

Professional Certification Coalition Member Strategy Call
Wednesday, September 16, 2020
12:00 p.m. ET

Steering Committee: ICE (Denise Roosendaal), ASAE (Mary Kate Cunningham/Jeff Evans)
Legal Counsel: Jerry Jacobs, Craig Saperstein, Julia Judish, and Lori Panosyan (Pillsbury)

1. Welcome

- a. Welcome to new members that have joined since our last member call!
- b. Friendly reminder — the password for the “For Members” portion of the website will be updated on Oct. 1st and provided to members who have paid their membership dues (fully or the first installment).
- c. We appreciate your attention to any outstanding dues as we maximize our resources during this challenging time.

2. Strategic Discussion – State Legislation

a. Missouri regulatory interpretation regarding use of the term “registered”

- i. Right before the PCC was founded in July 2018, two occupational licensure reform bills passed in MO – H.B. 1719 and H.B. 1500 – and were signed into law by the outgoing Governor.
- ii. The statute contains language that could be interpreted to prohibit professionals who hold private credentials from using the title “registered” unless the state has established a registration system with which the individual has registered. The statute also contained several other provisions we found problematic for the certification community.
- iii. This year, we worked with lobbyists on the ground in Jefferson City to pass legislation to amend the statute. We were successful in getting a bill passed that included legislative language we proposed, but the specific language we proposed related to registration met some resistance from the bill’s sponsor, because he felt the intent of the statute was not to restrict individuals from using privately issued titles.
- iv. After this year’s legislative session, a staff member for the bill sponsor, Sen. Koenig, had an email exchange with an official from the Missouri Division of Professional Registration in which the agency official indicated that the Division did not interpret the statutory provision as preventing use of the title “registered” by an individual holding a privately issued certification with that designation.
 1. This exchange suggests that there is not a desire among lawmakers or regulators to go after individuals holding themselves out as “registered” with a privately conferred title. We are unaware of any

instances in which Missouri has attempted to enforce the statute against professionals using the privately issued title “registered.”

2. Further, we believe the provision is unconstitutional on First Amendment grounds, as applied to those who have legitimately earned a credential that confers a “registered” designation on them, consistent with the U.S. Supreme Court’s decision in *Peel v. Att’y Registration and Disciplinary Comm’n.*, 496 U.S. 91 (1990).
- v. This summer, the PCC wrote to the interim director of the Division asking to convert the email exchange into a formal letter of interpretation. The interim director replied by asserting that the Division does not have the legal authority to issue formal letters of interpretation under MO Supreme Court precedent. However, the agency head also noted that the Division has no authority over private certifications and only has the authority to issue discipline against licensees.
- vi. This response fell short of stating definitively that the Division would not seek disciplinary action against licensees who use the title “registered” based on a privately issued credential, and it leaves unaddressed whether the state might take action against individuals using a privately issued “registered” title who do not hold licenses.
- vii. **The PCC poses the following question to members:** Should the PCC seek a formal interpretation of the statute from the MO Attorney General?
 1. Reasons to seek a formal opinion from the AG:
 - a. We think we have strong arguments that would support a favorable interpretation from the AG
 - b. Individuals/groups could seek to enforce the language as written against professionals using the privately issued title “registered”
 - c. Clarify ambiguity and provide assurance to professionals using the “registered” title
 - d. A favorable AG opinion could serve as persuasive authority in other states seeking to enact similar provisions
 - e. An unfavorable opinion would prove to skeptical legislators that this *is* a problem that requires a legislative fix
 2. Important considerations
 - a. When “registered” is a trademarked term (e.g. registered dietitians)
 - b. Timing – if the opinion is unfavorable, it is important to have a legislative option to turn to, without a long delay

- c. The PCC has retained local lobbying assistance in MO in the past and could do so in the future
 - d. Whether ALEC and IJ would be willing to weigh in
 - e. Whether the AG is up for election
3. PCC members generally expressed the view that, despite the risks of an unfavorable opinion, it would be advisable for the PCC to seek an opinion for the MO Attorney General. Pending further intelligence to be gathered, the PCC is likely to move forward and seek such an opinion.

b. Michigan S.B. 40

- i. We have been tracking S.B. 40 and H.B. 4488 since the beginning of 2019. The MI legislature is in session, and after almost 2 years, the two bills are moving. The PCC is working to gather on-the-ground intelligence and is considering direct advocacy.
- ii. S.B. 40 was introduced in 2019 and rolled over into the current legislative session. A hearing was held on the bill earlier this summer.
- iii. The bill is based on the old “review and repeal” model legislation drafted by IJ and ALEC and includes a presumption against licensure laws in general.
- iv. In addition to requiring that proponents of licensure laws present evidence of harm to the public and “market competition” language, the bill restricts usage of the title “registered” to those registered with the state, as with the Missouri statute.
- v. The PCC aims to revise the bill to include (1) our standard safe-harbor amendments that nothing will restrict the recognition of private certification in licensure laws, (2) changes to the current language calling for the state to enact governmental certification programs as an alternative to licensure requirements, and (3) a definition of “registered” that precludes banning the use of the tile “registered” when conferred by private certification organizations.
- vi. On-the-ground intelligence suggests that there is not significant momentum to push this bill past the committee stage, but we continue to monitor it closely.

c. Michigan H.B. 4488

- i. H.B. 4488 – which just passed the Michigan House – is an ex-offender reentry bill that purports to limit and restrict how licensure agencies may consider the criminal conviction history of applicants or holders of professional licenses.

- ii. However, this bill goes further than the standard ex-offender reentry bills we have seen all over the country: even as amended by the House, it would prohibit licensing agencies not only from considering non-felony criminal convictions, but also from considering judgments in a civil action against an individual for lack of good moral character.
- iii. Under the bill, a licensing board cannot consider judgements in civil actions unless more than one judgement in a civil action has been entered against the individual. Further, a licensing board cannot consider a criminal conviction unless it is a felony that has a direct relationship with the activities licensed or poses a threat to public safety (but not to public health or welfare).
- iv. This affects PCC members because professional certification organizations have codes of conduct and professional societies have ethics codes – both of which often rely on public records of licensure actions to obtain information on what a credential holder or certificant has done and whether they are complying with applicable conduct/ethics codes.
- v. The PCC has been consistent in its position that licensure boards should not be restricted from considering the facts underlying criminal convictions, as they have been established in a proceeding with due process. The same rationale applies to facts established in a civil judgment. Convictions or judgments for fraud or embezzlement, for example, may be relevant to whether an individual should be licensed, even if that conduct does not directly relate to the scope of licensed practice or affect public safety.
- vi. Although the bill applies only to licensure agencies, the PCC is concerned and sent a letter to the bill’s sponsor in the spring of 2019. The PCC has not had any recent engagement, but is communicating with sources on the ground to gather intelligence and execute a plan of action, including communicating with allied groups, such as MICPA, or potentially engaging a local lobbyist.

3. Strategic Discussion – Federal Legislation

a. S. 3779/H.R. 7032 – Skills Renewal Act

- i. The Skills Renewal Act would provide a \$4,000 tax credit for new skills training to individuals who have lost their jobs due to the pandemic.
- ii. After intensive conversations, the PCC succeeded in persuading the bill sponsors to support amendments to the bill to allow the tax credit to cover the costs associated with obtaining a private credential or certification, including costs associated with testing.

- iii. However, the bill itself has not moved on a standalone basis and the likely legislative vehicle for its potential advancement through Congress – a comprehensive COVID-19 relief – is largely dormant as Democrats and Republicans remain at an impasse over the legislation.
- iv. The PCC’s work on the Skills Renewal Act and previously on a bill to allow use of 529 accounts for certification-related expenses has raised our profile on Capitol Hill and will make us a player in ongoing discussions related to these issues.

b. Further COVID-19 relief legislation

- i. As noted above, Democrats and Republicans have failed to reach an agreement on the next COVID-19 relief bill, due to disagreements on provisions, size, and scope.
- ii. This week a group of bipartisan, moderate lawmakers known as the “Problem Solvers Caucus” encouraged movement by introducing their own package.
- iii. PCC Steering Committee member ASAE continues to have conversations with key staff and there is recognition that COVID-19 relief legislation is necessary for economic recovery.

4. Strategic Discussion – Amicus brief in *Kenney v. American Board of Internal Medicine*

- a. The PCC filed an amicus brief and is now waiting for a decision from the appeals court, which hopefully will be provided in the next few months. The amicus brief supports the district court’s ruling that a private certification organization’s recertification exam requirement does not violate antitrust prohibitions on “tying” products, and our brief specifically endorses the district court’s reasoning that private certification organizations have the right to define, enforce, and change their own standards and requirements for certification.

5. Stakeholder Outreach

- a. This is the time of year that the PCC often gets back in touch with ALEC, IJ, and other stakeholders to check-in on the model legislation process and to try and find areas of common ground.
- b. On the left side of the political spectrum, NELP, with which the PCC has been in communication in the past, has become increasingly interested in criminal conviction history reform.

Thank you for your continued participation in and support of the PCC.