Introduced

Senate Bill 646

BY SENATOR MAYNARD

[Introduced January 29, 2020; referred
to the Committee on Government Organization]
A BILL to amend and reenact §30-1A-1, §30-1A-2, §30-1A-3, §30-1A-4, §30-1A-5, and §30-1A-6 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §30-1A-1a, all relating to reviewing proposals for new occupational regulation and existing occupational regulation provisions; declaring the state policy for regulation of occupations; defining terms; establishing procedures and criteria for the review of proposals or applications for the regulation of an occupation; specifying required contents to include in an application; outlining a methodology to address identified risks or harms; setting time requirement for completion of review and report; providing for public hearings and additional findings; requiring adoption of certain rules of both houses of the Legislature; outlining a process for annual review of a portion of existing licensing authorities and issuing public reports and recommendations therefrom; and establishing canons of interpretation.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1A. PROCEDURE FOR REGULATION OF OCCUPATIONS AND PROFESSIONS.

§30-1A-1. Legislative findings; policy.

The Legislature finds that regulation should be imposed on an occupation or profession only when necessary for the protection of public health and safety. The Legislature further finds that establishing a procedure for reviewing the necessity of regulating an occupation or profession prior to enacting laws for such regulation and analyzing existing occupational regulations will better enable it to evaluate the need for the regulation and to determine the least restrictive regulatory alternative consistent with public health and safety.

For occupational regulations and the boards of the state, it is the policy of the state that:

(1) The right of an individual to pursue a lawful occupation is a fundamental right;

(2) Where the state finds it is necessary to displace competition, it will use the least
restrictive regulation to protect consumers from present, significant, and substantiated harms that
threaten public safety; and

(3) Legislative leaders will assign the responsibility to review legislation and laws related
to occupational regulations.

§30-1A-1a. Definitions.

As used in this article:

“Government certification” means a voluntary, government-granted, and nontransferable
recognition to an individual who meets personal qualifications related to a lawful occupation. Upon
the government’s initial and continuing approval, the individual may use “government certified” or
“state certified” as a title. A non-certified individual also may perform the lawful occupation for
compensation but may not use the title “government certified” or “state certified”. In this chapter,
the term “government certification” is not synonymous with “occupational license”. It also is not
intended to include credentials, such as those used for medical-board certification or held by a
certified public accountant, that are prerequisites to working lawfully in an occupation;

“Government registration” means a requirement to give notice to the government that may
include the individual’s name and address, the individual’s agent for service of process, the
location of the activity to be performed, and a description of the service the individual provides.
“Government registration” does not include personal qualifications and is not transferable but it
may require a bond or insurance. Upon the government’s receipt of notice, the individual may use
“government registered” as a title. A non-registered individual may not perform the occupation for
compensation or use “government registered” as a title. In this chapter, “government registration”
is not intended to be synonymous with “occupational license”. It also is not intended to include
credentials, such as those held by a registered nurse, which are prerequisites to working lawfully
in an occupation;

“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;
“Least restrictive regulation” means, from least to most restrictive:

1. Market competition,
2. Third-party or consumer-created ratings and reviews,
3. Private certification,
4. Voluntary bonding or insurance,
5. Specific private civil cause of action to remedy consumer harm,
6. Deceptive trade practice act,
7. Mandatory disclosure of attributes of the specific good or service,
8. Regulation of the process of providing the specific good or service,
9. Regulation of the facility where the specific good or service is sold,
10. Inspection,
11. Bonding,
12. Insurance,
13. Government registration,
14. Government certification,
15. Specialty occupational certification solely for medical reimbursement, and

“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:

“Occupational regulation” means a statute, rule, practice, policy, or other state law that allows an individual to use an occupational title or work in a lawful occupation. It includes government registration, government certification, and occupational license. It excludes a business license, facility license, building permit, or zoning and land use regulation except to the extent those state laws regulate an individual’s personal qualifications to perform a lawful
“Personal qualifications” are criteria related to an individual’s personal background and characteristics. They may include one or more of the following: completion of an approved educational program, satisfactory performance on an examination, work experience, apprenticeship, other evidence of attainment of requisite knowledge and skills, passing a review of the individual’s criminal record, and completion of continuing education;

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

“Specialty occupational certification solely 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 new or niche medical services based on meeting personal qualifications established by the Legislature. A private health insurance company or other private company may recognize this credential. Notwithstanding this specialty certification, 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 certification to provide the identified medical services for compensation, but the non-certified individual will not qualify for payment or reimbursement from a government agency.

§30-1A-2. Required application for regulation of professional or occupational group; application and reporting dates.

(a) The Joint Standing Committee on Government Organization is responsible for facilitating the review of all legislation to enact or modify an occupational regulation to ensure compliance with the policy stated in §30-1A-1 of this code. The Joint Standing Committee on Government Organization shall refer the review of a proposal for regulation of any unregulated profession or occupation or any revision or expansion of the scope of practice of a regulated
profession or occupation to the Performance Evaluation and Research Division of the Office of
the Legislative Auditor.

(a) Any professional or occupational group or organization, any individual or any other
interested party which proposes the regulation of any unregulated professional or occupational
group or organization, or who proposes to establish, revise or expand
the scope of practice of a regulated profession or occupation shall submit an application to the
Joint Standing Committee on Government Organization, as set out in this article.

(b) The Joint Standing Committee on Government Organization may only accept an
application for regulation of a professional or occupational group or organization, or establishment, revision or expansion of the scope of practice of a regulated
profession or occupation, when the party submitting an application files with the committee a
statement of support for the proposed regulation which has been signed by at least 10 residents
or citizens of the State of West Virginia who are members of the professional or occupational
group or organization for which regulation is being sought, or for which establishment, revision or
expansion of the scope of practice of a regulated profession or occupation is being sought.

(c) The completed application shall contain:

(1) A description of the professional or occupational group or organization for which regulation is proposed, or for which establishment, revision or expansion of
the scope of practice of a regulated profession or occupation is proposed, including a list of
associations, organizations and other groups currently representing the practitioners in this state,
and an estimate of the number of practitioners in each group;

(2) A definition of the problem and the reasons why regulation or establishment, revision
or expansion of the scope of practice is necessary;

(3) The reasons why government certification, government registration, licensure or
occupational license or other type of regulation is being requested and why that regulatory
alternative was chosen over a less restrictive alternative;

(4) A detailed statement of the proposed funding mechanism to pay the administrative
costs of the regulation or the establishment, revision or expansion of the scope of practice, or of
the fee structure conforming with the statutory requirements of financial autonomy as set out in
this chapter;
(5) A detailed statement of the location and manner in which the group plans to maintain
records which are accessible to the public as set out in this chapter;
(6) The benefit to the public that would result from the proposed regulation or
establishment, revision or expansion of the scope of practice; and
(7) The cost of the proposed regulation or establishment, revision or expansion of the
scope of practice; and
(8) Evidence, if any, of present, significant and substantiated harms to consumers in the
state.
§30-1A-3. Analysis and evaluation of application.
(a) The Joint Committee on Government Organization shall refer the completed
application of the professional or occupational group or organization to the Performance
Evaluation and Research Division of the Office of the Legislative Auditor.
(b) The Performance Evaluation and Research Division of the Office of the Legislative
Auditor shall conduct an analysis and evaluation of the application. The analysis and evaluation
shall be based upon the criteria listed in subsection (c) of this section. The Performance
Evaluation and Research Division of the Office of the Legislative Auditor shall submit a report,
and such supporting materials as may be required, to the Joint Standing Committee on
Government Organization, as set out in this section.
(c) The Performance Evaluation and Research Division shall determine if the proposed
regulation meets the state's policy in §30-1A-1(b) of this code of using the least restrictive
regulation necessary to protect consumers from present, significant, and substantiated harms.
(d) The Performance Evaluation and Research Division’s analysis in subsection (c) of this
section will employ a rebuttable presumption that consumers are sufficiently protected by market
competition and private remedies, as included in the definition of “least restrictive regulation” in
§30-1A-1a of this code. The Joint Standing Committee on Government Organization will give
added consideration to the use of private certification programs that allow a provider to give
consumers information about the provider’s knowledge, skills, and association with a private
certification organization.

(e) The Performance Evaluation and Research Division may rebut the presumption in
subsection (d) of this section if it finds both credible, empirical evidence of present, significant,
and substantiated harm, and that consumers do not have the information or means to protect
themselves against such harm. If evidence of such unmanageable harm is found, the committee
will recommend the least restrictive government regulation to address the harm.

(f) The Performance Evaluation and Research Division of the Office of the Legislative
Auditor will use the following guidelines to form its recommendations reported pursuant to
subsections (j) or (k) of this section. If the harm arises from:

(1) Contractual disputes, including pricing disputes, the office may recommend enacting
a specific civil cause of action in small-claims court or district court to remedy consumer harm.
This cause of action may provide for reimbursement of the attorney’s fees or court costs, if a
consumer’s claim is successful;

(2) Fraud, the office may recommend strengthening powers under the state’s deceptive
trade practices acts or requiring disclosures that will reduce misleading attributes of the specific
good or service;

(3) General health and safety risks, the office may recommend enacting a regulation on
the related process or requiring a facility license;

(4) Unclean facilities, the office may recommend requiring periodic facility inspections;

(5) A provider’s failure to complete a contract fully or to standards, the office may
recommend requiring the provider to be bonded;

(6) A lack of protection for a person who is not a party to a contract between providers and
consumers, the office may recommend requiring the provider have insurance;

(7) Transactions with transient, out-of-state, or fly-by-night providers, the office may
recommend requiring the provider register its business with the Secretary of State;

(8) A shortfall or imbalance in the consumer's knowledge about the good or service relative to the provider's knowledge (asymmetrical information), the office may recommend enacting government certification;

(9) An inability to qualify providers of new or highly-specialized medical services for reimbursement by the state, the office may recommend enacting a specialty certification solely for medical reimbursement;

(10) A systematic information shortfall in which a reasonable consumer of the service is permanently unable to distinguish between the quality of providers and there is an absence of institutions that provide guidance to consumers, the office may recommend enacting an occupational license; and

(11) The need to address multiple types of harm, the office may recommend a combination of regulations. This may include a government regulation combined with a private remedy including third-party or consumer-created ratings and reviews, or private certification.

(g) The Performance Evaluation and Research Division's analysis of the need for regulation in subsection (e) of this section shall include the effects of legislation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs and other effects.

(h) The Performance Evaluation and Research Division's analysis of the need for regulation in subsection (e) of this section also shall compare the legislation to whether and how other states regulate the occupation, including the occupation's scope of practice that other states use, and the personal qualifications other states require.

(i) The Performance Evaluation and Research Division may also request information from state agencies that contract with individuals in regulated occupations and others knowledgeable of the occupation, labor-market economics, or other factors, costs and benefits.

(j) For an application proposing the regulation of an unregulated professional or occupational group or organization, the Performance Evaluation and Research Division's report
shall include evaluation, analysis, and findings as to:

(1) Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety, or welfare of the public, and whether the potential for the harm is easily recognizable and not remote or dependent upon tenuous argument the evidence of present, significant, and substantiated harms to consumers in the state;

(2) Whether the practice of the profession or occupation requires specialized skill or training which is readily measurable or quantifiable so that examination or training requirements would reasonably assure initial and continuing professional or occupational competence The requisite personal qualifications, if any;

(3) The scope of practice, if applicable;

(3) (4) Whether the public can be adequately protected by other means in a more cost-effective manner If regulation is required to address evidence of harm to consumers in the state, the least restrictive regulation of the occupation or profession; and

(4) (5) Whether the professional or occupational group or organization should be regulated as proposed in the application.

(d) (k) For an application proposing the establishment, revision, or expansion of the scope of practice of a regulated profession or occupation, the report shall include the evaluation, analysis and findings as set forth in subsection (e) (j) of this section inasmuch as applicable, and a clear recommendation as to whether the scope of practice should be established, revised, or expanded as proposed in the application.

(e) For an application received after December 1, and on or before June 1, the Performance Evaluation and Research Division of the Office of the Legislative Auditor shall present a report to the Joint Committee on Government Organization by December 31 of that year.

(f) For an application received after June 1 and on or before December 1, the Performance Evaluation and Research Division of the Office of the Legislative Auditor shall present a report to the Joint Committee on Government Organization by June 30 of the next year.
The Performance Evaluation and Research Division of the Office of the Legislative Auditor shall submit its report to the Joint Standing Committee on Government Organization no less than nine months after the office receives the application for analysis.

§30-1A-4. Public hearing and committee recommendations.

(a) After receiving the required report, the Joint Standing Committee on Government Organization may conduct public hearings to receive testimony from the public, the Governor or his or her designee, the group, organization or individual who submitted the proposal for regulation, and any other interested party.

(b) The Joint Committee on Government Organization may issue additional findings and recommendations regarding:

(1) The least restrictive regulation of the occupation or profession; and

(2) Whether regulation would result in the creation of a new agency or board or could be implemented more efficiently through an existing agency or board;

(b) (c) The Joint Standing Committee on Government Organization shall report its findings and recommendations, if any, to the next regular session of the Legislature.

(c) The report shall include:

(1) Whether regulation of each occupation or profession is necessary for the public health and safety and, if regulation is necessary, recommendations as to what is the least restrictive type of regulation consistent with the public interest; and

(2) Whether regulation would result in the creation of a new agency or board or could be implemented more efficiently through an existing agency or board.

(d) The report may include a recommendation that the occupation or profession be regulated by any of the following mechanisms, in whole or in part:

(1) By practice standards, which may include restrictions established by statute;

(2) By registration, which may include inspections or other enforcement provisions;

(3) By statutory certification, which may include testing or assessment of the practitioner’s credential or competency;
(4) By supervision by a licensed practitioner, which may include practice standards, registration or statutory certification;
(5) By licensure by a new or existing agency or board, which may include restrictions of the scope of practice, minimum competency, education, testing, registration, certification, inspection or enforcement

(d) The Performance Evaluation and Research Division shall publish its report on the Legislative Auditor’s website. The Joint Standing Committee on Government Organization shall also make the report and any additional findings and recommendations publicly available and post it on the Legislature’s website.

(e) The House of Delegates and the Senate shall each adopt a rule requiring any committee considering legislation to enact or modify an occupational regulation to receive the Performance Evaluation and Research Division’s report and the Joint Standing Committee on Government Organization’s findings and recommendations in subsection (b) if applicable, prior to voting on the legislation.

(f) Nothing in this article shall be construed to preempt federal regulation or to require a private certification organization to grant or deny private certification to any individual.

§30-1A-5. Reapplication requirements Review of existing occupational licensing.

(a) If the Joint Standing Committee on Government Organization approves an application for regulation of a professional or occupational group or organization, but the legislation incorporating its recommendations does not become law in the year in which it is first introduced, the applicants for regulation may introduce legislation during each of the two successive regular sessions without having to make reapplication.

(b) If the Joint Standing Committee on Government Organization does not approve an application for regulation, establishment, revision or expansion of the scope of practice of a professional or occupational group or organization, any party who continues to propose the regulation, establishment, revision or expansion must reapply in accordance with the provisions of this article.
(a) Starting January 1, 2021, the Joint Committee on Government and Finance will assign
to the Performance Evaluation and Research Division of the Office of the Legislative Auditor the
responsibility to analyze existing occupational license requirements.

(b) The Performance Evaluation and Research Division is responsible for reviewing
annually approximately 20 percent of the current occupational licensing authorities under the
committee’s jurisdiction. The joint committee will select the occupational licensing authorities to
be reviewed annually.

(c) The Performance Evaluation and Research Division shall review all occupational
licensing authorities within the subsequent five years and will repeat such review processes in
each five-year period thereafter.

(d) The Performance Evaluation and Research Division will use the criteria in section §30-
1A-3 of this code to analyze all existing occupational licenses. The division also may consider
research or other credible evidence whether an existing regulation directly helps consumers to
avoid present, significant, and recognizable harm.

(e) (1) Starting January 1, 2022, the Performance Evaluation and Research Division of the
Office of the Legislative Auditor shall report annually the findings of its reviews to the Speaker of
the House of Delegates, the President of the Senate, the Joint Standing Committee on
Government Organization, and the Governor. In its report, the Performance Evaluation and
Research Division shall recommend the Legislature enact new legislation that:

(A) Repeals the occupational licenses;

(B) Converts the occupational licenses to less restrictive regulations according to the
listing in §30-1A-1a of this code;

(C) Instructs the relevant licensing board or agency to promulgate revised regulations
reflecting the Legislature’s decision to use a less restrictive alternative to an occupational license;

(D) Changes the requisite personal qualifications for an occupational license;

(E) Redefines the scope of practice in an occupational license; or

(F) Reflects other recommendations to the Legislature.
(2) The Performance Evaluation and Research Division also may recommend that no new legislation is enacted.

(3) The Performance Evaluation and Research Division will make its report publicly available and post it on its website.

(4) Nothing in this article shall be construed to preempt federal regulation, to authorize the office to review the means that a private certification organization uses to issue, deny or revoke a private certification to any individual, or to require a private certification organization to grant or deny private certification to any individual.

§30-1A-6. Article construction.

(a) Nothing in this article shall be construed as limiting or interfering with the right of any member of the Legislature to introduce or of the Legislature to consider any bill that would create a new state governmental department or agency or amend the law with respect to an existing one.

(b) Notwithstanding the provisions of subsection (a) of this section, the recommendations of the Joint Standing Committee on Government Organization are to be given considerable weight in determining if a profession or occupation should be regulated, or if the scope of practice of a regulated profession or occupation should be established, revised or expanded.

(c) In construing any governmental regulation of occupations, including an occupational licensing statute, rule, policy, or practice, the following canons of interpretation are to govern, unless the regulation is unambiguous:

(1) Occupational regulations will be construed and applied to increase economic opportunities, promote competition, and encourage innovation;

(2) Any ambiguities in occupational regulations will be construed in favor of workers and aspiring workers to work; and

(3) The scope of practice in occupational regulations is to be construed narrowly to avoid burdening individuals with regulatory requirements that only have an attenuated relationship to the goods and services they provide.
NOTE: The purpose of this bill is to establish standards and procedures for analysis and consideration in determining what level, if any, of government regulation of an occupation should be imposed on that occupation and to require periodic review of existing occupational regulation to determine if and when less restrictive alternatives should be implemented.

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