

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

To: Members, Subcommittee on Contracting and Workforce
From: Committee Staff
Re: Hearing, "Barriers to Opportunity: Do Occupational Licensing Laws Unfairly Limit Entrepreneurship and Jobs?"
Date: March 24, 2014

On Wednesday, March 26, 2014, at 10:00 a.m. the Subcommittee on Contracting and Workforce of the Committee on Small Business will meet in Room 2360 of the Rayburn House Office Building for a hearing titled, "Barriers to Opportunity: Do Occupational Licensing Laws Unfairly Limit Entrepreneurship and Jobs?" The hearing will examine the proliferation of state and local occupational licensure laws, with a particular emphasis on whether certain laws create unreasonable barriers to entry for new entrepreneurs. The hearing also will examine some of the broader macroeconomic consequences of occupational licensing, such as its effect on consumer prices, income inequality, and reduced labor mobility.

I. History of Occupational Licensing

In the initial years after its founding, few occupations in the United States were licensed.¹ Over time, however, this began to change. For example, some of the first occupational licenses in the United States arose in the medical field, particularly the practice of medicine.² The American Medical Association was formed in 1847 by those concerned about the potential consequences to human life from unqualified practitioners, and by 1900 every state had its own mandatory licensing law for the practice of medicine.³

Over the last 60 years the number of occupations subject to state and local licensure laws has expanded greatly. Whereas in 1950, fewer than 5 percent of all occupations were licensed at the state level,⁴ today, an estimated 29 percent of occupations are licensed, or approximately 1 in 3 occupations.⁵ A wide variety of occupations now require licensure in some or many states including: animal trainers; barbers; bartenders; funeral attendants; home entertainment installers; interior decorators; makeup artists; travel agents; and upholsterers.⁶ The growth of licensing

¹ BYRON SCHLOMACH, THE GOLDWATER INSTITUTE, SIX REFORMS TO OCCUPATIONAL LICENSING LAWS TO INCREASE JOBS AND LOWER COSTS 2 (2012) *available at* <http://goldwaterinstitute.org/sites/default/files/Policy%20Report%20247%20Licensing.pdf> [hereinafter Schломach Report].

² *Id.*

³ *Id.*

⁴ Morris M. Kleiner and Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 651, 679, 2010, *available at* http://www.hhh.umn.edu/people/mkleiner/pdf/Prevalence_of_Occupational_lics.pdf [hereinafter Kleiner & Krueger].

⁵ *Id.* at 9; accord DICK M. CARPENTER, ET. AL., THE INSTITUTE FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF THE BURDENS FROM OCCUPATIONAL LICENSING 6 (2012), *available at* https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf. [hereinafter IJ Study].

⁶ IJ Study, *supra* note 5, at 10-11.

may provide benefits to the public; however, there also are potential costs associated with limiting competition in various businesses.⁷

II. The Purpose of Occupational Licensure Laws

There are generally three forms of occupational regulation.⁸ The least restrictive form is registration, in which individuals file their names, addresses and qualifications with a government entity.⁹ The next form is certification, in which a government agency or private entity administers an examination and certifies the individuals competency.¹⁰ The most restrictive form is licensure;¹¹ this may include fees, education and training, examinations, minimum grade-level education requirements, and age restrictions.¹²

The theory of occupational licensing presumes that those regulating a particular occupation are unbiased, capable gatekeepers and enforcers.¹³ This view holds that the public benefits of occupational licensing include protecting human health and safety and that it is in the public interest to protect consumers against incompetent, untrustworthy, or irresponsible practitioners.¹⁴ Furthermore, licensing may promote investment in human capital, as many licenses require minimum education requirements.¹⁵

However, while many may agree that government has a legitimate interest in regulating certain professions, there are other occupations in which extending the government's regulatory powers may have a tenuous connection with the aforementioned interests of protecting consumers from unqualified practitioners. Instead, licensing may erect inappropriate barriers that interfere with the ability of individuals to enter a particular field of endeavor. As competition is reduced, individuals will not be able to enter various occupations potentially reducing output of those services below that demanded by consumers thereby increasing the price of services or goods. At the same time, entrepreneurial opportunities are denied.

The theory underpinning occupational licensing is that those regulating entry are unbiased arbiters of standards and conduct; however, in many states a majority or even super-majority of these regulatory officials are comprised of practitioners.¹⁶ To the extent that regulatory boards are made up of practitioners (who clearly understand the expertise needed to practice their particular profession or occupation), their personal vested interest in protecting their own

⁷ <http://www.econlib.org/library/Encl/OccupationalLicensing.html>.

⁸ Kleiner & Krueger, *supra* note 4, at 1.

⁹ *Id.* In addition, the registration process may include posting a bond or filing a fee. *Id.*

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² IJ Study, *supra* note 5, at 7.

¹³ Kleiner & Krueger, *supra* note 4, at 2.

¹⁴ MORRIS M. KLEINER AND ALAN B. KRUEGER, ANALYZING THE EXTENT AND INFLUENCE OF OCCUPATIONAL LICENSING ON THE LABOR MARKET 2 (2009), available at http://www.nber.org/papers/w14979.pdf?new_window=1 [hereinafter Licensing Study].

¹⁵ DANE STANGLER, PROGRESSIVE POLICY INSTITUTE, COMMENT, OCCUPATIONAL LICENSING: HOW A NEW GUILD MENTALITY THWARTS INNOVATION 2 (2012), available at http://progressivepolicy.org/wp-content/uploads/2012/04/03.2012-Stangler_Occupational-Licensing_How-A-New-Guild-Mentality-Thwarts-Innovation1.pdf [hereinafter PPI Report]. As will be discussed in the memorandum, many occupational licensing laws require practitioners to achieve minimum levels of training and education and may even include continuing education requirements. ADAM SUMMERS, REASON FOUNDATION, OCCUPATIONAL LICENSING: RANKING THE STATES AND EXPLORING ALTERNATIVES 22 (2007) available at <http://reason.org/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf> [hereinafter Reason Foundation].

¹⁶ Reason Foundation, *supra* note 15, at 18.

income may lead them to impose conditions to entry that restrict potential competitors.¹⁷ Furthermore, if regulatory boards are comprised of members of the particular profession or occupation, they may be reluctant to discipline their compatriots, thus undermining the argument that licensure protects consumers from bad actors.¹⁸

Similarly, it is unclear whether certain occupational licensing requirements are necessary given the nature of the work being performed. For example, interior design, to the extent it is regulated, may require educational, testing and practice attainment out of proportion to the risk to purchasers of such services.¹⁹ In contrast, most states require a licensed Emergency Medical Technician (EMT) to undergo one month of instruction, take one written and one practical examine prior to licensure.²⁰

Furthermore, if occupational licensing is necessary to protect the public or advance a public benefit, one would expect there to be more consistency in licensure laws between states.²¹ Yet, that is not the case. For example, an occupational license issued in one state is often not recognized in other states,²² or an occupation may be licensed in one state but not another. States also may have significantly different occupational licensing standards and requirements making obtaining a license in another state a potentially costly and time-consuming proposition.

III. Additional State and Local Occupational Regulations

In addition to occupational licensing, there are other forms of regulation similar to occupational licensing that create barriers to would-be entrepreneurs. For example, certain states and localities may have certificate of need (CON) laws that require a potential new business owner to demonstrate their service is in the public need before opening their business.²³ CON laws were initiated in the 19th century to regulate railroads and public utilities.²⁴ However, CON laws have proliferated and now apply to a plethora of businesses, none of which pose the significant risks to consumers or property owners that CON laws were designed to prevent. These include taxi companies and moving companies.²⁵ These CON laws provide a new business's competitors the opportunity to oppose the issuance of the certificate simply because the existing businesses do not want another competitor in their market.²⁶

¹⁷ *Id.*

¹⁸ *Id.* at 11.

¹⁹ IJ Study, *supra* note 5, at 14. Interior design requires an average of six years of education and apprenticeship and the passage of an examination in order to obtain a license. *Id.* at 162.

²⁰ *Id.* at 152.

²¹ *Id.* at 25.

²² UNITED STATES DEPARTMENT OF DEFENSE & UNITED STATES DEPARTMENT OF TREASURY, SUPPORTING OUR MILITARY FAMILIES: BEST PRACTICES FOR STREAMLINING OCCUPATIONAL LICENSING ACROSS STATE LINES 3 (2012), available at http://www.defense.gov/home/pdf/Occupational_Licensing_and_Military_Spouses_Report_vFINAL.PDF [hereinafter Defense-Treasury Report]. Of course, there are instances in which distinctions may be appropriate and should be based on the circumstance, such as reciprocity for lawyers.

²³ *Regulatory Barriers to Entrepreneurship that Impede Business Start-Ups, Briefing Before the United States Commission on Civil Rights* (2013) (statement of Timothy Sandefur) (on file with author) [hereinafter PLF CRC Testimony].

²⁴ Nicole Steelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 173, 220 (2001). A complete explanation of the history and original purpose of CON laws is beyond the scope of this memorandum. Needless to say, they were enacted in recognition of the potential deleterious effects of too much competition in low margin industries, to promote investment in the utility and ensure the broader public had access to services. Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Societies Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381, 386-87 (2012), available at <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1011&context=ndjlepp>.

²⁵ *Id.*

²⁶ *Id.*

IV. The Economic Costs and Consequences of State Occupational Licensure Laws

State and local occupational licensure and CON laws impose a number of economic costs on would-be entrepreneurs and consumers. For potential entrepreneurs, these costs can include the time and expenses associated with obtaining necessary permission to enter the occupation or business which may include the costs of examination, applications, and in the cases of most CONs, possible administrative hearings.²⁷ For those with limited means, these government imposed start-up costs may be unaffordable.²⁸

While occupational licensing has been associated with a 15 percent increase in wages, these potential wage increases may not be enough to offset the above-mentioned costs in obtaining a license. This has raised concerns that occupational licensing may contribute to inequality²⁹ by preventing lower-income workers from achieving the economic gains associated with the wages or potential earnings from a business.³⁰ For consumers, it raises the costs of services, or reduces output or a combination of both.³¹

In addition, occupational licensing may impose costs on the broader economy.³² According to one study, the total cost of licensing regulations to the economy is between \$34.8 billion to \$41.7 billion per year.³³ Occupational licensing may also impede innovation and business development as would-be entrepreneurs focus their resources on meeting licensing board requirements rather than on meeting the needs of their businesses or customers.³⁴

Finally, occupational licensing may reduce job creation and labor mobility. According to one study, job growth in certain professions was 20 percent greater on average in states where the profession is unlicensed.³⁵ Further, states may not recognize another state's occupational licenses.³⁶ In 2012, the United States Departments of Treasury and Defense issued a report addressing how the lack of occupational licensing reciprocity creates economic burdens on military families, who often move between states.³⁷

V. Proposals for Reform

Currently, there are two avenues would-be entrepreneurs can use to overturn or change state occupational licensure or CON laws: seeking redress through the courts or the legislature. However, if a would-be entrepreneur is finding it difficult to afford the cost associated with obtaining a license or CON, the costs of a court challenge are daunting. Some entrepreneurs have found assistance through civil liberties law firms that represent clients pro bono.

²⁷ PLF CRC Testimony, *supra* note 24, at 6. Additionally, like occupational licensure, CON laws can increase consumer costs, restrict consumer choice and block entrepreneurial opportunities. *Id.* at 9.

²⁸ *Id.* at 7.

²⁹ PPI Report, *supra* note 15, at 2.

³⁰ Of course, the opposite is true for those lower-income or disadvantaged workers who may have been grandfathered into a license and do not have to contend with the expenses of licensure.

³¹ *Id.* at 2.

³² Schlomach Report, *supra* note 1, at 6.

³³ Reason Foundation, *supra* note 15, at 36.

³⁴ *Id.* at 22.

³⁵ Licensing Study, *supra* note 14, at 8.

³⁶ IJ Study, *supra* note 5, at 15.

³⁷ Defense-Treasury Report, *supra* note 23, at 3.

Most state licensing laws are challenged as violating an individual's constitutional right to due process and equal protection.³⁸ However, the nation's antitrust laws, which are enforced by the FTC, are another avenue to challenge unfair methods of competition that are prohibited.³⁹ Nevertheless, that power may be limited because of two antitrust immunities.⁴⁰ The factors and circumstances that must exist for one immunity, the "state action" doctrine, to be invoked as a defense by a state regulatory board to an antitrust suit is the subject of a case, *North Carolina State Board of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013), that the United States Supreme Court will hear later this year.

The second option is to seek repeal through the legislature. While there have been some successes in changing or overturning state laws through the legislative process, as Members know, engaging in the legislative process to change a law is a time-consuming and unsure proposition.

However, there are options short of fully overturning or repealing a state occupational licensure or CON law that would reduce unnecessary barriers to entrepreneurship. For example, the proliferation in state and local occupational licensing has increased calls to reform the practice and ensure that the scope and severity of licensing requirements are justified by the nature of the work.⁴¹ Reforms may include: 1) "sunrise" laws that require proposed occupational licensing laws to be evaluated according to a set of criteria, including evidence that regulation is necessary to protect human health, safety or welfare, a cost-benefit analysis by third parties, and an explanation of why the public could not be protected by alternatives to licensure;⁴² 2) "sunset" laws that would periodically review and apply the same criteria to existing licensing laws;⁴³ 3) replacing licensing laws with voluntary certification, which does not prohibit uncertified persons from practicing an occupation;⁴⁴ and 4) pursuing occupational licensing reciprocity between states.

V. Conclusion

As the private sector economy continues to struggle to create sufficient numbers of new jobs to offset those lost in the recession and as workers contend with the soft labor market's concomitant drag on wages, many unemployed and underemployed Americans may decide to utilize whatever skills or talents they have to start their own business and earn income. However, individuals that need to obtain an occupational license or other form of government approval to do so may be hindered from creating a new business or entering a new occupation because of the costs and burdens associated with licensing laws.

³⁸ See Aaron Edlin and Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV., (forthcoming 2014) (manuscript at 26-27), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384948. Section 1 of the Fourteenth Amendment provides that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

³⁹ The FTC is empowered to prevent unfair methods of competition from being used in or affecting commerce. 15 U.S.C. § 45.

⁴⁰ *Id.* at 20-1.

⁴¹ IJ Study, *supra* note 5, at 26.

⁴² Schlomach Report, *supra* note 1, at 21.

⁴³ *Id.*

⁴⁴ Reason Foundation, *supra* note 15, at 35. While certification standards can be as onerous as licensing requirements, private certification organizations may have an interest in setting the minimum standard necessary in order to ensure the organization's and standard's reputation. *Id.*