hearing examiner's findings be confirmed unless the findings are not supported by evidence. The board, Judge James Reynolds explained, did not have the authority to throw out the examiner's findings for the sole reason because it would have determined the case differently, and had erred by not considering each of the examiner's findings individually.

"These deficiencies violate the requirements of the [Act] for the agency to appoint a competent hearing examiner and for proper review of the hearing examiner's findings," wrote Judge James Reynolds. "It is analogous to the selection of a jury in a civil case and then when the verdict comes in against a party, that party asking for the selection of another jury. Except in this case, it is even more striking because it is the agency who selected the hearing examiner."

The board had a duty to appoint a competent hearing examiner and then review that examiner's findings to determine whether they were supported by evidence but "[t]he Board apparently feels it failed to comply with these requirements because it rejected wholesale several findings made by its hearing examiner on the basis that its selected hearing examiner was not competent to decide the matters before him."

In addition, during proceedings before the board, one of its members, Mary Anne Guggenheim, took the opportunity to comment on the lack of qualifications of one of Ibsen's expert witnesses, with the board member saying that she had known the witness for years and that he was not competent to testify on the matters at hand, despite the fact that the witness had been approved by the hearing examiner.

The board member also cited to two letters sent to the board by another doctor. Neither the assertions about the witness nor the letters were admitted into evidence and were unable to be challenged by Ibsen. This, too, violated due process, Judge Reynolds held.

While acknowledging that the board was entitled to rely on its members' expertise, the judge wrote, "What happened with Dr. Guggenheim's comments . . . was beyond and different from the use of experience, technical competence, and specialized knowledge" and Ibsen should have afforded the opportunity to rebut those assertions, as required by law.

New laws barring complaint disclosure do not apply to pending case

Issue: Public disclosure of complaint information

Two new laws passed to prevent the disclosure of confidential complaint documents filed against licensees with the state's Department of Financial and Professional Regulation did not apply to pending cases, the Illinois Supreme Court held May 24 (*Perry v. Department of Financial and Professional Regulation*).

The case before the Court was the consolidation of two separate suits. In the first, Christopher Perry, a licensed structural engineer, filed a Freedom of Information Act request with the state Department of Financial and Professional Regulation in 2013, seeking to obtain the documents of a complaint made against him.

The Department denied his request, noting that even a redacted version of the complaint would reveal the identity of the complainant and thus violate that person's confidentiality. Faced with that denial, Perry filed a court action with the Department seeking to force it to turn over a redacted version of the complaint.

Then, while the case was moving through the court system, the state legislature passed an amendment to the Department of Professional Regulation Law that protected documents like the ones sought by Perry from disclosure. Confronted with the new legal regimen, the court dismissed Perry's action.

Concurrent with Perry's suit, the libertarian advocacy organization Institute for Justice, with ties to billionaire deregulatory advocates Charles and David Koch, also brought suit against the Department, seeking FOIA disclosure of all complaints the department had received against hair braiders and licensed cosmetologists from 2011 to the end of 2013. The action was part of a greater campaign against the licensing of hair braiders as a full cosmetician.

During that suit, a separate piece of legislation amended the state's Barber Act to prevent disclosure of complaints filed with the Department against

members of that profession, using essentially identical language to the earlier amendment to the Professional Regulation Law. In contrast with Perry's case, the court ordered the Department to produce the records and imposed legal costs on the agency. The Department appealed.

An appellate court hearing both appeals ruled that the non-disclosure amendments acted retroactively and could validly be applied to pending FOIA cases, upholding the Department's decision to deny the documents and rejecting Perry's and the Institute's claim for attorney fees. The two plaintiffs appealed and the case went up to the Supreme Court of Illinois, which issued a decision May 24 holding that the new laws could not act to prevent the disclosure of the complaint documents.

The justices of the Court engaged in an extended analysis of Illinois retroactivity jurisprudence, holding first that the legislature had not expressly stated whether the new laws were to apply retroactively, and second, that the amendments were substantive in nature.

Unfortunately for the Department, under current Illinois jurisprudence, substantive statutory changes cannot be applied to pending lawsuits unless the legislature expressly so mandates, so the new amendments could not be applied to Perry's and Institute's document requests.

The justices reversed the dismissal of Perry's case and returned it to the trial court for further proceedings. The justices also reversed the appellate court's dismissal of the Institute case and reinstated the trial court's decision.

Therapist's discipline reversed because she never established a professional relationship with patient

Issue: Applicability of professional relationship standards

In a June decision, the West Virginia Supreme Court upheld the ruling of a lower court which had rejected discipline imposed by the state's speech pathologist board on a therapist for abandoning a patient.

The court ruled that the brief exchange between the therapist and the patient's representative—during which the therapist refused to schedule an initial appointment—was insufficient to create a therapist-patient relationship and its accompanying duties of care (*Lindsay v. West Virginia Board of Examiners for Speech-Language Pathology and Audiology*).

In 2013, Elissa Lindsay, who contracted with Bowers Hospice House in West Virginia to provide speech therapy to its patients, was contacted by the representative of Bowers patient to make an appointment for services. Bowers declined to schedule an appointment, informing the representative—a licensed nurse with whom Lindsay was acquainted–that she was too busy and—according to the representative—that speech therapy would be ineffectual for the patient.

Upon learning of Lindsay's refusal to see the patient, another licensed speech-language pathologist, a member of the West Virginia Board of Examiners for Speech-Language Pathology and Audiology, filed a professional complaint. The board began an investigation, eventually determining that Lindsay had acted unprofessionally and below the expected standard of care, and had abandoned her patient. The board reprimanded Lindsay and imposed a year of supervised practice.

Lindsay appealed, and a state circuit reversed the board's decision on the grounds that Lindsay, by refusing to schedule an appointment, had never formed a therapist-patient relationship with the patient. Therefore, no action of Lindsay's could be said to have been made as part of her treatment of the patient, and she could not have abandoned a patient she never accepted in the first place.

The court also ruled that the evidence did not support a finding that Lindsay had made any recommendations of a course of treatment for the patient.

The board appealed that decision, and the case went up to the Supreme Court of West Virginia, which issued a ruling June 15 affirming the lower court.

In its appeal, the board argued that, because the woman who contacted Lindsay was a patient of the hospice that employed Lindsay's services, the woman was a patient of Lindsay's by extension.

The court disagreed, holding that no therapist-patient relationship existed. Reading the actual language of Lindsay's contract with the hospice, the court noted that she was only obligated "to participate in the establishment of the plans of care for patients when appropriate."

The inclusion of the phrase "when appropriate," the court wrote, allowed Lindsay the discretion to refuse to take on the hospice's patients. In additions, the evidence in the case did not support a finding that Lindsay's actions had otherwise created an implied patient-therapist relationship.

Thus Lindsay owed no duty in the case, either to care for the woman or to provide a referral to another speech therapist. Although Lindsay had made suggestions to the woman's representative regarding possible avenues of care, the court wrote that, in the actual context of the phone call between Lindsay and the representative, "it could not reasonably be understood . . . that [Lindsay] was making specific recommendations as to a treatment regime."

State board cannot remand discipline case to ALJ over legal error

Issue: Statutory powers of state licensing board

A Texas appellate court reversed a state board of nursing disciplinary decision after the board exercised an authority it did not actually have: remanding a case to an administrative law judge because of a legal error (*Banda v. Texas State Board of Nursing*).

The case started in 2013, when nurse Amy Banda and the Texas Board of Nursing entered into an agreement regarding Banda's inappropriate conduct with one of her patients. After a second complaint regarding the same patient was filed in 2014, the board initiated an action against Banda.

However, after a hearing, an administrative law judge found that the alleged professional violation that led to the second complaint occurred after Banda and the patient had ended their professional relationship and that Banda, therefore, had not violated her professional boundaries in that case.

The board, disagreeing with that exculpatory finding on the grounds that the judge had misapplied legal precedent, sent the decision back to the administrative judge for further proceedings. Then, after the judge issued a remanded decision, the board placed Banda's license on effective probation for two years. Banda appealed the decision, and the case eventually reached a state Court of Appeals, which issued a decision May 24.

In her appeal, Banda argued that the board did not have the authority to remand a decision to an administrative law judge for further proceedings, an argument with which the court agreed.

Although the board has the authority under the state's Administrative Procedure Act to change the findings of an administrative judge if the judge incorrectly applies the law, it does not have the authority to simply remand a case to an administrative judge. By doing so, the board had exceeded its statutory authority by creating a new power for itself.

Having ruled the board's act unlawful, the court overturned Banda's discipline and remanded the case, writing that, "On remand, the Board may resume exercising its discretion from the point at which it exceeded its authority, i.e. when it remanded the case to the ALJ for a new proposal for decision."

Failure to meet continuing education requirements not fraud—but does merit discipline, court rules

Issue: Discipline for failure to meet continuing education requirements

An appellate court in Kansas overturned a finding of fraudulent conduct against a pharmacist who had failed to timely finish his continuing education hours, but upheld the state pharmacy board's decision to sanction him anyway, finding in a June 15 decision that the board had multiple, overlapping reasons to do so (*Kollhoff v. Kansas Board of Pharmacy*).

In 2015, Kansas pharmacist John Kollhoff declined to renew his license on time, taking an extra month and availing himself of the opportunity to complete roughly 20 of the 30 required continuing education hours he needed for his renewal period.

The Board of Pharmacy, unhappy that Kollhoff had used credits earned outside of his renewal period, fined him $2,100 dollars and added an additional requirement of 84 additional credit hours to be completed within 30 days.

Kollhoff requested a hearing, arguing that the board had misinterpreted its governing statutes by requiring him to have finished his credit hours before his license renewal date. He was unsuccessful; the board upheld the sanction and added and additional $4,400 in legal costs.

Additionally, in what appears to be a procedural error, the board's final decision listed fraudulent behavior as one of three bases to uphold the sanction, despite that fact that Kollhoff had not been charged with fraud.

The licensee appealed, reiterating his argument that the board had erroneously interpreted the law governing the deadline for him to have completed his education credits and arguing that the board had acted arbitrarily and without authority in sanctioning him.

A district court found in favor of the board, upholding, among other things, the board finding that Kollhoff had acted fraudulently during his renewal process.

Kolhoff again appealed. Unlike the lower court, the Court of Appeals of Kansas found that the board erred when it held that Kollhoff had obtained the renewal of his license by fraudulent means. In its original summary order sanctioning Kollhoff, the board had simply held that Kollhoff was in violation of

pharmacy licensing law because he had failed to meet his renewal application deadline.

That order did not mention fraudulent activity by Kollhoff and, during his requested hearing, the board, pointing to the *lack* of a fraud charge, actually prevented Kollhoff from testifying in his defense against that charge. In the end, because the question was not charged and heard, there was no evidence that Kolhoff intended to commit fraud, so fraud could not be found.

Kolhoff's victory was short-lived. Despite that error, the court ultimately upheld his sanction, holding that the board had overlapping grounds to find that Kollhoff violated the pharmacy licensing law.

Kollhoff had, in the end, failed to timely renew his license and, under Kansas law, he was not entitled to any grace period. Although Kansas pharmacy licensing statutes had once stipulated such a grace period, the state legislature eliminated that provision in 2014.

Also, although Kollhoff claimed that the board acted without authority when it sanctioned him, he had failed to raise this issue during his administrative proceedings; thus he could argue that case now, the court held.

Licensing

Licensing found to have no effect on two occupations' wages *(from page 1)*

The CSG researchers used CSG's own time series data plus occupational employment data from the federal Bureau of Labor Statistics to compare wage trends before and after licensure to a control state that does not license the occupation at all.

Analysis showed there was no evidence that electrician licensure has any effect on wages and employment. "If a licensing effect did exist, we would expect the [trend line] to trend upward for wages and downward for employment after a state licenses electricians," says study co-author Matthew Shafer,

Instead, the three sets of state comparisons CSG performed showed hardly any deviation in the trend lines upon initial licensure. A similar result seemed to hold for massage therapy. "The trend lines for massage therapists are more erratic, but still do not seem to support a possible licensing effect," Shafer reports.

He points to some possible explanations for the study's result. "It might be that a licensing effect takes many years to be seen, or the increase in wages and decrease in employment growth could be a slow, gradual process over the course of many years that eventually restricts entrants into the profession but does not do so initially." Or, "Perhaps the licensing requirements adopted are not severe enough to deter an aspiring practitioner from entering the occupation."

Still, the lack of evidence of impact shown in the study suggests that deregulation may not bring the outcome policymakers may expect, Shafer concludes. "It is not clear from this evidence that deregulation will have the economic impacts that some believe." He suggests that "perhaps policymakers should focus their efforts on things other than deregulation when figuring out how to grow their state economies."

Feds ramp up licensing deregulation push with $7 million in grants

Issue: Federal influence on state professional regulation

Nine states and two state government organizations received grants ranging from $240,000 to $1.5 million in June from the U.S. Department of Labor (DOL), to further the department's stated goal of reviewing and streaming states' occupational licensing laws.

The grants will support state analysis of relevant licensing criteria, potential portability issues, and whether licensing requirements are overly broad or burdensome.

Secretary of Labor Alexander Acosta states that excessive licensing can create economic barriers for Americans seeking a job, including veterans and military spouses, and hinder competitiveness for businesses.

"Because licensing is based on state law, states must take the lead in reforming the licensing system. These grants provide an opportunity to examine licensing criteria and remove burdens that limit competition and bar entry to employment," Acosta said.

The awardees are asked to develop specific plans of action designed to reduce excessive licensing and consider the potential of alternative approaches to licensing that maintain the protection of public health and safety, such as professional certification.

The DOL also awarded $1.5 million to help transitioning service members and veterans meet civilian educational requirements for employment in selected civilian licensed occupations through the Veterans Accelerated Learning for Licensed Occupations Project.

Under a 2017 DOL grant, the National Conference of State Legislatures and its partners are producing technical assistance resources for states on occupational licensing and posting reports and searchable databases at ncsl.org/research/labor-and-employment/occupational-licensing.aspx.

The new awards were made to 12 agencies or associations:

Council of State Governments $1,000,000
National Conference of State Legislatures $1,000,000
Colorado Department of Regulatory Agencies $260,000
Kansas Department of Labor $297,769
Commonwealth of Kentucky $450,000
Nevada Department of Employment Training and Rehabilitation $449,999
New Hampshire Office of Professional Licensure and Certification $244,260
Job Service North Dakota $450,000
Oklahoma Department of Labor $450,000
Commonwealth of Pennsylvania $422,000
Vermont Secretary of State-Office of Professional Regulation $450,000
Kentucky Science and Technology Corporation (for Veterans Accelerated Learning for Licensed Occupations Project) $1,500,000

Does occupational licensing promote consumer health and safety? Econometric study looks at primary data for some answers

Issue: Research on measurable impact of licensing laws

Concerns about the fact that nearly one third of the labor force are currently subject to some form of entry requirements for licensed fields have fueled critique of occupational licensing in recent years. But very

little research has actually probed, historically or now, whether licensing is helpful or harmful to the consumers it is supposed to benefit. Empirical evidence is scarce. A study released in May by the National Bureau of Economic Research (NBER) is intended to start filling the gap.

Entitled "The Effect of Occupational Licensure on Consumer Welfare, Early Midwifery Laws and Maternal Mortality," the study uses a data set assembled from primary sources to look at the effect of midwifery licensing laws introduced in states and municipalities between 1900 and 1940 upon a measurable probability: the likelihood of dying.

Research over the last four decades has primarily focused on the economic effects of setting requirements that restrict entry into licensed fields: higher prices, insulation from competition, reduced access to services, fewer jobs created. "Whether occupational licensing [protects consumers] or not is an important, but unanswered question," say Montana State University economist D. Mark Anderson and colleagues at several other universities who conducted the study.

The NBER research team's conclusion: Requiring midwives to be licensed reduced maternal mortality by 6 to 8 percent and may have let to modest reductions in infant mortality and mortality among children under the age of 2 from diarrhea. As reviewers at *Chicago Booth Review* succinctly sum up the study's findings: "Licensing midwives saves lives."

The case of midwifery was uniquely suited to studying licensing's impact, the study authors note, because American women in the early 20th century typically gave birth at home either attended by a doctor or midwife who had sole responsibility for the health of mother and infant.

"By drawing upon historical data, we are able to estimate the relationship between requiring that a group of health care providers (midwives) be licensed and a specific consumer health outcome (maternal mortality) over which they had a direct, immediate, and profound impact," the authors explain.

Before adoption of early state licensing requirements, the market for midwifery services was wholly unregulated, making it simpler to examine licensing's impact. The pattern of regulation today is more difficult to isolate for purposes of a study. "In the modern health care sector where a large number of specialists are already licensed, loosening or tightening licensing requirements for a specific type of health care provider represents only an incremental change in the overall licensing regime."

From 1900 to 1940, 22 states and at least a dozen municipalities adopted midwifery licensing requirements, the study reports. The first licensing law had been adopted in Illinois in 1877 as part of a practice act for any person "practicing medicine in any of its departments."

Licensure requirements adopted from 1900 to 1940 varied significantly among the states. Applicants in Mississippi were judged based on their character, cleanliness, and intelligence, but were not required to take an exam or graduate from a school of midwifery, while California, Washington and Wisconsin required that midwives graduate from a recognized school of midwifery and pass an examination administered by the state medical board. In 8 of the 18 states for which the researchers have pre- and post-treatment maternal mortality data, obtaining a license required only receiving basic instruction from a public health nurse or county health officer.

In spite of such differences, the study found that the estimates suggest that adopting even the least stringent licensing requirements led to a 5 percent reduction in maternal mortality. States that required applicants to pass an exam or graduate from a recognized school of midwifery appeared to show a more pronounced relationship between midwifery laws and maternal mortality, the authors note. Overall, the introduction of licensing for midwives was associated with a 6 to 8 percent reduction in maternal mortality as reported annually in *Mortality Statistics* and *Vital Statistics of the United States*.

To control for the possible role of broad improvements in antiseptic technique or antiseptic awareness which took place in the same span of time, the study tested whether midwifery laws were related to non-maternal mortality from sepsis (deaths caused by bacterial infection) and non-maternal mortality from tetanus. "The results provide additional evidence that the relationship between midwifery licensing requirements and maternal mortality is causal," the authors report.

The NBER study authors believe that the estimates are "the first econometric evidence of which we are aware on the relationship between licensure and consumer safety and are directly relevant to ongoing policy debates both in the United States and the developing world surrounding the merits of licensing midwives."

They add: "Whether requiring doctors, dentists, and other health professionals to be licensed also leads to better health outcomes is an open, but crucial, question that deserves the attention of future researchers."

Nevada sunset panel recommends retaining 22 boards, eliminating only "dysfunctional" homeopathy board

Issue: Sunset reviews of professional licensing and regulation

Nevada's Sunset Subcommittee of the Legislative Commission reviewed 23 professional and occupational licensing boards for its 2018 sunset report. But in a report released in June, it opted to recommend abolishing only the homeopathic board, which licenses 40 practitioners. Licensing of homeopaths should be turned over to the state Division of Public and Behavioral Health, the panel recommended. The newly installed president of the homeopathic board told the subcommittee he planned to fight the recommendation in the legislature.

The board was labeled "dysfunctional" by subcommittee chair Irene Bustamente Adams, a member of the Nevada Assembly. A $145,000 debt owed to the attorney general's office for legal representation was a key factor in the recommendation to abolish the board.

The sunset panel also recommended that several boards review their fees. The Private Investigator's Licensing Board, at the extreme end, was cited for having fees —e.g., $1000 for renewal of a license—that the panel described as "out of line" compared to those of other states.

No exemption from licensing rules for small-sized business

Issue: Applicability of licensing requirements to small business

A Pennsylvania court ruled June 4 against a woman who had brought a legal case seeking an exception to state licensing law in order to continue operating her unlicensed real estate business, making the argument that the state's licensing scheme was unduly burdensome on her small practice. (*Ladd v. Real Estate Commission of the Commonwealth of Pennsylvania*).

In its decision, the court noted that state law was not required to make exceptions for professional practices with only a few clients.

Sara Ladd worked, in her own words, as a “short-term vacation property manager” in the Pocono Mountains in Pennsylvania, at first renting out two houses and setting up a website to manage those rentals, and then later helping others to rent their properties, as well. Eventually, Ladd set up a company to provide rental management services. At this point, the Pennsylvania's Real Estate Commission contacted Ladd to tell her that she was engaged in the unlicensed practice of real estate. Ladd then ceased operating.

Ladd and one of her clients then filed a court case seeking a declaratory judgment from the Commonwealth Court of Pennsylvania against the board, arguing that the state’s Real Estate Licensing and Registration Act, the statutory scheme which prevents her from operating her rental management business, imposes undue burdens on her ability to pursue her chosen occupation, in violation of the Pennsylvania Constitution.

The plaintiffs argued that, because her business was smaller than that of licensed real estate agents, with a limited number of clients, it should not be subject to the same regulatory scheme.

The Commission argued that Ladd’s legal action was premature because it had not yet taken formal action against her. However, the court disagreed, holding that, under Pennsylvania judicial precedent, an industry plaintiff potentially impacted by an enforcement decision—–in the way that Ladd would be in this case—was entitled to an advance decision. “Here,” Judge Kevin Brobson wrote, “Ladd faces the direct and immediate price of compliance with RELRA or sanctions for noncompliance.”

Turning to the substance of the case, the court held that the Act’s licensing scheme prohibiting Ladd from operating as a rental agent was in accordance with Pennsylvania's constitution.

Noting the similarity of the real estate licensing scheme to other professions, Judge Brobson wrote that “We would no sooner obviate the requirement for a professional engaging in the practice of real estate to hold a license than we would obviate the licensure requirement for an attorney, physical therapist, or any other professional, merely because they have limited clients or only practice part of the year."

"Were this court to accept Petitioners’ argument, we would effectively upend the legitimacy of any requirement by the Commonwealth for a professional license.”

The court acknowledged that, given the small size of her business, Ladd would face a relatively greater burden than a professional real estate agent, but noted that the Pennsylvania Constitution “does not require the General Assembly to establish a tiered system for every professional that it regulates in order to account for different volumes of work performed."

"Ladd likely shares her frustration with any other person who aspired to work minimally in a given field but feels the prerequisites for that field are too onerous. Despite the reasonableness of her frustration, we are still compelled to uphold the will of the General Assembly in policing professionals.”

Having rejected Ladd’s arguments, the court dismissed her case.

Competition

Ban on funeral home/cemetery joint operation upheld as pro-competitive licensing rule

Issue: "Anti combination laws" and free competition

The Supreme Court of Wisconsin, in a June 27 decision, upheld the state's law prohibiting joint operation of funeral homes and cemeteries, holding that the state had sufficient motivation to prohibit anti-competitive behavior to support the law's prohibition on otherwise lawful economic activity (*Porter v. State of Wisconsin*).

Wisconsin statues prohibit joint ownership of a cemetery and a funeral home and licensed funeral directors from operating in conjunction with a cemetery. Glenn Porter, a cemetery owner who wanted to incorporate a funeral home into his business, brought suit against the Wisconsin Funeral Directors Examining Board seeking to have a court declare the “anti-combination laws,” as they are known, declared unconstitutional as violations on grounds of due process and equal protection.

To defend the laws, the state enlisted a Lake Forest College economics professor, Jeffrey Sundberg, as an expert witness, who explained that the laws have the purpose of preventing the anti-competitive tendencies of cemetery-funeral home conglomerates, which would have outsized bargaining power in the funeral home market due to the relative scarcity of cemeteries.

After using that power to force competing funeral homes out of business, Prof. Sundberg explained, the potential existed for the remaining conglomerate to rise prices for consumers, now that it faced no competition.

In addition, the professor explained that the anti-combination laws prevent abuses that can arise from the commingling of cemetery and funeral revenues. Cemeteries are required to keep a certain amount of customer money in trust for future expenses; the professor opined that the combination firms would be able to manipulate the prices of funerary goods to artificially decrease the amount of money that customers paid directly to the cemetery, artificially lowering the amount of money required to be held in trust.

A Wisconsin circuit court granted summary judgment for the state and Porter appealed, eventually reaching the Supreme Court of Wisconsin which upheld the laws.

The Supreme Court agreed with the state’s arguments as elucidated by Prof. Sundberg, citing the anticompetitive potential of combination firms and the potential for price manipulation of additional products to circumvent the cemetery fund trust laws.

“Both funeral establishment directors and cemetery operators serve a particularly vulnerable class of consumers: those who have suffered the loss of a loved one,” wrote Justice Shirley Abrahamson.

“Both funeral establishment directors and cemetery operators are subject to trusting requirements for the products and services they sell. The unique characteristics of funeral establishment directors and cemetery operators ‘reasonably suggest’ that the anti-combination laws serve the public good by protecting vulnerable consumers and making it more difficult for funeral directors

and cemetery operators to disguise the commingling of funds with different trusting requirements."

These motivations of the state, the court concluded, were sufficient to support the imposition of the law.

Two justices, disagreeing with the decision wrote a long dissent citing Thomas Jefferson, James Madison, and the Roman philosopher Cato, among others, to argue that Wisconsin had no rational basis to believe that cemetery-funeral home combinations could lead to anti-competitive behavior and that the laws thus impinged on the economic freedom of Porter without cause.

The dissent seemed to focus on the lack of evidence that combination would not affect competition between cemeteries as opposed to funeral homes and thus failed to address the anti-competitive effects that preferential access to cemeteries could cause in the funeral home industry, the basis of the majority's decision.

The real purpose of the laws, the two dissenters wrote, citing evidence that the funeral director industry was directly involved in the drafting of the laws, was anti-competitive protection of the funerary industry.

Having rejected Porter's arguments, the justices ruled the laws constitutional and upheld the summary judgment order of the lower court.

Professional Licensing Report is published bimonthly by **ProForum**, a non-profit organization conducting research and communications on public policy, 9425 35th Ave NE, Suite E, Seattle WA 98115. Telephone: 206-526-5336. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: professionallicensingreport.org Editor: Anne Paxton. Associate Editor: Kai Hiatt. © 2018 Professional Licensing Report. ISSN 1043-2051. Listed, Legal Newsletters in Print.
Subscribers may make occasional copies of articles in this newsletter for professional use. However, systematic reproduction or routine distribution to others, electronically or in print, including photocopy, is an enforceable breach of intellectual property rights and expressly prohibited.

Subscriptions, which include both printed and PDF copies of each issue, are $228 per year, $447 for two years, $617 for three years, $798 for four years. Online access to PLR content is included in the subscription price; online-only subscriptions are $199 per year. Additional print subscriptions for individuals (within the same physical office or board only) are $40 each per year and include a license to distribute a PDF copy to a single person. Licenses to distribute extra PDF copies only, to individuals within the same physical office or state licensing board, are $20 per recipient per year.