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Senate Bill 40 (as introduced 1-22-19)
Sponsor: Senator Lana Theis
Committee: Regulatory Reform

Date Completed: 7-28-20

CONTENT

The bill would amend the Legislative Council Act to do the following:

- **Review each introduced bill that would enact or amend an occupational regulation to determine whether it met the policy of using the least restrictive regulation necessary to protect consumers.**
- **Prescribe certain requirements that would apply to the review of pending legislation.**
- **Require the Commission to annually review, beginning January 1, 2020, the occupational regulations of the occupations that were subject to State regulation to evaluate whether the regulations were consistent with using the least restrictive regulation necessary to protect consumers.**
- **Require the Commission to employ a rebuttable presumption that market competition and private remedies were sufficient to protect consumers.**
- **Require the Commission to submit to the Legislature, by January 31 each year, a report of the finding of its annual review of occupational regulations in the preceding calendar year.**

The bill would take effect 90 days after its enactment.

Definitions

"Occupational regulation" would mean a statute, rule, practice, policy, or other Michigan law that requires an individual to possess certain personal qualifications to use an occupational title or work in a law occupation. The term would include registration, certification, and occupational license. The term would not include a business license, facility license, building permit, or zoning and land use regulation established under Michigan law, except to the extent that Michigan law regulates an individual's personal qualifications to perform a lawful occupation.

"Registration" would mean a requirement to give notice to the Michigan 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 services that the individual provides. All of the following would apply for the purposes of the interpretation of registration:

- Registration would not include personal qualifications but could require a bond or insurance.
- Registration would not be transferable.
- Registration would not be synonymous with an occupational license.

- The use of the words "registration" or "registered" in other Michigan statutes to mean requiring an individual to meet certain personal qualifications to work legally, such as requiring a nurse aid to become registered before working legally, would be considered for the bill's purposes as requiring an individual to meet the requirements for an occupational license.
- When the government received notice, the individual who gave notice could use "registered" as a designated title.

A nonregistered individual could not perform the occupation for compensation or use "registered" as a designated title.

"Certification" would mean a voluntary program in which a private organization or the Michigan government grants nontransferable recognition to an individual who meets personal qualifications established by the private organization or the Michigan government. All of the following would apply for purposes of the interpretation of certification:

- Certification would include the authority to use "certified" as a designated title if certification were granted.
- A program of certification would not prevent a noncertified individual from performing the lawful occupation of an individual who held a certification for compensation, but that individual could not use the title "certified".
- Certification would not be synonymous with the term "occupational license"
- The use of the word "certification" or "certified" in other Michigan statutes to mean requiring an individual to meet certain personal qualifications to work legally, such as requiring a certified public accountant to become certified before working legally, would have to be interpreted for the purposes of the bill as requiring an individual to meet the requirements of an occupational license.

"Least restrictive regulation" would mean any of the following, from least to most restrictive:

- Market competition.
- Third-party or consumer-created ratings and reviews.
- Private certification.
- A specific private civil cause of action to remedy consumer harm.
- An action that is a deceptive trade practice.
- A regulation of the process of providing specific goods or services to consumers.
- Inspection.
- Bonding or insurance.
- Registration.
- Government certification.
- A specialty occupational license for medical reimbursement.
- An occupational license.

"Specialty occupational license for medical reimbursement" would mean a nontransferable authorization in law for an individual to qualify for payment or reimbursement from a government agency for the nonexclusive provision of medical services based on meeting personal qualifications established by the Legislature. All of the following would apply to a specialty occupational license for medical reimbursement:

- A private company could recognize this credential.
- An individual who was regulated under another occupational regulation to provide similar services as defined in that regulation for compensation and reimbursement could provide those services without a specialty occupational license for medical reimbursement.

- An individual who did not possess a specialty occupational license for medical reimbursement could provide similar services for compensation if he or she did not qualify for payment or reimbursement from a government agency.

"Occupational license" would mean a nontransferable authorization in law that meets both of the following:

- Allows an individual to perform a lawful occupation for compensation if he or she meets personal qualifications established by law.
- Prohibits an individual who does not possess a valid occupational license from performing the occupation for compensation.

"Lawful occupation" would mean a course of conduct, pursuit, or profession that includes the sale of goods or services that are not themselves illegal to sell, whether or not the individual who is selling them is subject to an occupational regulation.

"Personal qualifications" would mean criteria that are related to an individual's personal background and characteristics, including completion of an approved education program, satisfactory performance on an examination, work experience, moral standing, criminal history, and completion of continuing education.

MI Law Review Commission; Review of Occupational Regulation Laws

Section 403 of the Act prescribes the duties and responsibilities of the Michigan Law Revision Commission. Under the bill, in addition to its duties under Section 403, after a bill that would enact or amend an occupational regulation was introduced, the Commission would have to review the legislation to determine whether it met the policy of using the least restrictive regulation necessary to protect consumers from present, significant, and substantiated harms that threaten public health and safety.

All of the following would apply to the review of pending legislation:

- The Commission could require the legislation's proponents to submit evidence of present, significant, and substantiated harms to Michigan consumers; and could require information from other individuals who were knowledgeable about the occupation, labor economics, or other relevant factors.
- The Commission would have to evaluate the effects of the legislation on opportunities for workers, consumer choices and costs, general unemployment, market competition, and governmental costs, and any other effects of the legislation if enacted.
- The Commission would have to compare the manner in which the legislation would regulate an occupation if enacted to whether or how other states regulate the occupation.
- The Commission would have to complete the review, prepare a written report of the results of the review, and submit the report to the committee to which the legislation was referred, on a timely basis.

Beginning January 1, 2020, the Commission would have to review annually the occupational regulations of approximately 20% of the occupations that were subject to State regulation, and over each five-year period review all occupational regulations that were subject to regulation, and evaluate whether those regulations were consistent with the policy of using the least restrictive regulation necessary to protect consumers from present, significant, and substantiated harms that threaten public health and safety. For purposes of its review, the Commission could require that an occupational board, its members, and other individuals submit information to the Commission.

In its analysis of occupational regulations, the Commission would have to employ a rebuttable presumption that market competition and private remedies were sufficient to protect consumers, and if that presumption were rebutted, where appropriate, State regulation would have to be tailored to address specific market failure identified by the Commission to protect consumers from one or more of the following, as appropriate:

- Fraud, by strengthening powers under the Michigan Consumer Protection Act and other deceptive trade practices statutes in Michigan.
- Unsanitary facilities and general health and safety concerns, by periodic inspections.
- Potential damages to the buyer or to third parties that were not a party to a contract
- Potential damages by transient or fly-by-night providers by requiring registration with the Secretary of State.
- Asymmetrical information between a seller and buyer, by voluntary certification.
- Governmental reimbursement for providing medical services for new or highly specialized medical provisions by a specialty license for medical reimbursement.

By January 31, 2021, and by each subsequent January 31, the Commission would have to submit an annual report of the findings of its annual review of occupational regulations in the preceding calendar year to the Speaker of the House of Representatives, the Senate Majority Leader, and the Attorney General. In the report about an occupational regulation, the Commission would have to do either of the following:

- If the Commission concluded as a result of the review that the occupational regulation did not reflect the policy of using the least restrictive regulation necessary, recommend that the Legislature enact new legislation that did one or more of the following: a) repealed or rescinded the occupational regulation, b) converted the occupational regulation to a less restrictive regulation that reflected the policy of using the least restrictive regulation necessary; c) instructed the relevant licensing board or agency to promulgate a revised occupational regulation; or d) reflected any other recommendations of the Commission.
- If the Commission concluded as a result of the review that the occupational regulation did reflect the policy of using the least restrictive regulation necessary, recommend that the Legislature not enact new legislation.

Proposed MCL 4.1404

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

The bill would have a minor negative fiscal impact on the Legislature and no fiscal impact on local units of government. The increase in work for the Council likely would result in an increase in statutorily required actual and necessary expense reimbursements to its members. The magnitude of these reimbursements would depend upon the number of additional days the Council would be engaged in work and the corresponding eligible expenses.

The evaluation mandated by the bill could result in the hiring of additional FTEs at a cost of \$105,000 annually per FTE for salary and benefits. However, it is unknown at this time if additional personnel would be required.

Fiscal Analyst: Joe Carrasco
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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.