

1 OCCUPATIONAL AND PROFESSIONAL LICENSING

2 AMENDMENTS

3 2013 GENERAL SESSION

4 STATE OF UTAH

5 Chief Sponsor: Brian M. Greene

6 Senate Sponsor: \_\_\_\_\_

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8 LONG TITLE

9 General Description:

10 This bill modifies the Occupational and Professional Licensure Review Committee Act,  
11 Title 58, Occupations and Professions, and the Legislative Oversight and Sunset Act, by  
12 limiting the use of the state's regulatory authority over lawful occupations to matters of  
13 public health or safety.

14 Highlighted Provisions:

15 This bill:

- 16 ▶ defines terms;
- 17 ▶ modifies the membership of the Occupational and Professional Licensure Review  
18 Committee by requiring that the public members be selected by the director of the  
19 Division of Occupational and Professional Licensing;
- 20 ▶ provides that the committee shall meet at least twice annually;
- 21 ▶ requires that the committee conduct sunrise and sunset reviews for all occupations  
22 and professions proposed to be newly regulated or that are subject to their related  
23 statutes being terminated under Section 63I-1-258;
- 24 ▶ modifies the committee's reporting requirements;
- 25 ▶ creates a statutory recognition of an individual's fundamental right to pursue any  
26 lawful occupation;
- 27 ▶ provides that the state may not enact an occupational regulation that substantially



28 burdens an individual's ability to engage in a lawful occupation unless the state demonstrates  
29 that the occupational regulation:

- 30           • addresses a compelling state interest in protecting against present, recognizable,  
31 and significant harm to the health or safety of the public;
- 32           • furthers the state's compelling interest in protecting and maintaining the health  
33 or safety of the public; and
- 34           • is the least restrictive means for furthering the state's compelling interest in  
35 protecting and maintaining the health or safety of the public;
  - 36           ▶ creates a private right of action for violation of this statute and establishes  
37 applicable burdens of proof and standards of judicial construction;
  - 38           ▶ requires that future legislation proposing licensing or regulation of a previously  
39 unregulated occupation or profession include a sunset date; and
  - 40           ▶ makes technical changes.

41 **Money Appropriated in this Bill:**

42           None

43 **Other Special Clauses:**

44           None

45 **Utah Code Sections Affected:**

46 AMENDS:

- 47           **36-23-101.5**, as enacted by Laws of Utah 2007, Chapter 137
- 48           **36-23-102**, as last amended by Laws of Utah 2008, Chapter 218
- 49           **36-23-103**, as last amended by Laws of Utah 2008, Chapter 218
- 50           **36-23-104**, as last amended by Laws of Utah 2010, Chapter 286
- 51           **36-23-105**, as enacted by Laws of Utah 1999, Chapter 152
- 52           **36-23-106**, as last amended by Laws of Utah 2012, Chapter 242
- 53           **36-23-107**, as last amended by Laws of Utah 2007, Chapter 137

54 ENACTS:

- 55           **58-2a-101**, Utah Code Annotated 1953
- 56           **58-2a-102**, Utah Code Annotated 1953
- 57           **58-2a-103**, Utah Code Annotated 1953
- 58           **58-2a-104**, Utah Code Annotated 1953

- 59           **58-2a-105**, Utah Code Annotated 1953
- 60           **58-2a-106**, Utah Code Annotated 1953
- 61           **63I-1-102.5**, Utah Code Annotated 1953



63 *Be it enacted by the Legislature of the state of Utah:*

64           Section 1. Section **36-23-101.5** is amended to read:

65           **36-23-101.5. Definitions.**

66           As used in this chapter:

67           (1) "Committee" means the Occupational and Professional Licensure Review  
68 Committee created in Section 36-23-102.

69           (2) "Government requestor" means:

70           (a) the governor;

71           (b) an executive branch officer other than the governor;

72           (c) an executive branch agency;

73           (d) a legislator; or

74           (e) a legislative committee.

75           ~~(2)~~ (3) "Newly regulate" means to regulate under Title 58, Occupations and  
76 Professions, an occupation or profession not regulated under Title 58 before the enactment of  
77 the new regulation.

78           ~~(3)~~ (4) "Proposal" means:

79           (a) an application submitted under Section 36-23-105, with or without specific  
80 proposed statutory language;

81           (b) a request for review by a legislator of the possibility of newly regulating an  
82 occupation or profession, with or without specific proposed statutory language; or

83           (c) proposed or introduced legislation to newly regulate an occupation or profession  
84 referred to the committee by another legislative committee.

85           ~~(4)~~ (5) "Sunrise review" means a review under this chapter of a proposal to newly  
86 regulate an occupation or profession.

87           (6) "Sunset review" means a review under this chapter of a statute:

88           (a) regarding a licensed profession under Title 58, Occupations and Professions; and

89           (b) that is scheduled for termination under Section 63I-1-258.

90 Section 2. Section **36-23-102** is amended to read:

91 **36-23-102. Occupational and Professional Licensure Review Committee.**

92 (1) There is created the Occupational and Professional Licensure Review Committee.

93 (2) The committee consists of nine members appointed as follows:

94 (a) three members of the House of Representatives, appointed by the speaker of the  
95 House of Representatives, no more than two from the same political party;

96 (b) three members of the Senate, appointed by the president of the Senate, no more  
97 than two from the same political party; and

98 (c) three public members appointed [~~jointly by the speaker of the House of~~  
99 ~~Representatives and the president of the Senate as follows~~] by the director of the Division of  
100 Occupational and Professional Licensing and selected from the following two groups:

101 (i) [~~two members who have~~] at least one member who has previously served, but [~~are~~]  
102 is no longer serving, on any [~~of the~~] advisory [~~boards~~] board created under Title 58,  
103 Occupations and Professions; and

104 (ii) at least one member from the general public who does not hold any type of license  
105 issued by the Division of Occupational and Professional Licensing.

106 (3) (a) The speaker of the House of Representatives shall designate a member of the  
107 House of Representatives appointed under Subsection (2)(a) as a cochair of the committee.

108 (b) The president of the Senate shall designate a member of the Senate appointed under  
109 Subsection (2)(b) as a cochair of the committee.

110 Section 3. Section **36-23-103** is amended to read:

111 **36-23-103. Committee terms -- Vacancies.**

112 (1) A legislator serving on the committee shall serve a two-year term or until the  
113 legislator's successor is appointed.

114 (2) (a) Except as provided in Subsection (2)(b), a public member shall serve a  
115 three-year term or until the public member's successor is appointed.

116 (b) The [~~speaker of the House of Representatives and the president of the Senate~~]  
117 director of the Division of Occupational and Professional Licensing shall, at the time of  
118 appointment or reappointment, adjust the length of terms of the public members to ensure that  
119 approximately one of the public members is appointed every year.

120 (3) A legislative or public member of the committee may serve one or more terms.

121 (4) (a) A vacancy occurs:

122 (i) when a legislative member ceases to be a member of the Legislature; ~~[or]~~

123 (ii) when a member of the committee resigns from the committee~~[-]; or~~

124 (iii) when a member is removed by the appointing authority for cause.

125 (b) A vacancy shall be filled by the appointing authority, and the replacement member  
126 shall serve for the remaining unexpired term.

127 Section 4. Section **36-23-104** is amended to read:

128 **36-23-104. Committee meetings -- Compensation -- Quorum -- Legislative rules.**

129 (1) The committee ~~[may]~~ shall meet as needed, at the call of the committee chairs, to  
130 carry out the duties ~~[set forth]~~ described in Section 36-23-106.

131 (2) A public member may not receive compensation or benefits for the member's  
132 service, but may receive per diem and travel expenses in accordance with:

133 (a) Section 63A-3-106;

134 (b) Section 63A-3-107; and

135 (c) rules made by the Division of Finance pursuant to Sections 63A-3-106 and  
136 63A-3-107.

137 (3) (a) Five members of the committee constitute a quorum.

138 (b) If a quorum is present, the action of a majority of members present is the action of  
139 the committee.

140 (4) Except as provided in Subsection (3), in conducting all its business, the committee  
141 shall comply with the rules of legislative interim committees regarding motions.

142 Section 5. Section **36-23-105** is amended to read:

143 **36-23-105. Applications -- Fees.**

144 (1) ~~[Representatives of occupations or professions who desire to have their occupation~~  
145 ~~or profession licensed or regulated by the state may]~~ If a government requestor or a  
146 representative of an occupation or profession that is not licensed by the state proposes that the  
147 state license or regulate an occupation or profession, the requestor or representative shall, prior  
148 to the introduction of any proposed legislation, submit an application for sunrise review to the  
149 Office of Legislative Research and General Counsel in a form approved by the committee.

150 (2) ~~[Applicants shall submit]~~ If an application is submitted by a representative of an  
151 occupation or profession, the application shall include a nonrefundable fee of \$500 ~~[with each~~

152 application]. All application fees shall be deposited in the General Fund.

153 Section 6. Section **36-23-106** is amended to read:

154 **36-23-106. Duties -- Reporting.**

155 (1) The committee shall:

156 (a) conduct a sunrise review in accordance with Section 36-23-107 [~~for all~~  
157 ~~applications~~], within 12 months, for each application submitted in accordance with Section  
158 36-23-105;

159 (b) (i) conduct a sunset review for [~~an occupational or professional license~~  
160 ~~classification that is referred to the committee by any other legislative committee by applying:]~~  
161 all statutes regarding a licensed profession under Title 58, Occupations and Professions, that  
162 are scheduled for termination under Section 63I-1-258;

163 [~~(i) the criteria in Section 36-23-107;]~~

164 [~~(ii) the criteria in Title 63I, Chapter 1, Legislative Oversight and Sunset Act; and]~~

165 [~~(iii) any other appropriate criteria; and]~~

166 [~~(e) submit a written report by no later than December 31 of each calendar year to:]~~

167 [(i) the speaker of the House of Representatives;]

168 [(ii) the president of the Senate;]

169 [(iii) the chair of the House Rules Committee;]

170 [(iv) the chair of the Senate Rules Committee; and]

171 [~~(v) the chairs of the Business, Economic Development, and Labor Appropriations~~  
172 ~~Subcommittee.]~~

173 (ii) conduct a sunset review under this Subsection (1)(b) prior to the last general  
174 session of the Legislature that is scheduled to meet before the scheduled termination date; and

175 (iii) conduct a review regarding any other occupational or professional licensure matter  
176 referred to the committee by the Legislature, the Legislative Management Committee, or other  
177 legislative committee.

178 (2) The committee shall submit an annual written report before November 1 to:

179 (a) the Legislative Management Committee; and

180 (b) the Business and Labor Interim Committee.

181 [~~(2)~~] (3) The written report required by Subsection [(1)(c)] (2) shall include:

182 (a) all findings and recommendations made by the committee under Subsection (1) or

183 ~~[(3)]~~ (4) in that calendar year; and

184 (b) a summary report ~~[for]~~ of each ~~[sunrise]~~ review conducted by the committee  
185 stating:

186 (i) whether the ~~[sunrise]~~ review was conducted under Subsection (1) or ~~[(3)]~~ (4);

187 (ii) whether ~~[or not]~~ the ~~[sunrise]~~ review included a review of specific proposed or  
188 existing statutory language;

189 (iii) any action taken by the committee as a result of the ~~[sunrise]~~ review; and

190 (iv) the number of legislative members that voted in favor of the action described in  
191 Subsection ~~[(2)]~~ (3)(b)(iii).

192 ~~[(3)]~~ (4) The committee may~~[: (a) conduct a sunrise review of any proposal to newly~~  
193 ~~regulate an occupation or profession; (b) conduct any other review referred to it by the~~  
194 ~~Legislature, the Legislative Management Committee, or other legislative committee; or (c)]~~  
195 conduct any other study related to regulation of an occupation or profession under Title 58,  
196 Occupations and Professions.

197 Section 7. Section **36-23-107** is amended to read:

198 **36-23-107. Sunrise or sunset review -- Criteria.**

199 (1) In conducting a sunrise review or a sunset review under this chapter, the committee  
200 may:

201 (a) receive information from:

202 (i) representatives of the occupation or profession proposed to be newly regulated or  
203 that is subject to a sunset review;

204 (ii) the Division of Occupational and Professional Licensing; or

205 (iii) any other person; and

206 (b) review ~~[the]~~ a proposal with or without considering proposed statutory language~~[:]~~.

207 ~~[(c) evaluate the criteria in Subsection (2) to determine whether or not the occupation~~  
208 ~~or profession should be regulated by the state; and]~~

209 ~~[(d) as to the proposal, recommend:]~~

210 ~~[(i) that the proposal be adopted by the Legislature;]~~

211 ~~[(ii) that the proposal be adopted by the Legislature with recommended changes;]~~

212 ~~[(iii) that the proposal not be adopted by the Legislature; or]~~

213 ~~[(iv) any other action.]~~

214 (2) When conducting a sunrise review or sunset review under this chapter, the  
215 committee shall [~~use the following criteria~~]:

216 (a) consider whether state licensing of the profession is necessary for the health and  
217 safety of the public;

218 (b) if the committee determines that state licensing of the profession is not necessary  
219 for the health and safety of the public, recommend to the Legislature that the state refrain from  
220 licensing the profession;

221 (c) if the committee determines that continued state licensing of the profession is  
222 necessary for the health and safety of the public, consider whether each licensing provision in  
223 the proposed or existing statute is the least restrictive means for furthering the state's  
224 compelling interest in protecting and maintaining the health or safety of the public; and

225 (d) recommend to the Legislature any necessary changes to the proposed or existing  
226 licensure provisions to ensure each provision is the least restrictive means for furthering the  
227 state's compelling interest in protecting and maintaining the health or safety of the public.

228 (3) In its performance of each sunrise review or sunset review, the committee may  
229 apply the following criteria, to the extent that it is applicable:

230 (a) whether [~~or not~~] the unregulated practice of the occupation or profession has clearly  
231 harmed or may harm or endanger the health, safety, or welfare of the public;

232 (b) whether [~~or not~~] the potential for harm or endangerment described in Subsection  
233 (2)(a) is easily recognizable and not remote;

234 (c) whether [~~or not~~] the public needs, and can reasonably be expected to benefit from,  
235 an assurance of initial and continuing occupational or professional competence;

236 (d) whether [~~or not~~] regulation of the occupation or profession:

237 (i) imposes significant new economic hardship on the public;

238 (ii) significantly diminishes the supply of qualified practitioners; or

239 (iii) otherwise creates barriers to service that are not consistent with the public welfare  
240 or interest;

241 (e) whether [~~or not~~] the occupation or profession requires knowledge, skills, and  
242 abilities that are:

243 (i) teachable; and

244 (ii) testable;



245 (f) whether [~~or not~~] the occupation or profession is clearly distinguishable from other  
246 occupations or professions that are already regulated;

247 (g) whether [~~or not~~] the occupation or profession has:

248 (i) an established code of ethics;

249 (ii) a voluntary certification program; or

250 (iii) other measures to ensure a minimum quality of service;

251 (h) whether [~~or not~~]:

252 (i) the occupation or profession involves the treatment of an illness, injury, or health  
253 care condition; and

254 (ii) practitioners of the occupation or profession will request payment of benefits for  
255 the treatment under an insurance contract subject to Section 31A-22-618;

256 (i) whether [~~or not~~] the public can be adequately protected by means other than  
257 regulation; and

258 (j) other appropriate criteria as determined by the committee.

259 Section 8. Section **58-2a-101** is enacted to read:

260 **CHAPTER 2a. RIGHT TO PURSUE ANY LAWFUL OCCUPATION ACT**

261 **58-2a-101. Title.**

262 This chapter is known as the "Right to Pursue any Lawful Occupation Act."

263 Section 9. Section **58-2a-102** is enacted to read:

264 **58-2a-102. Definitions.**

265 For purposes of this chapter:

266 (1) "Court" means a trial or appellate court.

267 (2) (a) "Lawful occupation" means a course of conduct, profession, or vocation that  
268 includes the sale of a good or the rendering of a service for profit.

269 (b) "Lawful occupation" includes the sale of a good or the rendering of a service when  
270 the good or service itself is not illegal, irrespective of whether the individual selling the good or  
271 rendering the service is subject to an occupational regulation that restricts the individual's  
272 ability to sell the good or render the service.

273 (c) "Lawful occupation" does not include a course of conduct, profession, or vocation  
274 of an individual selling a good or rendering a service when the good or service itself is illegal.

275 (3) "Occupational regulation" means a statute, rule, practice, policy, or other

276 state-prescribed requirement related to the requirements of an individual to engage in a specific  
277 lawful occupation.

278 (4) (a) "State" means the government of the state.

279 (b) "State" includes:

280 (i) a government office, department, division, bureau, or other body of government in  
281 the state; and

282 (ii) a county, municipality, or political subdivision of the state.

283 (5) (a) "Substantial burden" means the imposition of a significant obstacle or cost on an  
284 individual seeking to enter into or continue in a lawful occupation.

285 (b) "Substantial burden" does not include a burden that is incidental or negligible to the  
286 average person.

287 Section 10. Section **58-2a-103** is enacted to read:

288 **58-2a-103. Right to engage in any lawful occupation.**

289 (1) Each citizen of the state 18 years of age or older has a fundamental right to engage  
290 in any lawful occupation.

291 (2) The state may not adopt an occupational regulation that imposes a substantial  
292 burden on a citizen of the state 18 years of age or older unless the state demonstrates that the  
293 occupational regulation:

294 (a) addresses a compelling state interest in protecting against present, recognizable, and  
295 significant harm to the health or safety of the public;

296 (b) materially furthers the state's compelling interest in protecting and maintaining the  
297 health or safety of the public;

298 (c) is the least restrictive means for furthering the state's compelling interest in  
299 protecting and maintaining the health or safety of the public; and

300 (d) is not primarily enacted to discourage competition or to confer economic advantage  
301 to a limited class.

302 Section 11. Section **58-2a-104** is enacted to read:

303 **58-2a-104. Private cause of action.**

304 (1) A person may bring an action against the state for declaratory judgment, injunctive  
305 relief, or other equitable relief in a court of competent jurisdiction for a violation of Section  
306 58-2a-103, without regard to the exhaustion of administrative remedies.

307 (2) A person may assert as an affirmative defense the right to engage in any lawful  
308 occupation and that the state has violated Subsection 58-2a-103(2) in a judicial or  
309 administrative proceeding brought by the state to enforce an occupational regulation.

310 (3) Unless an occupational regulation includes an explicit statutory exemption from the  
311 requirements of this chapter, a person may bring an action or assert an affirmative defense as  
312 described in Subsections (1) and (2) related to the occupational regulation.

313 (4) If a person who brings an action or asserts an affirmative defense under this section  
314 makes a prima facie showing that an occupational regulation substantially burdens the person's  
315 right to engage in a lawful profession, the burden of proof shifts to the state to demonstrate by  
316 clear and convincing evidence that the occupational regulation:

317 (a) addresses a compelling state interest in protecting against present, recognizable, and  
318 significant harm to the health or safety of the public;

319 (b) materially furthers the state's compelling interest in protecting and maintaining the  
320 health or safety of the public; and

321 (c) is the least restrictive means for furthering the state's compelling interest in  
322 protecting and maintaining the health or safety of the public.

323 Section 12. Section **58-2a-105** is enacted to read:

324 **58-2a-105. Judicial determination.**

325 (1) When this chapter is interpreted by a court or administrative tribunal it shall be  
326 liberally construed to protect the right of a citizen to engage in any lawful occupation as  
327 recognized in Subsection 58-2a-103(1).

328 (2) When issuing a decision under this chapter, a court or administrative tribunal:

329 (a) shall issue written findings of fact and conclusions of law; and

330 (b) may not grant any presumptions regarding the state's evidence required by  
331 Subsection 58-2a-104(4).

332 Section 13. Section **58-2a-106** is enacted to read:

333 **58-2a-106. Limitation.**

334 This chapter does not:

335 (1) create a right of action against:

336 (a) a private party; or

337 (b) the state when acting as an employer;

338 (2) require a private party to do business with an individual who is not licensed or  
339 otherwise authorized by the state to engage in a lawful occupation; or

340 (3) prohibit an employer, including the state, from making specific education, training,  
341 licensing, or other requirements a condition of employment.

342 Section 14. Section **63I-1-102.5** is enacted to read:

343 **63I-1-102.5. Legislative review in Title 58, Occupations and Professions.**

344 Beginning on or after January 1, 2014, legislation proposing the licensing or regulation  
345 of an occupation or profession under Title 58, Occupations and Professions, that is not subject  
346 to licensing or regulation under Title 58, Occupations and Professions, on December 31, 2013:

347 (1) is subject to a reauthorization schedule as described in Title 63I, Chapter 1,  
348 Legislative Oversight and Sunset Act; and

349 (2) shall include a repeal date in Section 63I-1-258 that is no later than 10 years after  
350 the effective date of the legislation.

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**Legislative Review Note**  
**as of 1-21-13 10:54 AM**

**Office of Legislative Research and General Counsel**