

OVERVIEW OF HB 525 STUDY OF LICENSING BOARDS

What licensing boards are necessary for public health, safety, and welfare?

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Introduction

Implementation of House Bill No. 525, passed in the 2011 legislative session, resulted in a 2011-2012 review by the Economic Affairs Interim Committee of 16 of the 33 professional and occupational licensing boards. The remaining boards are to be reviewed, as indicated in HB 525, in the 2013-2014 interim. The legislation directed that the oldest boards be reviewed first.

For the government to be involved in regulation of a profession, there generally is a perceived need to protect public health, welfare, or safety through restrictions on professions and occupations. Boards also try to protect not only the public but licensees from competitors who do not agree to follow the rules, whether those rules require licensing itself or professional conduct.

HB 525 was intended to provide a legislative examination of boards to determine if they were serving a public interest and not just a private interest. If there is not a public role, the thought behind HB 525 was, then government did not need to be involved in regulating the profession. As with any review, there also was an opportunity for licensees and others to comment on problems that they saw with boards as well as to highlight board benefits.

The 2011-2012 review by the Economic Affairs Interim Committee of 16 licensing boards resulted in only a few boards having "call-backs" to address concerns. Recurring complaints by two of the three professions on the Board of Dentistry ran through much of the interim. The financial troubles of the Board of Hearing Aid Dispensers brought that board back to the Committee more than once to determine how to deal with the loss of audiologists as licensees and the internal legal costs generated by frequent complaints against just a few of the dispenser licensees. Complaints regarding other boards generally involved competition concerns.

Some boards had few complaints and occasionally drew generous praise as many licensees (and others) took the time to answer an internet-based survey posted by the Economic Affairs Committee, with links from the licensing boards' websites. The Economic Affairs Committee appreciated the time spent by board members to address HB 525 questions and by concerned licensees and others involved with boards.

I. Overview of HB 525 requirements -- The Narrow Sunset Review vs. Board Problems.

The HB 525 review asked for a determination of whether a licensing board met requirements to protect public health and safety. The work plan for the HB 525 reviews also incorporated elements of SB 165, which was enacted in the 2011 session and sought 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.

If a board did not meet the criteria in Table 1, then the Economic Affairs Interim Committee (the Committee) was to determine whether to recommend to the full legislature that the board be terminated. The board's ability to remain solvent also was to be considered as part of the recommendation¹ and each board review included data on the board's revenues and expenditures in the most recently available fiscal year.

Table 1: HB 525 criteria to determine if board meets a public purpose (37-1-142(2), MCA)

1.	Does the unregulated practice of the occupation or profession create a direct, immediate hazard to the public health, safety, or welfare?
2.	Is the scope of practice readily identifiable and distinguishable from the scope of practice of other professions and occupations?
3.	Does the occupation or profession require a specialized skill or training for which nationally recognized standards of education and training exist?
4.	Are qualifications for licensure justified?
5.	Does licensure provide a public benefit?
6.	Does licensure significantly increase the cost of service to the public?
7.	Is there public support for licensure?

As part of its information gathering, the Committee conducted a survey that was open to licensees as well as members of the Internet public. Licensees were notified through their board websites about the survey, which was also available through the Economic Affairs Committee website. More than 2,000 people took the survey, although many people from out of state responded without any apparent ties to Montana or the licensing boards (there apparently are people with little to do except troll for surveys online!) Board members also were asked to respond to questions prepared by the Committee. Samples of these responses are in Appendix A.

The Committee voted to recommend retention of all 16 of the licensing boards reviewed in 2011-2012. The overall support for retaining these licensing boards did not mean that the Committee endorsed all the operations of the boards, and in some cases committee members noted that licensing boards needed to work to address concerns of their licensees. Board problems presented before the Committee are addressed in Section III.

¹That language reads: 37-1-142(3) "After a presentation and public comment during the review before the interim committee, the interim committee shall report to the legislature convening in the next odd-numbered year which boards, if any, fail to meet a majority of the criteria in subsection (2) and may recommend termination. The recommendation also must include information from the department regarding the board's ability to remain solvent or achieve fiscal solvency as provided in 37-1-101."

II) Private Payment (Board Fees) for Public Health, Safety, Welfare - does it make sense or is it a trade-off to allow self-regulation?

A frequently heard complaint among licensees and board members is that they have little control over board costs if they want to minimize these costs. Under 37-1-134, a board must set fees that are commensurate with costs (not set costs commensurate with fees). A budget brief prepared by Quinn Holzer, in 2011 serving as an analyst with the Legislative Fiscal Division, described board budgets as "driven by two primary factors: 1) the number of licensees associated with the Board, and 2) the costs associated with the Board's administration."²

Administrative costs consist of:

- direct operating expenses of the boards;
- direct hours for staff directly working on a board's activities;
- a combination of indirect hours for activities not specifically attributable to a single board and for activities of the Business Standards Division's bureau chiefs and administration-level positions (the costs for these indirect hours are assigned based on the total number of direct hours divided by the direct hours spent on a board. For example, if there were 10 boards and 100 hours spent on all boards, the percent charged to each board would not necessarily be 10% but rather a percentage based on the direct hours spent on each board.)
- indirect charges, which includes most legal work and a proportional charge for DLI's Central Services and the Commissioner's Office, plus phone lines, rent, and information technology services provided by the Department of Administration and information technology not directly associated with the Business Standards Division. The indirect charges all have similar allocations spread across all boards, programs, and other DLI divisions.

While all the boards are attached for "administrative purposes" to DLI, as provided in 2-15-121, MCA, the result of statutory changes over the years has been to assign duties to the department for which boards must pay. The department tells boards what these administrative costs are and attempts to treat all boards equally in terms of staffing and cost-sharing. For example, all boards have at least two attorneys, with one as board counsel and another who acts as a prosecuting attorney. A board may or may not need the prosecuting attorney (depending on the amount of complaints filed), but the department assigns a prosecuting attorney to make sure there is no conflict of interest for the board counsel. One attorney on staff may be a counsel for several boards but serve as a prosecuting attorney for two other boards.

The number of a board's licensees drive up costs for licensing and, depending on statutory licensing requirements, for compliance costs. Board decisions can increase some of the costs based on budgetary authority. For large boards, such as the Board of Nursing with more than

²The memo on board costs is available at:
<http://leg.mt.gov/content/Committees/Interim/2011-2012/Economic-Affairs/Meeting-Documents/June-2011/board-fee-process.pdf>.

18,000 licensees, annual budgets may run close to \$1 million. For smaller boards with few complaints, like the Board of Optometry with fewer than 300 licensees, the annual budget might run less than \$27,000. For boards just starting up, DLI has estimated initial costs of \$40,000, which also is a median estimate of board costs.

Costs that boards can determine themselves, for example, may include how many meetings to have by phone, whether to meet at locations other than Helena (which increases staff costs for attending), and whether to pay for board members to attend conferences around the country (or even outside the country). Board members are appointed by the governor. The current governor's website (http://governor.mt.gov/boards_councils/default.asp) has an application for interested persons to send in their name. Each board usually has one public member, if not more, as determined by statute.

During a 2005-2006 examination of licensing boards under Senate Joint Resolution No. 35, a key question was asked: if a licensing board truly is needed for public health, safety, and welfare then should the licensees pay for that board or should the state? The current process in which the licensees themselves pay for the board, determine costs beyond the administrative costs, and regulate their competitors is part of an agreement by which, for self-regulation, the licensees pay the costs themselves.

In terms of alternative approaches to licensing boards, most of the board members who responded to questions asked by the Committee (Does the profession or occupation have one or more associations that could provide oversight without the need for a licensing board? and Why not use the association as the oversight body?) said that associations for the most part are there to lobby, boost the profession, and not necessarily to monitor bad actors. In response to another question (What are the benefits of a board being part of the licensing, and discipline process, instead of the department handling one or both?) most responses indicated that the knowledge of a profession or occupation was important to knowing whether someone had transgressed ethical or professional standards. If there were no boards, professionals would need to be brought in to help adjudicate, probably at higher cost for missing a day of work.

As one way of smoothing the department's administrative role, the Business Standards Division spent much of the 2011-2012 biennium providing a plan to reorganize administrative functions. This was intended to flatten out the previous silos in which each board may have had staff carrying out functions identical to functions handled by other boards. Some boards voiced concerns that they were losing staff with specialized knowledge, and in fact two groups sought legislation in the 2013 session to allow a basic attachment to the Department of Labor and Industry but all board hiring of personnel and decision-making to be entirely handled by the board. The two groups were Realtors and certified public accountants. The concern about lack of staff directly assigned to licensing boards remains ongoing and may be the subject of a Legislative Audit Committee performance audit (the Legislative Audit Committee meeting June 13 to decide its priorities for performance

audits in the coming biennium.) Meanwhile, the department has pointed out that the revised structure provides efficiencies through staff cross-training (to avoid stalled licensing or investigations if the assigned personnel call in sick, for example) while retaining specialized knowledge and encouraging greater sharing with other staff members.

The reorganization also resulted in three bureau chiefs instead of two with a new bureau chief replacing a position that formerly had been a deputy administrator. More information on the impact of that reorganization on budgeting will be available either at the June 2013 EAIC meeting or at a later EAIC meeting. Staffing levels and assignments may change, the department noted, as the boards gain experience under the revised plan.

III) Concerns about boards as indicated through the EAIC Survey or Committee meetings

Board problems heard at the Committee meetings

- Professions under the thumb of other professions on the same board³
 - Denturists and dental hygienists told the Committee that they felt their professions were ignored by the dentists on the Board of Dentistry, who have 5 seats on the 10-member board with dental hygienists having 2 seats, public members having 2 seats, and denturists represented by one board member. Efforts to address the Board of Dentistry concerns became somewhat confused by the HB 525 process, which ultimately involved a vote whether to recommend to the full legislature to keep the board or to terminate it (not change it). Initially, a committee member asked at the Aug. 24, 2012, Committee meeting for a bill draft that would separate the Board of Dentistry into one dealing only with dentists and a second bill that provided for representation of dental hygienists and denturists. That bill draft, LCdent,⁴ was not voted on as a committee bill. It was intended, in part, to stimulate discussion about separating into two boards. Instead, at a second review of Board of Dentistry concerns at the Jan. 20, 2012, Committee meeting there was a discussion regarding proposals presented by the Board of Dentistry to have two subcommittees, one of dental hygienists and one of denturists. The subgroups and their associations both supported an idea by which a subcommittee's recommendation for their respective profession would become the standard unless overturned by a supermajority of the board. However, the Board of Dentistry itself recommended only subcommittees whose recommendations would be subject to a regular determination by the full board. The ensuing committee action involved a motion to endorse the Board of

³This concern included addressing issues raised in Senate Bill No. 165, enacted in the 2011 session, which included a prohibition on discrimination among licensees and restraint of trade by licensees over a trade or profession that is not licensed.

⁴See the draft at: <http://leg.mt.gov/content/Committees/Interim/2011-2012/Economic-Affairs/Assigned-Studies/HB525/LCdentBart.pdf>

Dentistry as is, followed by a failed substitute motion to endorse the supermajority subcommittee approach. The Committee ultimately endorsed keeping the Board of Dentistry as is, for the purposes of the HB 525 review. However, Committee members asked the Board of Dentistry to continue to work with the dental hygienists and denturists. The Board of Dentistry chairman, Dr. Dale Chamberlain, provided a report at the Committee's last meeting.

- Crematory operators, some funeral directors, and a member of the public complained about how the Board of Funeral Service handled complaints. The Department of Labor and Industry considered a bill draft for the 2013 session to generally revise Board of Funeral Service statutes but this was not put forward.
- Hearing aid dispensers raised concerns about their fees more than doubling, in part because legislation in 2011 eliminated the need for roughly 30 audiologists to be doubly licensed as hearing aid dispensers. The remaining 70 or so licensees had to meet high legal fees that board members attributed to hearings generated by complaints against mostly the same few licensees. One proposal investigated by the Committee was to ask the Attorney General's Office of Consumer Protection how much help that office could be in pursuing violations that currently are brought before a screening panel of the Board of Hearing Aid Dispensers and potentially adjudicated by the Board of Hearing Aid Dispensers. These tend to be consumer complaints regarding a hearing aid dispenser's failure to make good, as provided by law, on returned hearing aids.
- Plumbers and electricians told the Committee that they were frustrated that fines levied against unlicensed practitioners went into the general fund instead of to the respective boards, which could have used the fines to offset the costs of adjudication panels that heard the unlicensed practice complaints. Their comment was that the good practitioners were having to pay through their licensing fees for the cost of investigating unlicensed practitioners attempting to avoid licensure fees. The Department of Labor and Industry proposed an agency bill, House Bill No. 109, that would have allowed for enforcement of unlicensed practice for not only the Board of Plumbing and the Electrical Board, but the Board of Realty Regulation as well. The bill was tabled in the House Business and Labor Committee.
- Social workers and professional counselors--among other licensees and members of the general public who complained about licensees--raised concerns about their board's investigation, screening, and adjudication process, which they said did not give them an opportunity to address the complaints. Senate Bill No. 64, enacted as Chapter 16, Laws of 2013, provided immunity to social workers and professional counselors for unprofessional conduct allegations that are based on testimony by the

social worker or professional counselor in a judicial proceeding.

- Conflicts of interest in screening panels. Boards generally have different board members sit on the screening panel to determine if a complaint is worth sending before an adjudication panel of peers for censure of some type. Small boards may have a board member who is the actual subject of the complaint, which is a situation described by one member of the public who complained about a funeral director who is on the Board of Funeral Service.

Board problems aired through the survey process or otherwise fielded by the Committee

- **Lack of due process in screening and adjudication**

Licensing boards often are considered to provide a process for constructive criticism, monitoring the profession and keeping the practitioners from a bad reputation caused by bad actors in their midst. Sometimes that process also is considered a cheaper alternative than going to court to protect the public health, safety, and welfare -- particularly on the part of the accused practitioner. However, if the screening panels or adjudication panels of the licensing board do not display neutrality and an accused practitioner feels that the screening or adjudication was unfair, the process ends up adding a step to a costly litigation process rather than preventing litigation. According to department officials, the screening process is not intended to be a hearing with both sides given equal treatment; rather the process is designed to filter out serious complaints from those that do not have a basis in law, which is the only basis on which the board can take action. This process may need more examination outside of HB 525 to determine if both the public and licensees are served impartially and well.

- **Lack of enforcement**

This complaint surfaced from many licensees. The problem is not only of licensure but of regulation. One alarm installer said he could operate outside the bounds of licensure until someone "tattled" on him because there are no inspectors to determine if he has done the installation correctly and no way for anyone to know whether he is working unless there are required permits or inspectors.

This complaint was raised not only by licensees but by those who otherwise might engage in unlicensed practice. If a licensing board does not have anything more than moral suasion and the threat of an injunction that may or may not be carried out, then what is the purpose of being licensed if a person does not need a license for insurance or other reasons? Is a licensing board really necessary if "unlicensed practice" is the biggest complaint?

- **Unclear recognition of reciprocity, particularly of health care professionals licensed in other states who still must fill out complete forms in Montana for licensure**

As voiced to the Select Committee on Efficiency in Government in the 2011-2012 interim, there was a suggestion to allow a broad policy of reciprocity to recognize health care professionals who are

licensed in neighboring states. Health care representatives have suggested that Montana health care licensing boards should recognize licenses issued in other states and allow those licensed professionals to practice in Montana without obtaining a license from a Montana licensing board. This change would require the drafting of legislation.

Stakeholders say reciprocity would allow Montana to better compete with other states in hiring health care professionals, reduce delays in hiring, and reduce administrative hurdles for health care facilities.⁵ Existing law (37-1-304, MCA) provides for reciprocity but in a permissive manner.

37-1-304. Licensure of out-of-state applicants -- reciprocity. (1) A board may issue a license to practice without examination to a person licensed in another state if the board determines that:

- (a) the other state's license standards at the time of application to this state are substantially equivalent to or greater than the standards in this state; and
- (b) there is no reason to deny the license under the laws of this state governing the profession or occupation.

(2) The license may be issued if the applicant affirms or states in the application that the applicant has requested verification from the state or states in which the person is licensed that the person is currently licensed and is not subject to pending charges or final disciplinary action for unprofessional conduct or impairment. If the board or its screening panel finds reasonable cause to believe that the applicant falsely affirmed or stated that the applicant has requested verification from the other state or states, the board may summarily suspend the license pending further action to discipline or revoke the license.

(3) This section does not prevent a board from entering into a reciprocity agreement with the licensing authority of another state or jurisdiction. The agreement may not permit out-of-state licensees to obtain a license by reciprocity within this state if the license applicant has not met standards that are substantially equivalent to or greater than the standards required in this state as determined by the board on a case-by-case basis.

The Committee took up this issue as related to the Board of Medical Examiners' licensing process and heard both in June 2012 and September 2012 from the stakeholders and members of the Board of Medical Examiners regarding rationale and processes.

- **A concern that all boards are treated the same by the division when not all problems are the same (uniformity vs. particularity).** This concern may be more fully explored if either the legislative performance audit is conducted or the Economic Affairs Committee chooses to look at the impacts of the reorganization on licensing boards.

Summary

The Economic Affairs Committee in the 2011-2012 interim recommended retaining all licensing boards reviewed in the that interim. These boards are listed in Table 3.

⁵<http://leg.mt.gov/content/Committees/Interim/2011-2012/Efficiency-in-Government/Topic-Areas/Medicaid/jan2012-nonmedicaid-ideas.pdf>

Table 3: HB 525 Reviews of Licensing Boards Reviewed 2011-2012

Licensing Board	Review Date	Decision
Chiropractors	Aug. 24, 2011	continue as is
Dentistry	Aug. 23, 2011 Jan. 20, 2012	review again in January 2012 with proposal to split boards January vote: continue as is, endorse committees of denturists/dental hygienists; try to resolve problems among practitioners
Electrical	April 20, 2012	continue as is
Professional Engineers and Professional Land Surveyors	April 20, 2012	continue as is
Funeral Service	Oct. 6, 2011 Jan. 20, 2012	decision postponed to January 2012 January vote: continue as is
Hearing Aid Dispensers	Oct. 5, 2011	decision postponed to April 2012 April vote: continue as is
Medical Examiners	Oct. 6, 2011	continue as is
Nursing	Jan. 20, 2012	continue as is
Nursing Home Administrators	Oct. 6, 2011	continue as is
Optometry	Jan. 20, 2012	continue as is
Outfitters	Jan. 19, 2012	continue as is
Pharmacy	Aug. 23, 2011	continue as is
Plumbers	April 20, 2012	continue as is
Psychologists	June 12, 2012	continue as is
Public Accountants	Jan. 19, 2012	continue as is
Veterinary Medicine	Aug. 24, 2011	continue as is

The 2013-2014 Economic Affairs Committee will review the Boards of:

- Alternative Health Care;
- Architects and Landscape Architects;
- Athletic Trainers;
- Barbers and Cosmetologists;
- Clinical Laboratory Science Practitioners;
- Massage Therapists;
- Occupational Therapy Practice;
- Physical Therapy Examiners;
- Private Alternative Adolescent Residential or Outdoor Programs;
- Private Security;
- Radiologic Technologists;

- Real Estate Appraisers;
- Realty Regulation;
- Respiratory Care Practitioners;
- Sanitarians;
- Social Workers/Professional Counselors/Marriage and Family Therapists; and
- Speech-Language Pathologists and Audiologists.

Changes from 2011-2012 to the 2013-2014 review

A separate study plan is available for the 2013-2014 portion of the HB 525 reviews. The 2013 Legislature also amended session law for 2011 to no longer require a complete reiteration of the sunset reviews once this last set of boards is reviewed. The Economic Affairs Committee has existing authority to consider any licensing board for sunseting and particularly for examining any board that has fiscal problems.

The separate study plan was necessary in part because of the following concerns that developed in the 2011-2012 board reviews:

- The 2011-2012 study plan required a representative of the board at each review. While the study plan indicated a representative of the profession or occupation and of the board needed to be at each review to explain how the board operates and issues of concern to the profession or occupation, in some cases boards decided to send more than one representative. This was a cost to the board and in many cases to the board member who had to give up income for the time spent traveling to and from the meeting and sometimes for a very brief presentation to the Committee.
- The 2011-2012 boards all were the oldest boards, as required by the HB 525 study, which said to review the oldest boards first. The 2011-2012 Committee recommended that only those boards that have numerous complaints, critical survey responses, or an indication of fiscal problems ought to be reviewed for sunset purposes. This still would require all boards to answer the questions distributed by the Committee but would limit both board members' time and Committee time to only boards with perceived problems.