



Legislative Monitoring Analysis: Oklahoma SB 651

Bill Name: [“Right to Earn a Living Act”](#)

Principal Sponsor: Sen. Dahm (R)

Introduced: 2/4/2019

Stated Purpose: “SB 651 creates the Right to Earn a Living Act. The measure limits all occupational regulations to demonstrably necessary and carefully tailored policies designed to fulfill public health, safety or welfare objectives. Within one year of the measure’s enactment, agencies will be required to review all occupational regulations and occupational licenses within their jurisdictions and to:

- 1) Articulate specific public health, safety or welfare objectives
- 2) Articulate why the regulation is needed for these objectives
- 3) Analyze the effects of the regulations
- 4) Compare the regulation to other states’ regulations

Any regulation that fails to meet the listed requirements in the measure shall be repealed by the agency or shall require the agency to recommend to the Legislature actions needed to repeal the regulation. Any person may appeal to a state agency to repeal a regulation. State agencies must respond within ninety days of the request. Regardless of whether an appeal is pending, any person may also file an action with the courts to challenge a regulation as burdensome.”

Status (as of 2/5/2019): Active.

Second Reading referred to Business, Commerce, and Tourism Committee, then to Appropriations Committee on 2/5/2019.

Overview:

This bill poses a more direct threat to professional licensing than other bills monitored by the Professional Certification Coalition in two significant ways:

- Unlike other bills that call for a commission to write a report recommending a less restrictive regulation, this bill would mandate that agencies repeal regulations unless an extremely high evidentiary burden is met: that the regulation is “demonstrably necessary and carefully tailored to fulfill legitimate public health, safety or welfare objectives.”

- The bill allows private lawsuits seeking injunctive relief – and compensated by an award of attorneys’ fees – challenging any regulation that cannot meet the burden of showing that a less restrictive alternative would meet the public interest.

Analysis:

The bill requires that all occupational regulations be limited to those demonstrably necessary and carefully tailored to fulfill legitimate public health, safety or welfare objectives. “Welfare” is narrowly construed to encompass protection of members of the public against fraud or harm. This evidentiary burden is extremely high. The “demonstrably necessary” standard suggests that proof of actual harms from the absence of the regulatory requirements would be needed to meet it, especially since the definition of “welfare” is so limited. In addition, the “narrowly tailored” standard holds an agency to a burden of proving that the agency has followed the hierarchy of least to most restrictive measures, as defined by the act, in evaluating licensure requirements.

To that end, every agency (defined to include the state, all agencies, board and commissions of state government and all political subdivisions of the state) is required to conduct a comprehensive review of all occupational regulations and occupational licenses within their jurisdiction; for each occupational regulation or license all agencies must:

1. Articulate with specificity the public health, safety, or welfare objective(s) served by the regulation;
2. Articulate the reasons why the regulation is necessary to serve the specified objective;
3. Analyze, where information is readily available, the effects of regulation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs and other effects; and
4. Compare the regulation to whether and how other states regulate the business or profession.

An amendment that broadens this list of information that an agency must consider would soften the threat to occupational licensing and create a more balanced review.

If an agency determines that a regulation is not “demonstrably necessary and carefully tailored to fulfill legitimate public health, safety or welfare objectives,” it must repeal or modify the regulation or recommend that the legislature take action giving authority to the agency to repeal or modify the regulation. Each agency is required to report all actions taken to conform with the act within fifteen months following the act’s enactment.

Further, the bill invites expensive litigation by providing that a court can enjoin enforcement of a regulation and award attorneys’ fees as costs to the petitioner if the court determines that the agency has failed to prove by “a preponderance of evidence that the challenged occupational regulation is not demonstrably necessary and carefully tailored to fulfill legitimate public health, safety or welfare objectives” or “where the challenged occupational regulation is necessary to the legitimate public health, safety or welfare objectives, such objectives can be effectively served by using a less restrictive regulation, as defined in Section 2 of this act

[establishing a ranking of least to most restrictive measures], which is less burdensome to economic opportunity.” Placing the burden of proof on the agency, rather than on the petitioner, to demonstrate that no less restrictive regulation can achieve legitimate objectives almost assures that the petitioner will prevail: the bill adopts a hierarchy of least restrictive to most restrictive measures that has not previously been common in the rule-making process, and there is in fact no data available that gathers evidence of public harm from each level of restriction and compares the level of harm from requiring, say, bonding and insurance versus licensure conditioned on certification. In addition, the threat and likelihood of litigation – and the cost burden of the resulting legal expenses – would create significant budgetary pressures on states to eliminate occupational licensure wherever feasible.

The bill currently lists “private certification” as the third least restrictive form of regulation. Safe harbors should be added to protect both regulatory recognition of private certifications and statutory prohibitions on deceptive trade practices (listed as the sixth least restrictive form of regulation).