TEXAS PUBLIC POLICY FOUNDATION
Testimony

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*Center for Effective Justice*

# Testimony before the Senate Business & Commerce Committee

## *Regarding Interim Charge Concerning Occupational Licensing*

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## Background

Texas is known for regulating with a lighter hand than most states, which many analysts have cited as one reason the state continues to outperform other states economically. However, when it comes to occupational licensing, Texas often regulates with a heavy hand. Approximately one-third of Texas' workforce is either individually licensed by the government or works for a licensed entity, exceeding the national average.[1]

A recent Texas Legislative Council report prepared for the House Government Reform Committee showed a sharp increase in licensed occupations since the 1960's just as the size of government has grown.[2] Indeed, the number of occupations licensed by the state of Texas has multiplied twelvefold in less than 65 years.[3] There were only 43 non-alcohol-related trades that required licensure in 1945; today there are 514, encompassing 3 million Texas workers.[4] These recently regulated industries include such diverse pursuits as athletic trainer, geoscientist, air conditioner technician, funeral director and mold assessor, among many others. In the 2007 session alone, Texas lawmakers licensed 21 new occupations and businesses, including property tax lenders, residential fire alarm technicians, professional land surveying firms, air conditioning and refrigeration technicians, hair braiders and weavers, combative sports events coordinators, residential appliance installers, tow truck operators, and vehicle storage facility employees.[5]

Various bills that failed in the last two legislative sessions would have licensed auto mechanics, roofers, sheetmetal workers, journeymen, and lactation consultants. In the cases of roofers and mechanics, more well-established groups within the occupation sought licensing that would have the effect of excluding competitors and allowing them to raise prices charged to consumers. A representative of the trade group advocating the legislation licensing mechanics responded to a legislator's suggestion that a pilot licensing program first be tried in Houston by saying that it wouldn't work because good mechanics who didn't want to deal with the paperwork would go to other parts of the state.[6]

## Cost and Criminal Penalties Associated with Licensing

A University of Minnesota study of occupational licensing found that "occupational licensing reduces employment growth in states that are licensed relative to those that are not regulated." States that licensed dieticians and nutritionists, respiratory therapists, and librarians experienced 20 percent lower employment growth in these fields.[7] UT-Austin Economics Professor Daniel Hammermesh estimated that the "deadweight loss" to society from occupational licensing is between $34.8 and $41.7 billion per year.[8] Moreover, research comparing outcomes among workers in the same field who are licensed in one state but not another has found no difference in quality.[9]

Occupational licensing violations carry criminal penalties. Occupations Code Section 165.151 makes it a Class A misdemeanor (up to one year in jail) for violating "any rule" of any professional licensing board covered by that subchapter. This means many boards can effectively create their own criminal offenses and licensees must read the Texas Register every week to learn the latest crime. There are also specific criminal penalties for individual occupations. For example, the unlicensed practice of speech pathology is punishable by up to six months in county jail. Moreover, practicing acupuncture without a license is a third degree felony punishable by up to 10 years in prison. Significant differences between criminal and civil law make criminal law an overly blunt instrument for regulating non-fraudulent business activities. Whereas administrative rulemaking and civil proceedings may utilize a cost-benefit analysis to evaluate the conduct at issue, no such balancing occurs in criminal proceedings because it is assumed that criminal laws cover only those activities that are inherently wrong. Also, criminal law, because it is enforced entirely by state prosecution, tends to minimize the role of the victim. Indeed, the prototypical "regulatory" offense such as mislabeling fruit under Chapter 93 of the Agriculture Code does not include anyone actually being harmed as an element of the offense. Finally, civil and criminal law have traditionally been distinguished by the requirement that a criminal must have a guilty state of mind, expressed in the Latin term *mens rea*, but an increasing number of regulatory offenses either dispense with the *mens rea* requirement or require merely criminal negligence rather than intentional, knowing, or reckless conduct.

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The chart above shows how many of the criminal penalties for occupational licensing violations are treated as being on par with more traditional offenses.

## Punching the Clock After Doing the Time

One consequence of licensing so many occupations is that sometimes otherwise qualified individuals with a minor criminal record unrelated to the occupation can be locked out of their livelihoods. Approximately 20 percent of Texans have a criminal record. Most of them served probation rather than being incarcerated, and many fully met their obligations and successfully completed probation only to face numerous collateral consequences.

While Chapter 53 of the Occupations Code governs ex-offender disqualification for most occupations, some occupations such as those regulated by the Private Security Board have their own statutes. The *Austin American-Statesman* reported that the Board in 2006 alone "cited an unacceptable criminal history to summarily deny nearly 10,000 applicants the opportunity to work in one of the 16 professions it regulates," including locksmiths and guard dog trainers.[10] Many of these revocations involved minor misdemeanors decades ago that had no relevance to the occupation. Unlike most other occupations, an arrest without a conviction can lead to license revocation and there is no appeal to the Board or the State Office of Administrative Hearings (SOAH). Clearly, a sex offender should not be a licensed day care worker and someone who committed insurance fraud shouldn't be licensed to sell insurance. But many agencies have defined nearly all crimes as "directly related" under Chapter 53. For example, a drug possession offense, even a misdemeanor, is considered directly related to being a water well driller and an embalmer. Any felony prevents a person from being a vehicle inspector.

Studies have found that individuals whose last offense occurred many years ago are very unlikely to re-offend. Researchers at the University of South Carolina and University of Maryland concluded in a 2006 longitudinal study of ex-offenders that: "after approximately seven years there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record."[11] Moreover, most re-offending acts, and the vast majority of those committed by non-violent ex-offenders, are nonviolent.[12] Also, most of these offenses would have had the same impact whether or not the person had an occupational license.

Gainful employment significantly reduces criminal behavior. A study by the federal court system found that nearly 88 percent of the 624 probationers who were employed both at the start and at the end of their supervision successfully complied with the conditions of their supervision while less than 37 percent of those unemployed at both stages did so.[13] A Massachusetts study of parolees found that those employed within the first three months of leaving prison were more than seven times less likely to return to prison.[14] A Pennsylvania study found that ex-offenders who are employed are much more likely to fulfill their restitution obligation.[15]

Evidence also indicates that the quality of the job, both in terms of pay and satisfaction, is correlated with an ex-offender's recidivism rate. Specifically, a University of Minnesota study of ex-offenders found that a shift from food service work (with a job quality score of .57) to often-licensed skilled craft work (with a job quality score of 1.08) decreases the chance of criminal behavior by approximately 11 percent.[16]

Legislation enacted in the 2009 session as House Bill 963[17] now codified in Occupations Code Chapter 53.0211 allows appropriate, qualified ex-offenders to obtain a provisional/probationary license to enter certain occupations. This provides ex-offenders a strong, positive incentive to both comply with the law and be productive, as their provisional/probationary license may be revoked if they violate the rules of the occupation or, for those under community supervision, violate the terms of their supervision. The legislation also required each licensing agency to implement the successful declaratory order procedure that the Board of Nursing Examiners has utilized for some time, whereby a prospective applicant can find out in advance whether their criminal record will be qualifying before spending the time and expense on a training program and other prerequisites. Rules to implement this bill have been implemented by the Texas Department of Licensing and Regulation (TDLR), but it is not clear whether other agencies that regulate occupations have implemented the bill. Also, it is important that both licensing and correctional agencies take steps within existing resources to let prospective applicants know about the opportunity to receive a provisional license.

## Recommendations

- **Avoid licensing new occupations, and revise laws to eliminate criminal penalties associated with many occupations.** The Sunset Advisory Commission Occupational Licensing Model recommends: "Criminal penalties should exist only for agencies overseeing practices that can have dire consequences on the public health and welfare." In 2008, the House Government Reform Committee compiled a document listing all occupational licensing penalties that spanned 142 pages.

- **Explore eliminating some licensing categories, such as bottled water operators, timekeepers, referees, talent agencies, and proprietary school employees.**

- **Identify occupations that could be regulated with less government bureaucracy through private accreditation.** For example, athletic trainers, who are now subject to state licensing requirements, could be certified by the National Athletic Trainers Board of Certification and court reporters may be certified by the National Court Reporters Association. Once it is determined these organizations have appropriate standards, those who are certified by the organizations could be exempt from having to obtain and maintain a state license.

- **Replace or narrow the catch-all provision in Occupations Code Section 165.151 that makes it a Class A misdemeanor (up to one year in jail) for violating "any rule" of any professional licensing board.** Rules adopted by agencies that regulate occupations should not automatically carry criminal penalties. This provision should be replaced or revised to specify that the default is civil penalties or license revocation and that a criminal penalty only applies where specifically and statutorily authorized by the Legislature.

- **Monitor TDLR and other licensing agencies to ensure that well-conceived rules implement HB 963.**

- **Avoid duplicative licensing of both the company and its employees.** For example, both alarm companies and their salespeople and installers must be licensed. If the company has a license, they can simply be required, as part of compliance, to screen their employees.

- **Create an optional bonding route in some occupations where, in lieu of annual bureaucratic oversight, the person or company could post a bond.** This is well suited to occupations that are regulated in large part due to the concern that there might be fly-by-night operations where, for example, a consumer could be left with a product or system but no one to honor the warranty or service it. For instance, City of Houston regulations on itinerant vendors provide for one-time registration and posting of a bond, but no ongoing regulation. Although it is not clear whether cities should regulate peddlers, at least it is a one-time process.

- **Require that, as part of existing sunset reviews of all agencies, any occupations regulated by that agency be reviewed to determine whether licensing is still necessary.**

- **Require all proposals to license new occupations first be reviewed by the Sunset Advisory Commission.** The Commission would provide a cost/benefit analysis and identify alternatives to licensing. At least 14 states including Oregon, Arizona, and Florida have adopted provisions providing for such a "sunrise" review of proposals to license new occupations.[18] Additionally, the Sunset Advisory Commission should be required, in the course of their regular reviews of each agency, to determine whether the occupations they regulate still need to be regulated and whether existing criminal penalties are necessary. These provisions constituted House Bill 1543[19] by Representative Bill Callegari in 2009, though the bill would have authorized a sunrise review upon request, rather than required it.

- **Allow unlicensed individuals to perform appropriate functions within certain fields which would not endanger the public if they proactively inform the prospective customer that they are not licensed.**

- **Require that fiscal notes for bills that involve licensing new occupations include estimated cost to the economy in fewer jobs and consumers in higher prices.**

- **Create a safe harbor for minor violations where licensee must be given time to come into compliance and require licensing agency to provide notice and deadline for licensee to comply and cure before case is referred to Attorney General for prosecution or civil litigation.**

- **Create more apprentice categories so people can start working immediately under someone who is licensed.** Current examples include plumbing apprentice and shampoo apprentice.

- **Review the scope of practice rules of key licensing agencies to identify those that may be unduly restrictive.** For example, restrictions on advanced practice nurses' scope of practice have driven up costs by reducing what tasks nurses can perform, even with telemedicine oversight by a doctor.[20]

- **Review initial and continuing licensing requirements to ensure they do not unnecessarily exclude qualified individuals, such as overly burdensome written exams in fields that involve manual labor.** In HB 2211 in 2007, prospective mechanics, would have had to pass a written exam, though many mechanics may do excellent work with their hands with little educational background and, consequently, their performance on a written exam would not accurately reflect their competency. Additionally, the 30 hours of continuing education requirement for mechanics was more than an attorney must complete.

- **Fully consider the market mechanisms ranging from word-of-mouth to Angie's List to the Better Business Bureau that increasingly enable consumers to select qualified individuals without relying on a government stamp of approval.** There are also many private and voluntary certification providers for occupations, such as the National Institute for Automotive Service Excellence, whose seal for mechanics and auto repair shops is commonly recognized. Consumers can also file cases, particularly in small claims court, if they cannot resolve their disputes with merchants and the Attorney General enforces laws against fraud.

- **Clarify overly broad statutory provisions such as language inadvertently added by HB 2644 in 2007.** This language states: "A person may not for compensation perform or offer to perform any service with a purported health benefit that involves physical contact with a client." If enforced, this would presumably require personal trainers and yoga instructors to be licensed.

- **Ensure that an appropriate culpable mental state is included in the elements of all occupational offenses.** If an occupational violation is committed unknowingly, a civil penalty or license revocation is more appropriate than a criminal penalty.

- **Provide discretion in statutes governing certain occupations licensed by the Department of Public Safety Law Enforcement Bureau so that the Bureau can consider applicants with minor, unrelated offenses that occurred many years ago.** Currently, this agency, unlike others, has no discretion to consider applicants who have any type of criminal history, even if it is minor, ancient, and unrelated to the occupation. When the state began licensing locksmiths through this Bureau in 2005, hundreds of capable and honest locksmiths were locked out of their livelihoods for offenses of this nature due to the absence of any discretion in this statute that would allow the agency to exercise common sense.[21]

- **Amend the Code of Criminal Procedure to allow for citation without arrest for additional misdemeanors and prohibit arrest for regulatory Class C misdemeanors.** It does not make sense to arrest and jail ordinary business people who are responsive when cited for a regulatory misdemeanor that does not pose an immediate danger to the public. Yet, under current state law, arrest is mandatory for all Class A and B misdemeanors except seven offenses specified in HB 2391[22] enacted in 2007. Law enforcement and correctional resources can be conserved by simply issuing citations either requiring a court appearance or offering payment by mail or online for many Class A and B misdemeanors, including occupational and other business regulatory offenses. ✯

## Endnotes

[1] Texas House Government Reform Committee Interim Report, 80th Legislature (16 Jan. 2009).

[2] Ibid.

[3] Wesley Hottot, "Bureaucratic Barbed Wire: How Occupational Licensing Fences Out Texas Entrepreneurs," Institute for Justice (Oct. 2009).

[4] Ibid.

[5] Texas House Government Reform Committee Interim Report, 80th Legislature (16 Jan. 2009).

[6] Texas House Licensing and Administrative Procedures Committee Hearing (1 May 2007).

[7] Morris Kleiner and Hwikwon Ham, "Regulating Occupations: Does Occupational Licensing Increase Earnings and Reduce Employment Growth?" (7 June 2006).

[8] Daniel Hammermesh, Labor Demand, Princeton, New Jersey Chapter 3. Princeton University Press (1993).

[9] Morris Kleiner, "Occupational Licensing," Journal of Economic Perspectives, Vol. 4 No. 4 (Fall 2000).

[10] Eric Dexheimer, "Locked Out of Their Livelihoods," *Austin American Statesmen* (18 Feb. 2007).

[11] Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, "Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement."

[12] Recidivism of Inmates Released in 1994, U.S. Department of Justice Bureau of Justice Statistics (June 2002).

[13] James L. Johnson, "Sex Offenders on Federal Community Supervision: Factors that Influence Revocation," *Federal Probation* 70 (June 2006).

[14] Michael E. Morrissey, "A Description of the Employment Patterns of Persons Released from Virginia's Correctional Institutes between July 1, 1998 and June 30, 2002" (Aug. 2007).

[15] Center for Research on Criminal Justice, "Predictors and Outcomes of Restitution in Pennsylvania," Pennsylvania State University (2002).

[16] Christopher Uggen and Jeremy Staff, "Work as a Turning Point for Criminal Offenders" *Corrections Management Quarterly* (Fall 2001).

[17] House Bill 963, 81st Legislature.

[18] Occupational Regulation in Other States, Report of the Minnesota State Auditor.

[19] House Bill 1543, 81st Legislature.

[20] Arlene Wohlgemuth, Testimony Before House Committee on Public Health, Scope of Practice for Advanced Practice Nurses (Apr. 2011).

[21] Eric Dexheimer, "Locked Out of Their Livelihoods," *Austin American-Statesman* (18 Feb. 2007).

[22] House Bill 2391, 80th Legislature.