

115TH CONGRESS
2D SESSION

S. 3598

To limit private antitrust damages against occupational licensing boards, to promote beneficial reforms of State occupational licensing, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 11, 2018

Mr. CORNYN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To limit private antitrust damages against occupational licensing boards, to promote beneficial reforms of State occupational licensing, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Occupational Licensing
5 Board Antitrust Damages Relief and Reform Act of
6 2018”.

7 **SEC. 2. DEFINITIONS.**

8 In this Act:

1 (1) CERTIFICATION.—The term “certification”
2 means a voluntary program under which—

3 (A) a private organization (in the case of
4 private certification) or the government of a
5 State (in the case of government certification)
6 authorizes an individual who meets certain per-
7 sonal qualifications to use “certified” as a des-
8 ignated title with respect to the performance of
9 a lawful occupation; and

10 (B) a noncertified individual may perform
11 the lawful occupation for compensation but may
12 not use the title “certified”.

13 (2) MEMBER, OFFICER, EMPLOYEE, OR
14 AGENT.—The term “member, officer, employee, or
15 agent”, with respect to an occupational licensing
16 board, means an individual appointed by, to, or em-
17 ployed by the occupational licensing board.

18 (3) OCCUPATIONAL LICENSE.—The term “occu-
19 pational license” means a nontransferable authoriza-
20 tion under law for an individual to perform a lawful
21 occupation for compensation based on meeting per-
22 sonal qualifications established by the State govern-
23 ment.

1 (4) OCCUPATIONAL LICENSING BOARD.—The
2 term “occupational licensing board” or “board”
3 means an entity established under State law—

4 (A) the express purpose of which is to reg-
5 ulate the personal qualifications required to en-
6 gage in or practice a particular lawful occupa-
7 tion; and

8 (B) that has authority conferred by State
9 law to interpret or enforce the occupational reg-
10 ulations of the State.

11 (5) OCCUPATIONAL REGULATION.—The term
12 “occupational regulation”—

13 (A) means a statute, rule, regulation, prac-
14 tice, policy, or law that sets educational, exam-
15 ination, training and/or experience requirements
16 to authorize an individual to work in a lawful
17 occupation;

18 (B) includes any statute, rule, regulation,
19 practice, policy, or law requiring certification or
20 an occupational license; and

21 (C) does not include a business license, fa-
22 cility license, building permit, or zoning and
23 land use regulation except to the extent that
24 such a requirement or restriction substantially

1 burdens an individual’s ability to work in a law-
2 ful occupation.

3 (6) WIDELY REGULATED OCCUPATION.—The
4 term “widely regulated occupation” means an occu-
5 pation in which forty (40) or more States require an
6 occupational license to engage in such occupation.

7 (7) STATE.—The term “State” means each of
8 the several States, the District of Columbia, and any
9 territory or possession of the United States.

10 **SEC. 3. PRIVATE ANTITRUST DAMAGES.**

11 (a) IN GENERAL.—No damages, or interest on dam-
12 ages, may be recovered under section 4, 4A or 4C of the
13 Clayton Act (15 U.S.C. 15, 15a, or 15c) by any person,
14 except for any State, instrumentality of a State, or em-
15 ployee of a State or instrumentality of a State acting in
16 his or her official capacity, from an occupational licensing
17 board, or any member, officer, employee, or agent of a
18 board, acting in their official capacity, if—

19 (1) the State—

20 (A) has enacted a law requiring an occupa-
21 tional license to practice the lawful occupation
22 regulated by the occupational licensing board;

23 (B) has set forth criteria outlining any
24 personal qualifications necessary to obtain an
25 occupational license and has required that li-

1 censees adhere to standards of practice and eth-
2 ical standards in the performance of regulated
3 lawful occupations; and

4 (C) has found that—

5 (i) the public needs, and can be rea-
6 sonably expected to benefit from, occupa-
7 tional licensing of the lawful occupation;
8 and

9 (ii) the unlicensed conduct of the law-
10 ful occupation would harm or endanger the
11 health, safety, or welfare of the public;

12 (2) an occupation licensed by an occupational li-
13 censing board—

14 (A) is a widely regulated occupation; or

15 (B)(i) is not a widely regulated occupation
16 and the State has implemented a periodic sun-
17 set review process of the occupational licensing
18 board with regard to that occupation; and (ii)
19 if previously unregulated by the State, the State
20 has implemented a sunrise review process of the
21 occupational licensing board with regard to its
22 regulation of that newly licensed occupation;

23 (3) the chief executive, legislature, or other
24 elected officer of the State—

1 (A) has appointed all members of the occu-
2 pational licensing board; and

3 (B) has required public representation on
4 the occupational licensing board; and

5 (4) the State or the occupational licensing
6 board has established a mechanism under which any
7 person aggrieved by an action of the occupational li-
8 censing board has the right to—

9 (A) contest such action at a hearing before
10 the occupational licensing board at which the
11 individual may provide evidence, argument, and
12 analysis;

13 (B) review, at a reasonable time before the
14 hearing, all evidence that the occupational li-
15 censing board has gathered relating to the con-
16 tested action;

17 (C) receive a final reasoned decision in
18 writing from the occupational licensing board
19 within a reasonable period after the hearing;
20 and

21 (D) appeal an adverse decision of the occu-
22 pational licensing board to an independent ad-
23 judicator, including judicial review.

24 (b) APPLICABILITY.—This section shall not apply to
25 any case commenced before the date of enactment of this

1 Act, unless it would be inequitable not to apply this section
2 to a pending action.

3 (c) RULE OF CONSTRUCTION.—Nothing in this Act
4 shall be construed to modify or impair the applicability
5 or availability of—

6 (1) relief pursuant to section 4A or 4C of the
7 Clayton Act (15 U.S.C. 15a, 15c);

8 (2) injunctive relief pursuant to section 16 of
9 the Clayton Act (15 U.S.C. 26);

10 (3) equitable monetary or injunctive relief pur-
11 suant to section 13(b) of the Federal Trade Com-
12 mission Act (15 U.S.C. 53(b)); or

13 (4) the ability of any person to recover the cost
14 of the suit, including a reasonable attorney's fee,
15 under section 4 of the Clayton Act (15 U.S.C. 15).

16 (d) SAVINGS CLAUSE.—The immunity from damages,
17 or interest on damages, that is provided to members, offi-
18 cers, employees, or agents of an occupational licensing
19 board of a State under subsection (a) shall not apply to
20 any action unrelated to their official capacity, such as im-
21 plementing rules governing minimum prices or fees.

22 **SEC. 4. STATE LICENSING STUDIES TO BE CONDUCTED.**

23 Not later than 120 days after the date of enactment
24 of this Act, the Comptroller General of the United States
25 shall submit to Congress a report on—

1 (1) how States can best address occupational li-
2 censing reform, particularly for those occupations
3 that are not directly related to protecting the health,
4 safety, or welfare of the public, including rec-
5 ommendations on how States can weigh the costs
6 and benefits of occupational licensing against those
7 of less restrictive alternatives, such as certification
8 and other approaches;

9 (2) how States can conduct comprehensive cost-
10 benefit assessments of occupational regulations and
11 occupational licensing boards through sunrise re-
12 views and periodic sunset reviews;

13 (3) how States can implement policies to sup-
14 port occupational licensing uniformity and occupa-
15 tional license portability, including streamlined li-
16 censing portability programs for veterans and mili-
17 tary service members and spouses; and

18 (4) how occupational licensing requirements af-
19 fect low-income workers, the unemployed, immi-
20 grants with work authorizations, and individuals
21 with criminal records.

22 **SEC. 5. RULE OF CONSTRUCTION.**

23 Except as provided in section 3, nothing in this Act
24 shall be construed to modify or impair the applicability

1 or the enforcement of the antitrust laws, as defined in the
2 first section of the Clayton Act (15 U.S.C. 12).

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