NATIONAL
HEALTH FREEDOM
ACTION

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Opposition to State Requirements for Licensure, Registration, and Certification of Unlicensed Health Care Practitioners

National Health Freedom Action (NHFA) opposes state government licensure, registration, or certification, for unlicensed health care practitioners practicing in the public domain, who are providing healing services that do not pose an imminent risk of harm to the public.

NOTE: States have jurisdiction over the regulation of occupations and professions because it is part of their state police power under the 10th amendment of the Constitution to protect the public's health, safety and welfare. The legal definition of "license" "registration" and "certification' for professions is unique and different in each state. For purposes of this discussion all three of these categories of occupational laws require signing-up with the government before a person can do an act of healing. These laws range in complexity from requiring a practitioner to provide the state or local government with practitioner information and payment of a fee, to more complex laws requiring a practitioner to have a particular type of education, use of an exclusive title, and criminal statutes to enforce against those practitioners who practice outside of the government requirements.

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1. Fundamental Rights:

a.) Many healing and health care practices are a normal and necessary part of human social behavior and are an inherent right of all people to experience and practice. This fundamental right needs to be preserved. Healing practices must retain a presumption of safety, similar to food, and should not be regulated without a showing of harm. Healing practices are not a privilege to be doled out by a government but rather an inherent right of all people.

b.) The right to make one's own health care decisions is a well-established constitutional fundamental right in the United States. Laws regulating health care practitioners directly impact the right of citizens to make decisions. For example, if a state would ban all practitioners except one kind of healing practitioner, then health seekers would not be able to have any other choice about their health. Any law that regulates health care practitioners impacts health seeker options and those laws should not unnecessarily infringe on the right of health seekers to access practitioners of their choice in order to preserve their ability to make decisions for

their own health.

c.) Because the right to make one's own health care decisions is a constitutional fundamental right, laws that impact that right should be held to the highest level of constitutional scrutiny: strict scrutiny. Applying the constitutional strict scrutiny standard to health care practitioner laws protects people's rights by requiring governments to show a "compelling state interest" before regulating practitioners. In addition, under the strict scrutiny standard, laws also need to be fashioned in a way that are the "least restrictive means possible".

d.) Although state licensure, registration, or certification might appear to be a quick and acceptable option when it comes to regulating the healing arts practitioners we have observed that in some instances there are no compelling state interests or a proposed law is not the least restrictive means possible.

NHFA and NHFC wish to educate citizens with this article about the relationship between government and the individuals of whom the government serves. The question of when to use the state's police power to make a law to regulate the activity of a citizen is a key question in our American jurisprudence and should be considered with great deliberation.

2. The Problem:

a.) Individual states have numerous professional occupational laws for health practitioners who may pose a significant risk of harm to the public ranging from very simple to very complex requirements. An occupational practice act law includes a definition of an individual occupation so that practitioners know whether they fit under the definition of the occupation, and then the law includes expectations or requirements of the government for practitioners within that definition. The laws also include enforcement provisions for those not complying with the law.

b.) Most of the occupational laws in the states have a list of exemptions for those practitioners who the state would not want to take action against for practicing without a state license, registration or certification. For example, the medical practice law for medical doctors in many states has an exemption from criminal charges for those who practice by spiritual means or prayer. Healing by spiritual means or prayer in those states therefore has a presumption of safety and the state would have to show harm before charging someone criminally for practicing medicine without a license.

c.) The problem arises when the definitions in the occupational laws are so very broad that they include not just the targeted profession but all of the healers practicing in the public domain even if they are not posing harm to the public.

For example, the practice of medicine in Minnesota is defined as follows:

Subd. 3. Practice of medicine defined. For purposes of this chapter, a person not exempted under section 147.09 is "practicing medicine" or engaged in the "practice of medicine" if the person does any of the following:

(1) advertises, holds out to the public, or represents in any manner that the person is authorized to practice medicine in this state;

(2) offers or undertakes to prescribe, give, or administer any drug or medicine for the use of another;

(3) offers or undertakes to prevent or to diagnose, correct, or treat in any manner or by any means, methods, devices, or instrumentalities, any disease, illness, pain, wound, fracture, infirmity, deformity or defect of any person;

(4) offers or undertakes to perform any surgical operation including any invasive or noninvasive procedures involving the use of a laser or laser assisted device, upon any person; or

(5) offers to undertake to use hypnosis for the treatment or relief of any wound, fracture, or bodily injury, infirmity, or disease.[i]

Under these types of broad definitions, practitioners who do not wish to participate in the government requirements for state licensure, registration, or certification can become vulnerable to criminal charges. The other key problem is that most of the occupational practice acts do not have exemptions for many unlicensed gentle healers.

3. Constitutionality:

a.) Constitutionally, there is no compelling state interest to warrant state licensure, registration, or certification of all people that do healing acts. The healing arts are an inherent right of the people. One could say that the broad definitions in the occupational acts are a good thing and very helpful for the occupational practitioners so that they have a sense of who they are and understand the broad scope of practice under which to perform the acts protected by the state that may pose a significant risk to the public. But the fact that in some cases that broad definition is so broad that it encompasses all healers even if they are not performing acts that pose a risk of harm to the public is a technical problem. There is no compelling state interest to warrant state licensure, registration, or certification of all people that do healing acts.

b.) Constitutionally there are less restrictive means possible to regulate healing practitioners. A less restrictive means of regulating practitioners in the public domain would be the presence of adequate exemptions to licensure, registration and certification regulations; exemptions for practitioners who are not posing a risk of significant harm to

the public, who are not using exclusively protected titles, and who are providing truthful and not misleading information to health seekers.

Rather than having unlicensed or unregistered healers be vulnerable to criminal charges and forcing them underground, or coercing them to sign up with the government under a regulatory law before doing a healing act, proper exemptions are a good solution and protect healing practitioners right to practice in the public domain. Exemptions can delineate when the state government has jurisdiction and power over a healing practitioner to demand something from them or stop them from practicing. When there are no adequate exemptions protecting those healers that are not posing any risks, then the law does not meet the constitutional threshold of compelling government interest and least restrictive means.

c.) Meeting constitutional muster is a worthy goal for all US laws.

4. Agency Rulemaking:

a.) Rulemaking is a problem that arises with overly broad occupational acts. The occupational laws often delegate rulemaking capability to governmental agencies to be in charge of implementing the law. The agency can then promulgate further rules that might expand and define more intricately the requirements of the state licensure, registration, or certification.

b.) When agencies are set up the legislature delegates a specifically defined area of responsibility to the agency so that they know their area of authority and jurisdiction. Often times the legislature intentionally does not make the law detailed enough to cover all of the issues that might arise in the future so the legislature often also delegates rulemaking authority to the agency with particular parameters for when or for what reason enforceable rules can be made by the agency.

c.) Historically speaking, setting up agencies and giving them rulemaking authority was very controversial because the legislature is the constitutionally appointed lawmaking body. The thinking was that agencies could not make further rules that were not already handed down by the legislature. However, over the years, it was decided through case law that in fact legislatures could delegate their law-making authority to agencies in the form of rulemaking as long as certain rulemaking procedures of public notice and comment were followed closely and as long as it was clear what area of lawmaking was being delegated. In most states, the rulemaking process itself includes very stringent administrative procedural laws under an Administrative Procedures Act. As such, rules can only be made with adequate procedural compliance and public notice and comment according to the Administrative Rule Act.

d.) Rulemaking is still a very sensitive topic to legislators and an important issue to watch while drafting legislation having to do with an administrative process of an agency. Lawmakers are generally careful about passing legislation that includes rulemaking powers. They are careful to track whether a bill will have rulemaking implications or

delegations and often will send a bill that contemplates rulemaking or that is under an agency that has rulemaking power through special committees for review of all of the potential issues that might arise. It is interesting to note that some legislators are pro-rulemaking and are willing to delegate broad rulemaking power to agencies, while other legislators are extremely opposed to an agency making any kind of rule on its own without it being in an area specifically delegated by the legislature.

e.) It is very difficult to successfully oppose or overturn the official rulemaking process while it is in process since the agency is most often considered the expert about the needs of the practitioners under their jurisdiction. Strong and organized evidence and opposition is needed to impact an agency. For example, there may be a rule promulgated that requires practitioners to attend a particular kind of continuing education that the practitioners might not believe is valuable, but the rule goes through under the recommendation of the agency if the practitioners do not organize to stop the rule.

f.) The nature of government is that it easily grows. For example, government agencies requiring state licensure, registration, or certification, once they experience ownership of a list of practitioners, may develop goals and objectives for that list of practitioners which are not in concert with the goals and objectives of many of the practitioners themselves. For example, we have witnessed agencies successfully recommending and supporting legislation to increase the type of regulation of a practitioner group. Once the agency has jurisdiction, they can recommend moving from permit, to title certification, then to more restrictive registration, and finally to full blown licensure with educational requirements and title protection and including criminal sanctions. This generally happens over a number of years. But to begin with there may have been no need for any type of legislation at all, and all that was needed was a proper exemption for the practitioners instead of an occupational law.

5. Levels of Occupational Regulation:

It is helpful to understand actual formats of occupational law, whether it be permit, certification, registration, or licensure, to ensure that there is an understanding of the implications of beginning any type of regulation of a practitioner group.

The term “registration” is used in many different formats and we present the following to you as an educational tool to help analyze just what a regulation is.

Permit (AKA Registration in some states)

Permit is called registration in some states. The significance of permit regulation is that it is the first step into regulation of a person, the beginning of a mandatory relationship directly with the government. There have been controversial instances in our nation’s history of the government requiring certain groups to sign up with the government so that the government could have a roster of individuals in a particular group. This history has helped us clarify as freedom advocates that any law that promotes a mandatory relationship with the government should always be grounded in a careful consideration of

our founding fathers' intentions to protect the individual sovereignty of people and the natural law of man and woman to be free in their own person. Requiring this first step of permit requires the state to show a significant risk of harm if the regulation is not in place.

Permits are not specifically about the relationship a health care practitioner has with their client. The significance of permits is that it regulates a person's relationship with the government. When a government adopts a law for a permit regulation, the group loses its presumption of being considered safe.

The following are two examples that provide curious rationales for not adopting permits. Fittingly, the states that these examples come from are two of the states that now do not require permits or registration for unlicensed health care practitioners.

Example 1: Minnesota - No Permit Required for Unlicensed Health Care Practitioners

The Minnesota study on Complementary and Alternative Medicine report did not recommend permit or registration for unlicensed health care practitioners. Two years after the report was submitted Minnesota passed the Complementary and Alternative Health Care Freedom of Access Act, a "safe harbor" practitioner exemption law, which did not require permit or registration but which defined mandatory disclosures practitioners were required to give to their clients before treatment.

Example 2: California – No Permit Required for Unlicensed Health Care Practitioners

In 2002, California legislature did not follow the thinking of a study in California on registration but rather passed a Consumer Health Freedom Act, protecting consumer access to unlicensed practitioners. The new legislation did not involve permit or registration but mandated that unlicensed practitioners provide specific disclosures to their clients.

It is important to review an agency's rulemaking authority in depth where an occupation has a voluntary or a mandatory permit or registration requirement under the jurisdiction of an agency. This can be helpful in evaluating the scope of the agency's ability to expand their requirements through rulemaking.

When an agency has responsibility of a group, it often evaluates the laws and procedures having to do with that group and recommends to the legislature changes needed to better serve the public. The legislature then considers expanding or decreasing the agency's function regarding the group including providing expanded or decreased rulemaking capabilities or other regulatory features.

For example, the state of Minnesota repealed its Unlicensed Mental Health Act and converted it to a licensing law in 2003, and Wisconsin converted the Wisconsin Massage Therapy Voluntary Registration Act to a mandatory licensing law. Whether it is the regulated group that comes before the legislature wanting more regulation or whether the

agency recommends changes in the regulations, the important factor in these scenarios is that "a group" has been identified and an administrative system has been put in place in the government to relate to the group. A specialized relationship and administrative process is set up with the government. Permit registration is often just the beginning of a mandatory relationship with the government.

Certification (AKA Registration in some states)

Certification and Registration are also used interchangeably in some state. This can be confusing in conversations with people because some states also use permit and registration interchangeably, and also, they might use licensure and registration interchangeably.

Certification is a type of regulation where government limits the use of an occupational title to persons who meet predetermined standards of education or training. It is often called Title regulation. Certification is often called a voluntary certification because practitioners who do not register with the government can still practice as long as they do not use the protected titles.

The term certification can be confusing because private groups sometimes credential practitioners by giving them a certificate upon graduation from a particular academic program, some even enforcing the use of their titles by trademarks. This is not the same as government title regulation by certification with the government.

The interesting component of certification is that it is often sought after by groups that have affiliations with particular schools. The first step is that national certification bodies are set up, supported by academic institutions, to create more continuity in a profession and higher standards in the industry. As the national certification body gains more members and power their members often approach the legislature to request that their particular certification be recognized as the one that should be mandated if individuals want to call themselves a particular professional name.

Of course, if you happen to be a practitioner who has not obtained the certification but has historically always used the name of the occupation to describe what you do, then that person would lose that opportunity under a new law. The good news is that he/she would still be allowed to practice but without the use of the protected title. The bad news is that academic institutions with more funds may have more funds available to lobby their interests and increase the regulations in the future. Individuals whose education is less prominent have less advantage.

Like with permits or any other type of occupational regulation, the profession or the agency can always approach the legislature for increases or decreases in the level of regulation. In addition, if rulemaking is involved, rules can be promulgated within the rulemaking capability of the agency. Reasons for revisions to certification laws already in existence can include insurance issues, professional image, unwanted competition, disagreement on standards of care, or a belief that the public should not have access to

uncertified practitioners because of harm.

Licensing (AKA also called Registration in some states)

Licensing is the most restrictive form of regulation of an occupation by the government because it not only regulates the use of a title, but it also regulates who can practice a profession. Basically, it creates a monopoly over a particular set of practices and particular title. Sometimes licensure regulations use the term "registered" instead of "licensed".

How it works is that the government gives a group of persons the privilege of doing particular acts and using particular titles on the condition that they receive a particular type of education and abide by the minimum acceptable standard of care of their profession. These types of laws promote the government's condoning of a particular type of education and training and professional standards of care and outlaw other types in the same field of health. To justify its actions governments have depended on "scientific evidence" to decide what is safest for the population to have an exclusive group performing an activity. Since these laws are mandatory, they eliminate many practitioners who might fall under the broad definitions in the law and thus many options for health-seekers.

For example, if a practitioner does not obtain a license but has a gift for practicing a trade that would be considered to be within the definition of the profession and/or its broad scope of practice he/she could be charged criminally for practice of the occupation without a license. Thus, the health seeker cannot have access to that person.

For those practitioners who do obtain a license but who begin to practice things that they have learned beyond the accepted and prevailing standards of care of that profession, they could be disciplined and lose their license. In this scenario too health-seekers lose access to their option to receive services from that practitioner.

It is rare that a licensing law is repealed. However Sunset review laws have been put in place to put a check on the power of licensing boards. In the past in California the Consumer Protection Agency overseeing the California Dental Board, completely dismantled the dental licensing board for not abiding by a directive on notice to consumers of mercury toxicity. And in Michigan some licensing laws were repealed deeming them unnecessary.

Summary on Regulatory Types

Because the many states have diverse ways of regulating the health care professions it is important to be familiar with state law as you proceed to protect or achieve health freedom. Things to evaluate are:

1. Does the law have a compelling state interest of significant harm to regulate a profession?

2. If regulation is warranted, is the regulation only to protect the use of a particular title or does it need to impact the right to practice too?

3. If regulation of practice is included, is it necessary to have criminal penalties for non-compliance?

4. Is agency rulemaking necessary and if so, what are the parameters?

5. Are there creative solutions like exemption laws that would be more suitable and less costly?

6. Impact of Unnecessary regulation on Consumers and Practitioners

Mandatory state licensure, registration, certification and permit requirements negatively impact consumers' access to health care options. Consumer may lose legal access to healing practitioners that resonate with their beliefs and preferences but who are not conventionally endorsed by the government in their approaches to healing. In addition, it is well documented that regulatory laws often increase cost of care because governments require funds from practitioners to regulate them and practitioners and institutions then pass on those fees to clients.

Negative impacts on practitioners include having to sign up and apply to the government and pay a fee before doing a healing act, even if that act poses no risk of harm to the public. If a practitioner decides not to be regulated, they are tempted to practice underground, or they may leave their vocation because of the demands in the regulation. Even if they agree to be regulated, when they find themselves under the jurisdiction of an agency they may be subjected to risks of future additional regulation through rulemaking, such as random inspections or mandatory education requirements that they may not desire or be able to meet. If they were under a lesser regulation, such as permit, they may find that over time the regulation increases thus impacting their use of title and educational requirements and under licensing, even their standards of care.

Health Freedom Safe Harbor Practitioner Exemption Legislation

It is extremely important that Health Freedom legislation, or safe harbor exemption laws, exempting unlicensed practitioners from current criminal practice laws under some circumstances, are available in every state. Healing and health care practices are a normal and necessary part of human social behavior and are an inherent right of all people to experience and practice. This fundamental right needs to be preserved. Healing practices are not a privilege to be doled out by a government but rather an inherent right of all people. The safe harbor practitioner exemption laws are not another form of regulation or credentialing but rather are understood to be legal exemptions to permit, registration, certification and licensing laws.

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[i] Minnesota Statute 147.081, Practice of Medicine Defined, accessed online Nov. 1, 2021 @ https://www.revisor.mn.gov/statutes/cite/147/pdf