

Occupational Licensing

An occupational license is a state-issued license required to pursue a particular occupation or engage in certain economic activity. Under occupational licensure, individuals are restricted from working in those occupations or engaging in those activities without permission from the state. All persons working in a given field should be properly trained to perform their duties properly and safely. However, while licensure is often justified in professions that impact the health, safety, and welfare of the public (e.g. doctors, lawyers, peace officers, and engineers), it is also frequently imposed on many professions where such concerns are absent (e.g. interior designers and auctioneers), imposing fees and state-administered examinations. Violating licensing regulations or operating without a license often carries criminal and civil penalties.

Proponents of occupational licensing argue that licensure ensures the safety and reliability of products and services. Such claims are dubious, however. In a competitive and free market, one must always stay ahead of the next competitor or risk losing business. With some exceptions, quality, price, and availability adapt to changing market conditions. Regulation by licensure, on the other hand, results in less competition, fewer choices, higher costs, and the potential to thwart innovation. These effects are not always visible to the consumer, but they are nonetheless built-in costs without justification in most instances.

The practice of state licensure is so ubiquitous that it rarely receives the attention it deserves, but a growing body of evidence and research reveals that occupational licensing schemes can have broad, negative effects on the job market. One study of national trends found that occupational licensing programs reduce the rate of job growth by 20 percent.¹ The same study estimated that the total economic cost of licensing regulations from reduced job growth, decreased competition, higher prices, and discouraged innovation and investment falls between \$34.8 billion and \$41.7 billion per year.²

The Institute for Justice (IJ), a public interest law firm that regularly challenges onerous licensing regulations, has studied the effects of occupational licensing extensively and reached the following conclusion:

When reviewing current or proposed licensing laws, policymakers should demand proof that there is a clear, likely and well-established danger to the public from unlicensed practice. And if they do choose to license an occupation, they should carefully determine how much of the burden placed on applicants is truly needed to ensure public health and safety. *Forcing would-be workers to take unnecessary classes, engage in lengthy apprenticeships, pass irrelevant exams or clear other needless hurdles does nothing to ensure the public's safety. It simply protects those already in the field from competition by keeping out newcomers.*³ (emphasis added).

Indeed, “keeping out newcomers” is a considerable benefit coveted by established market participants who often lobby for licensure of their particular field. Nobel Prize-winning economist Milton Friedman explained in his book, *Capitalism and Freedom*:

¹ “Occupational Licensing: Ranking the States and Exploring Alternatives,” by Adam B. Summers. (2007) <http://reason.org/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf>

² *Ibid.*

³ “License to Work: A National Study of Burdens from Occupational Licensing,” by Dick M. Carpenter II, Ph.D., Lisa Knepper, Angela C. Erickson, John K. Ross. Conclusions and Recommendations. (2012). <http://ij.org/l2w-conclusion>

[T]he pressure on the legislature to license an occupation rarely comes from the members of the public who have been mulcted or in other ways abused by members of the occupation. On the contrary, the pressure invariably comes from members of the occupation itself. Of course, they are more aware than others of how much they exploit the customer and so perhaps they can lay claim to expert knowledge. Similarly, the arrangements made for licensure almost invariably involve control by members of the occupation which is to be licensed.⁴

The Texas Legislature has studied this issue as well. The January 2009 Interim Report of the House Committee on Government Reform examined the impetus behind ongoing efforts to license and regulate professions:

Licensed members of a regulated profession enjoy several advantages from the state's regulation of their trade. These advantages include less competition, improved job security, and greater profitability. ... Given these advantages, occupational licensing programs are typically advocated for and defended by members of the profession.

Such industry self-interest was apparent during the 83rd Legislative Session. House Bill 1522 (83R) and Senate Bill 617 (83R), for instance, would have created a registration requirement for people providing energy efficiency audits as a carve-out exemption from licensing requirements for air conditioning contractors. Existing market participants were in full support of the bills. The Air Conditioning Contractors of America and Texas Home Energy Rating Organization openly stated that they assisted with the writing and development of SB 617.⁵ HB 1522 and SB 617 did not pass, but they exemplify the open industry support that typically accompanies regulation and licensing legislation. These bills also exemplify the way that previously enacted overreaching licensing statutes can lead to yet more licensing statutes.

Expanding Licensure Regulation

According to University of Minnesota economist Morris Kleiner, occupational licensure now affects more American workers than minimum wage laws or unionization.⁶ Kleiner estimates that the percentage of the American workforce required to obtain a license in their chosen profession grew from approximately 4.5 percent in the 1950s to approximately 20 percent in 2000.⁷ Kleiner and his co-author, Alan Krueger, later put their estimate at closer to one in three workers (certified or licensed), or 35 percent.⁸

Kleiner and Krueger also agree that licensing growth has been driven by industry insiders. Kleiner explains, "[The growth] tends to come from the occupations themselves. They organize, they pay somebody to be the head of an organization, they lobby the legislature."

A recent article in the *Washington Post* expanded:

⁴ Friedman, Milton. *Capitalism and freedom*. Chicago: University of Chicago Press, 1962.

⁵ See <http://www.tacca.org/advocacy/>

⁶ "A License for Protection," by Morris M. Kleiner. *Regulation*, Vol. 29, No. 3 (Fall 2006).

⁷ *Ibid.*

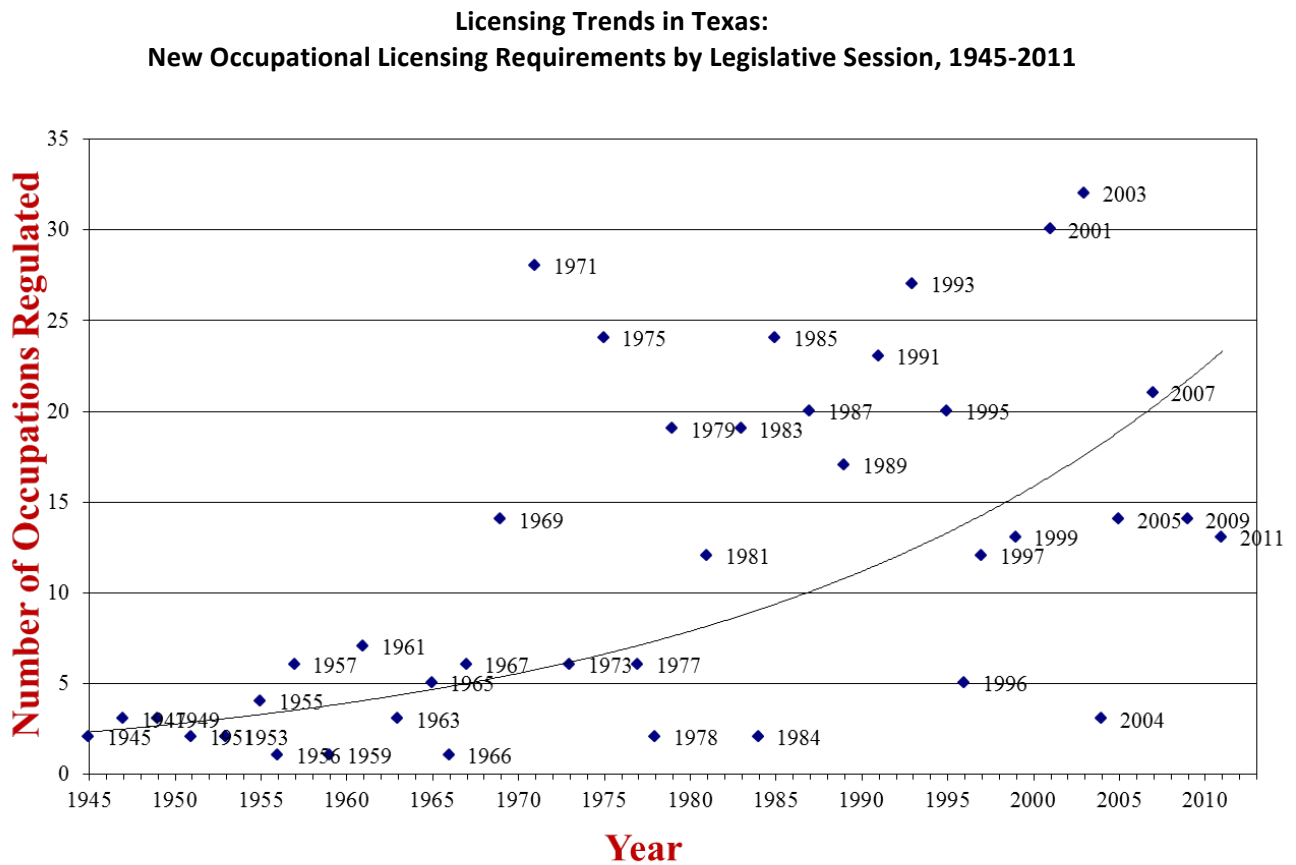
⁸ *Ibid.*

And such rules are often attractive to local lawmakers because they represent new revenue streams that typically more than pay for the cost of regulating the industry. Plus licensing was associated with 18 percent higher wages. And it creates barriers to entry and benefits those already in the profession.⁹

In a way, occupational licensing is a new form of unionism in that it enables control over the service-sector labor supply, which can drive up the quality of the workers in a profession as well as the wages, Kleiner said.¹⁰

Occupational Licensing in Texas

The following chart showing the number of new occupations regulated in each Texas legislative session since 1945:



Unionization v. Occupational Licensing. (Source: Morris & Krueger, 2013.)¹¹

⁹ <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/03/nearly-two-in-five-workers-cant-do-their-jobs-without-government-approval/>

¹⁰ <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/03/nearly-two-in-five-workers-cant-do-their-jobs-without-government-approval/>

¹¹ <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/03/nearly-two-in-five-workers-cant-do-their-jobs-without-government-approval/>

The growth in occupations licensed is apparent, and approximately 150 activities currently require a state-issued license before they can be legally performed in Texas¹².

Texas also finishes towards the back of the pack in terms of the burden of its licensing laws. In a national study of occupational licensing, the Institute for Justice (IJ) chose 102 lower-income occupations to focus on, ranging from child care workers and teachers, to dental assistants, dietetic technicians, and manicurists. Although some of the occupations on the list are commonly recognized as licensed, many are surprising. Approximately half of them offer the possibility of new business creation, meaning that they are occupations in which the practitioners can start their own businesses. IJ specifically included these occupations because they provide “a window into how licensing affects not only job prospects, but also entrepreneurial activity.”¹³

The 102 occupations studied by IJ reveals that 15.7 percent of people working in these occupations are low and middle-income workers with less than a high school diploma.¹⁴ Because many occupational licenses require a high school diploma, these workers are effectively shut out of the market. The study highlights that occupational licensing laws disproportionately harm minorities and people with lower levels of education, while reducing the number of options available to consumers and raising costs.¹⁵

Texas requires licensure for 34 of the 102 occupations identified by IJ, which is fewer than most states, but its regulations, however, are relatively more burdensome, ranking 17th most burdensome in the country.¹⁶ On average, Texas’ regulation of the 102 identified professions requires an average of \$304 in fees, 326 days of training, and two examinations.¹⁷ Texas requires training that is often excessive and disproportionate to the public safety concerns that supposedly justify them. For instance, an emergency medical technician must only train for 33 days, but cosmetologists and barbers require 350 days of training.¹⁸

For another example, take African hair-braiding instruction. IJ recently filed a complaint on behalf of Isis Brantley, a “nationally recognized expert on African hair-braiding.” She has been teaching hair-braiding for almost two decades and has braided hair for famous musicians, such as Erykah Badu.¹⁹ In 2007, Texas began requiring a 35-hour hair-braiding license and inserted it into the Occupations Code with the state’s barbering statutes. In the complaint, IJ alleges the following:

¹² Texas Department of Licensing and Regulation, Strategic Plan 2011 – 2015, June 18, 2010.

¹³ “License to Work: A National Study of Burdens from Occupational Licensing,” by Dick M. Carpenter II, Ph.D., Lisa Knepper, Angela C. Erickson, John K. Ross. The Occupations. (2012). <http://ij.org/l2w-occupations>

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ “License to Work: A National Study of Burdens from Occupational Licensing,” by Dick M. Carpenter II, Ph.D., Lisa Knepper, Angela C. Erickson, John K. Ross. Texas. (2012). <http://licensetowork.ij.org/tx>

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ <https://www.texastribune.org/2013/10/01/dallas-hair-braider-sue-over-regulations/>

Defendants will not allow Plaintiffs to offer 35-hours of hair-braiding instruction that qualifies their students to legally work as hairbraiders. Before being allowed to do so, Plaintiff Brantley must become a state-licensed barber instructor—which means obtaining a 1500-hour class-A barber license and completing an additional 750-hour course on barbering instruction. Defendants also require that she operate a state-licensed barber college, one at least 2,000 square-feet and full equipped to teach barbering, and wholly irrelevant to hair-braiding. In total, Plaintiff Brantley must spend 2,250 hours in barber school, pass four licensing exams, and spend thousands of dollars on tuition and a barber college, all to teach a 35-hour hair-braiding curriculum that is impossible to fail because the state requires no examination for its hair-braiding license.²⁰

The hair-braiding instruction lawsuit exemplifies how unnecessary licensing regulations can stifle business. Though not as poorly ranked as California (2nd), it should be noted that Texas requires licensure for a number of occupations that California does not, including teeth whiteners, school sports coaches, dyslexia therapists, polygraph examiners and stevedores (dock-workers), to name a few. On the other hand, California licenses a laundry-list of occupations that Texas does not, such as tree trimmers, painters, teacher assistants, landscapers, and upholsterers, to name a few.

Finally, many occupations are subject to stiff criminal penalties in lieu of, or in addition to, civil liability. Penalties for violating Interior Design licensing regulations, for instance, do not include civil penalties; all knowing violations of Interior Design licensing provisions are Class C Misdemeanor criminal violations, which are punishable by jail confinement for up to one year and a fine up to \$4,000. Likewise, auctioneers commit a Class B Misdemeanor if they operate without a license. Class B Misdemeanors are punishable by jail confinement for up to 180 days and a fine up to \$2,000. These criminal penalties are enforced. For instance, auctioneer Drake King was arrested for auctioning without an auctioneer's license. According to the Texas Department of Licensing and Regulation, King pled guilty to the Class B Misdemeanor, was fined \$500, and spent six days in jail.

Criminal penalties apply to a host of businesses that have coin-operated machines on their premises if they do not comply with licensing regulations. The same can be said for longshoremen²¹, polygraph examiners, athletic trainers, vehicle towers and dieticians. The result is a state regulatory structure that not only makes it difficult to start a new business, but risks turning people who attempt to do so into criminals. Imposing a Class C Misdemeanor on otherwise legal and harmless economic activity puts people who are trying to earn a living on par with people who commit disorderly conduct, assault, bail jumping, trespassing or leaving a child in a vehicle. Other examples of Class B Misdemeanors include DWI, prostitution, terroristic threats and indecent exposure.

²⁰ <http://www.scribd.com/doc/172538713/Brantley-v-Kuntz-File-Stamped-Full-Complaint-pdf>

²¹ Note that in the Texas Occupations Code, longshoremen are referred to as "Stevedores."

Reforms

Important health and safety laws, such as those requiring sanitary conditions in salons, or other consumer protection laws, such as the prohibition on price gouging, would be maintained. However, Texas should scale back its licensing laws considerably. Doing so will create more opportunity for individuals and result in increased economic growth. For example, when Mississippi repealed its cosmetology license requirement for hair-braiders and replaced it with a registration requirement, 300 new braiders registered with the state.²² Not only did they relocate from neighboring states, but also stopped working in Mississippi in secret and became open members of the economic community.²³

Recommendation: Repeal specific licenses.

There are two specific types of reforms Texas could implement. First, it could repeal many of its occupational licensing laws outright. Second, it could adopt a number of policies that govern the justification, adoption and enforcement of licensing laws, including the standards under which they are judged when challenged in court. Note, however, that licensure requirements that protect the health and safety of consumers would not be targeted or revised under either of these approaches.

The following is a non-exclusive list of occupations currently requiring a license or license equivalent in Texas that should be subject to reform and repeal:

- *Interior Designer* (Chapter 1053, Occupations Code) – Interior designers in Texas must register with the state to legally operate as a registered interior designer. They must meet onerous experience, examination, and application requirements in addition to fees.
- *Salvage Vehicle Dealer* (Section 2302.101, Occupations Code)
- *Dog Trainer* (Section 1702.221, Occupations Code) – Trainers expertise ranges from training animals to be obedient to high standard behavior for training and competition. Texas is one of only 20 states that requires licensure for animal trainers. This particular license relates to guard dogs for private security under Chapter 1702 of the Occupations Code.
- *Coach*²⁴ – Though not a specific requirement under the Occupations Code or the Education Code, most school districts require coaches to be licensed teachers. Licensing as an educator requires 1,460 days of experience and education, which is more than is required for Emergency Medical Technicians (33). This number is excessive, even without the added fact that more than half of states do not require occupational licensure for school sports coaches.
- *Auctioneer* (Chapter 1802, Occupations Code)

²² “License to Work: A National Study of Burdens from Occupational Licensing,” by Dick M. Carpenter II, Ph.D., Lisa Knepper, Angela C. Erickson, John K. Ross. Conclusion. (2012). <http://ij.org/l2w-conclusion>

²³ *Ibid.*

²⁴ See <http://www.dallasnews.com/sports/high-schools/headlines/20130606-order-for-certification-has-disd-coaches-scrambling-to-earn-teaching-credentials-by-end-of-2013-14.ece>; See also <http://licensetowork.ij.org/tx>

- *Barber Licenses* (Chapter 1601, Occupations Code) – There are several licenses under the umbrella of barbering that could be repealed:
 - Manicurist
 - Barber Hair Weaving Specialist
 - Barber Hair Braiding Specialist
 - Shampoo Apprentice

- *Cosmetology Licenses* (Chapter 1602, Occupations Code) – There are several licenses under the umbrella of Cosmetology:
 - Cosmetologist, including hair braiders and wig specialists
 - Manicure Specialist
 - Esthetician Specialist
 - Shampoo Apprentice;
 - Eyelash Extension Specialist

- *Towing/Booting Operator* (Chapter 2308, Occupations Code) – There are several licenses under the umbrella of Towing and Booting:
 - Incidence Management Towing Operator’s License
 - Private Property Towing Operator’s License
 - Consent Towing Operator’s License
 - Boot Operator’s License

Recommendation: Reform general occupational licensing such as increasing reciprocity, prohibiting grandfathering, providing exemptions, and abolishing criminal penalties.

Below are general reforms that will improve Texas’ system overall.

- *Abolish Criminal Penalties* – A person seeking to engage in economic activity should not be made a criminal for failure to comply with a licensing requirement, except where public health and safety is clearly at risk. Criminal activity perpetrated by a license-holder (or even a non-license holder) should be prosecuted under the statutes that are relevant to that activity. Just as a license is no guarantee that the holder will not engage in criminal activity, so the lack of a license should not, by itself, render the person a criminal.

- *Health and Safety Requirement* – There should be a strict standard to meet in order to justify a new occupational licensing scheme. No profession should require licensure unless that profession directly impacts the health and safety of its customers. Doctors, for instance, meet this justification. Interior designers do not. Section 1.001 of the Occupations Code (Purpose of Code) should be amended to clearly state the new standard. This requirement should also prohibit municipalities, cities, counties and other political subdivisions from requiring licensure unless health and safety are at issue.

- *Increase Reciprocity* – Texas should adopt a market-driven policy on licensing reciprocity that allows individuals licensed in other jurisdictions to practice in Texas with few or no additional regulatory requirements. House Bill 162 (83R) increased reciprocity for veterans considerably. A good start would be to extend HB 162 to all Texas residents. To go further, legislation should be introduced to codify reciprocity in the Occupations Code.

- *No Grandfathering* – A common practice for existing market participants seeking licensing legislation is to grandfather themselves into the regulatory structure, without having to comply with the requirements being adopted. Requiring all market participants in a given field to comply with new requirements with no exceptions would incentivize self-regulation by decreasing the protective effects that licensure has on existing businesses. Section 1.001 of the Occupations Code (Purpose of Code) should be amended to include this provision and state that it takes priority over all subsequent legislation under the Code.
- *Opt-out* – One way to expedite deregulation in occupational licensing is to provide a blanket exemption for all non-health and non-safety related occupations as long as they disclose that they are operating without a state-issued license. Businesses or individuals opting out should be required to either display a notice, in view of customers, that they are operating without a state-issued license, or include that information conspicuously in a written contract. Occupations not subject to the opt-out provision, such as doctors, for instance, should only be prevented from opting out upon satisfaction of a high standard requiring that the occupation directly relate to and affect the health and safety of its customers. The Occupations Code should be amended to add the opt-out provision.
- *Target licensure requirement to the goal of protecting the health and/or safety of the public* – If the state wishes to ensure that those who are required to enter a customer’s home in the course of their work do not have a history of criminal activity, regulation should be limited to ensuring the individual has passed a criminal background check. Requirements that otherwise limit the ability of qualified individuals to pursue their chosen career path are unnecessary and should not be adopted.