

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Committee Substitute

for

Senate Bill 472

BY SENATOR MAYNARD

[Originating in the Committee on Government
Organization; reported on March 10, 2021]

1 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
2 of the Code of West Virginia, 1931, as amended; and to amend said code by adding
3 thereto a new section, designated §30-1A-1a, all relating to regulation of occupations and
4 professions; establishing legislative policy; providing definitions; providing criteria to
5 analyze a required application to regulate an occupation or profession; requiring
6 Performance Evaluation and Research Division to conduct an analysis of application;
7 establishing rebuttable presumption against regulating an occupation or profession absent
8 certain conditions; setting out criteria to assess harms to consumers and possible
9 recommendations that may be instituted against an occupation or profession; providing
10 for an economic study of the recommendations made; setting time frame for the
11 Performance Evaluation and Research Division to conduct analysis and return report;
12 providing for recommendations based on the assessed harm to consumers in the
13 Performance Evaluation and Research Division's report; authorizing additional
14 recommendations and findings by the Joint Standing Committee on Government
15 Organization; requiring additional findings by the Joint Standing Committee on
16 Government Organization be made public; mandating committee's findings and
17 recommendations along with any report be submitted to any committee considering
18 legislation prior to voting; requiring Performance Evaluation and Research Division begin
19 review of existing licenses under certain criteria; providing effective date for licensure
20 review; mandating review of certain licenses annually; requiring annual licensing review
21 to be set by the chairs of the Joint Standing Committee on Government Organization;
22 setting eight-year review schedule; requiring Performance Evaluation and Research
23 Division to report its findings and recommendations to the committee relating to licensing
24 review; establishing effective date for the Performance Evaluation and Research Division
25 to begin reporting its findings and recommendations to the committee; and establishing

26 standards of statutory interpretation relating to government regulation of occupations or
27 professions.

Be it enacted by the Legislature of West Virginia:

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

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

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

7 (b) For occupational regulations and the boards of this state, it is the policy of this state
8 that:

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

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

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

§30-1A-1a. Definitions.

1 For the purposes of this chapter, the words defined in this section have the meaning given.

2 “Government certification” means a voluntary, government-granted, and nontransferable
3 recognition to an individual who meets personal qualifications related to a lawful occupation. Upon
4 the government’s initial and continuing approval, the individual may use “government certified” or

5 “state certified” as a title. A noncertified individual also may perform the lawful occupation for
6 compensation but may not use the title “government certified” or “state certified”. In this chapter,
7 the term “government certification” is not synonymous with “occupational license”. It also is not
8 intended to include credentials, such as those used for medical-board certification or held by a
9 certified public accountant, that are prerequisites to working lawfully in an occupation.

10 “Government registration” means a requirement to give notice to the government that may
11 include the individual’s name and address, the individual’s agent for service of process, the
12 location of the activity to be performed, and a description of the service the individual provides.

13 “Government registration” does not include personal qualifications and is not transferable but it
14 may require a bond or insurance. Upon the government’s receipt of notice, the individual may use
15 “government registered” as a title. A nonregistered individual may not perform the occupation for
16 compensation or use “government registered” as a title. In this chapter, “government registration”
17 is not intended to be synonymous with “occupational license”. It also is not intended to include
18 credentials, such as those held by a registered nurse, which are prerequisites to working lawfully
19 in an occupation.

20 “Lawful occupation” means a course of conduct, pursuit, or profession that includes the
21 sale of goods or services that are not themselves illegal to sell irrespective of whether the
22 individual selling them is subject to an occupational regulation.

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

- 24 (1) Market competition;
- 25 (2) Third-party or consumer-created ratings and reviews;
- 26 (3) Private certification;
- 27 (4) Voluntary bonding or insurance;
- 28 (5) Specific private civil cause of action to remedy consumer harm;
- 29 (6) Deceptive trade practice act;
- 30 (7) Mandatory disclosure of attributes of the specific good or service;

31 (8) Regulation of the process of providing the specific good or service;

32 (9) Regulation of the facility where the specific good or service is sold;

33 (10) Inspection;

34 (11) Bonding;

35 (12) Insurance;

36 (13) Government registration;

37 (14) Government certification;

38 (15) Specialty occupational certification solely for medical reimbursement; and

39 (16) Occupational license.

40 “Occupational license” is a nontransferable authorization in law for an individual to perform
41 exclusively a lawful occupation for compensation based on meeting personal qualifications
42 established by the Legislature. In an occupation for which a license is required, it is illegal for an
43 individual who does not possess a valid occupational license to perform the occupation for
44 compensation.

45 “Occupational regulation” means a statute, rule, practice, policy, or other state law that
46 allows an individual to use an occupational title or work in a lawful occupation. It includes
47 government registration, government certification, and occupational license. It excludes a
48 business license, facility license, building permit, or zoning and land use regulation except to the
49 extent those state laws regulate an individual’s personal qualifications to perform a lawful
50 occupation.

51 “Personal qualifications” are criteria related to an individual’s personal background and
52 characteristics. They may include one or more of the following: Completion of an approved
53 educational program, satisfactory performance on an examination, work experience,
54 apprenticeship, other evidence of attainment of requisite knowledge and skills, passing a review
55 of the individual’s criminal record, and completion of continuing education.

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

60 “Specialty occupational certification solely for medical reimbursement” means a non-
61 transferable authorization in law for an individual to qualify for payment or reimbursement from a
62 government agency for the nonexclusive provision of new or niche medical services based on
63 meeting personal qualifications established by the Legislature. A private health insurance
64 company or other private company may recognize this credential. Notwithstanding this specialty
65 certification, it is legal for a person regulated under another occupational regulation to provide
66 similar services as defined in that statute for compensation and reimbursement. It is also legal for
67 an individual who does not possess this specialty certification to provide the identified medical
68 services for compensation, but the noncertified individual will not qualify for payment or
69 reimbursement from a government agency.

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

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

7 (a)(b) Any professional or occupational group or organization, any individual, or any other
8 interested party which that proposes the regulation of any unregulated professional profession or
9 occupational group or organization- occupation, or who proposes to establish, revise, or expand

10 the scope of practice of a regulated profession or occupation shall submit an application to the
11 Joint Standing Committee on Government Organization, as set out in this article.

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

21 ~~(e)~~(d) The completed application shall contain:

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

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

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

32 (4) A detailed statement of the proposed funding mechanism to pay the administrative
33 costs of the regulation or the establishment, revision, or expansion of the scope of practice, or of
34 the fee structure conforming with the statutory requirements of financial autonomy as set out in
35 this chapter;

36 (5) A detailed statement of the location and manner in which the group plans to maintain
37 records which are accessible to the public as set out in this chapter;

38 (6) The benefit to the public that would result from the proposed regulation or
39 establishment, revision, or expansion of the scope of practice; ~~and~~

40 (7) The cost of the proposed regulation or establishment, revision, or expansion of the
41 scope of practice; and

42 (8) Evidence, if any, of present, significant, and substantiated harms to consumers in the
43 state.

§30-1A-3. Analysis and evaluation of application.

1 (a) The Joint Standing Committee on Government Organization shall refer the completed
2 application of the professional or occupational group or organization to the Performance
3 Evaluation and Research Division of the Office of the Legislative Auditor.

4 (b) The Performance Evaluation and Research Division of the Office of the Legislative
5 Auditor shall conduct an analysis and evaluation of the application. The analysis and evaluation
6 shall be based upon the criteria listed in subsections (c) through subsection (k) of this section.
7 The Performance Evaluation and Research Division of the Office of the Legislative Auditor shall
8 submit a report, and such supporting materials as may be required, to the Joint Standing
9 Committee on Government Organization, as set out in this section.

10 (c) The Performance Evaluation and Research Division of the Office of the Legislative
11 Auditor shall determine if the proposed regulation meets the state's policy as set forth in §30-1A-
12 1(b) of this code of using the least restrictive regulation necessary to protect consumers from
13 present, significant, and substantiated harms.

14 (d) The Performance Evaluation and Research Division of the Office of the Legislative
15 Auditor's analysis in subsection (c) of this section will use a rebuttable presumption that
16 consumers are sufficiently protected by market competition and private remedies, as listed in §30-
17 1A-1a(1) through §30-1A-1a(4) of this code. The Joint Standing Committee on Government

18 Organization will consider the use of private certification programs that allow a provider to give
19 consumers information about the provider's knowledge, skills, and association with a private
20 certification organization.

21 (e) The Performance Evaluation and Research Division of the Office of the Legislative
22 Auditor may rebut the presumption in subsection (d) of this section if it finds both credible empirical
23 evidence of present, significant, and substantiated harm, and that consumers do not have the
24 information and means to protect themselves against such harm. If evidence of such
25 unmanageable harm is found, the committee may recommend the least restrictive government
26 regulation to address the harm, as listed in §30-1A-1a(5) through §30-1A-1a(16) of this code.

27 (f) The Performance Evaluation and Research Division of the Office of the Legislative
28 Auditor will use the following guidelines to form its recommendation in subsection (j) or subsection
29 (k) of this section. If the harm arises from:

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

34 (2) Fraud, the office may recommend strengthening powers under the state's deceptive
35 trade practices acts or requiring disclosures that will reduce misleading attributes of the specific
36 good or service or other relevant recommendations;

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

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

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

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

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

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

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

58 (h) The Performance Evaluation and Research Division of the Office of the Legislative
59 Auditor's analysis of the need for regulation in subsection (e) of this section should include
60 comparisons of the legislation to whether and how other states regulate the occupation, including
61 the occupation's scope of practice that other states use, and the personal qualifications other
62 states require.

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

67 ~~(e)(i)~~ For an application proposing the regulation of an unregulated professional or
68 occupational group or organization, the Performance Evaluation and Research Division of the
69 Office of the Legislative Auditor's report shall include evaluation, analysis, and findings as to:

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

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

78 (3) ~~The scope of practice, if applicable; Whether the public can be adequately protected~~
79 ~~by other means in a more cost-effective manner; and~~

80 (4) ~~If regulation is required to address evidence of harm to consumers in the state, the~~
81 ~~least restrictive regulation of the occupation or profession; and~~

82 (4)(5) Whether the professional or occupational group or organization should be regulated
83 as proposed in the application.

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

89 (l) ~~The Performance Evaluation and Research Division of the Office of the Legislative~~
90 ~~Auditor shall submit its report to the Joint Standing Committee on Government Organization no~~
91 ~~later than nine months after receiving the application for analysis.~~

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

96 ~~(f) For an application received after June 1 and on or before December 1, the Performance~~
97 ~~Evaluation and Research Division of the Office of the Legislative Auditor shall present a report to~~
98 ~~the Joint Committee on Government Organization by June 30 of the next year~~

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

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

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

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

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

11 ~~(b)(c) The joint standing committee on government organization~~ Joint Standing Committee
12 on Government Organization shall provide the Performance Evaluation and Research Division of
13 the Office of the Legislative Auditor's report and its findings and recommendations, if any, to the
14 next regular session of the Legislature.

15 (d) The Performance Evaluation and Research Division of the Office of the Legislative
16 Auditor shall publish its report on its website. The Joint Standing Committee on Government
17 Organization shall also make the report and any additional findings and recommendations publicly
18 available.

19 (e) Any committee considering legislation to enact or modify an occupational regulation
20 shall receive the Performance Evaluation and Research Division of the Office of the Legislative
21 Auditor's report and the Joint Standing Committee on Government Organization's findings and

22 recommendations as provided for in subsection (b) of this section, if applicable, prior to voting on
23 the legislation.

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

26 ~~(e) The report shall include:~~

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

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

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

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

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

36 ~~(3) By statutory certification, which may include testing or assessment of the practitioner's~~
37 ~~credential or competency;~~

38 ~~(4) By supervision by a licensed practitioner, which may include practice standards,~~
39 ~~registration or statutory certification;~~

40 ~~(5) By licensure by a new or existing agency or board, which may include restrictions of~~
41 ~~the scope of practice, minimum competency, education, testing, registration, certification,~~
42 ~~inspection or enforcement~~

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

1 ~~(a) If the Joint Standing Committee on Government Organization approves an application~~
2 ~~for regulation of a professional or occupational group or organization, but the legislation~~
3 ~~incorporating its recommendations does not become law in the year in which it is first introduced,~~

4 ~~the applicants for regulation may introduce legislation during each of the two successive regular~~
5 ~~sessions without having to make reapplication.~~

6 ~~(b) If the Joint Standing Committee on Government Organization does not approve an~~
7 ~~application for regulation, establishment, revision or expansion of the scope of practice of a~~
8 ~~professional or occupational group or organization, any party who continues to propose the~~
9 ~~regulation, establishment, revision or expansion must reapply in accordance with the provisions~~
10 ~~of this article~~

11 (a) Starting on July 1, 2021, the Performance Evaluation and Research Division of the
12 Office of the Legislative Auditor is responsible for annually reviewing those current occupational
13 licenses that the committee chairs select.

14 (b) The Performance Evaluation and Research Division of the Office of the Legislative
15 Auditor shall review all occupational licenses within the subsequent eight years and shall repeat
16 such review processes in each eight-year period thereafter.

17 (c) The Performance Evaluation and Research Division of the Office of the Legislative
18 Auditor shall use the criteria set forth in §30-1A-3(c) through §30-1A-3(i) of this code to analyze
19 all existing occupational licenses. The office also may consider research or other credible
20 evidence regarding whether an existing regulation directly helps consumers to avoid present,
21 significant, and recognizable harm.

22 (d)(1) Starting on July 1, 2022, the Performance Evaluation and Research Division of the
23 Office of the Legislative Auditor shall report the findings of its reviews to the Joint Standing
24 Committee on Government Organization. In its report, the Performance Evaluation and Research
25 Division of the Office of the Legislative Auditor may make recommendations to the committee that
26 the Legislature enact new legislation that:

27 (A) Repeals the occupational licenses;

28 (B) Converts the occupational licenses to less restrictive regulation as set forth in the
29 definition of "least restrictive regulation" in §30-1A-1a of this code;

- 30 (C) Changes the requisite personal qualifications of an occupational license;
31 (D) Redefines the scope of practice in an occupational license; or
32 (E) Reflects other recommendations to the Legislature.
33 (2) The Performance Evaluation and Research Division of the Office of the Legislative
34 Auditor also may recommend that no new legislation is enacted.
35 (3) Nothing in this article shall be construed to authorize the office to review the means
36 that a private certification organization uses to issue, deny, or revoke a private certification to any
37 individual, or to require a private certification organization to grant or deny private certification to
38 any individual.

§30-1A-6. Article construction.

- 1 (a) Nothing in this article shall be construed as limiting or interfering with the right of any
2 member of the Legislature to introduce or of the Legislature to consider any bill that would create
3 a new state governmental department or agency or amend the law with respect to an existing ~~one~~
4 department or agency.
5 (b) Notwithstanding the provisions of subsection (a) of this section, the recommendations
6 of the Joint Standing Committee on Government Organization are to be given considerable weight
7 in determining if a profession or occupation should be regulated, or if the scope of practice of a
8 regulated profession or occupation should be established, revised, or expanded.
9 (c) In construing any governmental regulation of occupations, including an occupational
10 licensing statute, rule, policy, or practice, the following interpretations are to govern, unless the
11 regulation is unambiguous:
12 (1) Occupational regulations should be construed and applied to increase economic
13 opportunities, promote competition, and encourage innovation;
14 (2) Any ambiguities in occupational regulations should be construed in favor of workers
15 and aspiring workers to work; and

16 (3) The scope of practice in occupational regulations should be construed narrowly to
17 avoid burdening individuals with regulatory requirements that only have an attenuated relationship
18 to the goods and services they provide.