

HOUSE BILL NO. 141

INTRODUCED BY R. LYNCH

BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING THE COMMISSIONER OF LABOR AND INDUSTRY TO EXERCISE ACTIVE SUPERVISION OF LICENSING BOARD ACTIONS THAT ARE ANTICOMPETITIVE OR POTENTIALLY ANTICOMPETITIVE; EXTENDING RULEMAKING AUTHORITY; AMENDING SECTIONS 2-15-121, 37-1-121, AND 37-1-131, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE."

WHEREAS, in 2015 the U.S. Supreme Court held in North Carolina State Board of Dental Examiners v. the Federal Trade Commission that members of state licensing boards on which a controlling number of decisionmakers are active market participants in the regulated profession are immune from federal antitrust liability for anticompetitive conduct as state actors only if the challenged restraint is clearly articulated and expressed as state policy and the state has and exercises active supervision over those types of board actions; and

WHEREAS, Montana's professional and occupational licensing board members include active market participants, and the Legislature intends to ensure that Montana law provides for the active supervision of boards as required by the U.S. Supreme Court decision for purposes of state action antitrust immunity; 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);



1 (ii) accede, if the agency is a licensing board regulated by the department of labor and industry under Title
 2 37, to the active supervision required by 37-1-121(4)(1)(D);

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

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

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

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

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

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

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

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 15 repealed by the agency.

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

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

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

21

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

23 **"37-1-121. Duties of commissioner -- definitions.** (1) In addition to the powers and duties under
 24 2-15-112 and 2-15-121, the commissioner of labor and industry shall:

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

28 ~~(2)~~(B) establish the qualifications of and hire all personnel to perform the administrative, legal, and
 29 clerical functions of the department for the boards. Boards within the department do not have authority to
 30 establish the qualifications of, hire, or terminate personnel. The department shall consult with the boards

1 regarding recommendations for qualifications for executive or executive director positions.

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

4 ~~(4)(D)~~ provide oversight and supervision of the duties and authority exercised by boards regulated under
5 Title 37, other than chapters 42, 43, and 61, by exercising active supervision authority to approve or disapprove
6 any board action identified by the department as restraining or potentially restraining competition in trade or
7 commerce. The commissioner shall approve a board action subject to this subsection ~~(4)~~ (1)(D) if the
8 commissioner determines that the board action is made or taken pursuant to a clearly articulated state policy and
9 that the restraint or potential restraint of trade or commerce is reasonable and necessary to protect the public
10 health, safety, or welfare. Any approval or disapproval under this subsection ~~(4)~~ (1)(D) must be in writing, comply
11 with the provisions in [section 4], and set forth the particular reasons supporting the determination. A disapproval
12 determination may include the commissioner's recommended modifications, if any, for the board's consideration.
13 The commissioner may assign duties, as necessary, BUT MAY NOT ASSIGN FINAL APPROVAL OR DISAPPROVAL.

14 (2) IF THE DEPARTMENT DISAPPROVES OR MODIFIES ANY BOARD ACTION UNDER SUBSECTION (1)(D), THE
15 DEPARTMENT AND NOT THE BOARD MAY BE LIABLE FOR CLAIMS RESULTING FROM THE DISAPPROVAL OR MODIFICATION.

16 ~~(5)(3)~~ As used in this chapter, the following definitions apply:

17 (a) "Board action" means a policy, rule, or other action taken by a board subject to subsection ~~(4)~~ (1)(D).

18 (b) "Commissioner" means the commissioner of labor and industry unless otherwise specified."

19

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

21 **"37-1-131. Duties of boards -- quorum required.** (1) A Under the active supervision of the state as
22 described in 37-1-121~~(4)~~(1)(D), a quorum of each board within the department shall:

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

26 (ii) apply the standards and rules referred to in subsection (1)(a)(i) in a manner that does not discriminate
27 against any person licensed by the board with regard to how the standards and rules are applied to other persons
28 licensed by the board and that does not restrain trade or competition unless necessary to protect public health
29 and safety;

30 (b) except as provided in 37-1-321, sit in judgment in hearings for the suspension, revocation, or denial

1 of a license of an actual or potential member of the particular profession or occupation within the board's
2 jurisdiction. The hearings must be conducted by a hearings examiner when required under 37-1-121.

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

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

10 (e) pay to the department the board's pro rata share of the assessed costs of the department under
11 37-1-101(6);

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

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

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

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

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

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

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

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

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

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3 NEW SECTION. **Section 4. Active supervision -- rebuttable presumption -- reconsideration.** (1)

4 (a) Except as provided in subsection (1)(c), before making a determination approving or disapproving a board
5 action subject to active supervision as provided in 37-1-121~~(4)~~(1)(D), the commissioner of labor and industry shall:

6 (i) notify the affected board in writing of the particular action identified for commissioner review;

7 (ii) give the board a timeframe of at least 30 days in which to provide the commissioner with written
8 comments and materials justifying the proposed action; and

9 (iii) meet with the board or its representatives regarding the board action.

10 (b) The commissioner may require that the board provide the commissioner with other relevant
11 information, including but not limited to comments, documents, or other material submitted to the board regarding
12 the board action.

13 (c) The commissioner may approve a board action subject to active supervision under 37-1-121~~(4)~~(1)(D)
14 without the notice and opportunity for board comment required under subsection (1)(a) if the commissioner has
15 sufficient information to act.

16 (2) (a) There is a rebuttable presumption that if a board has not received a written notice as provided
17 in 37-1-121~~(4)~~(1)(D) regarding a board action WITHIN 30 DAYS, that the board action is presumed to be approved
18 by the commissioner because the department has determined the board action will not unreasonably restrain or
19 potentially unreasonably restrain competition in trade or commerce.

20 (b) At any time a board may request that the department or commissioner confirm in writing that a board
21 action is not subject to active supervision under 37-1-121~~(4)~~(1)(D) because the commissioner has determined
22 that the board action will not unreasonably restrain or potentially unreasonably restrain competition in trade or
23 commerce.

24 (3) If the commissioner determines that a board action is subject to active supervision procedures under
25 37-1-121~~(4)~~(1)(D) and this section, the commissioner shall issue a written determination within 30 days after
26 meeting with the board or its representatives as provided in subsection (1).

27 (4) (a) The board may request that the commissioner reconsider the determination. A request under this
28 subsection (4) must be in writing, provide any additional supporting materials or arguments, and be received by
29 the commissioner within 10 days after issuance of the commissioner's written determination.

30 (b) The commissioner may meet with the board or representatives of the board as part of the

1 reconsideration process.

2 (c) The commissioner shall issue a written reconsideration decision within 10 days of receiving the
3 written request for a reconsideration or within 10 days after meeting with the board or its representatives
4 regarding the redetermination.

5 (5) This section may not be construed to mean that the commissioner's determination under
6 37-1-121~~(4)(1)(D)~~ or the process described in this section is a contested case proceeding as defined in 2-4-102.

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9 NEW SECTION. Section 5. Rules governing active supervision. The department may adopt rules
10 necessary to carry out active supervision of board actions as provided for in 37-1-121 and [section 4].

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12 NEW SECTION. Section 6. Codification instruction. [Sections 4 and 5] are intended to be codified
13 as an integral part of Title 37, chapter 1, part 1, and the provisions of Title 37, chapter 1, part 1, apply to [sections
14 4 and 5].

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16 NEW SECTION. Section 7. Effective date. [This act] is effective on passage and approval.

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18 NEW SECTION. SECTION 8. TERMINATION. [THIS ACT] TERMINATES JULY 1, 2021.

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