

HB0075S01 compared with HB0075

~~{deleted text}~~ shows text that was in HB0075 but was deleted in HB0075S01.

inserted text shows text that was not in HB0075 but was inserted into HB0075S01.

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Representative Brian M. Greene proposes the following substitute bill:

OCCUPATIONAL AND PROFESSIONAL LICENSING

AMENDMENTS

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brian M. Greene

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies the Occupational and Professional Licensure Review Committee Act~~{,}~~ and Title 58, Occupations and Professions~~{, and the Legislative Oversight and Sunset Act,~~ by limiting the use of the state's regulatory authority over lawful occupations to matters of public health or safety~~}~~.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ ~~{modifies the membership of}~~ requires a person who proposes that the state license an occupation or profession that is not currently licensed by the state to submit an

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application for a sunrise review by the Occupational and Professional Licensure Review Committee ~~{ by requiring that the public members be selected by the director of the Division of Occupational and Professional Licensing;~~

~~→ provides that the committee shall meet at least twice annually};~~

- ▶ requires that the committee conduct sunrise and sunset reviews for all occupations and professions ~~{ };~~

- proposed to be newly regulated ~~{ or };~~ and
- that are subject to their related statutes being terminated under Section 63I-1-258;

- ▶ ~~{ modifies the committee's reporting requirements;~~

~~→ creates a statutory recognition of an individual's fundamental right to pursue any lawful occupation;~~

~~→ provides that the state may not enact an occupational regulation that substantially burdens an individual's ability to engage in a lawful occupation unless the state demonstrates that the occupational regulation:~~

~~• addresses}~~ requires that when conducting a sunrise or sunset review, the committee shall:

- consider whether state licensing of the profession is necessary to address a compelling state interest in protecting against present, recognizable, and significant harm to the health or safety of the public;
- ~~{ furthers the state's compelling interest in protecting and maintaining }~~ if the committee determines that state licensing of the profession is not necessary to protect the health or safety of the public, recommend to the Legislature that the state refrain from licensing the profession;
- if the committee determines that state licensing of the profession is necessary to protect the health or safety of the public, consider whether each licensing provision is narrowly tailored to protect the health or safety of the public; and
- ~~{ is the least restrictive means for furthering the state's compelling interest in protecting and maintaining }~~ recommend to the Legislature any changes to the proposed or existing licensure provisions to ensure each provision is narrowly tailored to protect the health or safety of the public;

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- ▶ ~~{creates a private right of action for violation of this statute and establishes applicable burdens of proof and standards of judicial construction}~~over the next five years, requires the committee to review each profession licensed by Title 58, Occupations and Professions, that does not have a sunset date, using the same criteria as a sunrise or sunset review;
- ▶ requires the committee to study alternatives to professional licensing in 2013, including registration and certification;
- ▶ requires that ~~{future }~~legislation proposing the licensing or regulation of ~~{a previously unregulated}~~an occupation or profession under Title 58, Occupations and Professions:
 - may not be enacted by the Legislature until the proposal has been reviewed by the committee; and
 - shall include a ~~{sunset}~~repeal date in Section 63I-1-258 that is no later than 10 years after the effective date of the legislation; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

36-23-101.5, as enacted by Laws of Utah 2007, Chapter 137

36-23-102, as last amended by Laws of Utah 2008, Chapter 218

36-23-103, as last amended by Laws of Utah 2008, Chapter 218

36-23-104, as last amended by Laws of Utah 2010, Chapter 286

36-23-105, as enacted by Laws of Utah 1999, Chapter 152

36-23-106, as last amended by Laws of Utah 2012, Chapter 242

36-23-107, as last amended by Laws of Utah 2007, Chapter 137

ENACTS:

~~{58-2a-101}~~36-23-109, Utah Code Annotated 1953

~~{58-2a-102}~~58-1-110, Utah Code Annotated 1953

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~~{ 58-2a-103, Utah Code Annotated 1953~~
~~58-2a-104, Utah Code Annotated 1953~~
~~58-2a-105, Utah Code Annotated 1953~~
~~58-2a-106, Utah Code Annotated 1953~~
~~631-1-102.5, Utah Code Annotated 1953~~

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **36-23-101.5** is amended to read:

36-23-101.5. Definitions.

As used in this chapter:

(1) "Committee" means the Occupational and Professional Licensure Review Committee created in Section 36-23-102.

(2) "Government requestor" means:

(a) the governor;

(b) an executive branch officer other than the governor;

(c) an executive branch agency;

(d) a legislator; or

(e) a legislative committee.

~~(2)~~ (3) "Newly regulate" means to regulate under Title 58, Occupations and Professions, an occupation or profession not regulated under Title 58 before the enactment of the new regulation.

~~(3)~~ (4) "Proposal" means:

(a) an application submitted under Section 36-23-105, with or without specific proposed statutory language;

(b) a request for review by a legislator of the possibility of newly regulating an occupation or profession, with or without specific proposed statutory language; or

(c) proposed ~~or introduced~~ legislation to newly regulate an occupation or profession referred to the committee by another legislative committee.

~~(4)~~ (5) "Sunrise review" means a review under this chapter of a proposal to newly regulate an occupation or profession.

(6) "Sunset review" means a review under this chapter of a statute:

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- (a) regarding a licensed profession under Title 58, Occupations and Professions; and
- (b) that is scheduled for termination under Section 63I-1-258.

Section 2. Section **36-23-102** is amended to read:

36-23-102. Occupational and Professional Licensure Review Committee.

- (1) There is created the Occupational and Professional Licensure Review Committee.
- (2) The committee consists of nine members appointed as follows:
 - (a) three members of the House of Representatives, appointed by the speaker of the House of Representatives, no more than two from the same political party;
 - (b) three members of the Senate, appointed by the president of the Senate, no more than two from the same political party; and
 - (c) three public members appointed ~~jointly~~ by the speaker of the House of Representatives and the president of the Senate ~~[as follows]~~ by the director of the Division of Occupational and Professional Licensing and selected from the following two groups:
 - (i) ~~[two members who have]~~ at least one member who has previously served, but ~~[are]~~ is no longer serving, on any ~~[of the]~~ advisory ~~[boards]~~ board created under Title 58, Occupations and Professions; and
 - (ii) at least one member from the general public who does not hold any type of license issued by the Division of Occupational and Professional Licensing.
- (3) (a) The speaker of the House of Representatives shall designate a member of the House of Representatives appointed under Subsection (2)(a) as a cochair of the committee.
- (b) The president of the Senate shall designate a member of the Senate appointed under Subsection (2)(b) as a cochair of the committee.

Section 3. Section **36-23-103** is amended to read:

36-23-103. Committee terms -- Vacancies.

- (1) A legislator serving on the committee shall serve a two-year term or until the legislator's successor is appointed.
- (2) (a) Except as provided in Subsection (2)(b), a public member shall serve a three-year term or until the public member's successor is appointed.
- (b) The ~~jointly~~ speaker of the House of Representatives and the president of the Senate ~~jointly~~ director of the Division of Occupational and Professional Licensing shall, at the time of appointment or reappointment, adjust the length of terms of the public members to ensure that

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approximately one of the public members is appointed every year.

(3) A legislative or public member of the committee may serve one or more terms.

(4) (a) A vacancy occurs:

(i) when a legislative member ceases to be a member of the Legislature; ~~[or]~~

(ii) when a member of the committee resigns from the committee~~[-]; or~~

(iii) when a member is removed by the appointing authority for cause.

(b) A vacancy shall be filled by the appointing authority, and the replacement member shall serve for the remaining unexpired term.

Section 4. Section **36-23-104** is amended to read:

36-23-104. Committee meetings -- Compensation -- Quorum -- Legislative rules.

(1) The committee ~~[may]~~ shall meet as needed, at the call of the committee chairs, to carry out the duties ~~[set forth]~~ described in ~~[Section 36-23-106]~~ [this chapter](#).

(2) A public member may not receive compensation or benefits for the member's service, but may receive per diem and travel expenses in accordance with:

(a) Section 63A-3-106;

(b) Section 63A-3-107; and

(c) rules made by the Division of Finance pursuant to Sections 63A-3-106 and 63A-3-107.

(3) (a) Five members of the committee constitute a quorum.

(b) If a quorum is present, the action of a majority of members present is the action of the committee.

(4) Except as provided in Subsection (3), in conducting all its business, the committee shall comply with the rules of legislative interim committees regarding motions.

Section 5. Section **36-23-105** is amended to read:

36-23-105. Applications -- Fees.

(1) ~~[Representatives of occupations or professions who desire to have their occupation or profession licensed or regulated by the state may]~~ If a government requestor or a representative of an occupation or profession that is not licensed by the state proposes that the state license or regulate an occupation or profession, the requestor or representative shall, prior to the introduction of any proposed legislation, submit an application for sunrise review to the Office of Legislative Research and General Counsel in a form approved by the committee.

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(2) ~~[Applicants shall submit]~~ If an application is submitted by a representative of an occupation or profession, the application shall include a nonrefundable fee of \$500 [with each application].

(3) All application fees shall be deposited in the General Fund.

Section 6. Section **36-23-106** is amended to read:

36-23-106. Duties -- Reporting.

(1) The committee shall:

(a) conduct a sunrise review in accordance with Section 36-23-107 ~~[for all applications]~~, within 12 months, for each application submitted in accordance with Section 36-23-105;

(b) (i) conduct a sunset review for [an occupational or professional license classification that is referred to the committee by any other legislative committee by applying:] all statutes regarding a licensed occupation or profession under Title 58, Occupations and Professions, that are scheduled for termination under Section 63I-1-258;

~~[(i) the criteria in Section 36-23-107;]~~

~~[(ii) the criteria in Title 63I, Chapter 1, Legislative Oversight and Sunset Act; and]~~

~~[(iii) any other appropriate criteria; and]~~

~~[(c) submit a written report by no later than December 31 of each calendar year to:]~~

~~[(i) the speaker of the House of Representatives;]~~

~~[(ii) the president of the Senate;]~~

~~[(iii) the chair of the House Rules Committee;]~~

~~[(iv) the chair of the Senate Rules Committee; and]~~

~~[(v) the chairs of the Business, Economic Development, and Labor Appropriations Subcommittee.]~~

(ii) conduct a sunset review under this Subsection (1)(b) prior to the last general session of the Legislature that is scheduled to meet before the scheduled termination date; and

(iii) conduct a review or study regarding any other occupational or professional licensure matter referred to the committee by the Legislature, the Legislative Management Committee, or other legislative committee.

(2) The committee shall submit an annual written report before November 1 to:

(a) the Legislative Management Committee; and

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(b) the Business and Labor Interim Committee.

~~[(2)]~~ (3) The written report required by Subsection ~~[(1)(c)]~~ (2) shall include:

(a) all findings and recommendations made by the committee ~~[under Subsection (1) or~~
~~[(3)]~~ ~~[(4)]~~ in that in the calendar year; and

(b) a summary report ~~[for]~~ of each ~~[sunrise]~~ review or study conducted by the committee stating:

~~[(i)]~~ ~~whether the~~ ~~[(3)]~~ sunrise ~~[(4)]~~ review was conducted under Subsection (1) or ~~[(3)]~~ ~~[(4)]~~;

~~[(ii)]~~ (i) whether ~~[or not]~~ the ~~[sunrise]~~ review or study included a review of specific proposed or existing statutory language;

~~[(iii)]~~ (ii) any action taken by the committee as a result of the ~~[sunrise]~~ review or study; and

~~[(iv)]~~ the number of legislative members that voted in favor of the action described in Subsection ~~[(2)]~~ ~~[(3)]~~ (b)(iii);

(iii) a record of the vote for each action taken by the committee.

~~[(3)]~~ (4) The committee may ~~[-(a)]~~ conduct a sunrise review of any proposal to newly regulate an occupation or profession; ~~(b)~~ conduct any other review referred to it by the Legislature, the Legislative Management Committee, or other legislative committee; or ~~(c)]~~ conduct any other review or study related to regulation of an occupation or profession under Title 58, Occupations and Professions.

Section 7. Section **36-23-107** is amended to read:

36-23-107. Sunrise or sunset review -- Criteria.

(1) In conducting a sunrise review or a sunset review under this chapter, the committee may:

(a) receive information from:

(i) representatives of the occupation or profession proposed to be newly regulated or that is subject to a sunset review;

(ii) the Division of Occupational and Professional Licensing; or

(iii) any other person; and

(b) review ~~[the]~~ a proposal with or without considering proposed statutory language~~[-]~~;

~~[(c)]~~ evaluate the criteria in Subsection (2) to determine whether or not the occupation

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~~or profession should be regulated by the state; and]~~

~~[(d) as to the proposal, recommend:]~~

~~[(i) that the proposal be adopted by the Legislature;]~~

~~[(ii) that the proposal be adopted by the Legislature with recommended changes;]~~

~~[(iii) that the proposal not be adopted by the Legislature; or]~~

~~[(iv) any other action.]~~

(2) When conducting a sunrise review or sunset review under this chapter, the committee shall ~~[use the following criteria]:~~

(a) ~~consider whether state~~ ~~{licensing}~~regulation of the profession is necessary ~~{for the health and}~~to address a compelling state interest in protecting against present, recognizable, and significant harm to the health or safety of the public;

(b) ~~if the committee determines that state~~ ~~{licensing}~~regulation of the profession is not necessary ~~{for the health and}~~to protect against present, recognizable, and significant harm to the health or safety of the public, recommend to the Legislature that the state ~~{refrain from licensing}~~not regulate the profession;

(c) ~~if the committee determines that~~ ~~{continued}~~ state ~~{licensing}~~regulation of the profession is necessary ~~{for the health and}~~in protecting against present, recognizable, and significant harm to the health or safety of the public, consider whether each ~~{licensing}~~ provision in the proposed or existing statute is ~~{the least restrictive means for furthering the state's compelling interest in protecting and maintaining}~~narrowly tailored to protect against present, recognizable, and significant harm to the health or safety of the public; and

(d) ~~recommend to the Legislature any necessary changes to the proposed or existing~~ ~~{licensure}~~ provisions to ensure each provision is ~~{the least restrictive means for furthering the state's compelling interest in protecting and maintaining}~~narrowly tailored to protect against present, recognizable, and significant harm to the health or safety of the public.

(3) ~~In its performance of each sunrise review or sunset review, the committee may apply the following criteria, to the extent that it is applicable:~~

(a) whether ~~[or not]~~ the unregulated practice of the occupation or profession has clearly harmed or may harm or endanger the health, safety, or welfare of the public;

(b) whether ~~[or not]~~ the potential for harm or endangerment described in Subsection ~~[(2)]~~(3)(a) is easily recognizable and not remote;

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~~[(c) whether ~~{}~~ or not ~~{}~~ the public needs, and can reasonably be expected to benefit from, an assurance of initial and continuing occupational or professional competence;]~~

(c) whether regulation of the occupation or profession will significantly diminish an identified risk to the health, safety, or welfare of the public;

(d) whether ~~[or not]~~ regulation of the occupation or profession:

(i) imposes significant new economic hardship on the public;

(ii) significantly diminishes the supply of qualified practitioners; or

(iii) otherwise creates barriers to service that are not consistent with the public welfare or interest;

(e) whether ~~[or not]~~ the occupation or profession requires knowledge, skills, and abilities that are:

(i) teachable; and

(ii) testable;

(f) whether ~~[or not]~~ the occupation or profession is clearly distinguishable from other occupations or professions that are already regulated;

(g) whether ~~[or not]~~ the occupation or profession has:

(i) an established code of ethics;

(ii) a voluntary certification program; or

(iii) other measures to ensure a minimum quality of service;

(h) whether ~~[or not]~~:

(i) the occupation or profession involves the treatment of an illness, injury, or health care condition; and

(ii) practitioners of the occupation or profession will request payment of benefits for the treatment under an insurance contract subject to Section 31A-22-618;

(i) whether ~~[or not]~~ the public can be adequately protected by means other than regulation; and

(j) other appropriate criteria as determined by the committee.

Section 8. Section ~~{58-2a-101}~~36-23-109 is enacted to read:

~~{CHAPTER 2a. RIGHT TO PURSUE ANY LAWFUL OCCUPATION ACT~~

~~58-2a-101. Title:~~

~~This chapter is known as the "Right to Pursue any Lawful Occupation Act."~~

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~~Section 9. Section 58-2a-102 is enacted to read:~~

~~58-2a-102. Definitions:~~

~~For purposes of this chapter:~~

~~(1) "Court" means a trial or appellate court.~~

~~(2) (a) "Lawful occupation" means a course of conduct, profession, or vocation that includes the sale of a good or the rendering of a service for profit.~~

~~(b) "Lawful occupation" includes the sale of a good or the rendering of a service when the good or service itself is not illegal, irrespective of whether the individual selling the good or rendering the service is subject to an occupational regulation that restricts the individual's ability to sell the good or render the service.~~

~~(c) "Lawful occupation" does not include a course of conduct, profession, or vocation of an individual selling a good or rendering a service when the good or service itself is illegal.~~

~~(3) "Occupational regulation" means a statute, rule, practice, policy, or other state-prescribed requirement related to the requirements of an individual to engage in a specific lawful occupation.~~

~~(4) (a) "State" means the government of the state.~~

~~(b) "State" includes:~~

~~(i) a government office, department, division, bureau, or other body of government in the state; and~~

~~(ii) a county, municipality, or political subdivision of the state.~~

~~(5) (a) "Substantial burden" means the imposition of a significant obstacle or cost on an individual seeking to enter into or continue in a lawful occupation.~~

~~(b) "Substantial burden" does not include a burden that is incidental or negligible to the average person.~~

~~Section 10. Section 58-2a-103 is enacted to read:~~

~~58-2a-103. Right to engage in any lawful occupation.~~

~~(1) Each citizen of the state 18 years of age or older has a fundamental right to engage in any lawful occupation.~~

~~(2) The state may not adopt an occupational regulation that imposes a substantial burden on a citizen of the state 18 years of age or older unless the state demonstrates that~~

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the occupational regulation:

- ~~—— (a) addresses a compelling state interest in protecting against present, recognizable, and significant harm to the health or safety of the public;~~
- ~~—— (b) materially furthers the state's compelling interest in protecting and maintaining the health or safety of the public;~~
- ~~—— (c) is the least restrictive means for furthering the state's compelling interest in protecting and maintaining the health or safety of the public; and~~
- ~~—— (d) is not primarily enacted to discourage competition or to confer economic advantage to a limited class;~~

~~—— Section 11. Section 58-2a-104 is enacted to read:~~

~~—— 58-2a-104. Private cause of action.~~

~~—— (1) A person may bring an action against the state for declaratory judgment, injunctive relief, or other equitable relief in a court of competent jurisdiction for a violation of Section 58-2a-103, without regard to the exhaustion of administrative remedies;~~

~~—— (2) A person may assert as an affirmative defense the right to engage in any lawful occupation and that the state has violated Subsection 58-2a-103(2) in a judicial or administrative proceeding brought by the state to enforce an occupational regulation.~~

~~—— (3) Unless an occupational regulation includes an explicit statutory exemption from the requirements of this chapter, a person may bring an action or assert an affirmative defense as}~~ **36-23-109. Review of occupations and professions.**

(1) Before November 1, 2017, using the criteria described for a sunrise or sunset review described in Section 36-23-107, the committee shall review all occupations and professions subject to licensure under Title 58, Occupations and Professions, that are not scheduled for future termination under Section 63I-1-258.

(2) To ensure that before November 1, 2017, the occupations and professions described in {Subsections (1) and (2) related to the occupational regulation.

~~—— (4) If a person who brings an action or asserts an affirmative defense under this section makes a prima facie showing that an occupational regulation substantially burdens the person's right to engage in a lawful profession, the burden of proof shifts to the state to demonstrate by clear and convincing evidence that the occupational regulation:~~

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~~_____ (a) addresses a compelling state interest in protecting against present, recognizable, and significant harm to the health or safety of the public;~~

~~_____ (b) materially furthers the state's compelling interest in protecting and maintaining the health or safety of the public; and~~

~~_____ (c) is the least restrictive means for furthering the state's compelling interest in protecting and maintaining}~~ Subsection (1) are reviewed, the annual written report described in Section 36-23-107 submitted before November 1, 2013, and each annual written report submitted for the three years following that report, shall contain the findings and recommendations of the committee regarding approximately 20% of the occupations and professions subject to licensure under Title 58, Occupations and Professions, that are not scheduled for future termination under Section 63I-1-258.

(3) Before the annual written report described in Section 36-23-107 is submitted for 2013, the committee shall study potentially less restrictive alternatives to licensing for the regulation of occupations and professions, including registration and certification if appropriate, that would better avoid unnecessary regulation and intrusion upon individual liberties by the state, while still protecting the health or safety of the public.

Section ~~{12}~~9. Section ~~{58-2a-105}~~58-1-110 is enacted to read:

~~58-2a-105. Judicial determination:~~

~~_____ (1) When this chapter is interpreted by a court or administrative tribunal it shall be liberally construed to protect the right of a citizen to engage in any lawful occupation as recognized in Subsection 58-2a-103(1):~~

~~_____ (2) When issuing a decision under this chapter, a court or administrative tribunal:~~

~~_____ (a) shall issue written findings of fact and conclusions of law; and~~

~~_____ (b) may not grant any presumptions regarding the state's evidence required by Subsection 58-2a-104(4):~~

~~_____ Section 13. Section 58-2a-106 is enacted to read:~~

~~_____ 58-2a-106. Limitation:~~

~~_____ This chapter does not:~~

~~_____ (1) create a right of action against:~~

~~_____ (a) a private party; or~~

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- ~~(b) the state when acting as an employer;~~
- ~~(2) require a private party to do business with an individual who is not licensed or otherwise authorized by the state to engage in a lawful occupation; or~~
- ~~(3) prohibit an employer, including the state, from making specific education, training, licensing, or other requirements a condition of employment.~~

~~Section 14. Section 63I-1-102.5 is enacted to read:~~

~~63I-1-102.5}58-1-110. Legislative review in Title 58, Occupations and Professions. {Beginning on or after January 1, 2014, legislation}Legislation proposing the licensing or regulation of an occupation or profession under Title 58, Occupations and Professions, that is not currently subject to licensing or regulation under Title 58, Occupations and Professions, † on December 31, 2013:~~

~~(1):~~

~~(1) may not be enacted by the Legislature unless a proposal to license or regulate the occupation or profession has been reviewed by the Occupational and Professional Licensure Review Committee as described in Title 36, Chapter 23, Occupational and Professional Licensure Review Committee Act;~~

~~(2) is subject to a reauthorization schedule as described in Title 63I, Chapter 1, Legislative Oversight and Sunset Act; and~~

~~{2}3) shall include a repeal date in Section 63I-1-258 that is no later than 10 years after the effective date of the legislation.~~

†

Legislative Review Note

~~as of 1-21-13 10:54 AM~~

~~Office of Legislative Research and General Counsel}~~