



PACIFIC LEGAL FOUNDATION

July 27, 2017

Acting FTC Chairwoman Maureen Ohlhausen
Federal Trade Commission, Economic Liberty Taskforce

Re: Occupational licensing as a barrier to mobility and the potential for portability

Pacific Legal Foundation's Identity and Interest in Occupational Licensing

Pacific Legal Foundation (PLF) appreciates this opportunity to comment on how streamlining occupational licensing can promote geographic mobility and economic opportunity. PLF is a non-profit legal foundation that litigates nationwide in cases promoting individual liberty. Its Economic Liberty Project is devoted to protecting the constitutional right to earn a living free of unnecessary governmental interference. To that end, PLF attorneys engage in litigation, write amicus briefs, and provide legislative testimony regarding the constitutionality and policy implications of occupational licensing laws. PLF has represented numerous entrepreneurs and small-businesses in civil rights lawsuits challenging irrational licensure, including lawsuits against state laws that deliberately hinder mobility between states as a means of protecting their own citizens from competition. *See, e.g., Castillo v. Ingram*, 90 F.Supp.3d 1153 (D. Nev. 2015) (lawsuit challenging Nevada law requiring private investigators to establish an in-state office before applying for a license); *see also Vogt v. Ferrell*, 2:16-cv-04492 (S.D.W.V. May 19, 2016) (lawsuit challenging West Virginia's Certificate of Need law for moving companies on behalf of Virginia resident); *Young v. Ricketts*, 825 F.3d 487 (8th Cir. 2016) (lawsuit challenging requirement that an online advertiser located in California acquire a Nebraska real estate license to advertise homes there).

Occupational Licensing Burdens Mobility

In a 2015 report,¹ the Obama White House recognized that more than one fourth of Americans must obtain permission in the form of an occupational license before going to work. Licensing has proliferated rapidly since the 1950s—notably, in industries that present little threat to the public. In at least half of states, you must undergo training, satisfy educational requirements, pay fees, and obtain a license to be an auctioneer, cosmetologist, barber, taxidermist, or massage therapist. Sean E. Mulholland, et al., *Occupational Licensing and Interstate Migration*, Cato Journal Vol. 36, No. 1 (Winter 2016). In some states you need a license just to shampoo hair or mow a lawn—activities that most Americans routinely do at home without incident.

The proliferation of occupational licensing is largely explained by the benefit it provides to incumbent businesses. Because licensing requirements erect a barrier against new competitors, incumbents have an incentive to lobby for licensing laws. Economists dating as far back as Adam Smith have acknowledged this phenomenon, and modern research bears it out: licensing laws are often passed at the behest of market participants as a means of excluding competition. Moreover, the administrative bodies that interpret and enforce licensing laws are frequently comprised of members of the licensed professions—meaning they have an incentive to interpret those laws broadly to further stifle competition. *See, e.g., Twist Architecture & Design, Inc. v. Oregon Board of Architect Examiners*, 361 Or. 507 (Or. 2017) (Board of Architect Examiners interpreted licensing law to require architect’s license to create marketing drawings not intended to be used for construction). The sad result is that hardworking Americans and would-be entrepreneurs are deprived of economic opportunity for wholly protectionist reasons.

One serious impact of occupational licensing is decreased geographic mobility. *See, e.g.,* Morris M. Kleiner, *Border Battles: The Influence of Occupational Licensing on Interstate Migration*, Employment Research 22(4):4-6; B. Peter Pashigian, *Occupational Licensing and the Interstate Mobility of Professionals*, University of Chicago Working Paper No.220 (Dec. 1997). A patchwork of varying and overly-burdensome occupational licensing laws means that if a licensee seeks to change states to be closer to family, or to find new employment, or to follow a spouse who gets a new job, that licensee will have to undergo new schooling, work under someone else to obtain hours of experience, take new tests, and pay more fees in order to pursue their chosen profession. The result is that workers in heavily licensed occupations are nearly 15% less likely to move between states than those in less licensed occupations. White House Report at 66.

¹ https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembar.go.pdf

Consequences of Decreased Geographic Mobility

The right to move across state lines is not just an important constitutional liberty in its own right, it is fundamental to economic opportunity. Burdens on mobility make it difficult for entrepreneurs to explore new opportunities and seek higher wages in other states, to respond to evolving needs in new places, to provide important jobs in underserved areas, and to share innovative services with citizens of other states. And they result in the misallocation of workers across states, exacerbating unemployment.

Stifled mobility also deprives people of their ability to vote with their feet—which is essential to federalism. When it’s harder to move, it’s harder to exercise your choice to free yourself from unwanted state policies, school systems, environmental regulations, or taxes.

Occupational licensing doesn’t just burden the ability to move to another state; it thwarts the ability of entrepreneurs to use technological innovations to ply their trade across state lines. In theory, it is now easier than ever to communicate with co-workers or customers across the country from the comfort of one’s own home, or through quick and cheap travel. Entrepreneurs are able to provide a range of services across state lines that were formerly confined to offices. People now practice tele-medicine, tele-veterinarianism, and tele-law. They provide tutoring and therapy through Facetime. But licensing laws erect a barrier to practicing outside of one’s home state, thereby frustrating innovations which have reduced costs and improved quality.

Easing the Burden of Occupational Licensing Alleviates Burdens on Mobility, and Therefore Bolsters Economic Opportunity

As recognized by this panel, interstate compacts are one way of making it easier for people to move or to do their job across state lines. But compacts may impose uniform licensing requirements that are themselves overly burdensome or anti-competitive. Indeed, the Little Hoover Commission found that compacts can actually exacerbate the consequences of occupational licensing by imposing heightened licensing requirements across states—making citizens in states that formerly had lower standards *worse* off.²

A prime example are Certificate of Necessity (CON) laws, which exist in the transportation and medical industry. CON laws essentially require entrepreneurs to ask for permission from the existing companies before starting their own businesses, and for this reason have been called “Competitor’s Veto laws.” CON laws undoubtedly hamper geographic mobility and economic opportunity across state lines. PLF client Arty Vogt, who owned a moving company in Berryville,

² <http://www.lhc.ca.gov/studies/234/Report234.pdf>.

VA, sought to perform moves just 10 miles across the border in West Virginia, but was prevented by the latter's CON law. The solution to Arty's and other entrepreneurs' woes is not to allow portability of moving licenses---it is to get rid of the anti-competitive CON laws in states where they exist.³

Moreover, interstate compacts don't get to the root of the problem, which is that licensing often drives up the cost of doing business without furthering any legitimate health or safety rationale. Easing or getting rid of licensing requirements altogether where there is no connection to protecting public welfare both eases mobility and eliminates the anti-competitive effects associated with licensure.

PLF recently sponsored California SB 247, which would have de-regulated occupations that pose no threat to public safety, including locksmiths, custom upholsterers, and tree trimmers. It also prohibited local governments from enacting occupational licensing requirements, thereby bolstering mobility *within* the state. SB 247 followed a recent trend of about a half dozen states that have enacted similar legislation—and 14 other states where similar bills are pending. The legislative movement to repeal unnecessary occupational licensing laws has been bi-partisan and gotten support even from federal and state governmental agencies.

Rather than making licensing uniform, then, states may consider repealing licensing laws or enacting alternatives to licensing, such as registration or private certification requirements. Given that governmental licensing is subject to regulatory capture, private certification offers an alternative that responds to market forces. And in the age of Angie's list and Yelp, it is increasingly possible for consumers to quickly access information about providers without government oversight.

³ PLF lawsuits against these laws have resulted in 5 states voluntarily repealing their laws, and in 2014 a federal judge in Kentucky struck down another as unconstitutional. But CON laws in the transportation industry remain in over half of states.

Conclusion

A bi-partisan coalition has acknowledged that occupational licensing destroys competition at the expense of entrepreneurs and consumers, and erects a barrier to geographic and economic mobility. While interstate compacts have the potential to permit portability, they are also subject to regulatory capture, and can actually exacerbate the consequences of licensure. An alternative to compacts is reducing licensure to instances where it's actually needed to further legitimate health or safety objectives.

Sincerely,

A handwritten signature in blue ink, appearing to read 'APB', is centered below the closing 'Sincerely,'.

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Pacific Legal Foundation