

Professional Certification Coalition Member Strategy Call
Thursday, October 29, 2020
11:30 am 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 and thank you to existing members for your continued support.

2. Strategic Discussion – State Legislation

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

- i. Right before PCC was founded in July 2018, two occupational licensure reform bills passed in Missouri – H.B. 1719 and H.B. 1500 – that defined registration as the process by which applicants register with the state. The law states that unless an applicant engages in the state registration process, he or she is prohibited from using the term “registered” in Missouri or performing the occupation for compensation.
- ii. The PCC has been working to amend the statute. The bill’s sponsor, Sen. Koenig, is supportive of preventing the interpretation that professionals who hold private credentials are prohibited from using the title “registered,” as this wasn’t the legislation’s original intent, but for the same reason, he was reluctant to amend the legislation if the amendment was unnecessary.
- iii. A staff member for 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.
- iv. The PCC sent a letter to Interim Director of the Missouri Division of Professional Registration, Sarah E. Ledgerwood, requesting that the email exchange be converted into a formal letter of interpretation. Director Ledgerwood replied by asserting that the Division does not have the legal authority to issue formal letters of interpretation under MO Supreme Court precedent.
- v. As this 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 because the Division in any case has no jurisdiction over unlicensed professionals who use a privately issued

“registered” title, on the last member strategy call PCC members discussed whether the PCC should seek a formal interpretation of the statute from the MO Attorney General, and the consensus was in support of such action. **Thank you for your invaluable input!**

- vi. Missouri does not allow members of the public to request Attorney General interpretations but does allow agency officials to do so. The PCC scheduled a call with Director Ledgerwood, who was very supportive and said that she was very happy to help the PCC obtain an opinion from the Attorney General. The PCC has provided her written materials to support her request. Pending review by the Division’s department, the PCC expects her to submit the request for an AG opinion and will update members when it is submitted.

b. Michigan S.B. 40

- i. S.B. 40 is an occupational licensing reform bill that was introduced in 2019 and rolled over into the current legislative session. A hearing was held on the bill this summer, but our on-the-ground intelligence suggests this bill is unlikely to move forward.

c. Michigan H.B. 4488

- i. H.B. 4488 has now passed the Michigan House and moved past the committee stage in the Senate.
- ii. The bill purports to limit and restrict how licensure agencies may consider the criminal conviction history and civil judgment history of applicants or holders of professional licenses. However, this bill is an outlier from other ex-offender reentry bills: even as amended by the House, it would prohibit licensing agencies from considering non-felony criminal convictions, felony convictions that are not directly related to the activities the agency licenses, and judgments in a civil action against an individual for lack of good moral character, unless there have been multiple civil judgements.
- iii. The way the bill is drafted suggests that the intent of the legislature is to avoid having a criminal conviction or civil judgement be used as a “scarlet letter” or stigma without any thought given to the underlying facts.
- iv. However, in its current form, the bill could easily be applied to prevent licensure agencies from considering whether criminal behavior or fraud has a bearing on whether an individual should hold a license.
- v. The PCC has engaged a lobbyist in Michigan who has immediately spoken with the bill’s sponsor, Representative Brandt Iden. Rep. Iden is retiring and is seen as very productive and amenable to public feedback. He is currently the chair of the House Ways and Means Committee. He has told the lobbying firm that he does not want the unintended

consequences described above, so we are cautiously optimistic that he will consider our proposed amendments. The PCC will report back after direct conversations with Rep. Iden.

- vi. The Michigan Senate will be back in session after the election, but the bill is unlikely to move until after Thanksgiving.
- vii. The PCC has also been in touch with other Michigan institutes, including the Michigan Institute of Certified Public Accountants (MICPA). MICPA was able to amend the House version and therefore is neutral to our changes.
- viii. **Member question:** How does this impact private certifying bodies?
 - 1. Although the bill does not purport to directly restrict or limit certification organizations, 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. It could both tie the hands of licensure agencies and block important information on the fitness for certification to certification organizations.
 - 2. In the other direction, the bill threatens to create a loophole where licensure agencies may not consider a certification organization’s denial of an applicant if that denial was based on a criminal conviction or civil judgment.
- ix. **Member question:** What do you forecast is the future of this type of legislation?
 - 1. The PCC does not think ex-offender reentry bills are going away. There is a significant volume of them and both political parties have discussed these issues. As such, the PCC wants to work with legislatures to pass the best version of—rather than block—these bills.
 - 2. Further, in the employment context, there are several “ban the box” laws which prevent employers from considering criminal convictions. On the Federal level, we have already seen attempts to extend such bills to the certification context. Certification organizations and professional societies are seen as gatekeepers to professions, and the PCC will continue to watch for bills that reach beyond regulating licensing agencies.

d. Election Preview: Potential State Legislature Flips

- i. There are several states that have the potential to flip, such as Michigan, North Carolina, and Texas.

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.

b. H.R. 5339 (529 Plan Legislation) – Potential Inclusion in Retirement Security Legislation

- i. Rep. Kevin Brady introduced bipartisan retirement security legislation that includes automatic enrollment in 401k plans and increasing the savers credit. The introduced version of the bill does not include any provisions related to 529s, but this is the type of vehicle that the PCC would expect to be a natural fit for legislation on 529s to advance through Congress.
- ii. The PCC suspects this bill will evolve and is a marker for action next year. The PCC will have conversations with the House Ways and Means Committee and will report back.

c. Election Preview: Potential Impacts on Priority Legislation/Issues

- i. The PCC will forecast potential impacts on priority legislation and issue areas once election results become available.
- ii. Both the Skills Renewal Act and 529 Plan legislation are bipartisan, so hopefully regardless of what happens in the election, our prospects will remain relatively unchanged.

4. Strategic Discussion

a. **Universal Licensure/Reciprocal Licensure Bills: should the PCC take a position?**

- i. Universal licensure or reciprocal licensure bills — which allow individuals with an out-of-state license who meet certain criteria to practice in their new state — have not yet been included on the PCC’s monitoring watchlist, as they are neutral on their face with respect to certification.
- ii. However, there are aspects of this occupational licensure reform that could be concerning for PCC members, particularly those who provide certifications for regulated professions and those certifications that are conditions of licensure. For example, licensees could obtain licensure in states with laxer requirements for licensure – and no requirement for certification – to obtain reciprocal licensure in a state that does otherwise require certification as a condition of licensure.
- iii. **The PCC poses the following questions to members:** Should the PCC take a stance on universal licensure/reciprocal licensure bills? Should we draft a statement of principles and best practices to establish the certification community’s recommendations on how such bills are best enacted? Also, do members have examples of vast disparities in requirements between states?
 1. The PCC members generally expressed the view that the PCC should develop a statement of principles and best practices.
 2. Examples of professions where state requirements vary significantly are: acupuncturists, pharmacy technicians, and dental assistants.
 3. Importantly, the scope of practice for a licensed profession may vary from state to state.
 4. We encourage members to send additional thoughts, comments, and questions by email.

b. **Amicus brief in *Kenney v. American Board of Internal Medicine***

- i. *Kenney* concerns a group of physicians who objected on antitrust grounds to the requirement of a recertification exam to maintain certification. Last year, the Court dismissed the case, holding that recertification is part of the same product as initial certification and that private, nongovernmental certification bodies have a right to set standards for certification and recertification.

- ii. The plaintiffs appealed to the Third Circuit where the case was argued on October 22, 2020 before a three-judge panel.
- i. 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.
- ii. At oral argument, the attorney for the American Board of Internal Medicine emphasized what was in our amicus brief. Further, the court’s questions suggest a sympathetic view toward the Board. We have sent out a [link to the audio recording of the oral argument](#).
- iii. The PCC is hopeful that the court will affirm the lower court’s decision. Two similar cases reached a similar decision at the federal district court level: *Siva v. American Board of Radiology* and *Lazarou v. American Board of Psychiatry and Neurology*.

c. Stakeholder Outreach

- i. 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.

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