

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

Senate Bill 646

BY SENATOR MAYNARD

[Introduced January 29, 2020; referred
to the Committee on Government Organization]

1 A BILL to amend and reenact §30-1A-1, §30-1A-2, §30-1A-3, §30-1A-4, §30-1A-5, and §30-1A-6
 2 of the Code of West Virginia, 1931, as amended; and to amend said code by adding
 3 thereto a new section, designated §30-1A-1a, all relating to reviewing proposals for new
 4 occupational regulation and existing occupational regulation provisions; declaring the
 5 state policy for regulation of occupations; defining terms; establishing procedures and
 6 criteria for the review of proposals or applications for the regulation of an occupation;
 7 specifying required contents to include in an application; outlining a methodology to
 8 address identified risks or harms; setting time requirement for completion of review and
 9 report; providing for public hearings and additional findings; requiring adoption of certain
 10 rules of both houses of the Legislature; outlining a process for annual review of a portion
 11 of existing licensing authorities and issuing public reports and recommendations
 12 therefrom; and establishing canons of interpretation.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 1A. PROCEDURE FOR REGULATION OF OCCUPATIONS AND
 PROFESSIONS.**

§30-1A-1. Legislative findings; policy.

1 The Legislature finds that regulation should be imposed on an occupation or profession
 2 only when necessary for the protection of public health and safety. The Legislature further finds
 3 that establishing a procedure for reviewing the necessity of regulating an occupation or profession
 4 prior to enacting laws for such regulation and analyzing existing occupational regulations will
 5 better enable it to evaluate the need for the regulation and to determine the least restrictive
 6 ~~regulatory alternative~~ regulation consistent with public health and safety.

7 For occupational regulations and the boards of the state, it is the policy of the state that:

8 (1) The right of an individual to pursue a lawful occupation is a fundamental right;

9 (2) Where the state finds it is necessary to displace competition, it will use the least

10 restrictive regulation to protect consumers from present, significant, and substantiated harms that
11 threaten public safety; and

12 (3) Legislative leaders will assign the responsibility to review legislation and laws related
13 to occupational regulations.

§30-1A-1a. Definitions.

1 As used in this article:

2 “Government certification” means a voluntary, government-granted, and nontransferable
3 recognition to an individual who meets personal qualifications related to a lawful occupation. Upon
4 the government’s initial and continuing approval, the individual may use “government certified” or
5 “state certified” as a title. A non-certified individual also may perform the lawful occupation for
6 compensation but may not use the title “government certified” or “state certified”. In this chapter,
7 the term “government certification” is not synonymous with “occupational license”. It also is not
8 intended to include credentials, such as those used for medical-board certification or held by a
9 certified public accountant, that are prerequisites to working lawfully in an occupation;

10 “Government registration” means a requirement to give notice to the government that may
11 include the individual's name and address, the individual's agent for service of process, the
12 location of the activity to be performed, and a description of the service the individual provides.

13 “Government registration” does not include personal qualifications and is not transferable but it
14 may require a bond or insurance. Upon the government’s receipt of notice, the individual may use
15 “government registered” as a title. A non-registered individual may not perform the occupation for
16 compensation or use “government registered” as a title. In this chapter, “government registration”
17 is not intended to be synonymous with “occupational license”. It also is not intended to include
18 credentials, such as those held by a registered nurse, which are prerequisites to working lawfully
19 in an occupation;

20 “Lawful occupation” means a course of conduct, pursuit, or profession that includes the
21 sale of goods or services that are not themselves illegal to sell irrespective of whether the
22 individual selling them is subject to an occupational regulation;

- 23 “Least restrictive regulation” means, from least to most restrictive:
24 (1) Market competition,
25 (2) Third-party or consumer-created ratings and reviews,
26 (3) Private certification,
27 (4) Voluntary bonding or insurance,
28 (5) Specific private civil cause of action to remedy consumer harm,
29 (6) Deceptive trade practice act,
30 (7) Mandatory disclosure of attributes of the specific good or service,
31 (8) Regulation of the process of providing the specific good or service,
32 (9) Regulation of the facility where the specific good or service is sold,
33 (10) Inspection,
34 (11) Bonding,
35 (12) Insurance,
36 (13) Government registration,
37 (14) Government certification,
38 (15) Specialty occupational certification solely for medical reimbursement, and
39 (16) Occupational license.

40 “Occupational license” is a nontransferable authorization in law for an individual to perform
41 exclusively a lawful occupation for compensation based on meeting personal qualifications
42 established by the Legislature. In an occupation for which a license is required, it is illegal for an
43 individual who does not possess a valid occupational license to perform the occupation for
44 compensation;

45 “Occupational regulation” means a statute, rule, practice, policy, or other state law that
46 allows an individual to use an occupational title or work in a lawful occupation. It includes
47 government registration, government certification, and occupational license. It excludes a
48 business license, facility license, building permit, or zoning and land use regulation except to the
49 extent those state laws regulate an individual’s personal qualifications to perform a lawful

50 occupation;

51 “Personal qualifications” are criteria related to an individual’s personal background and
52 characteristics. They may include one or more of the following: completion of an approved
53 educational program, satisfactory performance on an examination, work experience,
54 apprenticeship, other evidence of attainment of requisite knowledge and skills, passing a review
55 of the individual’s criminal record, and completion of continuing education;

56 “Private certification” is a voluntary program in which a private organization grants
57 nontransferable recognition to an individual who meets personal qualifications and standards
58 relevant to performing the occupation as determined by the private organization. The individual
59 may use a designated title of “certified” or other title conferred by the private organization; and

60 “Specialty occupational certification solely for medical reimbursement” means a non-
61 transferable authorization in law for an individual to qualify for payment or reimbursement from a
62 government agency for the non-exclusive provision of new or niche medical services based on
63 meeting personal qualifications established by the Legislature. A private health insurance
64 company or other private company may recognize this credential. Notwithstanding this specialty
65 certification, it is legal for a person regulated under another occupational regulation to provide
66 similar services as defined in that statute for compensation and reimbursement. It is also legal for
67 an individual who does not possess this specialty certification to provide the identified medical
68 services for compensation, but the non-certified individual will not qualify for payment or
69 reimbursement from a government agency.

**§30-1A-2. Required application for regulation of professional or occupational group;
application and reporting dates.**

1 (a) The Joint Standing Committee on Government Organization is responsible for
2 facilitating the review of all legislation to enact or modify an occupational regulation to ensure
3 compliance with the policy stated in §30-1A-1 of this code. The Joint Standing Committee on
4 Government Organization shall refer the review of a proposal for regulation of any unregulated
5 profession or occupation or any revision or expansion of the scope of practice of a regulated

6 profession or occupation to the Performance Evaluation and Research Division of the Office of
7 the Legislative Auditor.

8 ~~(a)~~ (b) Any professional or occupational group or organization, any individual or any other
9 interested party which proposes the regulation of any unregulated ~~professional or occupational~~
10 ~~group or organization~~ profession or occupation, or who proposes to establish, revise or expand
11 the scope of practice of a regulated profession or occupation shall submit an application to the
12 Joint Standing Committee on Government Organization, as set out in this article.

13 ~~(b)~~ (c) The Joint Standing Committee on Government Organization may only accept an
14 application for regulation of a ~~professional or occupational group or organization~~ profession or
15 occupation, or establishment, revision or expansion of the scope of practice of a regulated
16 profession or occupation, when the party submitting an application files with the committee a
17 statement of support for the proposed regulation which has been signed by at least 10 residents
18 or citizens of the State of West Virginia who are members of the professional or occupational
19 group or organization for which regulation is being sought, or for which establishment, revision or
20 expansion of the scope of practice of a regulated profession or occupation is being sought.

21 ~~(c)~~ (d) The completed application shall contain:

22 (1) A description of the ~~professional or occupational group or organization~~ profession or
23 occupation for which regulation is proposed, or for which establishment, revision or expansion of
24 the scope of practice of a regulated profession or occupation is proposed, including a list of
25 associations, organizations and other groups currently representing the practitioners in this state,
26 and an estimate of the number of practitioners in each group;

27 (2) A definition of the problem and the reasons why regulation or establishment, revision
28 or expansion of the scope of practice is necessary;

29 (3) The reasons why government certification, government registration, ~~license~~ an
30 occupational license or other type of regulation is being requested and why that regulatory
31 alternative was chosen over a less restrictive alternative;

32 (4) A detailed statement of the proposed funding mechanism to pay the administrative

33 costs of the regulation or the establishment, revision or expansion of the scope of practice, or of
34 the fee structure conforming with the statutory requirements of financial autonomy as set out in
35 this chapter;

36 (5) A detailed statement of the location and manner in which the group plans to maintain
37 records which are accessible to the public as set out in this chapter;

38 (6) The benefit to the public that would result from the proposed regulation or
39 establishment, revision or expansion of the scope of practice; ~~and~~

40 (7) The cost of the proposed regulation or establishment, revision or expansion of the
41 scope of practice; and

42 (8) Evidence, if any, of present, significant and substantiated harms to consumers in the
43 state.

§30-1A-3. Analysis and evaluation of application.

1 (a) The Joint Committee on Government Organization shall refer the completed
2 application of the professional or occupational group or organization to the Performance
3 Evaluation and Research Division of the Office of the Legislative Auditor.

4 (b) The Performance Evaluation and Research Division of the Office of the Legislative
5 Auditor shall conduct an analysis and evaluation of the application. The analysis and evaluation
6 shall be based upon the criteria listed in subsection (c) of this section. The Performance
7 Evaluation and Research Division of the Office of the Legislative Auditor shall submit a report,
8 and such supporting materials as may be required, to the Joint Standing Committee on
9 Government Organization, as set out in this section.

10 (c) The Performance Evaluation and Research Division shall determine if the proposed
11 regulation meets the state's policy in §30-1A-1(b) of this code of using the least restrictive
12 regulation necessary to protect consumers from present, significant, and substantiated harms.

13 (d) The Performance Evaluation and Research Division's analysis in subsection (c) of this
14 section will employ a rebuttable presumption that consumers are sufficiently protected by market
15 competition and private remedies, as included in the definition of "least restrictive regulation" in

16 §30-1A-1a of this code. The Joint Standing Committee on Government Organization will give
17 added consideration to the use of private certification programs that allow a provider to give
18 consumers information about the provider's knowledge, skills, and association with a private
19 certification organization.

20 (e) The Performance Evaluation and Research Division may rebut the presumption in
21 subsection (d) of this section if it finds both credible, empirical evidence of present, significant,
22 and substantiated harm, and that consumers do not have the information or means to protect
23 themselves against such harm. If evidence of such unmanageable harm is found, the committee
24 will recommend the least restrictive government regulation to address the harm.

25 (f) The Performance Evaluation and Research Division of the Office of the Legislative
26 Auditor will use the following guidelines to form its recommendations reported pursuant to
27 subsections (j) or (k) of this section. If the harm arises from:

28 (1) Contractual disputes, including pricing disputes, the office may recommend enacting
29 a specific civil cause of action in small-claims court or district court to remedy consumer harm.
30 This cause of action may provide for reimbursement of the attorney's fees or court costs, if a
31 consumer's claim is successful;

32 (2) Fraud, the office may recommend strengthening powers under the state's deceptive
33 trade practices acts or requiring disclosures that will reduce misleading attributes of the specific
34 good or service;

35 (3) General health and safety risks, the office may recommend enacting a regulation on
36 the related process or requiring a facility license;

37 (4) Unclean facilities, the office may recommend requiring periodic facility inspections;

38 (5) A provider's failure to complete a contract fully or to standards, the office may
39 recommend requiring the provider to be bonded;

40 (6) A lack of protection for a person who is not a party to a contract between providers and
41 consumers, the office may recommend requiring the provider have insurance;

42 (7) Transactions with transient, out-of-state, or fly-by-night providers, the office may

43 recommend requiring the provider register its business with the Secretary of State;

44 (8) A shortfall or imbalance in the consumer's knowledge about the good or service relative
45 to the provider's knowledge (asymmetrical information), the office may recommend enacting
46 government certification;

47 (9) An inability to qualify providers of new or highly-specialized medical services for
48 reimbursement by the state, the office may recommend enacting a specialty certification solely
49 for medical reimbursement;

50 (10) A systematic information shortfall in which a reasonable consumer of the service is
51 permanently unable to distinguish between the quality of providers and there is an absence of
52 institutions that provide guidance to consumers, the office may recommend enacting an
53 occupational license; and

54 (11) The need to address multiple types of harm, the office may recommend a combination
55 of regulations. This may include a government regulation combined with a private remedy
56 including third-party or consumer-created ratings and reviews, or private certification.

57 (g) The Performance Evaluation and Research Division's analysis of the need for
58 regulation in subsection (e) of this section shall include the effects of legislation on opportunities
59 for workers, consumer choices and costs, general unemployment, market competition,
60 governmental costs and other effects.

61 (h) The Performance Evaluation and Research Division's analysis of the need for
62 regulation in subsection (e) of this section also shall compare the legislation to whether and how
63 other states regulate the occupation, including the occupation's scope of practice that other states
64 use, and the personal qualifications other states require.

65 (i) The Performance Evaluation and Research Division may also request information from
66 state agencies that contract with individuals in regulated occupations and others knowledgeable
67 of the occupation, labor-market economics, or other factors, costs and benefits.

68 ~~(e)~~ (j) For an application proposing the regulation of an unregulated professional or
69 occupational group or organization, the Performance Evaluation and Research Division's report

70 shall include evaluation, analysis, and findings as to:

71 (1) Whether the unregulated practice of the occupation or profession clearly harms or
72 endangers the health, safety, or welfare of the public, and ~~whether the potential for the harm is~~
73 ~~easily recognizable and not remote or dependent upon tenuous argument~~ the evidence of
74 present, significant, and substantiated harms to consumers in the state;

75 ~~(2) Whether the practice of the profession or occupation requires specialized skill or~~
76 ~~training which is readily measurable or quantifiable so that examination or training requirements~~
77 ~~would reasonably assure initial and continuing professional or occupational competence~~ The
78 requisite personal qualifications, if any;

79 (3) The scope of practice, if applicable;

80 ~~(3) (4) Whether the public can be adequately protected by other means in a more cost-~~
81 ~~effective manner~~ If regulation is required to address evidence of harm to consumers in the state,
82 the least restrictive regulation of the occupation or profession; and

83 ~~(4) (5) Whether the professional or occupational group or organization should be regulated~~
84 as proposed in the application.

85 ~~(d) (k)~~ (k) For an application proposing the establishment, revision, or expansion of the scope
86 of practice of a regulated profession or occupation, the report shall include the evaluation, analysis
87 and findings as set forth in subsection ~~(e) (j)~~ of this section inasmuch as applicable, and a clear
88 recommendation as to whether the scope of practice should be established, revised, or expanded
89 as proposed in the application.

90 ~~(e) For an application received after December 1, and on or before June 1, the~~
91 ~~Performance Evaluation and Research Division of the Office of the Legislative Auditor shall~~
92 ~~present a report to the Joint Committee on Government Organization by December 31 of that~~
93 ~~year.~~

94 ~~(f) For an application received after June 1 and on or before December 1, the Performance~~
95 ~~Evaluation and Research Division of the Office of the Legislative Auditor shall present a report to~~
96 ~~the Joint Committee on Government Organization by June 30 of the next year~~

97 (l) The Performance Evaluation and Research Division of the Office of the Legislative
 98 Auditor shall submit its report to the Joint Standing Committee on Government Organization no
 99 less than nine months after the office receives the application for analysis.

§30-1A-4. Public hearing and committee recommendations.

1 (a) After receiving the required report, the Joint Standing Committee on Government
 2 Organization may conduct public hearings to receive testimony from the public, the Governor or
 3 his or her designee, the group, organization or individual who submitted the proposal for
 4 regulation, and any other interested party.

5 (b) The Joint Committee on Government Organization may issue additional findings and
 6 recommendations regarding:

7 (1) The least restrictive regulation of the occupation or profession; and

8 (2) Whether regulation would result in the creation of a new agency or board or could be
 9 implemented more efficiently through an existing agency or board;

10 ~~(b) (c)~~ The Joint Standing Committee on Government Organization shall report its findings
 11 and recommendations, if any, to the next regular session of the Legislature.

12 ~~(c) The report shall include:~~

13 ~~(1) Whether regulation of each occupation or profession is necessary for the public health~~
 14 ~~and safety and, if regulation is necessary, recommendations as to what is the least restrictive type~~
 15 ~~of regulation consistent with the public interest; and~~

16 ~~(2) Whether regulation would result in the creation of a new agency or board or could be~~
 17 ~~implemented more efficiently through an existing agency or board.~~

18 ~~(d) The report may include a recommendation that the occupation or profession be~~
 19 ~~regulated by any of the following mechanisms, in whole or in part:~~

20 ~~(1) By practice standards, which may include restrictions established by statute;~~

21 ~~(2) By registration, which may include inspections or other enforcement provisions;~~

22 ~~(3) By statutory certification, which may include testing or assessment of the practitioner's~~
 23 ~~credential or competency;~~

24 ~~(4) By supervision by a licensed practitioner, which may include practice standards,~~
25 ~~registration or statutory certification;~~

26 ~~(5) By licensure by a new or existing agency or board, which may include restrictions of~~
27 ~~the scope of practice, minimum competency, education, testing, registration, certification,~~
28 ~~inspection or enforcement~~

29 (d) The Performance Evaluation and Research Division shall publish its report on the
30 Legislative Auditor's website. The Joint Standing Committee on Government Organization shall
31 also make the report and any additional findings and recommendations publicly available and
32 post it on the Legislature's website.

33 (e) The House of Delegates and the Senate shall each adopt a rule requiring any
34 committee considering legislation to enact or modify an occupational regulation to receive the
35 Performance Evaluation and Research Division's report and the Joint Standing Committee on
36 Government Organization's findings and recommendations in subsection (b) if applicable, prior to
37 voting on the legislation.

38 (f) Nothing in this article shall be construed to preempt federal regulation or to require a
39 private certification organization to grant or deny private certification to any individual.

§30-1A-5. Reapplication requirements Review of existing occupational licensing.

1 ~~(a) If the Joint Standing Committee on Government Organization approves an application~~
2 ~~for regulation of a professional or occupational group or organization, but the legislation~~
3 ~~incorporating its recommendations does not become law in the year in which it is first introduced,~~
4 ~~the applicants for regulation may introduce legislation during each of the two successive regular~~
5 ~~sessions without having to make reapplication.~~

6 ~~(b) If the Joint Standing Committee on Government Organization does not approve an~~
7 ~~application for regulation, establishment, revision or expansion of the scope of practice of a~~
8 ~~professional or occupational group or organization, any party who continues to propose the~~
9 ~~regulation, establishment, revision or expansion must reapply in accordance with the provisions~~
10 ~~of this article.~~

11 (a) Starting January 1, 2021, the Joint Committee on Government and Finance will assign
12 to the Performance Evaluation and Research Division of the Office of the Legislative Auditor the
13 responsibility to analyze existing occupational license requirements.

14 (b) The Performance Evaluation and Research Division is responsible for reviewing
15 annually approximately 20 percent of the current occupational licensing authorities under the
16 committee's jurisdiction. The joint committee will select the occupational licensing authorities to
17 be reviewed annually.

18 (c) The Performance Evaluation and Research Division shall review all occupational
19 licensing authorities within the subsequent five years and will repeat such review processes in
20 each five-year period thereafter.

21 (d) The Performance Evaluation and Research Division will use the criteria in section §30-
22 1A-3 of this code to analyze all existing occupational licenses. The division also may consider
23 research or other credible evidence whether an existing regulation directly helps consumers to
24 avoid present, significant, and recognizable harm.

25 (e) (1) Starting January 1, 2022, the Performance Evaluation and Research Division of the
26 Office of the Legislative Auditor shall report annually the findings of its reviews to the Speaker of
27 the House of Delegates, the President of the Senate, the Joint Standing Committee on
28 Government Organization, and the Governor. In its report, the Performance Evaluation and
29 Research Division shall recommend the Legislature enact new legislation that:

30 (A) Repeals the occupational licenses;

31 (B) Converts the occupational licenses to less restrictive regulations according to the
32 listing in §30-1A-1a of this code;

33 (C) Instructs the relevant licensing board or agency to promulgate revised regulations
34 reflecting the Legislature's decision to use a less restrictive alternative to an occupational license;

35 (D) Changes the requisite personal qualifications for an occupational license;

36 (E) Redefines the scope of practice in an occupational license; or

37 (F) Reflects other recommendations to the Legislature.

38 (2) The Performance Evaluation and Research Division also may recommend that no new
39 legislation is enacted.

40 (3) The Performance Evaluation and Research Division will make its report publicly
41 available and post it on its website.

42 (4) Nothing in this article shall be construed to preempt federal regulation, to authorize the
43 office to review the means that a private certification organization uses to issue, deny or revoke
44 a private certification to any individual, or to require a private certification organization to grant or
45 deny private certification to any individual.

§30-1A-6. Article construction.

1 (a) Nothing in this article shall be construed as limiting or interfering with the right of any
2 member of the Legislature to introduce or of the Legislature to consider any bill that would create
3 a new state governmental department or agency or amend the law with respect to an existing
4 one.

5 (b) Notwithstanding the provisions of subsection (a) of this section, the recommendations
6 of the Joint Standing Committee on Government Organization are to be given considerable weight
7 in determining if a profession or occupation should be regulated, or if the scope of practice of a
8 regulated profession or occupation should be established, revised or expanded.

9 (c) In construing any governmental regulation of occupations, including an occupational
10 licensing statute, rule, policy, or practice, the following canons of interpretation are to govern,
11 unless the regulation is unambiguous:

12 (1) Occupational regulations will be construed and applied to increase economic
13 opportunities, promote competition, and encourage innovation;

14 (2) Any ambiguities in occupational regulations will be construed in favor of workers and
15 aspiring workers to work; and

16 (3) The scope of practice in occupational regulations is to be construed narrowly to avoid
17 burdening individuals with regulatory requirements that only have an attenuated relationship to
18 the goods and services they provide.

NOTE: The purpose of this bill is to establish standards and procedures for analysis and consideration in determining what level, if any, of government regulation of an occupation should be imposed on that occupation and to require periodic review of existing occupational regulation to determine if and when less restrictive alternatives should be implemented.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.