

HOUSE BILL NO. 109

INTRODUCED BY E. MCCLAFFERTY

BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING THE STATE ELECTRICAL BOARD, THE BOARD OF PLUMBERS, AND THE BOARD OF REALTY REGULATION TO ISSUE CEASE AND DESIST ORDERS WITH RESPECT TO UNLICENSED PRACTICES; PROVIDING FOR JUDICIAL REVIEW AND ENFORCEMENT OF CEASE AND DESIST ORDERS; PROVIDING FOR THE AWARD OF COSTS, ATTORNEY FEES, AND PENALTIES; AMENDING SECTIONS 37-1-130 AND 37-1-302, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 37-1-130, MCA, is amended to read:

**"37-1-130. Definitions.** As used in this ~~part~~ chapter, the following definitions apply:

(1) "Administrative fee" means a fee established by the department to cover the cost of administrative services as provided for in 37-1-134.

(2) "Board" means a licensing board created under Title 2, chapter 15, that regulates a profession or occupation and that is administratively attached to the department as provided in 2-15-121.

(3) "Board fee" means:

(a) a fee established by the board to cover program area costs as provided in 37-1-134; and

(b) any other legislatively prescribed fees specific to boards and department programs.

(4) "Department" means the department of labor and industry established in 2-15-1701.

(5) "Department program" means a program administered by the department pursuant to this title and not affiliated with a board.

(6) "Expired license" means a license that is not reactivated within the period of 46 days to 2 years after the renewal date for the license.

(7) "Lapsed license" means a license that is not renewed by the renewal date and that may be reactivated within the first 45-day period after the renewal date for the license.

(8) "License" means permission granted under a chapter of this title to engage in or practice at a specific



1 level in a profession or occupation, regardless of the specific term used for the permission, including permit,  
2 certificate, recognition, or registration.

3 (9) "Terminated license" means a license that is not renewed or reactivated within 2 years of the license  
4 lapsing."

5

6 **Section 2.** Section 37-1-302, MCA, is amended to read:

7 **"37-1-302. Definitions.** As used in this part, the following definitions apply:

8 (1) "Board" means a licensing board created under Title 2, chapter 15, that regulates a profession or  
9 occupation and that is administratively attached to the department as provided in 2-15-121.

10 (2) "Complaint" means a written allegation filed with a board that, if true, warrants an injunction,  
11 disciplinary action against a licensee, or denial of an application submitted by a license applicant, or issuance  
12 of a restricted license to a license applicant.

13 (3) "Department" means the department of labor and industry.

14 (4) "Inspection" means the periodic examination of premises, equipment, or procedures or of a  
15 practitioner by the department to determine whether the practitioner's profession or occupation is being conducted  
16 in a manner consistent with the public health, safety, and welfare.

17 (5) "Investigation" means the inquiry, analysis, audit, or other pursuit of information by the department,  
18 with respect to a written complaint or other information before a board, that is carried out for the purpose of  
19 determining:

20 (a) whether a person has violated a provision of law justifying discipline against the person;

21 (b) the status of compliance with a stipulation or order of the board;

22 (c) whether a license should be granted, denied, or conditionally issued; or

23 (d) whether a board should seek an injunction.

24 (6) "License" means permission granted under a chapter of this title to engage in or practice at a specific  
25 level in a profession or occupation, regardless of the specific term used for the permission, including permit,  
26 certificate, recognition, or registration.

27 (7) "Profession" or "occupation" means a profession or occupation regulated by a board."

28

29 **NEW SECTION. Section 3. Proceedings to stop unlicensed practice -- recovery of costs and fees.**

30 (1) (a) This section applies only to the board of realty regulation created in 2-15-1757, the state electrical board

1 created in 2-15-1764, and the board of plumbers created in 2-15-1765.

2 (b) For the purposes of this section, "board" means any of the boards set out in subsection (1)(a).

3 (2) If, after investigation under 37-1-317, a board finds reasonable cause to believe that a person has  
4 engaged in or is engaging in an act or practice constituting unlicensed practice of a profession or occupation  
5 regulated by the board, the board is authorized to take administrative action against the person as provided in  
6 subsection (3).

7 (3) In its discretion, the board may:

8 (a) issue to the person a demand to cease and desist from the unlicensed act or practice; or

9 (b) following notice and opportunity for hearing as provided under the Montana Administrative Procedure  
10 Act and upon a finding that the preponderance of the evidence indicates that the person has engaged in or is  
11 engaging in an act or practice constituting unlicensed practice of a profession or occupation regulated by the  
12 board:

13 (i) issue an administrative order to cease and desist from the unlicensed act or practice;

14 (ii) require the person to pay up to \$5,000 for the costs of the administrative proceedings, including but  
15 not limited to costs that would be allowable under Title 25, chapter 10, as well as the costs of investigation and  
16 the board's attorney fees;

17 (iii) impose a civil penalty not to exceed \$1,500 for each violation and not to exceed a total of \$5,000 for  
18 all related violations; or

19 (iv) take any combination of actions under subsections (3)(b)(i) through (3)(b)(iii).

20 (4) Contested cases adjudicated in accordance with this section and the Montana Administrative  
21 Procedure Act must be conducted in the same manner as actions alleging unprofessional conduct against  
22 persons licensed under this chapter.

23 (5) The judicial review and appeal provisions of the Montana Administrative Procedure Act apply to a  
24 contested case proceeding under this section, and the board must be a party for purposes of judicial review.

25 (6) (a) (i) On judicial review of an administrative action taken pursuant to this section, in addition to other  
26 actions that may be taken pursuant to Title 2, chapter 4, part 7, the district court, in its discretion, may modify or  
27 reverse the award or denial of all costs, fees, and penalties.

28 (ii) A district court may increase or award costs and fees only to the prevailing party. Costs and fees  
29 assessed by the district court may include attorney fees from all proceedings, including the administrative  
30 proceedings and judicial review. On judicial review under this subsection (6), the total of costs, fees, and

1 penalties ordered by the court in any one legal action may not exceed \$10,000.

2 (b) (i) For purposes of this section, the prevailing party is the party that prevails with respect to the order  
3 to cease and desist, regardless of costs, fees, and penalties awarded or reversed and regardless of whether the  
4 order to cease and desist is raised as an issue on review or on appeal.

5 (ii) A party that prevails on judicial review or appeal with respect to findings affecting the number of  
6 violations is not a prevailing party on that basis.

7 (iii) If the board is the prevailing party on judicial review or appeal, penalties and fees may also be  
8 increased or awarded up to the limit provided in subsection (6)(a)(ii).

9 (7) (a) If, after an investigation under 37-1-317, a board finds reasonable cause to believe that a person  
10 is in violation of an administrative order to cease and desist, the board may enforce its order to cease and desist  
11 by petitioning the district court in the first judicial district or the county where the act or practice is alleged to have  
12 occurred or to be occurring. The board is not required to post a bond.

13 (b) If the district court finds that a person has violated a valid administrative order to cease and desist,  
14 the court shall order the person to cease and desist from the activity. The court shall also assess a civil penalty  
15 in an amount not to exceed \$5,000 for each violation that occurred after the board issued its cease and desist  
16 order. The total civil penalty assessed by the district court in any one enforcement action for violations of an  
17 administrative order may not exceed \$20,000.

18 (c) In a district court action to enforce an administrative order to cease and desist, the district court may  
19 award the prevailing party a judgment for payment of costs and fees, not to exceed \$20,000.

20 (8) For purposes of this section, each day or part of a day of unlicensed practice constitutes a separate  
21 violation.

22 (9) (a) The board may seek enforcement of a district court order in the same manner as provided for the  
23 enforcement of an administrative order. Violation of the district court order constitutes contempt of court and is  
24 subject to additional penalty as determined by the district court and allowed by law.

25 (b) In an action to enforce a district court order, the district court may award the prevailing party a  
26 judgment for payment of costs and fees not to exceed \$20,000 for any one enforcement action. Costs and fees  
27 assessed by the district court may include attorney fees from all proceedings, including the administrative  
28 proceedings, judicial review, and appeal.

29 (c) The court shall also assess a civil penalty in an amount not to exceed \$5,000 for each violation that  
30 occurred after the district court issued its previous order. The total civil penalty assessed by the district court for

1 violations of a district court order issued pursuant to this section may not exceed \$20,000 for any one  
2 enforcement action.

3 (10) (a) Costs, fees, and penalties awarded by an administrative order under this section accrue interest  
4 at the rate of 10% a year beginning on the 30th day after the date of the final order of the board unless the order  
5 is stayed by the district court.

6 (b) Costs, fees, and penalties awarded by a district court pursuant to this section that are in addition to  
7 those awarded by an administrative order accrue interest at the rate of 10% a year beginning on the 60th day  
8 after the date of the final order of the district court unless the order is stayed by the district court or supreme court.

9 (11) Unless the board's decision is subject to a court-ordered stay, a copy of the department's docket,  
10 certified by the department, may be filed with the district court clerk of any county and may be enforced and  
11 executed upon pursuant to Title 25 as if it were the docket from a Montana district court in which a judgment was  
12 obtained.

13 (12) Amounts collected by the board pursuant to this section must be first considered to be costs and  
14 fees. Once costs and fees are paid, any additional amount collected must be considered to be penalties. All  
15 amounts collected by the board pursuant to this section must be deposited in the special revenue account for the  
16 board, except that one-half of all penalties ordered by a district court in excess of the administrative penalties  
17 ordered by the board must be deposited in the state general fund.

18 (13) The board may contract with a collection agency for the purpose of collecting costs, fees, and  
19 penalties imposed pursuant to this section.

20 (14) The remedies provided to the board by this section are in addition to all other remedies or actions  
21 that may be taken.

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23 **NEW SECTION. Section 4. Codification instruction.** [Section 3] is intended to be codified as an  
24 integral part of Title 37, chapter 1, and the provisions of Title 37, chapter 1, apply to [section 3].

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26 **NEW SECTION. Section 5. Severability.** If a part of [this act] is invalid, all valid parts that are severable  
27 from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part  
28 remains in effect in all valid applications that are severable from the invalid applications.

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30 **NEW SECTION. Section 6. Effective date.** [This act] is effective on passage and approval.

