

# **WEST VIRGINIA LEGISLATURE**

## **2020 REGULAR SESSION**

**Introduced**

### **House Bill 3052**

BY DELEGATE FOSTER

[Introduced March 10, 2021; Referred to the  
Committee on Government Organization then the  
Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
 2 designated §29-30-1, §29-30-2, §29-30-3, §29-30-4, §29-30-5, §29-30-6, §29-30-7, §29-  
 3 30-8, §29-30-9, and §29-30-10, all relating to creating the Occupational Board Reform Act;  
 4 creating the Office of Supervision of Occupational Boards; providing the Attorney  
 5 General's Consumer Protection Division with the authority to establish the office;  
 6 establishing the office's responsibilities; giving the office the authority to actively supervise  
 7 state occupational boards; authorizing the office to play a substantial role in the  
 8 development of an occupational board's rules and policies, including the approval and  
 9 disapproval of proposed rules or policies in certain instances; providing for review and  
 10 oversight by the Attorney General; requiring the Speaker of the House of Delegates and  
 11 the President of the Senate to establish a position in the nonpartisan research staff to  
 12 analyze occupational rules; providing for the Legislature's analysis of occupational rules;  
 13 providing a short title; establishing its policy; providing for avoidance of liability under  
 14 federal anti-trust laws; defining terms; providing for statutory interpretation; providing for  
 15 petitions for review of criminal history; providing for preemption; and providing an effective  
 16 date.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 30. THE OCCUPATIONAL BOARD REFORM ACT.**

**§29-30-1. Short title.**

1 This article may be cited as the Occupational Board Reform Act.

**§29-30-2. Policy.**

1 For occupational rules and their boards, it is the policy of the state that:

2 (a) The right of an individual to pursue an occupation is a fundamental right.

3 (b) Occupational rules shall be construed and applied to increase economic opportunities,  
 4 promote competition and encourage innovation.

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

6 restrictive rule to protect consumers from present, significant and substantiated harms that  
7 threaten public health and safety.

8 (d) An occupational rule may be enforced against an individual only to the extent the  
9 individual sells goods and services that are included explicitly in the statute that defines the  
10 occupation’s scope of practice.

11 (e) The Consumer Protection Division of the Office of the Attorney General shall establish  
12 the Office of Supervision of Occupational Boards. The office shall actively supervise state  
13 occupational boards.

14 (f) The Legislature shall establish a position in its nonpartisan research staff to analyze  
15 occupational rules. The position shall review legislation and laws related to occupational rules.

**§29-30-3. Antitrust law.**

1 By establishing and executing the policies in §20-30-2 of this code, the state intends to  
2 ensure that occupational boards and board members will avoid liability under federal antitrust  
3 laws.

**§29-30-4. Definitions.**

1 For the purposes of this article, the words defined in this section have the following  
2 meanings:

3 “Active supervision” means the Office of Supervision of Occupational Boards shall  
4 independently:

5 (1) Play a substantial role in the development of an occupational board’s rules and policies  
6 to ensure they benefit consumers and not serve private interests of providers of goods and  
7 services who the board regulates;

8 (2) Disapprove the use of any board rule or policy and terminate any enforcement action  
9 outstanding at the time of this article’s enactment and subsequently that fails to accord with §20-  
10 30-2 of this code;

11 (3) Exercise control over each of the boards by reviewing and affirmatively approving only

12 rules, policies and enforcement actions that are consistent with §20-30-2 of this code; and use  
13 the nonpartisan research staff's analysis in §20-30-8 of this code; and

14 (4) Conduct reasonable investigations to gain additional information, including about less  
15 restrictive regulatory approaches, to reduce exposure to antitrust litigation. A government or  
16 private attorney providing general counsel to a board does not meet the requirement for active  
17 supervision.

18 "Certification" is a voluntary program in which a private organization or the state  
19 government grants nontransferable recognition to an individual who meets personal qualifications  
20 established by the private organization or the Legislature. Upon approval, the individual may use  
21 "certified" as a designated title. A noncertified individual may also perform the lawful occupation  
22 for compensation, but may not use the title "certified."

23 "Lawful occupation" means a course of conduct, pursuit or profession that includes the  
24 sale of goods or services that are not themselves illegal to sell irrespective of whether the  
25 individual selling them is subject to an occupational rule.

26 "Least restrictive rule" means, from least to most restrictive:

27 (1) Market competition;

28 (2) Third-party or consumer-created ratings and reviews;

29 (3) Private certification;

30 (4) Specific private civil cause of action to remedy consumer harm;

31 (5) Deceptive trade practices;

32 (6) Regulation of the process of providing the specific goods or services to consumers;

33 (7) Inspection;

34 (8) Bonding or insurance;

35 (9) Registration;

36 (10) Government certification;

37 (11) Specialty occupational license for medical reimbursement; and

38           (12) Occupational license.

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

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

49           “Personal qualifications” are criteria related to an individual’s personal background and  
50 characteristics including completion of an approved educational program, satisfactory  
51 performance on an examination, work experience, other evidence of attainment of requisite skills  
52 or knowledge, moral standing, criminal history and completion of continuing education.

53           “Registration” means a requirement to give notice to the government that may include the  
54 individual’s name and address, the individual’s agent for service of process, the location of the  
55 activity to be performed, and a description of the service the individual provides. “Registration”  
56 does not include personal qualifications but may require a bond or insurance. Upon the  
57 government’s receipt of notice, the individual may use “registered” as a designated title. A  
58 nonregistered individual may not perform the occupation for compensation or use “registered” as  
59 a designated title. “Registration” is not transferable.

60           “Specialty occupational license for medical reimbursement” means a nontransferable  
61 authorization in law for an individual to qualify for payment or reimbursement from a government  
62 agency for the nonexclusive provision of medical services based on meeting personal  
63 qualifications established by the Legislature. A private company may recognize this credential.

64 Notwithstanding this specialty license, it is legal for a person regulated under another occupational  
65 rule to provide similar services as defined in that statute for compensation and reimbursement. It  
66 is also legal for an individual who does not possess this specialty license to provide the identified  
67 medical services for compensation but the nonlicensed individual may not qualify for payment or  
68 reimbursement from a government agency.

**§29-30-5. Statutory interpretation.**

1 For the purposes of this article, the following statutory interpretations apply:

2 (a) The terms “certification” and “registration” are not synonymous with an “occupational  
3 license” in this article.

4 (b) The use of the words “certification” and “certified” in other statutes to mean requiring  
5 an individual to meet certain personal qualifications to work legally (e.g., a certified public  
6 accountant must become certified before working legally) shall be interpreted for the purposes of  
7 this article as requiring an individual to meet the requirements of an “occupational license”.

8 (c) The use of the words “registration” and “registered” in other statutes to mean requiring  
9 an individual to meet certain personal qualifications to work legally (e.g., a registered nurse shall  
10 become registered before working legally) shall be interpreted for the purposes of this article as  
11 requiring an individual to meet the requirements of an “occupational license”.

**§29-30-6. Petition for review of criminal history.**

1 (a) The fundamental right of an individual to pursue an occupation includes the right of an  
2 individual with a criminal history to obtain an occupational license, specialty occupational license  
3 for medical reimbursement, government certification or any state recognition of the individual’s  
4 personal qualifications (hereafter “state recognition” in this section).

5 (b) An individual with a criminal history may petition the responsible licensing board  
6 agency or department (hereafter “board” in this section), at any time, including before obtaining  
7 any required education or paying any fee, for a determination of whether the individual’s  
8 criminal history will disqualify the individual from obtaining state recognition.

9           (c) Notwithstanding any other statute or rule, the board may determine whether the  
10 individual's criminal history disqualifies the individual from obtaining state recognition.

11           (d)(1) The board may find the individual's criminal history disqualifies the individual from  
12 obtaining state recognition only if:

13           (A) The individual has a felony conviction;

14           (B) The type of felony for which the individual was convicted is expressly codified as a  
15 disqualifying offense in the relevant occupational license's statute; and

16           (C) The board concludes the state has an important interest in protecting public safety that  
17 is superior to the individual's right.

18           (2) The board may make this conclusion only if it determines, by a clear and convincing  
19 evidence at the time of the petition, that:

20           (A) The specific offense for which the individual was convicted is substantially related to  
21 the state's interest;

22           (B) The individual, based on the nature of the specific offense for which the individual was  
23 convicted and the individual's current circumstances, is more likely to reoffend by virtue of having  
24 the license than if the individual did not have the license; and

25           (C) That a reoffense will cause greater harm than it would if the individual did not have the  
26 license.

27           (e) The board shall issue its determination within 90 days after the board receives the  
28 petition. The determination shall be in writing and include a finding of facts and a conclusion of  
29 law.

30           (f) If the board determines the state's interest is superior to the individual's right, the board  
31 may advise the individual of actions the individual may take to remedy the disqualification.

32           (g) The individual may appeal the board's determination as provided by the state  
33 Administrative Procedure Act.

34           (h) The individual may submit a new petition to the same responsible licensing board at

35 any time two years after final judgment in the initial petition. If the new petition is submitted on the  
36 ground that the individual has undertaken the actions the board has advised him or her will remedy  
37 the disqualification, then the individual may submit a new petition at any time six months after  
38 final judgment in the initial petition.

39 (i) The board may rescind its determination at any time in the future if the individual is  
40 convicted of an additional offense that the board determines meets the elements in subsection  
41 (d) (1).

**§29-30-7. Office of Supervision of Occupational Boards.**

1 (a) The Consumer Protection Division of the Office of the Attorney General shall establish  
2 the Office of Supervision of Occupational Boards.

3 (b) Responsibility.-- The office shall actively supervise state occupational boards to  
4 ensure compliance with the policies in §29-30-2 of this code. This requires the office to be staffed  
5 by one or more attorneys who do not provide general counsel to any board and exercise control  
6 over a board's processes and substantive actions.

7 (c) Approval. -- The office must review and approve or reject any proposed board rule,  
8 policy, enforcement or other regulatory action prior to it being adopted or implemented. The  
9 office's approval must be explicit; silence or failure to act may not be considered approval.

10 (d) Complaint.-- A person may file a complaint to the office about a board's rule, policy or  
11 enforcement action that the person believes is inconsistent with §29-30-2 of this code. Within 90  
12 days, the office will investigate the complaint, identify remedies to the complaint, instruct the board  
13 to act, where appropriate, and respond in writing to the person. There is no administrative appeal  
14 available to the person of the office's decision under the state Administrative Procedure Act.

15 (e) Attorney general's review. -- A state legislator may ask the Attorney General to review:

16 (1) A board's rule, policy, or enforcement action that the state legislator believes is  
17 inconsistent with §29-30-2 of this code;

18 (2) The office's active supervision of a board; or

19 (3) The office's response to a complaint filed under subsection (d) of this section.

20 (f) Cost Allocation. -- The office and the Attorney General may assess its costs on each  
21 board for its services of active supervision and review. Each board may recoup the assessment  
22 by increasing the fees paid to each board by license holders.

**§29-30-8. The Legislature's analysis of occupational rules.**

1 (a) Legislature's analysis of occupational rules. -- The Speaker of the House of Delegates  
2 and the President of the Senate shall establish a position in the nonpartisan research staff to  
3 analyze occupational rules.

4 (b) Sunrise reviews. -- (1) The position shall review legislation to enact or modify an  
5 occupational rule to ensure compliance with the policies in §29-30-2 of this code.

6 (2) The position may require the legislation's proponents to submit evidence of present,  
7 significant and substantiated harms to consumers in the state. The position also may require  
8 information from others knowledgeable of the occupation, labor economics or other factors.

9 (3) The position shall determine if legislation meets the state policy of using the least  
10 restrictive rule necessary to protect consumers from present, significant, and substantiated  
11 harms.

12 (4) The position shall evaluate the effects of legislation on opportunities for workers,  
13 consumer choices and costs, general unemployment, market competition, governmental costs  
14 and other effects.

15 (5) The position shall compare the legislation to whether and how other states regulate  
16 the occupation.

17 (6) The position shall issue a report to relevant committees about legislation on a timely  
18 basis.

19 (c) Rule. -- The House of Delegates and the Senate shall each adopt a rule requiring a  
20 committee considering legislation to enact or modify an occupational rule to receive the position's  
21 analysis of the legislation prior to voting on the legislation.

22 (d) Sunset reviews. -- Starting on January 1, 2022, the position shall review annually  
 23 approximately 20 percent of the state's occupational rules to improve consistency with §29-30-2  
 24 of this code. The position will review all occupational rules over a period of five years. The position  
 25 may require information be submitted by a board, its members and others.

26 (e) Sunset reports. -- Starting on January 1, 2023, the position shall report annually the  
 27 findings of its reviews to the Speaker of the House of Delegates, the President of the Senate and  
 28 the Attorney General. In its report, the position shall recommend the Legislature enact new  
 29 legislation that:

30 (1) Repeals the occupational rules;

31 (2) Converts the occupational rules to less restrictive rules as defined in section four of  
 32 this article;

33 (3) Instructs the relevant licensing board or agency to promulgate revised occupational  
 34 rules; or

35 (4) Reflects other recommendations to the Legislature.

36 (f) The position may also recommend that no new legislation be enacted.

**§29-30-9. Preemption.**

1 This article preempts laws by municipalities, counties and other governments in the state  
 2 which regulate the same occupations regulated by the State of West Virginia.

**§29-30-10. Effective date.**

1 This article is effective on July 1, 2021.

NOTE: The purpose of this bill is to create the Occupational Board Reform Act. The bill creates the Office of Supervision of Occupational Boards. The bill provides the Attorney General's Consumer Protection Division with the authority to establish the office. The bill establishes the office's responsibilities. The bill gives the office the authority to actively supervise state occupational boards. The bill authorizes the office to play a substantial role in the development of an occupational board's rules and policies, including the approval and disapproval of certain proposed rules or policies, and provides for review and oversight by the Attorney General. The bill requires the Speaker of the House of Delegates and the President of the Senate to establish a position in the nonpartisan research staff to analyze occupational rules and provides for the Legislature's analysis of occupational rules. The

bill provides a short title. The bill establishes its policy and provides for avoidance of liability under federal anti-trust laws. The bill defines terms and provides for statutory interpretation. The bill provides for petitions for review of criminal history, for preemption, and an effective date.

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