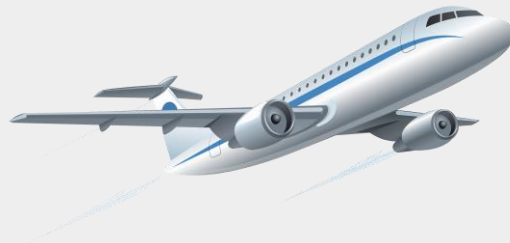


# The National Occupational Licensing Meeting 2022

Regulatory Best Practices  
and Antitrust Liability

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# How Regulatory Boards See Themselves....



The National Occupational Licensing Meeting 2022-Regulatory Best Practices and Antitrust Liability

## VS. How Regulatory Boards Are Perceived.



The National Occupational Licensing Meeting 2022-Regulatory Best Practices and Antitrust Liability

# Why do “we” see ourselves as public protectors?



# Why Do “We” have an Image Problem



# *NC Dental Examiners Board v. FTC*

“...agencies controlled by market participants are more similar to **private trade associations** vested by States with regulatory authority....”

=Even the “Supremes” distrust our ability to take off our active marketplace participant hats and put on our fair-minded regulator hat and abide by our sworn oath to protect the public. We must prove ACTIVE STATE SUPERVISION.

# Immunity Types and Limits

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**Shielding “our” just actions**

# Why Do We Need Immunity? (Other than Delta Plus Variant)

	<b>Acts of a governmental entity, when taken in good faith, should be protected in order to encourage state officials to protect the public without fear of suit.</b>
	<b>Prevent the chilling effect threat of suit would have on state actors faithfully discharging their duties and on state legislatures protecting their state treasury</b>
	<b>Prevent interference with the ability of state actors to carry out their duties due to the distraction and time consumption of being subjected to lawsuits</b>
	<b>Recruit and retain talent in state government and on Interstate Compact Commissions</b>
	<b>Immunity, when qualified, gives state actors the ability to use their prudent discretion</b>



# Potential (but not substantial) Outside Threats to Immunity/Exposure to Liability

## Judicial Narrowing of Immunity

Kisor/Auer (deference) line of cases: 5 prong test:

- 1) Genuinely ambiguous reg. needing board interpretation; and
- 2) It was a reasonable interpretation; and
- 3) an independent inquiry by the Court as to whether it was an authoritative position;
- 4) which implicated/required the substantive expertise of the Board;
- 5) which was a fair and considered judgment with no surprises.

## Legislative waiver of immunity

Tort Claims Acts allowing limited liability

## State Laws expressly forbidding deference

AZ via 2018 amendment to State Administrative Procedures Act was among the first  
AND THE LIST CONTINUES....

## Constitutional provisions denying immunity

Montana has no immunity pursuant to their state constitution unless a supermajority of the legislature grants it to the Board/Agency

*(Though these cases utilize federal doctrine, they do provide guidance which state courts can and have utilized to "not defer" to Board decisions too quickly)*

Multiple State Supreme Courts abandoning deference to Boards

# Potential Threats to Immunity/Exposure



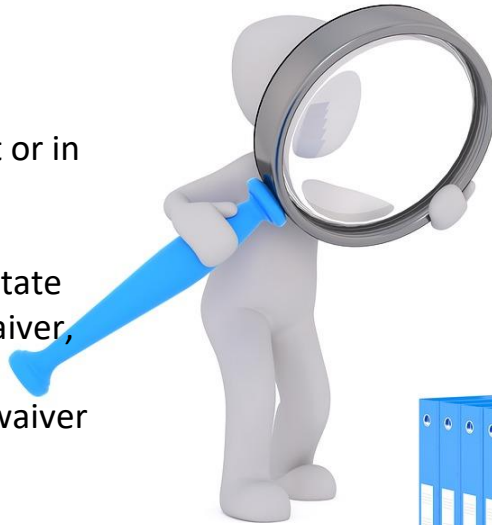
# Ways to Limit Threats to Immunity/Exposure to Liability in Court

✓	Article VII. 1. 1-3. NLC Compact
✓	Qualified immunity (Sovereign immunity that is NOT absolute)
✓	Eleventh Amendment State Action Immunity
✓	Tenth Amendment (US Const., Compact Clause, Art. 1 sec. 10 (clause 3) states have traditionally regulated the professions so that right is reserved for the states=Interstate Compacts
✓	Exhaustion of administrative remedies requirements
✓	Tort Claims Act- injured party has a remedy, but damages are limited
✓	Board and Compact Insurance Coverage

# Types of Immunity

## 11<sup>th</sup> Amendment/ State Action

- Prevents private actions from being brought against states in federal court or in state court if based on federal law
- Must prove you are a state actor
- Must not be expressly waived by the state by consent (ie: State Constitutional waiver, Judicial narrowing, Tort Claims Act, insurance purchase, other legislative waiver requiring vote to specifically re-confer immunity)
- Direct to Board members and Derivative to Compact Commissioners as flowing from their states which appoint them to a Compact



## Sovereign Immunity (Non-11<sup>TH</sup> Am. Immunity)

- Prevents private actions in state courts for appropriate, clearly authorized state action
- NOT Absolute
- Qualified and Functional in Nature
- QUERY:

*If a Compact commissioner's action is done appropriately sovereign immunity will shield that action EVEN if their state does not provide 11<sup>th</sup> amendment immunity*

# 11<sup>th</sup> Amendment Immunity

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**“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State”.**

- ✓ Immunity from Federal court suit CAN be waived by a state, but must be expressly waived by statute, etc.
- ✓ You can't file a suit for monetary damages that would be taken from the state treasury
- ✓ An applicant or licensee respondent CAN sue for injunctive relief

# Qualified And Functional Sovereign Immunity

(How to keep it)

...The action “you” took (or did not take) was **DISCRETIONARY** (*an act involving exercise of personal judgment*), it must also be:

## LAWFUL

- taken pursuant to *clearly articulated* and *unambiguous law*
- clearly and properly *delegated task/action*
- taken after/with *proper state supervision* (**only** if required by your state) \*Confer with your counsel or seek AG opinion or declaratory ruling

## FUNCTIONAL

- done in your official, not individual, capacity as a duly appointed representative of your state on a Board or Commission

# Sovereign Immunity (for state actor)

## Qualified and Functional

## Judicially Created

**Was the state action you took:**

### Discretionary

An act requiring/ involving exercise of personal judgement

**OR**

### Ministerial

Required by law= state actor must do it and there is no liability if you do it, no immunity protection if you fail to do it

Was it “lawful”=

- taken pursuant to
- clearly articulated and unambiguous law
- Properly delegated
- Properly supervised (varies state by state)

# Qualified And Functional Sovereign Immunity

(How to keep it)

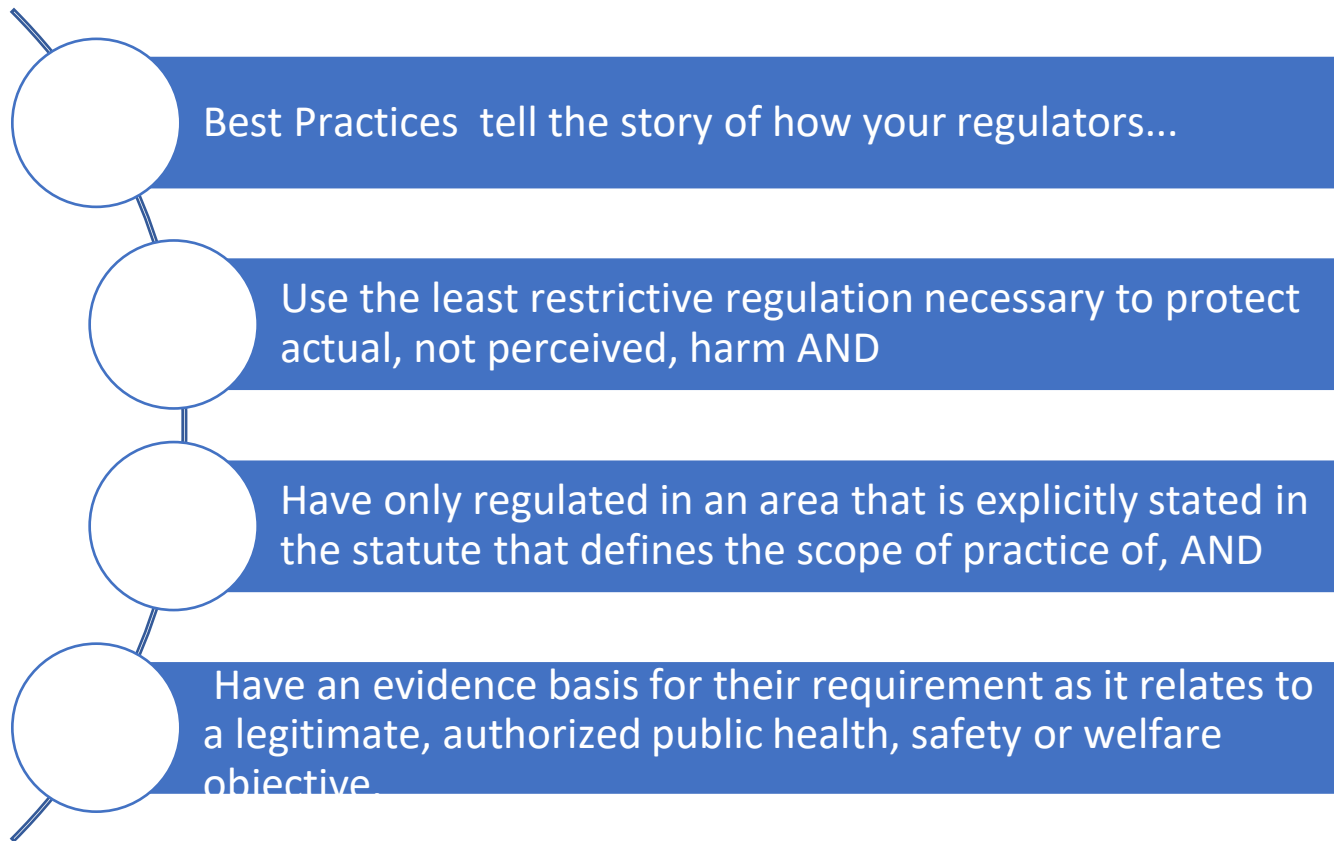
- If the action “you” took or did not take was **MINISTERIAL** (*Expressly required by law*) you **MUST** do it. **=No** immunity protection if you failed to discharge a duty that was required by law, **but** you also have stronger immunity protection when discharging ministerial duties.



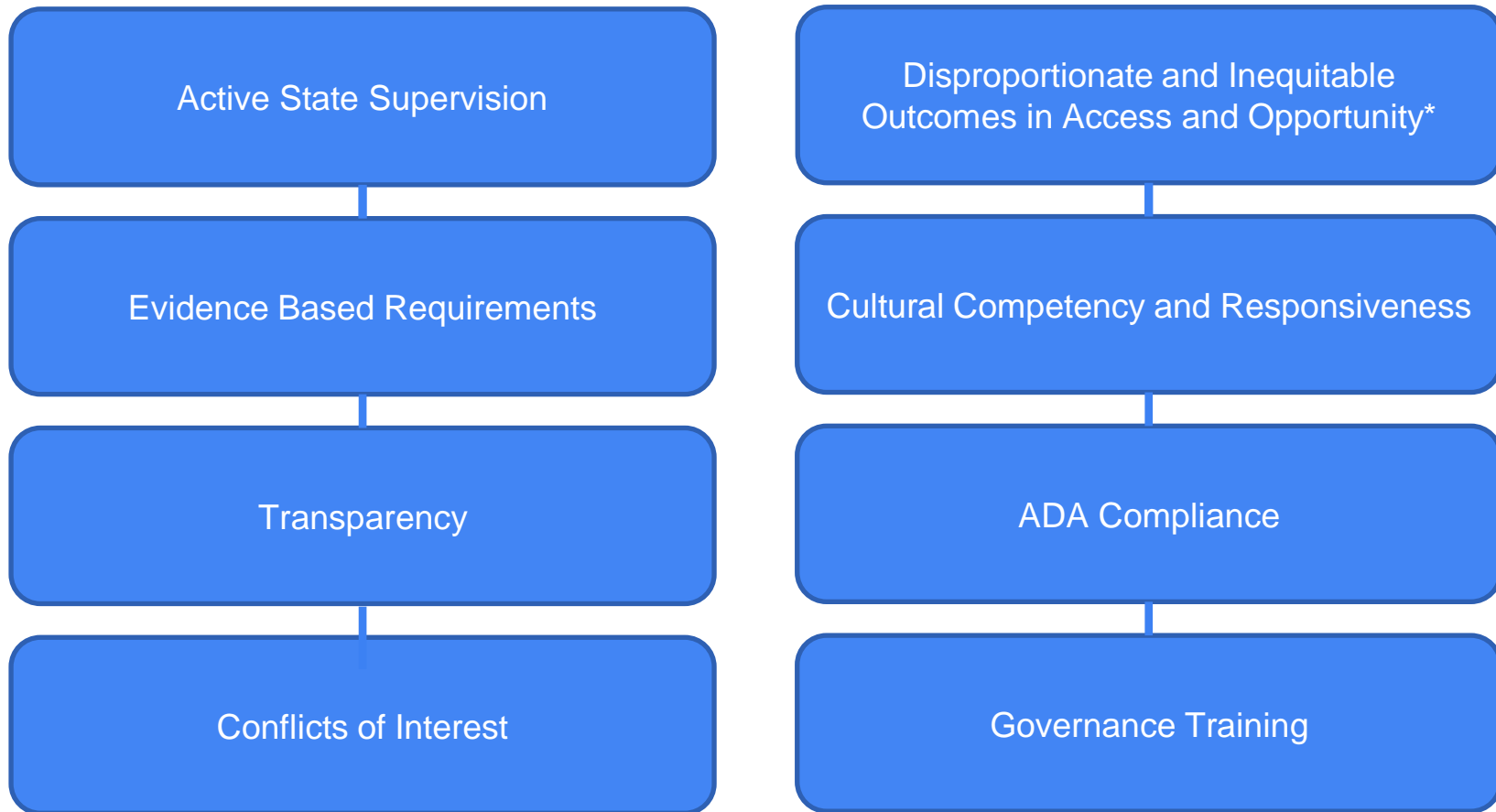


# Protecting Immunity





# Regulatory Best Practice Considerations

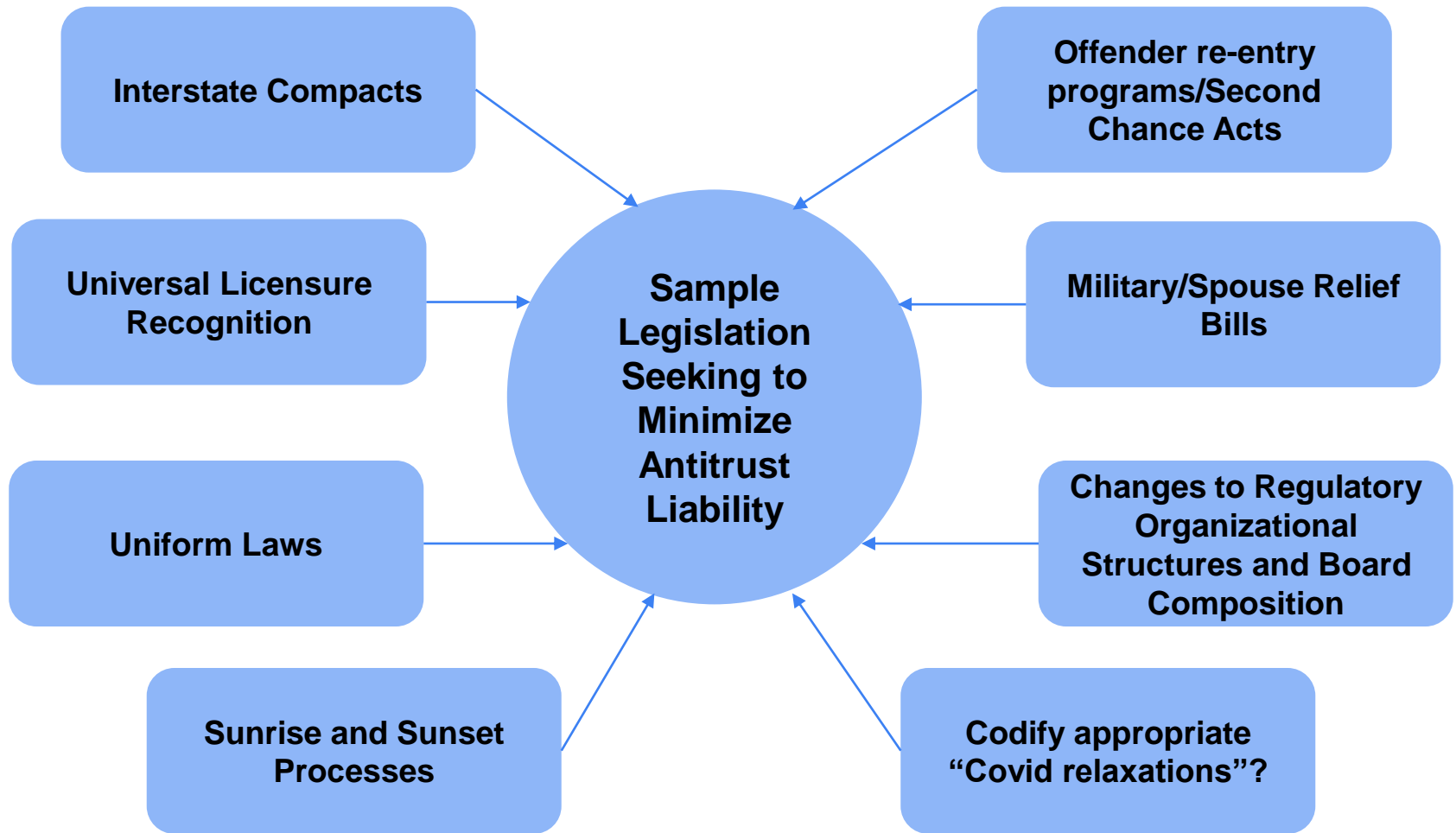


# Best Practices for Minimizing Antitrust Liability Risk: *Policies/Procedures*

- Engage in objective, evidence-based review and renewal of applications for licensure and renewal
- Engage in thorough and inclusive investigations with ample opportunity for all parties to provide documentation and conduct interviews
- Review your rules and regulations thoroughly and voluntarily eliminate repetitive, antiquated or unduly burdensome rules
- Review investigation, prosecution processes

- Be inclusive and creative when assessing competencies and opportunity for rehabilitation
- Have statistics to show that your supervision and continuing education requirements have a nexus to previous or ongoing complaints and public safety concerns reported to your board
- Could your board withstand a legal challenge that you have no evidence basis for your requirement (as it relates to a legitimate public health, safety or welfare objective)?

- Train your board members, staff and investigators early and often on the importance of transparency (and all relevant public records, open meetings laws), avoidance of conflicts and ANY appearance of protection of their market share if they are professional members of the board
- Understand what is expected of you at the state level (i.e.: audits, fiscal notes and other rulemaking requirements, survey and legislative query responses, current/ helpful and efficient websites, electronic capability for applications and filing of complaints, ease for military families)
- Have an “elevator speech” prepared for your legislators and stakeholders as to the work your board does to advance and enhance consumer protection in the less restrictive (to your licensees) means possible-tell the story of compacts as a tool for antitrust amelioration-invite legislators to your meetings
- Tell your story to the public with evidence on your website and garner earned media



# Notable Licensing Compacts

Nurse Licensure Compact-38 States+2 territories

Interstate Medical Licensure Compact-36 States+2 territories

Physical Therapy Compact-33 States+DC

Psypact-30 States+DC

EMS Licensure Compact-21 States

Audiology and Speech-Language Compact-21 States

OT Compact-21 States

Counseling Compact-11 States

**Policy Perspectives**

# **Options to Enhance Occupational License Portability**



**Federal Trade Commission**  
September 2018

# The FTC View

What regulators are doing wrong...



streamline licensing of military spouses in many occupations. Some professions have developed model laws or interstate compacts that improve licensure portability nationwide. These examples of successful portability suggest further liberalization and reform is both possible and beneficial.

Accordingly, for occupations that generally require state licensing as a public protection measure, FTC staff encourages stakeholders such as licensees, professional organizations, organizations of licensing boards, and state legislators to consider the likely competitive effects of options to improve license portability. As stakeholders evaluate those options, we suggest that they consider the following points:

- Both model laws and interstate compacts have been used to improve licensure portability for individual occupations
- For reducing barriers to multistate practice, consider the use of a mutual recognition model, in which licensees need only one state license to practice in other member states and are not required to give notice of their intent to practice in another state
- Alternatively, consider easing multistate practice by expediting licensure in each intended state of practice
- Take steps to ease licensure upon relocation to a new state, whether by expediting the process or by allowing licensees to practice in the new state of residence under an existing multistate license during processing of the application
- Harmonize state licensure standards, using the least restrictive standard that can gain the support of states nationwide
- State-based efforts to reduce barriers to licensing of relocated military spouses often address multiple occupations that require licensing
- At the state level, consider expanding the use of temporary licensing and other procedures that have helped reduce the burden of licensing for relocated military spouses to all applicants licensed by another state

Each type of portability initiative has advantages and disadvantages, and all take time and effort to develop and implement. However, a thoughtful consideration of the needs of a profession and the consumers it serves is likely to lead to a solution that can gain the support of licensees, licensing boards, the public, and state legislatures. Moreover, by enhancing the ability of licensees to provide services in multiple states, and to become licensed quickly upon relocation, license portability initiatives can benefit consumers by increasing competition, choice, and access to services, especially where providers are in short supply.

## IX. Conclusion

Occupational licensing can protect consumers from health and safety risks, generally in situations where consumers lack sufficient information to assess the qualifications of professionals. That said, licensing occupations also restricts competition. By establishing the entry requirements for an occupation, licensing regulations tend to reduce the number of market participants. In turn, this reduction in supply leads to a loss of competition, potentially resulting in higher prices and lower quality and convenience of services.

A key barrier imposed by licensing is the inability of qualified professionals licensed by one state to work in another state. There is little justification for the burdensome, costly, and redundant licensing processes that many states impose on qualified, licensed, out-of-state applicants. Such requirements likely inhibit multistate practice and delay or even prevent licensees from working in their occupations upon relocation to a new state. Indeed, for occupations that have not implemented any form of license portability, the harm to competition from suppressed mobility may far outweigh any plausible consumer protection benefit from the failure to provide for license portability.

Moreover, a slow and burdensome process for cross-state practice is unnecessary. There are many options to enhance license portability. Individual states have adopted initiatives to

Policy Perspectives

# Options to Enhance Occupational License Portability

Bilal Sayyed, Director, Office of Policy Planning


Tara Isa Koslov, Former Acting Director, Office of Policy Planning  
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This Policy Perspective was developed under the auspices of the FTC's Economic Liberty Task Force, convened by former Acting Chairman Maureen K. Ohlhausen.<sup>1</sup>

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# How Interstate Compacts can address Antitrust concerns:

- Reduce barriers to licensure portability
- Create uniform standards for entry into practice
- Eradicate board member discretion/"subjectivity" over entry into practice by establishing those uniform standards
- Create greater access to care by allowing for greater mobility of practitioners and additional practitioners to underserved areas
- Foster cooperation (i.e.: addresses legislative concern regarding turf wars)

# How Interstate Compacts can make us better regulators:

- Cast a broader net (beyond your state borders) for investigatory and disciplinary matters
- Enforcement mechanism to require other member states to comply (i.e.: report discipline timely to database)
- Enforcement mechanism to ensure timely issuance of license/privilege
- Greater cooperation and information sharing between states

[https://licensing.csg.org/wp-content/uploads/2021/12/2021\\_ULR\\_Report.pdf](https://licensing.csg.org/wp-content/uploads/2021/12/2021_ULR_Report.pdf)

The background of the right side of the image is a blue-tinted photograph of two people standing in front of a server rack. They appear to be working on the equipment. The image is partially obscured by a dark blue geometric shape that contains the title and footer text.

## 2021 Survey of UNIVERSAL LICENSE RECOGNITION LAWS

National Center for Interstate Compacts  
Occupational Licensure Project



CRITERIA	UNIVERSAL RECOGNITION	INTERSTATE COMPACT
Requires practitioners to abide by the scope of practice of the state in which they are practicing	✓	✓
Allows for expeditious interstate movement of practitioners during emergencies	✓	✓
Reduces barriers for out-of-state practitioners aiming to practice within your state	✓*	✓
Reduces barriers for in-state practitioners aiming to practice in multiple states	✗	✓
Allows military spouses to maintain a single home-state license for the duration of the service member's active duty, regardless of relocations, without submitting a separate application to each state's licensure board	✗	✓ <sup>1</sup>
Allows practitioners to work in multiple states, both in person and via telehealth/telework, without submitting a separate application to each state's licensure board, requiring verification of the current license, or obtaining a new background check	✗	✓
Brings together a coalition of states to establish uniform and enforceable interstate licensure standards that are narrowly tailored to the public protection requirements of a specific profession	✗	✓
Enhances public protection by creating a multi-state database of licensure information to facilitate collaboration on license verification and investigations of potential misconduct	✗	✓
Allows multistate practice without requiring the practitioner to change state of residence	Sometimes*	✓ <sup>2</sup>

\* Some states' universal recognition laws, such as those in Iowa and Arizona, require the practitioner to reside in the state while others, such as Colorado's and Idaho's, do not.

# LESSONS LEARNED FROM THE OCCUPATIONAL LICENSING CONSORTIUM

<https://www.ncsl.org/research/labor-and-employment/occupational-licensing-final-report-assessing-state-policies-and-practices637425196.aspx>

**Importance of messaging:** Nearly every state struggled to effectively communicate the consortium's work to certain stakeholders. State teams found success with messages that highlighted the work as **protecting consumer health and safety while also addressing critical workforce needs**. Often the messages had to be tailored for different stakeholder groups.

**Stakeholder engagement:** Consortium states that experienced pushback on goals or sponsored legislation struggled with engaging the right stakeholders from early in the process. States that did not have **buy-in** from the legislature early on failed to enact legislation and states that experienced changes in leadership had a hard time maintaining momentum. States that found meaningful ways to **engage stakeholders** of all kinds were much more successful at enacting changes and advancing their work.

**Importance of third-party facilitator:** **Changes to licensing and regulatory structures** are often **bipartisan** issues, appealing to both Democrats and Republicans for many of the same reasons. However, the partisan nature of many state legislatures and executive offices and **distrust from regulatory agencies or boards** created tension in many consortium states. Most states found that having a neutral third-party convener, such as NCSL, NGA and CSG, helped bring all stakeholders to the table, diminish feelings of mistrust or partisanship, and support meaningful and thoughtful licensing and regulatory changes. Furthermore, the partner staff also brought background knowledge on licensing policy and practice to the table, allowing each state team to work one-on-one with an expert facilitator

**Peer-to-peer learning:** Throughout the project, **state teams consistently ranked peer-to-peer discussions**, whether through meeting breakouts, facilitated phone calls or unstructured networking, as extremely valuable to their work. Hearing from their peers in other states on challenges, successes and hiccups helped many state teams address problems before they arose or identify new approaches to their outlined goals

**State technical assistance:** Along with annual multistate convenings, the consortium states also received in-state convenings and technical assistance. Led by the state teams, the technical assistance was often an opportunity to bring together a larger stakeholder group from the state to hear from experts and other states. Multiple times, experts or partner staff were brought in to testify before legislative committees



## LESSONS LEARNED FROM THE OCCUPATIONAL LICENSING CONSORTIUM

<https://www.ncsl.org/research/labor-and-employment/occupational-licensing-final-report-assessing-state-policies-and-practices637425196.aspx>

**Sunrise and sunset processes:** States with **sunrise and sunset measures** provide policymakers with **valuable tools** to evaluate proposed and existing regulations. The processes examine costs and benefits and state-by-state comparisons and feature data-driven analysis. Multiple consortium states without such measures in place pursued creating them during the project

**Institutionalizing efforts:** Realizing that changes in leadership and staff happen often, several states found ways to institutionalize their efforts. They did so either through formal approaches, such as creating sunset and sunrise review commissions, or informal approaches, such as **regular stakeholder meetings** or working groups

**Focus on targeted occupations:** Although many states have experienced success in enacting broad policy actions, impacting nearly all licenses in a state, others found success in focusing their work on tailored approaches to reducing barriers. **Political challenges and industry-specific factors create obstacles in moving broad licensing efforts**. Consortium states found that focusing on a handful of occupations ensured they had the right people at the table and enough resources to ensure all considerations and policy options were considered.

**Efforts for population groups:** Most consortium states identified population groups for which they aimed to reduce barriers early in the project. The two groups that received the most attention were **military veterans and spouses** and **people with a criminal record**. Although the barriers may differ, states learned that a best practice for one population group, such as reduced or waived fees, can often also be a successful approach for another.

# Parting Tips



**Provide governance training, cultural competency training to board and staff**



**Remind board and staff to confer with counsel early and often**



**Tell your board and staff to seek advice perhaps in writing, perhaps in the form of an AG opinion or**



**declaratory judgment. Advise your board and staff to confirm and know their authority**



**Review your laws and rules often to eliminate redundancies, non-evidence based and unnecessary provisions and to ensure scopes of practice are articulated thoroughly**



**Craft policies that require your board to fulfill duties of care, good faith, loyalty, etc.**



**Be proactive in training applicants and licensees how to be compliant and be creative in how you settle cases and rehabilitate practitioners= REGULATE IN THE MOST NARROWLY- TAILORED MANNER POSSIBLE TO TRULY PROTECT THE PUBLIC**

# Thank You

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