Professional Certification Coalition Member Strategy Call
Wednesday, March 3, 2021
11:30 a.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. We appreciate your continued support and involvement in these conversations. It is extremely helpful to hear your feedback as we move forward on these issues.

    b. **"Second half" invoices report**
        i. We sent out invoices for the second half of the fiscal year a few weeks ago.
        ii. Thank you to the vast majority of our members for fulfilling their dues requirements.
        iii. We look forward to receiving the remaining dues as soon as possible.
        iv. If we can answer any questions, please do not hesitate to reach out at info@profcertcoalition.org.

2. **State Legislation** (see the State Legislative Watchlist for the most up-to-date bill monitoring information)

    a. **Update: High Priority Bills discussed on last month's Member Strategy Call**
        i. We sent legislator letters for the 13 bills reported on in our last member meeting, except 3 that have died:
            1. MS S.B. 2048, MS H.B. 663, and VA H.B. 601.
        ii. Most have not moved, except for AZ S.B. 1218, which passed the Senate and is now in the House.
            1. We sent another, follow-up letter to the House committee reviewing the bill.
        iii. The Oklahoma Certification Opportunity Act (OK S.B. 756) has not moved forward.
        iv. IA S.S.B. 1046, a review and repeal bill that already includes PCC safe harbors, is actively being considered in committee.

    b. **Recently Added 2021 High-Priority Bills: *Returning Bills***
        i. **CT H.B. 6474** – ex-offender reentry/directly targets association eligibility requirements
            1. This bill adds criminal record history as a protected class and prohibits private organizations of members of regulated professions from denying membership on the basis of an individual's criminal record history.
            2. It is a direct, unconstitutional prohibition on organizations enforcing their eligibility requirements and codes of conduct.
            3. The bill also restricts licensing agencies from considering criminal record history in most circumstances after five years.

ii. **RI H.B. 5428** – review and repeal/ex-offender reentry
    1. In addition to a legislative letter, we have included a markup of amendments in our communications to legislators.

iii. **WA H.B. 1403** – review and repeal/sunset review
    1. This is another model Institute for Justice (IJ) bill, that calls for enacting government certification programs as an alternative to licensure.

c. **Recently Added 2021 High-Priority Bills:** ***New Bills***

i. **AZ H.B. 2787** – ex-offender reentry
    1. This bill only identifies public safety as a legitimate regulatory consideration, not public health or welfare.
    2. It imposes on the licensure agency a "clear and convincing" evidence standard in order to deny a license based on criminal conviction history.

ii. **CT H.B. 6407** – reciprocity (no equivalence of scope or standards)

iii. **CT H.B. 6445** – reciprocity (work experience in lieu of qualifications)

iv. **ID S. 1083** – reciprocity (lifetime exemption from exams for vets and spouses)

v. **KS H.B. 2066/S.B. 137** – reciprocity (work experience/private certification in lieu of qualifications; no equivalence of standards)

vi. **NE L.B. 263** – reciprocity (work experience/private certification in lieu of qualifications; no equivalence of standards)

vii. **PA S.B. 211** – broad liability on limitation if conducting business during pandemic
    1. This is an unusual bill – it appears to be aimed at protecting business that flout COVID-19 restrictions.
    2. It defines conducting a business transaction or keeping a physical business location open during a declared disaster as "protected business operations."
    3. It provides that anyone conducting a "protected business operation" is immune from civil and criminal liability and any administrative sanctions, including those by professional licensing boards, unless the individual causes actual harm.
    4. Read literally, as long as there are pandemic restrictions in place, this bill would prevent a board from taking action against an unlicensed person unless it can prove actual harm.
    5. **Member Question:** This bill would prevent a licensing board from taking action against an *unlicensed* person who is conducting business?
        a. Yes, unfortunately, that is our reading.

viii. **TN H.B. 108** – reciprocity (no equivalence of standards)

ix. **UT H.B. 183** – reciprocity (waives exam requirements based on work experience and training)

x. **WV H.B. 2007/S.B. 269** – reciprocity (work experience/private certification in lieu of qualifications; no equivalence of standards)
    1. In this bill, private certification is not defined as anything substantive, which runs the risk of including credentials an individual can purchase off the internet without meeting any other qualifications for licensure.

3. **License Reciprocity**

    a. After reviewing the introduced reciprocity bills, we noticed that many are providing alternative pathways to licensure for individuals from states without a licensure requirement in place, using work experience and private certification as a substitute.

    b. Therefore, we added the following principle to our Statement of Principles for Universal Licensure Recognition and Reciprocity:
        i. Grant alternative pathways to licensure for unlicensed out-of-state applicants only if the applicant demonstrates at least substantially equivalent educational, training, examination, credentials, and experience as are required of in-state applicants.

    c. **Member Question:** Does licensing reciprocity affect all licensed occupations?
        i. Although some bills include carve-out provisions that exclude listed occupations, most are written to affect all occupations. Providing alternative pathways to licensure based on work experience varies in practical effect. For example, that provision would have no relevance for an occupation that is licensed in all 50 states, but an occupation that is licensed in only 45 states would be impacted.

4. **Federal Legislation**

    a. **529 Plan Legislation**

        i. We have been in frequent communication with Rep. Spanberger, who is very close to reintroducing the bill that the PCC drafted.

        ii. **Confidentially**, Rep. Spanberger has obtained a commitment from Rep. Upton to be the lead Republican sponsor. Rep. Upton is the former chairman of the Energy and Commerce Committee and one of the more respected and most bipartisan Republican Members of Congress.

        iii. We also looked closely at the bill we drafted with Rep. Spanberger last year and have proposed minor changes to make it as favorable as possible to our membership.

1. In particular, we have made changes to our original draft to ensure certifications offered in unregulated professions – i.e., certifications that are not required for state licensure – are covered under the bill for the use of 529 funds. This eliminates any ambiguity from relying on terms that are undefined in existing law.

iv. Spanberger's office has indicated they are open to our amendments and want to work on the language with the bill's Senate sponsor, Sen. Klobuchar (who introduced a much narrower version of the bill that was our inspiration for pursuing this in the first place).

v. We are working to get the bill introduced this month, hopefully with our slightly improved language.

vi. **Member question:** will Rep. Spanberger be looking for additional original co-sponsors before introducing the bill?
    1. Yes, we think she'd love to have additional co-sponsors. However, there are two factors at play: (1) Time – she is motivated to introduce the bill soon, and (2) bipartisanship – she will likely want an even balance of Democratic and Republican cosponsors to the bill.

b. **Skills Renewal Act**

i. Sen. Klobuchar and Rep. Kilmer have reintroduced the original version of the bill. The introduced bill does not include amendments we proposed last year and this year.
ii. Sen. Klobuchar continues to consider our proposed amendments to the bill and remains committed to finding a legislative vehicle to which the Skills Renewal Act could be attached.

c. **Potential legislation to enable certification orgs/training programs to apply to participate in a federally funded program allowing them to offer discount examinations/enrollment to those affected by pandemic**

i. Regardless of what happens with the latest COVID-19 relief bill, we are considering and looking out for opportunities to have our proposed amendments to the Skills Renewal Act introduced as a standalone bill.

ii. Under our proposed alternative, certification organizations would offer discounted enrollment and/or exam fees to individuals displaced from their jobs due to the pandemic, supported by a federally funded Skills Renewal Scholarship Fund. This stands in contrast to the original version of the Skills Renewal Act, under which those individuals would need to apply for tax credits to cover the cost of training or obtaining credentials.

iii. The funding under our proposed alternative would come from a self-administered payroll tax credit, similar to the paid leave provisions of the Families First Coronavirus Response Act (FFCRA).

iv. Certification organizations would be responsible for reviewing applications from eligible individuals and promoting the scholarship program, which would also provide the opportunity to promote their certification programs.

v. If Congress does not again consider a major COVID-19 relief bill like the CARES Act or President Biden's American Rescue Plan – hopefully because we are in the homestretch of the pandemic! – the PCC may consider amending the bill so that it is not so closely tied to workers who have been furloughed or otherwise displaced due to the pandemic.

vi. **Member question:** when will the "ideal" version of the bill be available?
    1. As we have shared it with congressional staff, we would be happy to share it with members who want to review it. As it is still a draft bill, we would greatly appreciate your feedback. Please contact us if you would like to see the draft.

5. Court Decision in *Kenney*

a. As you may recall, the PCC, in partnership with ASAE and I.C.E., filed an *amicus curiae* ("friend of the court") brief in *Kenney v. American Board of Internal Medicine*, in the U.S. Court of Appeals for the Third Circuit.

b. This case traces back to district court litigation against medical specialty boards that have maintenance of certification (MOC) requirements. Plaintiffs claim that such requirements are an antitrust violation by unlawfully tying two unrelated products: initial certification and MOC. The district court decision emphasized that private certification organizations have the right to define their own standards and to change those standards; the PCC's *amicus* brief argued in support of that principle.

c. The district court rejected that argument and held that initial certification and MOC or recertification are part of a single product: certification.

d. The Third Circuit affirmed the district court's decision on all grounds.
    i. The Third Circuit affirmed the District Court's finding that plaintiffs failed to plausibly allege the first element of a tying claim, because the plaintiffs could not prove that ABIM's initial certification and MOC are separate products.
    ii. The court also affirmed dismissal of an unjust enrichment claim, on the basis that plaintiffs "have not plausibly alleged that they were forced to purchase MOC," which is one of three elements in such a claim.

e. This is groundbreaking, as there has not been an appeals court decision in the occupational certification context at all.

f. This bolsters the principle that private certification bodies have the right to establish their own credentialing standards.

g. **Member question:** can you talk further about the potential long-term implications of this decision for certification organizations?

i. There are other pending similar challenges in district courts. We predict numerous district court losses for those plaintiffs, as the appeals court decision will be very persuasive to lower courts. We hope it will also deter any similar future lawsuits against certification organizations.
ii. The decision reinforces the principle that just because a certification has become a *de facto* advantage in an individual's career, does not mean there is an unlawful conspiracy. Rather, the court decisions emphasize that the career importance of private certification is because consumers and employers find value in the certification.
iii. We do not know if there will be additional appeals and will track applications for certiorari at the Supreme Court; even if there is a further appeal, the vast majority of certiorari petitions are denied.
iv. Our prediction is that this is the end of the road for this case.