HOUSE BILL 1685-FN

AN ACT establishing a statutory commission for oversight over occupational regulation.


COMMITTEE: Executive Departments and Administration

ANALYSIS

This bill establishes an occupational regulation review commission to determine if regulatory boards utilize the least restrictive regulation. The bill requires a continuing review of all occupational boards and provides for analysis of legislation and rules before enactment or adoption.

Explanation: Matter added to current law appears in **bold italics.**
Matter removed from current law appears [in brackets and struckthrough.]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.
HB 1685-FN - AS INTRODUCED

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eighteen

AN ACT establishing a statutory commission for oversight over occupational regulation.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Chapter; Occupational Regulation Review Commission. Amend RSA by inserting after chapter 332-K the following new chapter:

CHAPTER 332-L

OCCUPATIONAL REGULATION REVIEW COMMISSION

332-L:1 Policy. For occupational regulations and their boards, it is the policy of the state that the right of an individual to pursue an occupation is a fundamental right, and that 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.

332-L:2 Definitions. In this chapter:

I. "Certification" means a voluntary program in which (a) a private organization or (b) the state government grants nontransferable recognition to an individual who meets personal qualifications established by (a) the private organization or (b) the legislature. Upon approval, the individual may use "certified" as a designated title. A non-certified individual also may perform the lawful occupation for compensation but may not use the title "certified."

II. "Commission" means the occupational review commission established in this chapter.

III. "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.

IV. "Least restrictive regulation" means, from least to most restrictive:

(a) Market competition.
(b) Third-party or consumer-created ratings and reviews.
(c) Private certification.
(d) Voluntary bonding or insurance.
(e) Specific private civil cause of action to remedy consumer harm.
(f) Deceptive trade practices acts.
(g) Mandatory disclosure of attributes of the specific good or service.
(h) Regulation of the process of providing the specific good or service.
(i) Inspection.
(j) Bonding.
(k) Insurance.
(l) Registration.
(m) Government certification.
(n) Specialty occupational license for medical reimbursement.
(o) Occupational license.

V. "Occupational license" is a nontransferable authorization in law for an individual to perform exclusively a lawful occupation for compensation based on meeting personal qualifications established by the legislature. In an occupation for which a license is required, it is illegal for an individual who does not possess a valid occupational license to perform the occupation for compensation.

VI. "Occupational regulation" means a statute, rule, practice, policy, or other state law that allows an individual to use an occupational title or work in a lawful occupation. It includes registration, certification, and occupational license. It excludes a business license, facility license, building permit, or zoning and land use regulation, except to the extent those state laws regulate an individual's personal qualifications to perform a lawful occupation.

VII. "Personal qualifications" mean criteria related to an individual's personal background and characteristics, including completion of an approved educational program, satisfactory performance on an examination, work experience, other evidence of attainment of requisite skills or knowledge, moral standing, criminal history, and completion of continuing education.

VIII. "Registration" means a requirement to give notice to the government that may include the individual's name and address, the individual's agent for service of process, the location of the activity to be performed, and a description of the service the individual provides. "Registration" does not include personal qualifications but may require a bond or insurance. Upon the government's receipt of notice, the individual may use "registered" as a designated title. A non-registered individual may not perform the occupation for compensation or use "registered" as a designated title. "Registration" is not transferable.

IX. "Specialty occupational license for medical reimbursement" means a non-transferable authorization in law for an individual to qualify for payment or reimbursement from a government agency for the non-exclusive provision of medical services based on meeting personal qualifications established by the legislature. A private company may recognize this credential. Notwithstanding this specialty license, it is legal for a person regulated under another occupational regulation to provide similar services as defined in that statute for compensation and reimbursement. It is also legal for an individual who does not possess this specialty license to provide the identified medical services for compensation but the non-licensed individual shall not qualify for payment or reimbursement from a government agency.

332-L:3 Occupational Regulation Review Commission. There is established a commission to review occupational regulation as provided in this chapter to determine if the policy of the state is effectively implemented.

I. The members of the commission shall be as follows:
(a) Three members of the house of representatives, one of whom shall be a member of the executive departments and administration committee, and one of whom shall be a member of the joint legislative committee on administrative rules, appointed by the speaker of the house of representatives.

(b) Two members of the senate, one of whom shall be a member of the joint legislative committee on administrative rules, appointed by the president of the senate.

(c) The executive director of the office of professional licensure and certification, or designee.

(d) The commissioner of the department of business and economic affairs, or designee.

(e) A public member who is representative of small business owners, appointed by the governor for a 2-year term.

II. Legislative members of the commission shall receive mileage at the legislative rate when attending to the duties of the commission.

III. The commission shall review New Hampshire occupational laws for compliance with the policies and practices required by this chapter. Based on the commission’s findings, the commission shall:

(a) Decide which regulatory schemes, if any, should be reformed.

(b) Develop a mechanism for mandatory disclosure to consumers when a practitioner has chosen not to be licensed.

(c) Provide a mechanism of enforcement if the disclosure to consumers is not properly made by an unlicensed practitioner.

(d) Develop the necessary legislation to accomplish the commission’s findings.

IV. The members of the commission shall elect a chairperson from among the members. The first meeting of the commission shall be called by the first-named house member. The commission shall hold regular meetings to accomplish its duties. Four members of the commission shall constitute a quorum.

V. The commission shall report its findings and any recommendations for proposed legislation to the speaker of the house of representatives, the president of the senate, the house clerk, the senate clerk, the governor, and the state library.

332-L:4 Sunrise and Sunset Reviews of Occupational Regulations.

I. The speaker of the house of representatives and the president of the senate shall assign to the commission the responsibility to analyze occupational regulations.

II. (a) The commission is responsible for reviewing legislation to enact or modify an occupational regulation to ensure compliance with the policies in RSA 332-L:1.

(b) The commission shall require proponents to submit evidence of present, significant, and substantiated harms to consumers in the state. The commission also may require information from others knowledgeable about the occupation, labor-market economics, or other factors.

(c) The commission shall determine if the proposed regulation meets the state's policy in
RSA 332-L:1 of using the least restrictive regulation necessary to protect consumers from present, significant, and empirically substantiated harms.

(d) The commission's analysis shall employ a rebuttable presumption that market competition and private remedies are sufficient to protect consumers.

(e) The presumption in subparagraph (d) may be rebutted if the commission finds credible empirical evidence of a systematic problem that warrants enactment of a government regulation to protect consumers. If such a problem is present in the state, the commission shall recommend the least restrictive government regulation that addresses the problem. The commission shall use the following guideline to form its recommendation:

(1) If the need is to protect consumers against fraud, the commission's presumptive recommendation shall be to strengthen powers under the state's deceptive trade practices acts or require disclosures that reduce misleading attributes of the specific good or service.

(2) If the need is to protect consumers against uncleanly facilities or to promote general health and safety, the commission's presumptive recommendation shall be to require periodic inspections of the provider's facility.

(3) If the need is to protect consumers against potential damages from a provider's failure to complete a contract fully or to standards, the commission's presumptive recommendation shall be to require the provider to be bonded.

(4) If the need is to protect a person who is not party to a contract between the provider and consumer (externalities), the commission's presumptive recommendation shall be to require the provider to have insurance.

(5) If the need is to protect consumers against potential damages by a transient or fly-by-night provider, the commission's presumptive recommendation shall be to require the provider to register the provider's business with the secretary of state.

(6) If the need is to protect consumers against a shortfall or imbalance of knowledge about the good or service relative to the seller's knowledge (asymmetrical information), the commission's presumptive recommendation shall be to enact voluntary private or government certification.

(7) If the need is to qualify providers of new or highly-specialized medical services for reimbursement by the state, the commission's presumptive recommendation shall be to enact a specialty license for medical reimbursement.

(f) The commission's analysis of the need for regulation in subparagraph (e) shall include the effects of legislation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs, and other effects.

(g) The commission's analysis of the need for regulation in subparagraph (e) also shall compare the legislation to whether and how other states regulate the occupation.

(h) The commission shall report its findings to the initial and subsequent legislative committees that will hear and consider the legislation.
III. Beginning on July 1, 2018, the commission will use the criteria in paragraph II to review annually approximately 20 percent of the state's occupational regulations. The commission shall review all occupational regulations over a period of 5 years.

IV. Beginning on July 1, 2018, the commission shall report annually the findings of its reviews to the speaker of the house of representatives, the president of the senate, the governor and the attorney general. In its report, the commission shall recommend the legislature enact new legislation that (a) repeals the occupational regulations, (b) converts the occupational regulations to less restrictive regulations, (c) instructs the relevant licensing board or agency to adopt revised rules reflecting the legislature's decision to use a less restrictive regulation, or (d) reflects other recommendations to the legislature. The commission also may recommend that no new legislation be enacted.

332-L:5 Petition for Review of a Criminal Record.

I. The right of an individual to pursue an occupation is a fundamental right.

II. An individual with a criminal record may petition a licensing board, agency, department, or other state or local issuer of occupational licenses, hereafter "board", at any time, including before obtaining any required education or training, for a determination of whether the individual's criminal record will disqualify the individual from obtaining state recognition.

III. The individual shall include in the petition the individual's criminal record or authorize the board to obtain the individual's criminal record.

IV. The individual may include additional information about the individual's current circumstances, including the time since the offense, completion of the criminal sentence, other evidence of rehabilitation, testimonials, employment history, and employment aspirations.

V. The board is authorized to determine whether the individual's criminal record disqualifies the individual from obtaining state recognition.

VI. Notwithstanding any other statute or rule, the board may find the individual's criminal record disqualifies the individual from obtaining state recognition only if:

   (a) The individual's criminal record includes a conviction for a felony or violent misdemeanor; and

   (b) The board concludes the state has an important interest in protecting public safety that is superior to the individual's right. The board may make this conclusion only if it determines, by clear and convincing evidence at the time of the petition, that:

       (1) The specific offense for which the individual was convicted is substantially related to the state's interest;

       (2) The individual, based on the nature of the specific offense for which the individual was convicted and the individual's current circumstances in paragraph IV, is more likely to re-offend by virtue of having the license than if the individual did not have the license; and

       (3) A re-offense will cause greater harm than it would if the individual did not have the license.
VII. The board shall issue its determination within 90 days after the board receives the petition. The determination shall be in writing and include the criminal record, findings of fact, and conclusions of law.

VIII. If the board determines the state's interest is superior to the individual's right, the board may advise the individual of actions the individual may take to remedy the disqualification. The individual may submit a revised petition reflecting the completion of the remedies at any time after 90 days following the board's judgment.

IX. The individual may appeal the board's determination in paragraph VII as provided for in RSA 541-A.

X. The individual may submit a new petition to the board at any time after 2 years following a final judgment in the initial petition.

XI. The board may rescind its determination at any time if the individual is convicted of an additional offense that the board determines meets the elements in paragraph VI.

XII. The board may charge a fee to recoup its costs not to exceed $100 for each petition.

XIII. The office of professional licensure and certification shall establish an annual reporting requirement of the (a) number of applicants petitioning each board, (b) the numbers of each board's approvals and denials, (c) the type of offenses for which each board approved or denied the petitions, and (d) other data the office determines. The office will compile and publish annually a report on a searchable public website.

332-L:6 Judicial Review. A court shall make its own findings of fact and conclusions of law. It shall not grant a presumption to legislative or administrative determinations of harm to the public health or safety, or that the regulation is the least restrictive means of furthering a governmental interest.

2 Effective Date. This act shall take effect July 1, 2018.
AN ACT establishing a statutory commission for oversight over occupational regulation.

FISCAL IMPACT:  [ X ] State  [ ] County  [ ] Local  [ ] None

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**Funding Source:**  [ X ] General  [ ] Education  [ ] Highway  [ ] Other

**METHODOLOGY:**

This bill establishes an occupational regulation review commission to determine if regulatory boards utilize the least restrictive regulations. The commission shall review occupational laws and determine which regulatory schemes, if any, shall be reformed; develop mechanisms for mandatory disclosure to consumers when a practitioner has chosen not to be licensed; provide a mechanism of enforcement if the disclosure to consumers is not properly made by an unlicensed practitioner; and develop necessary legislation and report findings annually.

This bill also permits individuals with criminal records to petition a licensing board, agency, department or other state or local issuer of occupational licenses for a determination of whether the individual's record will disqualify the individual from obtaining state recognition. A licensing board may charge a fee of $100 for each petition. The Office of Professional Licensure and Certification (OPLC) shall establish an annual reporting requirement of information on petitions to each board, and shall compile and annually publish such report on a searchable public website.

The OPLC states this bill may result in mileage reimbursement for some commission members or the elimination of board reimbursement fees for dissolved boards resulting in an indeterminable impact on state expenditures. This bill will also have an indeterminable impact on state general fund revenue as some revenue will be lost if some professions are not required to pay licensing fees and revenue may be gained from individuals with criminal records who are allowed to petition and receive licensing from occupational boards. If the commission requires administrative support by OPLC, 1 full-time Program Specialist II (LG 21, Step 1) would be required to fully support the commission and respond to and track petitions for criminal record
consideration. Total cost for this position would be $69,000 for FY 2019; $72,000 for FY 2020; $76,000 for FY 2021 and $79,000 for FY 2022. All other costs or revenues are indeterminable.

AGENCIES CONTACTED:

Office of Professional Licensure and Certification