



Occupational Licensing Reform and the Right to Earn a Living: A Blueprint for Action

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Entrepreneurialism and innovation create major gains for individuals and society in the form of greater choice, improved mobility, increased wealth, better health, and longer lifespans.¹ Economic studies and historical surveys have documented the symbiotic relationships between technological progress, economic growth, entrepreneurial activity, and long-term human betterment.² Fostering a social and political culture that protects entrepreneurialism, the freedom to innovate, and the right to earn a living is a moral imperative owing to the enormous consequences such a culture has for the well-being of current and future generations.³

This is why it is essential that public policy seek to reward entrepreneurial activity, experimentation, and risk-taking.⁴ Unfortunately, many barriers limit our collective ability to expand opportunities for innovation. These barriers include occupational licensing rules, protectionist industrial schemes, inefficient tax policies, and many other layers of regulatory red tape that have accumulated over time at the federal, state, and local levels.

This policy brief summarizes several potential reforms that policymakers can undertake to create a culture of innovation that protects the right to earn a living and rewards entrepreneurial efforts.⁵ While many policies affect those objectives, the focus here will be on licensing and entry barriers because they are among the most costly and susceptible to undue influence by special interests.

THE COSTS OF LICENSING

A large and growing body of economic research documents how occupational licensing restrictions result in higher prices and create barriers to entry and innovation for entrepreneurs.⁶ A

2015 Obama administration report documents the growing costs of occupational licensing rules, which result in a hidden tax on consumers of between roughly 3 and 16 percent.⁷ That report also documents how licensing rules limit economic mobility by “creating barriers to workers moving across State lines and inefficiencies for businesses and the economy as a whole.”⁸ In fact, research by economist Morris Kleiner and others shows that “restrictions from occupational licensing can result in up to 2.85 million fewer jobs nationwide, with an annual cost to consumers of \$203 billion.”⁹ In addition, these costs fall disproportionately on the most disadvantaged. A report conducted by the Institute for Justice finds that, on average, it takes workers in lower-income occupations nearly a year of education and experience, one exam, and \$267 in fees before they can obtain a license.¹⁰ These costs show that reforms to occupational licensing have the potential to significantly benefit consumers, workers, and employers. This may be why we see such bipartisan support for occupational licensing reform.¹¹ However, the question remains: What policy changes should be included in occupational licensing reform efforts?

POTENTIAL REFORMS

The Right to Earn a Living

Generally speaking, the right to earn a living is at the very heart of occupational licensing reform. The “right to earn a living” can be formalized as a legislatively granted constitutional or statutory right subject to judicial protection. This right creates a private cause of action for individuals to bring suit in a court of law if they think that a specific regulatory scheme or decision has unnecessarily infringed upon their ability to earn a living within a legally permissible line of work. One of the benefits of a reform such as this is that it recruits a completely separate branch of government, the judiciary, to provide an institutional check on policymakers and regulators. Creating this private cause of action can also serve as a binding way to enforce many of the occupational licensing reforms discussed later in this brief.

Unfortunately, legal action is costly in terms of time and other resources, even if these costs may be mitigated through the award of attorney’s fees. Lawsuits often take years to litigate and there is no guarantee that an individual’s specific action will be successful in the end. Courts also tend to give policymakers a great deal of regulatory discretion. However, while there are limitations to how completely right to earn a living can be protected, reforms that protect that right give workers and employers a meaningful form of redress when it comes to ensuring their economic liberty. In 2017, Arizona became the first state to officially enact a formal right-to-earn-a-living measure.¹²

Heightened Judicial Scrutiny

Increasing judicial scrutiny of occupational licensing regulations, or economic regulations in general, is an effective way to give teeth to the right-to-earn-a-living reform. Lawmakers could require a heightened standard of judicial review, such as strict or intermediate scrutiny, to shift

the burden of proof onto the government by requiring it to show that the occupational licensing scheme or decision is serving either a substantial or compelling governmental interest and is narrowly tailored to serve that interest. Currently, there is a “presumption of constitutionality” when it comes to most occupational licensing regulations. Raising the standard of standard of judicial scrutiny, however, would reverse this presumption and place the burden of proof on the government to show why its regulation should not be struck down. This would provide a viable solution to the issue of judicially granted regulatory discretion and substantially increase the probability that an individual’s claim against the government would be successful.

Ability to Appeal

Granting individuals the ability to appeal occupational licensing decisions creates a formal mechanism by which license applicants or other interested parties could lessen the burden that licensing regulations place upon them. This is an important type of reform because it gives individuals a form of recourse for specific regulatory determinations without forcing them to incur the level of cost associated with judicial remedies. Creating an ability to appeal can also serve as a cost-effective way to enforce many of the occupational licensing reforms discussed later. However, a limitation of this reform is that the people who adjudicate these appeals are typically housed within the same regulatory body as the original decision makers and tend to grant the original decision makers substantial discretion. One way to combat this limitation is by establishing an independent appeals commission that is entirely separate from the licensing body whose decision is being appealed.

Harm Requirement

Creating a harm requirement is one of the best first steps to occupational licensing reform. States enact occupational licensing regimes through their police power under the guise of promoting “health, safety, and general welfare,”¹³ and harm requirements are a way to make states articulate how these regimes are actually promoting those goals. Harm requirements force legislators and regulators to prove that there are present, significant, and substantial harms that are likely to result from the activity they are attempting to regulate. If policymakers are not able to prove that these harms are likely to occur, then the proposed or existing occupational licensing regime can be eliminated.

“Least Restrictive Means” Requirement

Imposing a least-restrictive-means requirement on regulatory bodies and legislative committees would mean creating a scale of measurement of regulation that ranges from least restrictive (such as market competition) to most restrictive (such as requiring an occupational license). Here is an example of a least-restrictive-means scale that was established by the Nebraska legislature:¹⁴

1. Market competition
2. Third-party or consumer-created ratings and reviews
3. Private certification
4. Specific private civil cause of action to remedy consumer harm
5. Deceptive trade practices under the Uniform Deceptive Trade Practices Act
6. Mandatory disclosure of attributes of the specific goods or services
7. Regulation of the process of providing the specific goods or services to consumers
8. Inspection
9. Bonding or insurance
10. Registration
11. Government certification
12. Occupational license

A least-restrictive-means requirement works in conjunction with a harm requirement because it forces policymakers to consider the potential harm associated with a given profession and choose the least restrictive regulatory option for addressing that potential harm. For example, the least restrictive means of regulating the harm associated with working as a florist would likely be market competition. However, the least restrictive means of regulating the harm associated with working in the medical field could very well be occupational licensing. However, because both potential harm and the least restrictive means of addressing that harm are assessed subjectively, each of these reforms should be combined with some form of judicial review to ensure that policymakers are meaningfully engaging in this process. The goal is to give these constraints teeth by bringing in another branch of government to serve as a check on legislative discretion. By creating a pre-established hierarchy for assessing the restrictiveness of various modes of regulation, this solution also gives courts a useful framework to analyze whether a particular licensing scheme is truly the least restrictive means for addressing the government's stated goal.

Recognition, Interstate Compacts, and Model Legislation

Recognition, interstate compacts, and model legislation are three distinct ways to combat the costs associated with having unique and independent licensing regimes for each of the different states. The cost of obtaining one occupational license alone can be significant, but this cost is substantially increased when an individual has to obtain multiple licenses from different states. Each of these three different policy proposals is aimed at lowering those costs. *Recognition* is when a state, either unilaterally or in conjunction with other states, agrees to recognize out-of-state licenses without requiring license holders to obtain a new license.¹⁵ This greatly reduces the cost associated with obtaining multiple licenses, but it does little to combat excessive licensing itself. *Interstate*

compacts are agreements between states that create one uniform licensing regime or recognize each other's licenses. Interstate compacts have many of the same costs as reciprocity but without as many of the benefits, because only certain states' licensing regimes are recognized. *Model legislation* is a particular policy that can be implemented in a uniform manner by different states. While model legislation does not get rid of all of the costs associated with obtaining a new license in a different state, it makes complying with licensing requirements much easier and cheaper, as the requirements are largely the same for the various jurisdictions that have adopted the model legislation. However, if the model legislation is particularly burdensome or is the result of capture by a certain industry, it can be actively counterproductive. Model legislation regarding a certain license could also encourage states that do not currently require a license for that profession to adopt a licensing requirement.

Unlicensed Provider Disclosure

Allowing consumers to opt out using an unlicensed provider disclosure would allow them to circumvent the entire state occupational licensing system. This reform entails consumers signing a waiver acknowledging that their specific provider does not have a state license and consenting to purchase the provider's good or service anyway. Unlicensed provider disclosures should probably include exceptions for high-risk professions, such as medicine or potentially legal counsel to mitigate the potential risk for consumer harm in particularly important areas. This would give greater autonomy to both providers and consumers of most licensed services while ensuring that providers are not misleading their customers.

Sunsetting and Regulatory Reduction Requirements

One of the other ways to deal with costly, outdated, or inefficient occupational licensing regulations is by requiring a periodic housecleaning. Regulations accumulate over time and, as noted by researchers Patrick McLaughlin, Nita Ghei, and Michael Wilt of the Mercatus Center at George Mason University, "The buildup of more and more regulatory restrictions distorts and deters the business investments that drive innovation and economic growth."¹⁶ McLaughlin and Wilt have also documented the ways in which regulatory accumulation "can hinder economic growth considerably, on top of the many other consequences often associated with regulations, such as higher unemployment, higher prices, and lower wages, particularly for low-income households."¹⁷ Unfortunately, experience with sunseting and "delicensing" requirements at the state level has been mixed because, unsurprisingly, some legislatures have ignored or circumvented requirements.¹⁸ In some cases, sunseting rules has been effective in closing or curtailing some archaic laws or programs, but it will always be an uphill battle.¹⁹ Mercatus Center scholar James Broughel has noted that some efforts to reduce red tape and regulatory accumulation, such as Virginia's Regulatory Reduction Pilot Program, have gained bipartisan support.²⁰ The Virginia measure aims to reduce regulations and other similar requirements by 25 percent over a three-year period, primarily

by examining excessive occupational licensing rules and other examples of overcriminalization. More efforts like that would be helpful. McLaughlin has outlined several reforms that lawmakers could implement to begin tackling this serious problem, including

- legislative impact accounting,
- regulatory budgeting,
- regulatory review commissions, and
- hard caps on regulatory growth.

In essence, lawmakers need a sort of opposite Moore’s law for regulatory policy, or what one could call “the Sunsetting Imperative.” Just as innovation occurs and older technologies become obsolete after a certain amount of time, so do regulations. This requirement would demand the following: any existing or newly imposed occupational licensing regulation should include a provision sunsetting the law or regulation within two years.²¹

CONCLUSION

There is no silver bullet that can instantly remedy the problem of occupational overlicensing. Reform is especially challenging because of the many overlapping jurisdictional entry restrictions that exist across state and local governments today. This problem was decades in the making and will likely take many years to correct. The various reform options given in this brief can help jumpstart that process and begin opening the door to expanded opportunities for innovation, employment, and economic growth.

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NOTES

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