WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

Senate Bill 492

BY SENATOR MAYNARD

[Introduced January 31, 2019; Referred
to the Committee on Government Organization; and then
to the Committee on the Judiciary]
A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §30-1-22, relating to permitting unlicensed persons to be hired by consumers; providing for a short title; providing for definitions; providing for disclosure information; providing for an example disclosure form; providing for working without a license; providing for defense and relief; providing for remedies; providing for applicability; providing for limitations; providing for preemption of state statutes; and providing for an effective date.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1. GENERAL PROVISIONS APPLICABLE TO ALL STATE BOARDS OF EXAMINATION OR REGISTRATION REFERRED TO IN CHAPTER.

§30-1-22. The occupational licensing consumer choice act.

(a) Short title. – This section may be cited as "The Occupational Licensing Consumer Choice Act."

(b) Legislative purpose. – The Legislature intends for this act to:

(1) Expand opportunities, promote innovation and increase competition by allowing consumers to make decisions in hiring and contracting with providers of their choice;

(2) Relieve providers from burdensome occupational licenses;

(3) Promote the use of less-restrictive regulatory alternatives to occupational licenses to protect consumers' health and safety;

(4) Encourage trade associations and similar private organizations to self-regulate;

(5) Promote interstate mobility and flexible labor markets; and

(6) Reduce the exposure of members of occupational licensing boards to liability under federal and state antitrust laws.

(c) Definitions. – For purposes of this section, the following definitions shall apply:

“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 human
person (person) selling them is subject to the requirements of an occupational license.

“Nonlicensed disclosure” means a disclosure that a person is working in a lawful occupation without an occupational license as required by subsection (d) of this section.

“Occupational license” means a statute, rule, policy, enforcement practice or action, or any other requirement by a state authority that requires a person to obtain and maintain personal qualifications to work in a lawful occupation. It excludes a business license, facility license, building permit, inspection requirement, building code, zoning law, or land-use regulation except to the extent any of those legal requirements regulate a person’s personal qualifications to perform a lawful occupation.

“Personal qualifications” are criteria related to a person’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, and completion of continuing education.

“State authority” means any state agency, department, board, commission, or other governing body, and includes executive and administrative officers of such bodies.

(d) Nonlicensed disclosure information and means. – (1) To provide a service for which state law otherwise requires an occupational license, an unlicensed person must make a nonlicensed disclosure using no less than a 14-point font set in boldface that:

(A) The unlicensed person is working in a lawful occupation without a license;

(B) The state otherwise requires that providers of the service hold an occupational license; and

(C) The unlicensed person is allowed to provide the service under §30-1-22 of this code.

(2) The unlicensed person must make the nonlicensed disclosure in subdivision (1) of this subsection (d) by at least one of the following means:

(A) By notice on the homepage of the unlicensed person’s website;
(B) By the unlicensed person sending a letter, email or other written correspondence to
the consumer prior to providing the service;

(C) By notice posted at the entry of the facility where the consumer enters to receive
services from the unlicensed person; or

(D) In a written contract or purchase order signed by unlicensed person and the consumer
prior to providing the service.

(e) Example of a nonlicensed disclosure by contract – An unlicensed person may meet
the requirements in subsection (d) of this section by using this or a substantially similar form:

I. PROVIDER’s DISCLOSURE: “West Virginia state law requires providers of the service
that you, the consumer, are agreeing to purchase in this contract to hold an occupational license.
I am not licensed by the state, but by providing this nonlicensed disclosure I am allowed by [cite
this section] to perform the service in this contract.

__________________________________________________
Unlicensed Person’s Name (Printed) Unlicensed Person’s Website

__________________________________________________
Unlicensed Person’s Physical Address Unlicensed Person’s

E-mail Address

(____)_________________________ (____)_________________________
Unlicensed Person’s Telephone Number Unlicensed Person’s 2nd Telephone Number

Service provided:

[insert description]

__________________________________________________
Unlicensed Person’s Signature Date
The unlicensed person may list the private trade organizations to which the unlicensed person belongs and any titles or credentials the unlicensed person earned from those organizations.

II. CONSUMER ACKNOWLEDGEMENT: I acknowledge I am entering into an agreement with a provider who does not hold an occupational license. I understand West Virginia licenses this occupation, and I may contract with either a licensed or unlicensed person for this service.

____________________________________  __________________
Consumer’s Signature  Date

(f) Working without an occupational license. – (1) A person otherwise subject to the requirements of an occupational license by a state authority may work in West Virginia without an occupational license if the person makes a nonlicensed disclosure.

(2) An employer or contractor may: (A) Hire or contract with an unlicensed person otherwise subject to the requirements of occupational license; and (B) offer that unlicensed person’s service to a consumer if the employer or contractor makes a nonlicensed disclosure.

(3) An unlicensed person may not be denied any benefit provided to a person who holds an occupational license as long as: (A) The unlicensed person; or (B) the unlicensed person’s employer or contractor makes a nonlicensed disclosure.

(4) A state authority must disclose on its internet website and all written or digital and online application forms for occupational licenses that a person may work in West Virginia without an occupational license otherwise required if: (A) The unlicensed person; or (B) the unlicensed person’s employer or contractor makes a nonlicensed disclosure.

(g) Defense and relief. –

(1) Production of a nonlicensed disclosure is a defense against any administrative, civil or criminal action brought by a state authority for the purpose of enforcing the personal qualifications necessary to obtain and maintain an occupational license.

(2) Production of a nonlicense disclosure shall require immediate dismissal with prejudice
of any administrative, civil or criminal action brought by a state authority for the purpose of enforcing the personal qualifications necessary to obtain and maintain an occupational license against an unlicensed person engaged in a lawful occupation.

(h) Remedy. - In addition to the remedies otherwise provided by law, any consumer injured by an unlicensed person operating under this statutory code section may bring in small-claims or district court a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality.

(i) Applicability exceptions. - The act applies to the regulation of all occupations in West Virginia except for the following providers of human healthcare:

(1) Medical Doctors in §30-3-1 et. seq of this code;
(2) Registered nurses in §30-7-1 et. seq of this code;
(3) License practical nurse in §30-7A-1 et. seq of this code;
(4) Dentists in §30-4-1 et. seq of this code; and
(5) Pharmacists in §30-5-1 et. seq of this code.

(j) Limitations. – Nothing in this section shall be construed to require:

(1) A state authority, county or other governmental body to employ or contract with a person who does not hold an occupational license;
(2) The federal government to grant credentials, privileges or benefits under federal law to a person who does not hold an occupational license;
(3) A consumer to employ or contract with an unlicensed person;
(4) An employer, person or company to employ or contract with an unlicensed person;
(5) An insurance or bonding company to issue a policy or bond to an unlicensed person;
(6) A judicial court to allow an unlicensed person to practice law before it on behalf of a consumer;
(7) A state authority to refrain ordering the revocation of occupational license and prohibiting the person from working as an unlicensed person in that same occupation;

(8) A state authority to refrain from obtaining a court order enjoining a person whose previously-held occupational license was revoked from working as an unlicensed person in that same occupation;

(9) A state authority to refrain from enforcing health-and-safety regulations, including regulations permitting inspections, which are not related to the personal qualifications necessary to obtain and maintain an occupational license; or

(10) A private certification organization to grant or deny its private certification to any person.

(k) Further Limitations. – This act shall not be construed to impose any new or additional requirement on a person who is engaged in a lawful occupation that is not subject to the requirements of an occupational license.

(l) Preemption. – This section preempts all other statutes in West Virginia.

(m) Effective Date. – This section will become effective upon passage.

NOTE: The purpose of this bill is to create the Occupational Licensing Consumer Choice Act to allow persons to work for employers or consumers without first obtaining a professional license.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.