



Economic Affairs Interim Committee

62nd Montana Legislature

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House Bill No. 525 Study Plan

* * Overview of Licensing Boards * *

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for the Economic Affairs Interim Committee

Introduction

Licensing boards have existed since 1889 when the board licensing and regulating physicians first formed in Montana. The 1895 Legislature passed acts requiring certification of physicians and dentists and registration of pharmacists. Since then 30 other boards have been authorized by various legislatures and remain in existence to regulate professions or occupations. In addition, the Department of Labor and Industry regulates the fields of addiction counselors, boxing (athletics), fire prevention, boiler operators, steam engineers, blasters, crane operators, and the use of construction scaffolds and elevators.

In 2005-2006, the Economic Affairs Interim Committee conducted a study of licensing boards, which followed by a year a 2004 performance audit of the licensing boards. The result of the interim study was legislation, enacted in 2007, that required a series of questions to be answered prior to introduction of legislation requesting licensure of a new profession. (See Appendix.) As part of the 2005-2006 study, committee members reviewed previous statutes requiring a sunset review of licensing boards. HB 525 is based, in part, on the former criteria.

Committee Considerations

HB 525 Elements -- As the 2011-2012 Economic Affairs Interim Committee begins its review of licensing boards, relevant aspects of HB 525 to remember are:

- All licensing boards are to be reviewed twice, once either this interim or next interim, and the second time four years after the first (in the 2015-2016 or 2017-2018 interims).
- The review starts with the oldest boards first. See Table 1. Staff has taken this to mean that within the first review the boards formed before 1974 will be reviewed, although one board formed in 1974 is on the second review list. There is some flexibility for review and the scheduling reflects committee time constraints so that not all large boards are under consideration on the same day. The very oldest boards are not all heard at the same time, because some of these are very large boards.

- Criteria is listed for the committee to consider whether the board meets a public purpose. See Table 2.
- The committee may recommend termination of a board that fails to meet a majority of the criteria for a public purpose. Staff recommends making that decision on the day of review, after public comment regarding each particular board.

SB 165 and HB 73 Elements -- As the committee undertakes these reviews, members also may want to consider the concerns raised by SB 165, which was enacted this year. The legislation aims to protect against enforcement of board standards or rules in a way that discriminates against licensees or that restrains trade or competition except when necessary to protect public health and safety.

Questions of anti-competitiveness are often raised when a board reviews complaints about unlicensed practice. At what point is board action appropriate against what the board terms unlicensed practice? Are the terms for unlicensed practice clear and nondiscriminatory? Also, if the board is protecting public health and safety by taking action against unlicensed practice, should the responsibility for investigating and prosecuting the unlicensed practice be charged against the board (and licensed practitioners) or paid for by the state on behalf of public welfare? HB 73, which was tabled in the House Business and Labor Committee this year, included provisions to allow a board to charge someone up to \$5,000 for the cost of administrative proceedings if that person had been found "by a preponderance of the evidence" from a board or department proceeding to have engaged in unlicensed practice. HB 73 and SB 165 indicate two sides of the dilemma of unlicensed practice, with the main question revolving around whether the licensed practice truly protects public health and safety.

"Buyer Beware" or Consumer Protection? -- In the 2005-2006 study of boards, one of the introductory reports¹ referenced a Minnesota study that listed criteria for determining whether regulation is needed. These were:

- whether unregulated practice may harm or endanger the health, safety, or welfare of citizens and the potential for harm is recognizable and not remote;
- whether a specialized skill or training is necessary;
- whether the public needs or will benefit from assurances of initial and continuing occupational ability;
- whether other means are available to protect citizens; and
- whether the overall cost effectiveness and economic impact is positive.

¹See "Board ABCs", August 2005, p. 2. The referenced report is from the Office of the Legislative Auditor, State of Minnesota, "Occupational Regulation", February 1999. http://leg.mt.gov/content/committees/interim/2005_2006/econ_affairs/committee_activities/BOARD_BACK_GROUND_DRAFT.pdf

Who pays? -- Also a consideration is who bears the costs of licensing boards. From the perspective of many licensees, they pay (and presumably pass the cost along to their customers). State government through general taxpayer dollars does not pay.

Under section 37-1-134, MCA, licensing fees must be commensurate with costs. The department estimates direct and indirect costs based on the time spent by staff taking applications, investigating or inspecting, processing licenses, hearing complaints generated against licensees or unlicensed practitioners (which results in more attorney time and sometimes more administrative time from department personnel), and promulgating rules, whether done at a board's behest or required by legislative changes.

Who is licensed? -- Approximately 13% of Montana's workforce is licensed by a professional or occupational licensing board or by the department, which licenses addiction counselors, boxing promoters, boiler operators, steam engineers, blasters, and crane operators, and regulates fire prevention and the use of construction scaffolds and elevators.

Table 1: Boards for review in 2011-2012 and in 2013-2014, with a proposed schedule

Board	Created	Review Date
Board of Dentistry	1895	August 23, 2011
Board of Pharmacy	1895	August 23, 2011
Board of Chiropractors	1918	August 24, 2011
Board of Veterinary Medicine	1913	August 24, 2011
Board of Medical Examiners	1889	October 13, 2011
Board of Hearing Aid Dispensers	1969	October 13, 2011
Board of Funeral Services	1963	October 14, 2011
Board of Nursing Home Administrators	1969	October 14, 2011
Board of Nursing	1913	January 19, 2012
Board of Optometry	1974	January 19, 2012
Board of Public Accountants	1969	January 20, 2012
Board of Outfitters	1973	January 20, 2012
Board of Plumbers	1974	March 29, 2012
Electrical Board	1965	March 29, 2012
Board of Professional Engineers & Land Surveyors	1957	March 30, 2012
Board of Psychologists	1974	May 31, 2012

Boards for Review in 2013-2014	Created	Review Date
Board of Sanitarians	1974	TBD
Board of Radiologic Technologists	1975	TBD
Board of Speech Language Pathologists & Audiologists	1975	TBD
Board of Realty Regulation	1979	TBD
Board of Physical Therapy Examiners	1979	TBD
Board of Social Work Examiners & Professional Counselors	1983	TBD
Board of Private Security	1983	TBD
Board of Occupational Therapy Practice	1985	TBD
Board of Respiratory Care Practitioners	1991	TBD
Board of Real Estate Appraisers	1991	TBD
Alternative Health Care Board	1991	TBD
Board of Clinical Laboratory Science Practitioners	1993	TBD
Board of Barbers and Cosmetologists	2003(m)	TBD
Board of Private Alternative Adolescent Residential or Outdoor Programs	2005	TBD
Board of Architects and Landscape Architects	2007(m)	
Board of Athletic Trainers	2007	TBD
Board of Massage Therapy	2009	TBD

(m) stands for merged board and is the date used for the purposes of HB 525 origins. The Board of Barbers and the Board of Cosmetologists were created separately in 1929 but merged in 2003. The Board of Architects was created in 1917 and merged in 2007 with the Board of Landscape Architects, which was originally created in 1975.

Table 2: Criteria Listed in HB 525 for A Board That Serves a Public Purpose

a) Whether the unregulated practice of the occupation or profession creates a direct, immediate hazard to the public health, safety, or welfare
b) Whether the scope of practice is readily identifiable and distinguishable from the scope of practice of other professions and occupations
c) Whether the occupation or profession requires a specialized skill or training for which nationally recognized standards of education and training exist
d) Whether the qualifications for licensure are justified
e) Whether a public benefit is provided by licensure

f) Whether licensure significantly increases the cost of service
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g) Whether public support exists for licensure
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Proposed Review Process

The proposed structure of review will be a presentation by two boards at roughly each of eight committee meetings. A two-day meeting would involve presentations by four boards. Those presentations are to be by one or more board members responding to questions requested by the committee. See Table 3. Each presentation will be followed by public comment. Staff will prepare a short paper on each board, to introduce its scope of practice, the number of licensees, number and composition of board members, and its licensing or renewal charges.

Public comment is especially important for the reviews, as is information from board members themselves. Because it is important to hear from residents of Montana who may not follow the political process or who may not be a licensee of any of the boards, committee staff recommends reaching out to professional associations and other points of contact to alert members of the public that licensing board reviews are being undertaken. The alerts may use "survey monkey", a Facebook page, or some other forum for an orderly compilation of comments from those not as familiar with the political interim process. This is one way of trying to obtain comments from members of the public who oppose boards as well as supporters.

After public comment, while issues are fresh and while licensees or opponents (if any) are present, the 2011-2012 Economic Affairs Interim Committee will be asked to make a recommendation on whether to prepare termination legislation for the board that was subject of the presentation. A recommendation for termination may be limited to termination of a board with licensing still handled by the department. Or a recommendation for termination may suggest that the profession not be licensed by the state and that all complaints be handled by the consumer protection office of the attorney general or some other forum. Committee members also might suggest combining boards with similar scopes of practice to help relieve the cost of licensing for smaller boards. Conversely, the committee may consider separating professions that currently are combined under one board to help relieve perceived discrimination that may develop if any one profession is outnumbered by members of another profession on a board. The committee also may want to consider whether to restructure boards so that public members comprise a majority on the board, with representatives of the profession or occupation being in the minority and there less to regulate as to offer perspective.

Table 3. Questions for Board Representatives to Answer During Review

Does a profession or occupation need to be licensed for public health, safety or welfare?
If a license is necessary (for health, safety, or welfare), does the occupation need a board for oversight?
Does the profession or occupation have one or more associations that could provide oversight without the need for a licensing board?
Would some consumer protections be handled better by the Attorney General's office than by a board? (In other words, is there a value in a disinterested third party?)
What are the benefits of a board being part of the licensing and discipline process instead of the department handling one or both?
Are continuing education credits important for public health, safety, or welfare?
What is the purpose of creating a board and should the legislature adopt criteria regarding each board's purpose?
If the legislature adopts criteria for a board, is protection of health and safety all that matters or is public welfare in terms of consumer protection also important?
Is a licensing board needed in order for the practitioner to bill to receive insurance (for example, health insurance)? If so, is there an alternate method that may be recognized?
Should there be a general statement for the purpose of boards or is the current method better, of letting each board provide a purpose, if it chooses, because the purpose is more specifically suited to boards?
If boards have overlapping scopes of practice, should there be a judge of whether there is intrusion into the other's practices? Should each be allowed to operate on the other's turf without repercussions?
Is there an optimum ratio between licensees, board size, public representation?
Should any board have the ability to limit use of certain terminology to only a licensee? (see for example under 37-17-104 (1)(a), the exemption from definitions for psychologist: 37-17-104. Exemptions. (1) Except as provided in subsection (2), this chapter does not prevent: (a) qualified members of other professions, such as physicians, social workers, lawyers, pastoral counselors, professional counselors licensed under Title 37, chapter 23, or educators, from doing work of a psychological nature consistent with their training if they do not hold themselves out to the public by a title or description incorporating the words "psychology", "psychologist", "psychological", or "psychologic"

Appendix

The following statutes were enacted in 2007 to regulate creation of a new licensing board:

2-8-401. Purpose. It is the intent of the legislature to:

- (1) exercise the police power of the state through the establishment of licensing boards only when regulation of a profession or occupation benefits the public health, safety, welfare, or common good of the state's residents and that benefit outweighs the potential increased cost to the public and limitation on competition;
- (2) recognize those professions or occupations that require specialized skill or training; and
- (3) provide the public with a means to determine whether practitioners have met competency standards and to complain if the competency is suspect.

2-8-402. Intent to create new board. (1) A bill draft request to create a licensing board must include a letter of intent not exceeding 1,000 words that addresses the criteria in subsections (2) and (3).

- (2) The letter of intent must contain the following descriptions:
 - (a) how licensing would protect and benefit the public and, in particular, how the unregulated practice of the profession or occupation would pose a hazard to public health, safety, or welfare or the common good;
 - (b) the extent of practitioners' autonomy, as indicated by the degree of independent judgment that a practitioner may exercise or the extent of skill or experience required in making the independent judgment;
 - (c) the distinguishable scope of practice;
 - (d) the overlap or shared practices with an existing, licensed profession or occupation;
 - (e) the degree, if any, to which licensing would restrict entry into the profession or occupation for reasons other than public health, safety, or welfare or the common good;
 - (f) the specialized skills or training required for the profession or occupation;
 - (g) the proposed qualifications for licensure;
 - (h) whether a licensure exception would be provided to existing practitioners and whether those eligible for the exception would be required to meet proposed qualifications at a certain time;
 - (i) a list of other states that license the profession or occupation;
 - (j) regulatory alternatives other than licensing that are available to the practitioners of the profession or occupation; and
 - (k) previous efforts, if any, to regulate the profession or occupation.
- (3) In order to help in the determination of licensing costs, the letter of intent must contain a good faith effort to provide answers to the following questions:
 - (a) how many licensees are anticipated, including the number of practitioners in Montana;
 - (b) what is the proposed makeup of the licensing board; and
 - (c) what are the projected annual licensing fees based on information from the department of labor and industry for all costs associated with a board of the projected size.
- (4) After receiving a copy of the responses to subsections (2), (3)(a), and (3)(b), the department of labor and industry shall assist those developing the letter of intent under 2-8-403 or this section with the responses to subsection (3)(c) of this section.
- (5) For the purposes of this section, a letter of intent is a public record.

2-8-403. Intent to combine profession or occupation with existing board. (1) A bill draft request that proposes to license a profession or occupation by combining that profession or occupation with an existing board must contain a letter of intent if one of the following conditions applies:

- (a) the profession or occupation to be licensed falls under the supervisory authority of a profession or occupation with an existing board; or
 - (b) the profession or occupation to be licensed has an overlapping scope of practice or dual licensure with a profession or occupation under an existing board.
- (2) A letter of intent to combine with an existing board must contain responses to the questions provided in 2-8-402.
- (3) A letter of intent under this section is a public record.

2-8-404. Interim committee review of licensing boards and programs -- criteria -- repeal --

consolidation. (1) (a) Before January 1 of each even-numbered year, a legislative interim committee responsible for monitoring licensing boards and programs shall notify the department to which licensing boards or programs are administratively attached if the committee plans to review one or more licensing boards or programs to determine the need for a board or a program and the financial solvency or appropriate administrative attachment of the board or program.

(b) A review under subsection (1)(a) is separate from a performance audit conducted by the legislative audit committee.

(2) The focus of a review under subsection (1)(a) is:

(a) to determine whether a board or program continues to be needed to protect public health, safety, or welfare or the common good by addressing the following questions:

(i) does the improper practice of the profession or occupation pose a physical, financial, or emotional threat to public health, safety, or welfare and is there evidence of harm from improper practice; and

(ii) does the practice of the profession or occupation require specific training or skills that make evaluation of competency difficult for the consumer; or

(b) to assess the financial solvency of the board or program and the impact on consumers and on licensees if higher fees are projected for the next biennium.

(3) After the review, the legislative interim committee may draft legislation to:

(a) repeal the board or program if the board or program is no longer needed for public health, safety, or welfare or the common good; or

(b) combine a board with other licensing boards if a board meets the criteria in subsection (2)(a) but has one of the following criteria:

(i) is expected to have higher fees than if the board operates in combination with another board with similar interests;

(ii) has fewer than 200 licensees; or

(iii) has no or a limited number of complaints each year.

(4) The legislative interim committee, after a review of the administrative attachment of a board or program, may propose legislation to administratively attach the board or program to a department that has responsibilities related to the board or program.

2-8-405. Repeal of licensing board or program law -- deposit of fees. (1) If the legislature repeals a licensing board or program law, the department of labor and industry may collect only delinquent licensing fees or fines, if provided by law, on behalf of the repealed licensing board or program. Continuing education and other requirements for maintaining a license cease with the effective date of the repeal.

(2) (a) Fees collected on behalf of a board or program that is proposed to be repealed must be deposited in the state special revenue fund for the use of the board or program.

(b) Fees that are not needed for satisfying debt obligations of the board or program may be used by the department to offset the costs to the department of all boards and programs.