

**Unofficial Draft Copy**

As of: August 5, 2016 (4:38pm)

LC3901

\*\*\*\* Bill No. \*\*\*\*

Introduced By \*\*\*\*\*

By Request of the \*\*\*\*\*

A Bill for an Act entitled: "An Act to provide state action immunity from antitrust liability to professional and occupational licensing board members; authorizing the commissioner of labor and industry to exercise active supervision of licensing board actions that are anticompetitive or potentially anticompetitive; and amending sections 2-15-121, 37-1-121, and 37-1-131, MCA."

WHEREAS, in 2015 the U.S. Supreme Court held in North Carolina Dental Board v. the Federal Trade Commission that licensing boards with active market participants may have an incentive to protect their respective professions and thereby unlawfully limit competition and, relatedly, that board members in such cases are not eligible for immunity as state actors for their decisions unless a state supervisor has authority to review and veto the board actions; and

WHEREAS, Montana's professional and occupational licensing boards are substantially comprised of active market participants, and current Montana law does not provide for the degree of supervision required by the U.S. Supreme Court decision; and

WHEREAS, this legislation seeks to continue to rely on the expertise provided by practicing members of the profession to regulate the profession and affirmatively chooses to afford a

state action defense and thereby avoid personal legal liability for licensing board members.

Be it enacted by the Legislature of the State of Montana:

**Section 1.** Section 2-15-121, MCA, is amended to read:

**"2-15-121. Allocation for administrative purposes only. (1)**

An agency allocated to a department for administrative purposes only in this chapter shall:

(a) (i) exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department and without approval or control of the department except as provided in subsection (1)(a)(ii);

(ii) accede, if the agency is a licensing board governed under Title 37, to the active supervision exercised under 37-1-121(4);

(b) submit its budgetary requests through the department; and

(c) submit reports required of it by law or by the governor through the department.

(2) The department to which an agency is allocated for administrative purposes only in this title shall:

(a) direct and supervise the budgeting, recordkeeping, reporting, and related administrative and clerical functions of the agency;

(b) include the agency's budgetary requests in the departmental budget;

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(c) collect all revenues for the agency and deposit them in the proper fund or account. Except as provided in 37-1-101, the department may not use or divert the revenues from the fund or account for purposes other than provided by law.

(d) provide staff for the agency. Unless otherwise indicated in this chapter, the agency may not hire its own personnel.

(e) print and disseminate for the agency any required notices, rules, or orders adopted, amended, or repealed by the agency.

(3) The department head of a department to which any agency is allocated for administrative purposes only in this chapter shall:

(a) represent the agency in communications with the governor;

(b) allocate office space to the agency as necessary, subject to the approval of the department of administration."

{*Internal References to 2-15-121:*

2-4-110 dpt revw 2-15-112 dpt heads 2-15-212 wtr cm 2-15-217 ind aff  
2-15-243 sage grouse 2-15-411 cm pol prc 2-15-411 2-15-412 canvasrs  
2-15-1007 brd exmnrs 2-15-1009 perb 2-15-1010 trb 2-15-1010 trb  
2-15-1019 msfbrd 2-15-1025banking brd 2-15-1026 co prnt 2-15-1028 pb df  
2-15-1205 vet af 2-15-1205 2-15-1515 cm higher ed 2-15-1524 post ed cnc  
2-15-1704 UI 2-15-1705 BAPA 2-15-1706 c hm rhts 2-15-1707 wrk cmp judge  
2-15-1730 alt health 2-15-1731 bome 2-15-1732 dent 2-15-1733 pharm  
2-15-1734 nurs 2-15-1735 nhma 2-15-1736 optom 2-15-1737 chiros  
2-15-1738 rad teks 2-15-1739 spch-aud 2-15-1740 hearing 2-15-1741 psych  
2-15-1742 vets 2-15-1743 fnrl dir 2-15-1744 behav hlth 2-15-1745 paarp  
2-15-1747 brbrs/cos 2-15-1748 PTs 2-15-1749 OTs 2-15-1750 resp  
2-15-1751 san 2-15-1753 clin lab 2-15-1756 accts 2-15-1756  
2-15-1757 realty reg 2-15-1758 re app 2-15-1761 arch/lar 2-15-1763 PELS  
2-15-1764 elec 2-15-1765 plumb 2-15-1771 ath tr 2-15-1773 outfitters  
2-15-1781 priv sec 2-15-1782 ms ther 2-15-1808 boi 2-15-1809 horseracing  
2-15-1814 housing 2-15-1815 Fac fin 2-15-1820 eco dev cn 2-15-1821 coal  
2-15-1869 cncl dd 2-15-2006 cr cntrl 2-15-2006 cr cntrl 2-15-2021 gaming  
2-15-2029 post 2-15-2029 post 2-15-2203 pub ass'ce 2-15-2212 telecom acc

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2-15-2214 ch trust fnd 2-15-2216 trauma cr 2-15-2217 tr br 2-15-2302 ppr  
2-15-2302 pprl 2-15-2502 transp cmn 2-15-2506 aero 2-15-3002 wh-brly  
2-15-3003 hail ins 2-15-3003 2-15-3004 alfalfa seed 2-15-3015 ag dev cn  
2-15-3104 lv crimestp 2-15-3105 mlk cntrl 2-15-3110 liv lss 2-15-3110  
2-15-3303 oil-gas 2-15-3303 2-15-3305 rnglnd resorc 2-15-3307 h2o well  
2-15-3404 fwp crmstprs 2-15-3502 env review 15-2-102 stab 15-2-102  
17-7-111 bdgt 20-25-901 fmly ed sav 22-3-804 brl presv 22-3-1002 herit  
23-7-201 lot cmsn 27-6-104 med lgl p 27-12-104 chiro l p 30-16-302 rev  
37-1-101 doli duties 37-1-101 37-1-121 cmsr duties 37-1-130 def  
37-1-302 def 46-23-1115 adult offndr/cncl 50-60-115 bldg cn 52-2-303 kid  
53-10-203 prvdr rates 53-21-1107 suic rev 53-25-105 dd ovrst 61-3-346 mvd  
76-16-112 grs cnsrv 76-16-112 wh-brly fee 80-11-224 wht-brly 80-11-310 a  
81-23-103 mlk cntr 82-11-111 oil-gas 82-11-111 82-11-123 oil-gas  
82-11-123 82-11-124 oil-gas 90-1-131 sted 90-6-303 hrd-rck  
90-6-305 hrd-rck. indirect reference for 2-5-1819-research/com brd}

**Section 2.** Section 37-1-121, MCA, is amended to read:

**"37-1-121. Duties of commissioner.** In addition to the powers and duties under 2-15-112 and 2-15-121, the commissioner of labor and industry shall:

(1) at the request of a party, appoint an impartial hearings examiner to conduct hearings whenever any board or department program holds a contested case hearing. The hearings examiner shall conduct hearings in a proper and legal manner.

(2) establish the qualifications of and hire all personnel to perform the administrative, legal, and clerical functions of the department for the boards. Boards within the department do not have authority to establish the qualifications of, hire, or terminate personnel. The department shall consult with the boards regarding recommendations for qualifications for executive or executive director positions.

(3) approve all contracts and expenditures by boards within the department. A board within the department may not enter into a contract or expend funds without the approval of the

commissioner.

(4) provide oversight and supervision of the duties and authority exercised by boards established in Title 37 by exercising active supervision authority to approve or disapprove board decisions. The decisions include, in part or in full, any action, rule, regulation, or policy proposed or implemented by a board and identified by the department as restraining or potentially restraining competition in trade or commerce without a clearly articulated state policy. Any approval or disapproval under this subsection must be made in writing and set forth the particular reasons supporting the determination. The commissioner of labor and industry may assign duties, as necessary."

{ Internal References to 37-1-121:  
37-1-131 a 37-51-321x }

**Section 3.** Section 37-1-131, MCA, is amended to read:

**"37-1-131. Duties of boards -- quorum required.** (1) Under the active supervision of the state as defined in 37-1-121(4), a quorum of each board within the department shall:

(a) (i) set and enforce standards and adopt and enforce rules governing the licensing, certification, registration, and conduct of the members of the particular profession or occupation within the board's jurisdiction; and

(ii) apply the standards and rules referred to in subsection (1)(a)(i) in a manner that does not discriminate against any person licensed by the board with regard to how the standards and rules are applied to other persons licensed by the board and that

does not restrain trade or competition unless necessary to protect public health and safety;

(b) except as provided in 37-1-321, sit in judgment in hearings for the suspension, revocation, or denial of a license of an actual or potential member of the particular profession or occupation within the board's jurisdiction. The hearings must be conducted by a hearings examiner when required under 37-1-121.

(c) suspend, revoke, or deny a license of a person who the board determines, after a hearing as provided in subsection (1)(b), is guilty of knowingly defrauding, abusing, or aiding in the defrauding or abusing of the workers' compensation system in violation of the provisions of Title 39, chapter 71;

(d) take disciplinary action against the license of a person in a medical assistance program under chapter 3, 4, 7, or 8 if, in the period under contract, the licensee has on three separate occasions returned to the use of a prohibited or proscribed substance. The requirements of this subsection (1)(d) may not be construed as affecting the rights of an employer to evaluate, discipline, or discharge an employee.

(e) pay to the department the board's pro rata share of the assessed costs of the department under 37-1-101(6);

(f) consult with the department before the board initiates a program expansion, under existing legislation, to determine if the board has adequate money and appropriation authority to fully pay all costs associated with the proposed program expansion. The board may not expand a program if the board does not have adequate money and appropriation authority available.

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(2) A board, board panel, or subcommittee convened to conduct board business must have a majority of its members, which constitutes a quorum, present to conduct business.

(3) A board that requires continuing education or continued state, regional, or national certification for licensees shall require licensees reactivating an expired license to submit proof of meeting the requirements of this subsection for the renewal cycle.

(4) The board under the active supervision of the state as defined in 37-1-121(4) or the department program may:

(a) establish the qualifications of applicants to take the licensure examination;

(b) determine the standards, content, type, and method of examination required for licensure or reinstatement of a license, the acceptable level of performance for each examination, and the standards and limitations for reexamination if an applicant fails an examination; and

(c) examine applicants for licensure at reasonable places and times as determined by the board or enter into contracts with third-party testing agencies to administer examinations.

; and

~~(5)(d)~~ A board may, at the board's discretion, request the applicant to make a personal appearance before the board for nonroutine license applications as defined by the board.

~~(6)(5)~~ A board shall adopt rules governing the provision of public notice as required by 37-1-311."

{*Internal References to 37-1-131:*

37-48-106 x}

NEW SECTION. **Section 4. {standard} Codification**

**instruction.** [Section 1] is intended to be codified as an integral part of Title 37, chapter 1, part 1, and the provisions of Title 37, chapter 1, part 1, apply to [section 1].

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{Name :  
Title :  
Agency :  
Phone :  
E-Mail: }