

Job Licensing: Questions You Should Ask

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Questions a Legislator Should Ask (3rd Edition)
written by Kara Schmitt, Ph.D.
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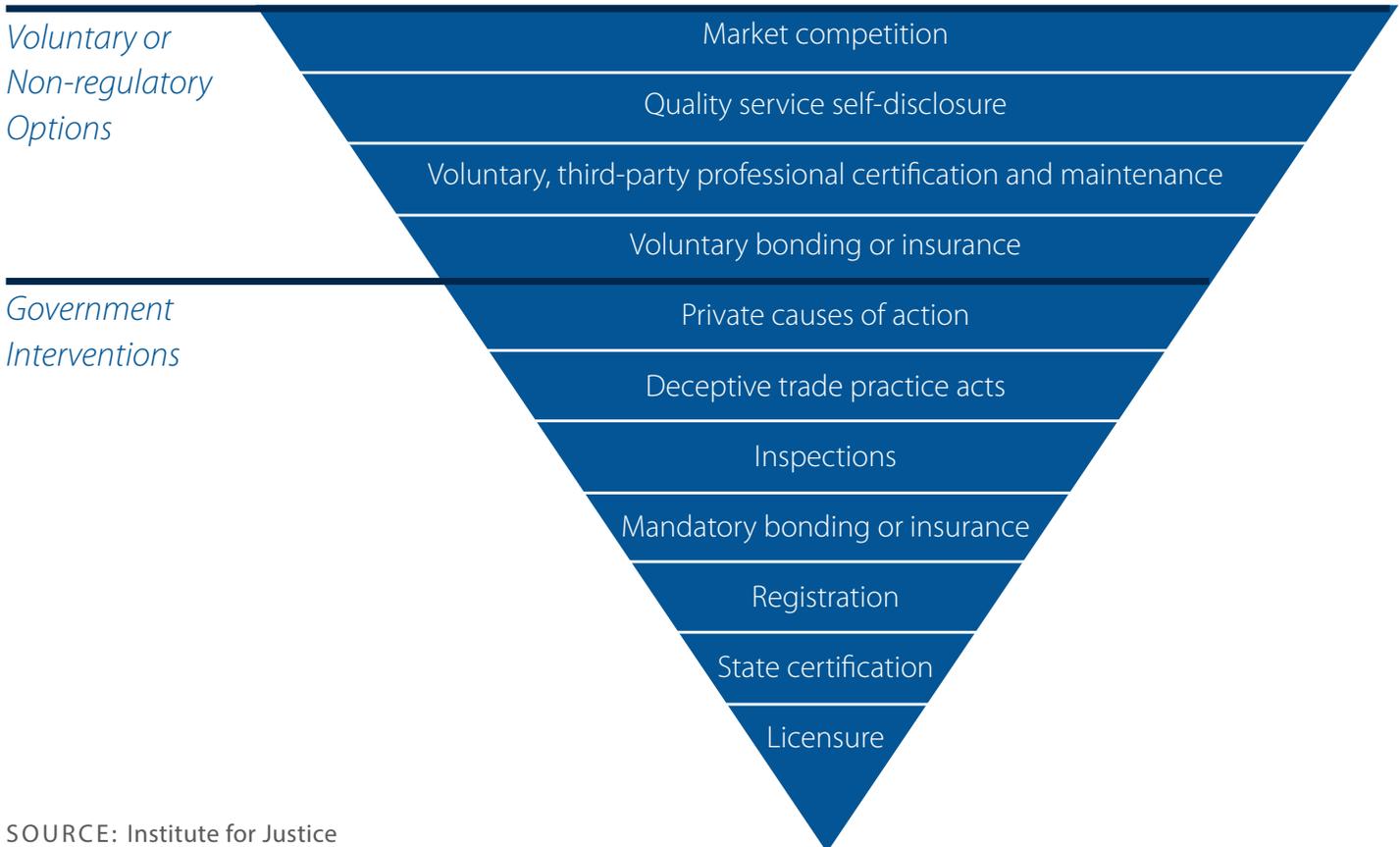
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The Inverted Pyramid: A Hierarchy of Occupational Regulation



SOURCE: Institute for Justice



The decision to regulate occupations (or deregulate them) should be a result of careful consideration of public safety and health.

**TOO MANY TIMES,
WE LICENSE
WITHOUT ASKING
QUESTIONS
ABOUT THAT.**

FOREWORD

Occupational licensing has come into its own as a regulatory topic for public policymakers to look at more carefully. While free market economists like Milton Friedman were talking about the dangers of government regulation of labor markets decades ago, we seem to have reached a tipping point that's resulted in policymakers taking a more serious look at what they've done.

In 2015, the Obama Administration released its *Occupational Licensing: A Framework for Policymakers* report. The Trump Administration has picked up on that agenda, encouraging state policymakers to find ways of making occupational licensing less onerous.

Of course, people were talking about occupational licensing before 2015. The Council of State Governments, the National Conference of State Legislatures, and countless public policy and public interest groups, including the Platte Institute, the Institute for Justice, and many others have been asking questions about how and why we license occupations for quite some time.

As states look for ways to attract more economic activity inside their borders, they've started to consider whether licensing reform could be a piece of that attraction. The movement started slowly in the states—with legislators voting to pare back or eliminate licensing requirements here and there in specific occupations.

More recently, states have started taking on the task of enacting broader job licensing reform. In 2018, Nebraska helped lead the way with the Occupational Board Reform Act—an effort which would require periodic review and analysis of all licenses issued by the state. Other states introduced similar legislation in their 2019 sessions. States like Arizona and Ohio have taken different approaches to occupational licensing.

No matter what approach state policymakers take, though, it seems certain that job licensing reform will continue to be a hot topic moving into the future. Policymakers need to ask themselves important questions as they both review existing licensing and consider the need for new licenses. The decision to regulate occupations (or deregulate them) should be a result of careful consideration of public safety and health. Too many times, we license without asking questions about that.

This publication provides you with some of those questions.

WHAT IS THE PROBLEM THAT COULD BE SOLVED BY THE REGULATION?

- Has the public been harmed due to a lack of regulation of the profession?
- To what extent has the public's health, safety, or economic well-being been endangered?
- Have claims of any public harm been documented?

TAKEAWAY FOR POLICYMAKERS

What is the problem that needs to be solved? If there's no problem, is it necessary to regulate?

WOULD THE PROPOSED REGULATION SOLVE THE PROBLEM?

- Will the proposed regulation provide adequate oversight to guarantee the protection of public health and safety?
- Are there other ways (bonding, insurance, civil action) which could alleviate the problem?

TAKEAWAY FOR POLICYMAKERS

If the problem is external to government action, or if there is no guarantee that it would solve the problem, consider other non-legislative options.



LICENSING NOTES FROM LAURA

Ultimately, both economists and policy analysts who have studied the impact of occupational licensing suggest that policymakers should ask some important questions before granting licensed status to occupations. Licenses tend to restrict the pool of those in the occupation, especially in middle- and low-income jobs, where the costs of becoming qualified for a license may be prohibitive to those who are considering the job. When the labor pool in the occupation is low, consumers can be left without the services of that occupation.

The Nebraska Department of Health and Human Services lays out an appropriate philosophy when considering regulation of health-related occupations by the state:

“Regulate only when necessary to protect the public or advance the public interest via improved access to care; increase regulation only when it is necessary to protect the public, and; proposals must be both necessary and sufficient to address credentialing or credentialing-related issues or problems.”

HAVE OTHER EFFORTS BEEN MADE TO ADDRESS THE PROBLEM?

- Does the profession or occupation have an established code of ethics, and has it been accepted and enforced?
- Does the occupation have an association formed for self-governance and establishing best practices?
- Does the profession have complaint-handling procedures for resolving disputes between practitioners and the public—and has the process been effective (if not, why not)?
- Is there any non-governmental certification program established to assist the public in identifying qualified practitioners?
- Could the use of applicable laws or existing standards solve problems? For instance:
 - Unfair and deceptive trade practice laws
 - Civil laws, injunctions, cease and desist orders
 - Criminal laws such as prohibitions against cheating, false pretenses, deceptive advertising
 - Can existing standards, such as product safety and building codes be used?
- Would strengthening existing laws help deal with the problem?

TAKEAWAY FOR POLICYMAKERS

State regulation/licensure shouldn't necessarily be the first step!

WHY SHOULD THE PROFESSION BE REGULATED BY THE JURISDICTION?

- Who are the consumers of the service?
 - Does the general public lack the necessary information to evaluate the qualification of providers and the service provided?
 - Are there institutions or qualified professionals who have the knowledge to evaluate qualifications and outcomes?
- To what degree does the profession practice independently?
 - How much unsupervised access does the practitioner have to the public?
 - Is there a high degree of independent judgment required of practitioners?
 - How much skill and experience are required in making these judgments?
 - If supervised, is the supervisor covered by regulatory statute? For many professions, if practitioners work under licensed supervisions, regulation of the supervisee may not be necessary.

TAKEAWAY FOR POLICYMAKERS

Consider whether the consumer of the service can assess the quality of services without state regulation through independent means, such as private certification, online reviews, personal experience—and whether their inability to assess poses a high risk to health or safety.

HAVE ALTERNATIVES TO REGULATION OF INDIVIDUALS BEEN CONSIDERED?

- Would regulation of the employer or business owner (e.g. restaurants, hospitals) rather than the individual practitioner provide the necessary public protection?
- Could registration of practitioners coupled with minimum or national standards set by a profession be used?
- Would government or non-government certification of practitioners be an acceptable alternative? The use of a title would be restricted to those who have demonstrated competence, but they would not have exclusive legal permission to practice the profession.
- Why would the use of the above options not be adequate when seeking to protect the public's interest?
- Why would licensing be the most effective option?

TAKEAWAY FOR POLICYMAKERS

There are lesser options available to mitigate risk.

HAS ADVICE BEEN SOUGHT FROM (POTENTIAL) REGULATORS AS TO WHETHER THE PROPOSED REGULATION WOULD BENEFIT THE PUBLIC?

TAKEAWAY FOR POLICYMAKERS

Focus should be on PUBLIC safety and health, not on occupational desires.



LICENSING NOTES FROM LAURA

Knowing if licensure is a good regulatory tool for an occupation requires asking some questions: Has there been significant, widespread harm caused by unlicensed practitioners? Do they or their employers not have the motivation to ensure that they have been properly trained, in order to avoid liability? Importantly, is it fair to impose the additional burden of job licensing on the individual worker?

HOW WOULD THE REGULATORY ACTIVITY BE ADMINISTERED?

- Who will be responsible for administering the regulation?
 - Is a new regulatory body required, or could an existing board/agency incorporate?
- What will be the composition of the board, if required in the statute?
 - Will there be public or auxiliary professionals on the regulatory entity?
 - If so, what proportion of the board will not be regulated professionals?
- What power will the regulatory entity have?
 - Will it review qualification, develop/approve examinations, investigate, discipline practitioners?
- Will actions of the regulatory entity be subject to review? If so, by whom, and what will be the scope of review powers?
 - Will the regulatory board operate in a manner consistent with federal and state antitrust laws (2015 Supreme Court decision in North Carolina)?
- How will the cost of administering the regulatory entity be financed?

TAKEAWAY FOR POLICYMAKERS

Creation of new occupational regulations should be carefully considered.

WHO IS ADVOCATING FOR THE PROPOSED REGULATION?

- Are members of the public proposing or supporting the regulatory legislation?
- What associations, organizations, or other groups in the jurisdiction represent the professional?
 - Approximately how many of the professionals belong to each group?
 - Are there different levels of practice in each group?
 - Are different philosophies of practice expounded by the various professional groups, and are these taken into consideration?
- Which of the above groups are actively involved in sponsoring regulatory legislation? Are other groups supporting the effort, and if not, why?



TAKEAWAY FOR POLICYMAKERS

Who benefits from this new regulation, the public who is made safer, or the practitioners whose competition is limited by limiting the free market?



LICENSING NOTES FROM LAURA

Many—including perhaps the premier authority on occupational licensing, Professor Morris Kleiner, and the late Nobel laureate in economics, Milton Friedman—have argued that occupational licensing in America has taken on a guild-like character. These “modern guilds” have behaved much as the medieval guilds, depending on grants of authority by the state (through licensing) to control whom, and how many, may enter the occupation, and what the limits of practice are.

In 2015, a U.S. Supreme Court case, *North Carolina Board of Dental Examiners v. Federal Trade Commission*, brought the issue of occupational licensing to the forefront, and helped to spur the interest in job licensing reform that is spreading in statehouses throughout the country. The court’s holding suggested that states must be vigilant in supervising licensing boards to make sure that they are not in violation of anti-trust laws.

WHAT ARE THE OPINIONS OF THE STATE REGULATORY AUTHORITIES, THE ASSOCIATIONS, AND INTEREST GROUPS REGARDING THE PROPOSED REGULATIONS?

- How should the views of these entities and their recommendations be considered when evaluating proposed regulations?
- Can state regulatory authorities help resolve constituent issues by utilizing existing laws and therefore protect the public without imposing new regulation?
- Do regulatory officials have the expertise to recommend the appropriate model for the regulation?

TAKEAWAY FOR POLICYMAKERS

Look at additional regulation or new regulation of occupations skeptically.

WOULD THE PROPOSED REGULATION UNFAIRLY DISADVANTAGE SPECIAL POPULATIONS SUCH AS VETERANS, INTERNATIONAL TRAINEES, INDIVIDUALS WITH CRIMINAL BACKGROUNDS, MILITARY PERSONNEL AND SPOUSES, IMMIGRANTS, LONG-TERM UNEMPLOYED, ETC.?

TAKEAWAY FOR POLICYMAKERS

Consider whether regulations will leave the state more or less competitive in the labor market, and whether it will provide more or less opportunity for entrepreneurs.

IF THE LEGISLATION IS ASSOCIATED WITH THE HEALTH PROFESSIONS, WILL THE PROPOSED REGULATION ADVERSELY AFFECT HEALTH EQUITY AND HEALTH DISPARITIES BY LIMITING ACCESS TO CERTAIN TYPES OF CARE OR SERVICE TO SEGMENTS OF THE PUBLIC, INCLUDING GEOGRAPHIC LOCATION?

TAKEAWAY FOR POLICYMAKERS

Look beyond the requests for licensing—will licensing which limits practice of those who aren't licensed limit the ability of patients to get services that would be adequate for them?



LICENSING NOTES FROM LAURA

More and more, it appears that seeking licensing—asking to be regulated, and in most cases, asking for a monopoly on the use of a title—is a way for new professions to obtain a sense of legitimacy in the public eye.

From a regulatory and economic point of view, granting “Legitimacy Through Licensing” is dangerous.

As new fields are developed, the move to licensure increases bureaucracy; and increases costs of entry into occupations. That, in turn, limits who can enter, and raises prices for consumers, as fewer people can meet the demand.

WOULD THE INTRODUCTION OF BARRIERS TO ENTRY INTO A PROFESSION OR OCCUPATION RESULT IN A LACK OF MARKET COMPETITION AND GREATER COSTS OR REDUCED QUALITY OF CARE TO SOCIETY AS A WHOLE?

- Is the occupation seeking to enhance its status by requesting its own regulatory law?
- Is the profession claiming it is prevented from rendering services for which its members are qualified because of the legal scope of practice of another entity? If so, what efforts have been made to address these issues?
- Is the profession seeking licensure in order to gain reimbursement under federal or state programs or from private insurers? Will licensure GUARANTEE reimbursement, or is it speculative?
- Is the profession attempting to establish title protection that will disadvantage current professionals in the market?
- Is the public seeking greater accountability of the profession?
- What would be the impact of the regulation on consumer choice?
- Would the regulation create barriers to access related to geography, income, or culture?

TAKEAWAY FOR POLICYMAKERS
Keep the importance of market competition in mind!

WHAT IS THE PUBLIC BENEFIT OF THE REGULATION?

- Would the benefit to the public outweigh any additional costs to the public?
- How will regulation help the public identify qualified practitioners?
- Do other states regulate this profession? If not, why not? If so, what regulatory models do the other states employ?
- How will regulation assure that practitioners are competent?
 - What standards are proposed for granting credentials?
 - Are all standards job-related?
 - How do these standards compare with those required by other states?
 - If standards differ from those of other states, can the difference(s) be justified?
 - Are there education/training and experience requirements? How do they compare to other states?
- How will credential standards be verified?
- What barriers to access would regulation impose on the public? What barriers to providing services would regulation impose on the regulated market participants?
 - Do any national compacts or regional license reciprocity agreements or endorsement statutes exist to facilitate licensing or practice in multiple jurisdictions?
- Can the required knowledge and skills be acquired through both formal education and alternative avenues? Why or why not?
 - Will licensure in another state provide an avenue for an individual to be credentialed in this state?

Continued on next page.



WHAT IS THE PUBLIC BENEFIT OF THE REGULATION? (CONTINUED)

- Will applicants for licensure be required to pass an examination?
 - Does an examination already exist?
 - Does it meet national, professional, and legal testing standards?
 - If no examination exists, who will develop it and how will the development costs be met?
 - What are the qualifications of the individuals who would develop the examination?
- Is there a grandparent clause in the proposed regulation?
 - Why is it necessary?
 - Will the required knowledge and skills of the grandparented practitioners be verified?
 - Will grandparented professionals be required to take an examination?
- How will continued professional competence be measured?
 - Will the regulation include an expiration date for the license?
 - Will the expiration date be reflective of how quickly the knowledge and skills of the occupation change?
 - Before renewal, how will practitioners demonstrate continuing education and competence?
- How will the public's complaints against practitioners be handled?
 - Will there be a method for receiving complaints?
 - Who will conduct timely and thorough investigations of complaints?
 - Will there be an effective and fair procedure for disciplining incompetent or unethical practitioners?
 - What are the grounds for the suspension or revocation of credentials?
 - What other disciplinary options, such as fines or restitution, will be available?
- Is it feasible to establish a restitution fund so that the public will be able to recover money lost through the actions of unscrupulous practitioners?

CONCLUSIONS

1. It is the decades-long policy of the state of Nebraska that occupational regulation should only be used to protect the public health, safety, and welfare.
2. That policy was reaffirmed with the passage of LB299 in 2018 and further affirms that when regulation by the state is necessary, the least restrictive means possible should be employed.
3. Legislators should always look foremost at the needs of the general public in making their regulatory decisions.



SHOULD YOU HAVE ANY QUESTIONS

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Please feel free to contact her should you have any questions, or if you would like to learn more about occupational licensing.

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