



MEMORANDUM

To: Interested Parties
From: Pillsbury Winthrop Shaw Pittman LLP
Date: April 25, 2017
Re: Background on Proposed Coalition to Address Major Threat to Certification Organizations
From Louisiana Legislation

Pending legislation in Louisiana, if enacted, would effectively place Louisiana off-limits to most certification organizations and, for the few certifications recognized by Louisiana’s licensing laws, would lay the groundwork for eliminating those certification requirements. As described in detail below, Pillsbury proposes the immediate formation of a coalition of professional certification organizations to advocate for amendment or defeat of this legislation. The Institute for Credentialing Excellence has already signed on to spearhead a coalition, but there is power in numbers. **We must act quickly: the Louisiana legislature has a mid-May target adjournment date.**

Background and Summary of Legislation

On March 28, 2018, Louisiana State Rep. Julie Emerson (R-Lafayette/St. Landry) introduced Louisiana House Bill 748, the Occupational Licensing Review Act. The legislation quickly advanced through the Louisiana House of Representatives, which passed the bill by a vote of 87-7, and is now slated for consideration by the Senate Commerce, Consumer Protection, and International Affairs Committee, likely in the next few days. Without significant public opposition, the bill appears to be on a fast track to passage prior to the legislature’s mid-May 2018 target adjournment date.

If enacted, HB 748 could have a chilling effect on the use of professional certification credentials in Louisiana, as well as their inclusion as a prerequisite for occupational licensing for many licensed professions in the state. Relevant provisions in the bill include the following:

- Except as endorsed by occupational licensure statutes, “[i]ndividuals possessing a ‘certification’ from a voluntary program shall not utilize the term ‘certified’ as a title.”
- Occupational regulation must use the “least restrictive regulation necessary to protect consumers from present, significant, and empirically substantiated harms.”

- The governor’s office must annually review 20 percent of Louisiana’s existing occupational regulations each year and must repeat that review process every five years thereafter to ensure these standards are met. In these “sunset reports”, the governor’s office is directed to recommend to the legislature whether current occupational regulations should be made less restrictive or repealed, or recommend that no legislation be enacted.
- In conducting its reviews of occupational licensing regulations, the governor’s office “shall employ a rebuttable presumption that market competition and private remedies are sufficient to protect consumers.”
- To rebut that presumption, proponents of licensure requirements that incorporate certification of expert qualifications must “submit evidence of...empirically substantiated harms to consumers...which may require the office to gather information from others knowledgeable of the occupation, labor-market economics, or other factors.” The presumption may be rebutted only if the governor’s office “finds credible empirical evidence of a systematic problem warranting enactment of a state regulation to protect consumers.” The office’s analysis “of the need for regulation...shall include, nonexclusively, the effects of the proposed legislation including the scope of practice, opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs, and whether and how other states regulate the occupation.” Consumer protection, health, and safety are notably absent from the list of factors the governor’s office is directed to consider.
- In interpreting occupational regulations, regulators shall construe them to “increase economic opportunities, promote competition, and encourage innovation.” Moreover, the “scope of practice in occupational regulations is to be construed narrowly so as to avoid its application to individuals who would be burdened by regulatory requirements that are only partially related to the goods and services they provide.”

Analysis

Based on our preliminary review of HB 748, we conclude that, if enacted, the legislation could be disastrous for non-governmental certification boards/agencies. In particular, HB 748’s definitions for the term “certification” effectively prohibits certified professionals from holding themselves out as such unless such certification is a requirement for state occupational licensure.

If our initial interpretation is correct, the proposed legislation has immediate constitutional problems under the U.S. Supreme Court case *Peel v. Att’y Registration and Disciplinary Comm’n.*, 496 U.S. 91 (1990). The *Peel* case (which addresses a situation where a lawyer was disciplined for holding himself out – truthfully – as possessing a specialty trial certification from a voluntary organization) held:

A State may not ... completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA. *Cf. In re Johnson*, 341 N. W. 2d, at 283 (striking down the Disciplinary Rule that prevented statements of being “a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so”). Information about certification and specialties facilitates the consumer’s access to legal services and thus better serves the administration of justice.... The Commission’s concern about the

possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment. Disclosure of information such as that on petitioner's letterhead both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys. [P]ublic censure of petitioner for violating Rule 2-105(a)(3) violates the First Amendment.

Additionally, the occupational licensing regulation sunset review procedure is crafted in such a way that virtually no non-governmental certification program can meet it, thus eliminating it as a prerequisite for licensing (and then effectively banning it from use in the state).

The requirement that agencies employ "a rebuttable presumption that market competition and private remedies are sufficient to protect consumers" and that such presumption may be overcome only if the governor's office "finds credible empirical evidence of a systematic problem warranting enactment of a state regulation to protect consumers" is also unworkable. For any licensure regulation that already requires certification, there will be no empirical evidence of a "systematic problem." In addition, this requirement blocks the state from acting to prevent foreseeable harm to patients and consumers at the hands of unqualified professionals practicing without certification, without first subjecting Louisiana citizens to the risk of widespread harm.

Proposed Strategy/Next Steps

Based on the very serious implications of this bill, Pillsbury proposes the establishment of an informal coalition consisting of professional certification organizations that will finance advocacy efforts aimed at amending or defeating HB 748. As noted, the Institute for Credentialing Excellence has already made a substantial commitment to spearhead the coalition, Pillsbury has identified lobbyists at the Picard Group in Baton Rouge who we believe are well positioned to assist the coalition in advocating for its position related to HB 748 within the few short weeks before the legislature adjourns.

This Louisiana bill is the most frontal and damaging attack on important professional certification programs of which we are aware. The imprecise drafting of this proposed legislation raises significant practical, legal, safety, and, indeed, constitutional concerns. We are optimistic that, with broad support and sufficient resources, there is a realistic chance that the bill can be amended to protect important certification programs that are critical to health, safety, and professionalism.

* * * *

Thank you for your consideration of this memo. We look forward to working with you on this important effort.