



Entrepreneurial Freedom Restoration Act—Model Policy

Summary: This model bill protects the right to pursue a lawful calling without undue government interference. Modeled after the federal Religious Freedom Restoration Act, the Entrepreneurial Freedom Restoration Act restores constitutional protections for entrepreneurial freedom that long existed under the state and federal constitutions, but that courts have eroded over the years. Government regulations of the right to earn a living are held to the same standard as other constitutional rights, which require the government to show that the regulations are truly aimed at protecting public health and welfare—not creating monopolies and cartels that harm consumers.

Section 1: Short Title

This Act shall be known and cited as the Entrepreneurial Freedom Restoration Act.

Section 2: Purpose and Findings

(a) Findings—The legislature finds and declares the following:

- (1) The right of individuals to pursue a chosen business interest, occupation, trade, or profession free from arbitrary, unreasonable, or excessive government interference is a fundamental right.
- (2) The original public meaning of the [insert state] constitution’s [insert relevant provisions: “law of the land,” “due process,” and “privileges and immunities” clause(s)] enshrined the right to earn a living as a fundamental right. These constitutional provisions recognized that the right to earn a living is deeply rooted in the history and tradition of [insert state] and of this Nation, the common law, and natural law.
- (3) Nevertheless, in *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955) and the *Slaughter-house Cases*, 83 U.S. 36 (1872), the U.S. Supreme Court virtually eliminated the requirement that the government justify burdens on the right to earn a living despite its enshrinement in the Fourteenth Amendment to the U.S. Constitution. This State’s courts have largely followed suit in interpreting the right to earn a living under the State constitution, thereby leaving it unprotected.



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- (4) Overly burdensome restrictions on the right to earn a living impede economic growth, hinder job creation, and limit consumer choices without promoting public health, safety, or welfare.
- (5) Heightened judicial review requiring the government to justify the burdens it imposes on the right to earn a living (as described in Section 5) provides a workable test for striking sensible balances between the right to earn a living and competing government interests in public health, safety, and welfare.
- (6) Economic protectionism is never a valid government interest and cannot justify burdens on the right to earn a living.

(b) Purposes—The purposes of this Act are:

- (1) To restore judicial protection of the right to earn a living by requiring courts to apply heightened judicial review, as described in Section 5, to government restrictions that unnecessarily burden the right to earn a living;
- (2) To promote economic opportunity, competition, and individual freedom by removing unnecessary restrictions on pursuing a livelihood in businesses, occupations, professions, and trades;
- (3) To provide a claim or defense to individuals when the government unnecessarily burdens their right to earn a living.

Section 3: Applicability

- (a) In General—This Act applies to all state and local laws, and implementation of those laws, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.
- (b) Rule of Construction—State and local laws adopted after the date of this Act's enactment are subject to this Act unless such law explicitly excludes such application by reference to this Act.
- (c) Right to Earn a Living Unaffected—Nothing in this Act shall be construed to authorize any government to burden the right to earn a living.

Section 4: The Right to Earn a Living is a Fundamental Right



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The right to earn a living in the businesses, professions, occupations, and trades of life is the very essence of personal freedom and opportunity. The State of [insert] recognizes it as a fundamental right.

Section 5: The Right to Earn a Living is Protected

(a) In General—State and local governments, including their branches, departments, agencies, instrumentalities, and officials, or other persons acting under the color of state or local law, shall not burden a person’s exercise of their right to earn a living unless the requirements of Subsection (b) are met. Government restrictions that burden the right to earn a living without satisfying Subsection (b) constitute a violation of this Act, making the government liable for legal and equitable relief.

(b) Exception—Government restrictions that burden the right to earn a living do not violate this Act if the government demonstrates through clear and convincing evidence that:

- (1) Applying the burden to the person is necessary to protect public health, safety, or welfare;
- (2) Applying the burden to the person is the least restrictive means to achieve the law’s stated purpose; and
- (3) Alternative mechanisms, such as voluntary certification or less restrictive regulatory measures, could not achieve the stated government interest without unnecessarily restricting entry into the occupation.
- (4) “Welfare” shall be narrowly construed to mean only the protection of the public against fraud or physical or psychological harm. “Welfare” shall not mean the protection of businesses or agencies, whether publicly or privately owned, against competition.

(c) Judicial Review—

- (1) A person whose right to earn a living has been burdened in violation of this Section may assert that violation as a claim for relief [in the appropriate court] and as a defense in any judicial or administrative proceeding. A court may issue declaratory, injunctive, or other equitable relief, and nominal damages to persons who prove a violation of this Act.
- (2) A person intending to engage in a specific business, profession, occupation, or trade but hindered from working by a burden on the right to earn a living,



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whether or not currently engaged in a specific business, profession, occupation, or trade, shall have standing to bring a claim or defense asserting a violation of this Act without being required to first apply for, obtain, or be denied a relevant occupational license or certification.

- (3) A person asserting a claim for nominal damages for a violation of this Act has standing to challenge restrictions alleged to burden the right to earn a living protected by this Act.
- (4) The court shall award reasonable attorney fees and costs to any person who proves the government violated this Act.
- (5) Nothing in this Act supersedes or preempts any existing cause of action that a person may have under the federal or state constitutions, any statute, or the common law. This Act instead provides an additional layer of protection for the right to earn a living.

Section 6: Severability

If any provision of this Act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application.

Section 7: No Immunity for Nominal Damages

The State of [insert] hereby waives sovereign immunity as to nominal damages up to \$1 for each claim for any act by a state or local government official that violates this Act by unlawfully burdening the right to earn a living.

Further, any government official who, through act or omission, unlawfully burdens the right to earn a living by enforcing restrictions found to violate this Act is liable for nominal damages up to \$1 for each claim and is not entitled to qualified immunity or any other type of immunity for nominal damages.

Section 8: Effective Date

This Act takes effect immediately upon the Governor signing it into law.