



Legislative Background Brief

for the
Economic Affairs Interim Committee

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Board, Licensing Options

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Professional and occupational licensing does not require having a board of peers to oversee regulation of the profession. However, in most cases the licensees prefer to have regulations put into place by those in the profession. There are benefits to licensing that do not rely on having a board and there are benefits to a board that licensees are willing to pay for. There are additional considerations related to being part of a government bureaucracy. This briefing paper will look at:

- the benefits of licensing;
- the benefits of having a board;
- options for licensing but not having a dedicated, single profession board;
- options of being regulated directly by statute with self-executing statutory compliance requirements and enforcement reliant on consumer complaints;
- issues related to government involvement in licensing and enforcement; and
- a history of the boards' evolution from more independence to more streamlined control through administrative attachment.

Benefits of licensing

Licensing provides benefits both for the public and for the licensee.

- *Public* -- Licensing, whether known by the terms certification, registration, or licensing, provides the public with assurance of a certain minimum skill level held by all licensees. Continuing education requirements imposed by many (not all boards if allowed by statute) provide assurance to the public that licensees' knowledge is up-to-date.
- *Licensee* -- The recognition conveyed through a professional license can be financially beneficial through advertising and billing. Some professionals are allowed to bill insurance because they are licensed.

Benefits of having a board

- *A forum for complaints* -- A board consisting of licensed peers and usually one or more public members provides a forum for the public or other licensees to complain about a licensee.
- *A regulatory body* -- A board can set guidance for the profession's practice in Montana. The scope of practice allowed to a profession

sometimes is set in statute, but generally is set in rule, which the board itself adopts. Adoption of a scope of practice by those self-interested sometimes causes problems when professions overlap as to what each profession allows its practitioners to do. For example, chiropractors allow licensees to sell nutritional supplements, which licensed nutritionists contend is a practice that violates their own scope of practice.

Often the guidance adopted by a board mirrors that of national organizations affiliated with the profession. Sometimes more than one type of national organization exists, each with a different philosophy. The Montana board may side with one of the philosophies, differentiating it from other state boards.

Rules adopted by boards consisting of the regulated licensees are more likely to reflect pertinent standards than rules adopted by a department without input from licensees.

Options for licensing without a dedicated, single-profession board

- ***Programs, not boards***

The Department of Labor and Industry's Business Standards Division currently has two programs that do not involve a board: the Athletics program for boxing and mixed martial arts and the Licensed Addiction Counselors program. Similarly, crane operators, hoist engineers, boiler operators, and elevator mechanics must be licensed but do not have boards for oversight. The Department of Labor and Industry has said in the past that, in general, programs cost about the same as with a board. The burden of oversight falls on the department.

Other professionals not under the Department of Labor and Industry also may receive certificates or licenses to practice but do not have boards. Among the biggest professions that receive certificates or licenses to practice are teachers and attorneys. Neither has a "board" per se, although the Board of Education certainly regulates teachers' activities and the Montana Supreme Court regulates attorneys' practices. A selection of other certified or licensed professionals without a board is listed in Table 1.

Table 1: Selected professionals licensed to practice or with certificates but without a board

Professional	Practice authorization	Regulatory Oversight
Justice of the peace	<ul style="list-style-type: none"> Issued a certificate after completing course prescribed by the Commission on Courts of Limited Jurisdiction 	<ul style="list-style-type: none"> Certificate must be filed with the County Clerk. Commission on Courts of Limited Jurisdiction
Water and wastewater treatment plant operators	<ul style="list-style-type: none"> Issued a certificate of competency by the Department of Environmental Quality 	<ul style="list-style-type: none"> Advisory Council assists department as advisors on qualifications of plant operators DEQ sets rules and continuing education requirements (37-42-202, MCA)
Construction blaster	<ul style="list-style-type: none"> Licensed by Department of Labor and Industry under Title 37, ch. 72. 	<ul style="list-style-type: none"> Department of Labor and Industry adopts rules for licensing and training.
Elevator contractors, mechanics, and inspectors	<ul style="list-style-type: none"> Licensed by Department of Labor and Industry under Title 37, ch. 73. 	<ul style="list-style-type: none"> Department of Labor and Industry adopts rules.
Crane operators, hoisting engineers	<ul style="list-style-type: none"> Licensed by Department of Labor and Industry under Title 50, ch. 76. 	<ul style="list-style-type: none"> Department of Labor and Industry adopts rules.
Boiler and steam engine operators	<ul style="list-style-type: none"> Licensed by Department of Labor and Industry under Title 50, ch. 74 	<ul style="list-style-type: none"> Department of Labor and Industry adopts rules.
Contractors	<ul style="list-style-type: none"> Construction contractors required to register with the Department of Labor and Industry. 	<ul style="list-style-type: none"> Registration provides limit on liability for those who hire registered contractors 39-9-207, MCA.
Family or group child day-care homes	<ul style="list-style-type: none"> License and registration by the Department of Public Health and Human Services 	<ul style="list-style-type: none"> Department of Public Health and Human Services under Title 52, chapter 2.
Community home for persons with severe disabilities	<ul style="list-style-type: none"> Certified by Department of Justice for fire and life safety. 	<ul style="list-style-type: none"> Department of Public Health and Human Services under Title 52, chapter 4.
Long-term care facilities	<ul style="list-style-type: none"> Certified by Department of Public Health and Human Services 	<ul style="list-style-type: none"> Department of Public Health and Human Services under Title 53, chapter 6.

Developmental Disabilities Professionals	<ul style="list-style-type: none"> • Certified by Department of Public Health and Human Services 	<ul style="list-style-type: none"> • Department of Public Health and Human Services under Title 53, chapter 20.
Professional person treating seriously mental ill persons*	<ul style="list-style-type: none"> • Certified by Department of Public Health and Human Services 	<ul style="list-style-type: none"> • Department of Public Health and Human Services under Title 53, chapter 21.
Fish and game wardens	<ul style="list-style-type: none"> • Certified by the Department of Fish, Wildlife, and Parks 	<ul style="list-style-type: none"> • Department of Fish, Wildlife, and Parks under Title 87, chapter 1.

Shaded areas in Table are included because of similarity to Private Adolescent Alternative Residential and Outdoor Programs

*Includes doctors, advanced practice registered nurses, and psychologists but can include a person other than those certified by DPHHS.

As noted in Table 1, water and wastewater treatment plant operators receive certificates from the Department of Environmental Quality, which uses an advisory council (rather than a board) along with a continuing education credit review committee. The Department of Natural Resources and Conservation is one of the other departments outside Labor and Industry that licenses a profession. DNRC oversees the Board of Water Well Contractors. That profession is not listed in Table 1 because the board actually exists. Water well contractors are licensed under Title 37, chapter 43. As also can be seen from Table 1 there are some entities licensed by the Department of Public Health and Human Services, which are included because of their similarity to the entities licensed under the Board of Private Adolescent Alternative Residential and Outdoor Programs.

• ***Multi-profession boards***

In the 2011-2012 interim, the Economic Affairs Committee heard from denturists and dental hygienists about their frustration with being together on one board with dentists but with unequal representation. Dental hygienists and dentists both have roughly the same number of licensees but the 10-member board has five dentists and two dental hygienists, one denturist, and two public members. In contrast to the arguments about unequal representation on that board, the Board of Medical Examiners has few similar complaints perhaps because none of the nonphysician licensees have similar numbers to the physicians in Montana. The Board of Medical Examiners licenses multiple professions from physicians to nutritionists and acupuncturists. The 13-member board has five physicians and one osteopathic doctor plus single representatives of five other occupations and two public members.

Other professions that combine under one board generally with few controversies include:

- social workers, professional counselors, and marriage and family

therapists under the Board of Social Workers and Professional Counselors. No marriage and family therapists are represented on the 7-member board, although the department's proposed legislation, HB 133, had added them. That bill did not pass.

- speech-language pathologists and audiologists are under the Board of Speech-Language Pathologists and Audiologists;
- morticians, cemetery operators, and crematory operators are under the Board of Funeral Services;
- naturopathic physicians and direct-entry midwives are under the Board of Alternative Health Care;
- barbers and cosmetologists (which include hairdressers, manicurists, estheticians, and electrologists) are under the Board of Barbers and Cosmetologists. The Board of Barbers was merged into the Cosmetologists Board in 2003.
- real estate brokers (salespersons, etc.) and property managers are under the Board of Realty Regulation; and
- professional engineers and professional land surveyors are under the same Board of professional engineers and professional land surveyors.

Having multiple professions under one board is one way of keeping licensee costs lower than if the licensees all had separate boards. A multiple profession board also may benefit by having information from experts in related fields. In contrast, as evidenced by the problems conveyed to the EAIC in the 2011-2012 interim, licensees under the Board of Dentistry struggle over "turf", which is exacerbated for licensees not in the majority because of a dominance of board positions held by dentists compared with those held by dental hygienists and denturists. A similar problem exists for the Board of Funeral Service, which has a majority of morticians on the board with some complaints arising related to crematory operations. Board membership allows one crematory operator or technician or a mortician who runs a crematory.

Use of separate boards, however, does not necessarily resolve "turf" problems because conflicts may arise when one profession's board adopts a scope of practice that another profession considers under its domain. Other than filing a protest during the rule adoption process, the only other administrative option is to request that the department convene a joint meeting with the other board under 37-1-107, MCA. Legislative options to limit scopes of practice also are a possibility.

Saving money by being under one board was one of the ideas behind the legislature suggesting in 2005 that the Board of Architects and Board of Landscape Architects be merged. However, the department has continued to keep budgeting separate for the two professions, although no statute requires separation. The landscape architects pay \$250 to renew a license while architects pay \$55 for license renewal. Costs are kept separate, as indicated by the Legislative Financial Audit of the Department of Labor

and Industry, which listed both a Board of Architects and a Board of Landscape Architects, each of which had cash balances in Fiscal Years 2012 and 2013 that were more than twice the appropriation.

"Self-Executing" Statutes Enforced Through Consumer Complaints

A few professions exist that operate under statutes without any sort of regulation regarding complaints other than the consumer's ability to sue for violation of contract or unprofessional conduct. Among these are: contractors, home inspectors, and sellers of wheelchairs. The latter two provide various requirements that home inspectors (Part 10) or wheelchair manufacturers (Part 12) are to meet. Failure to meet those requirements means that a consumer can call on the Department of Justice to exercise its authority under Title 30, chapter 14, regarding Unfair Trade Practices and Consumer Protection. The Unfair Trade Practices and Consumer Protection Act (part 1) authorizes the Department of Justice to

investigate, issue injunctions, or initiate court actions against a person or company engaged in unfair methods of competition and unfair or deceptive acts or practices (as described in 30-14-103, MCA).

Construction contractors must register with the Department of Labor and Industry, but none of the statutes in Title 39, chapter 9, covering contractor registration actually provides any

Hearing Aid Dispensers and Consumer Protection

During the 2011-2012 licensing board review, the Economic Affairs Committee asked the Department of Labor and Industry and the Department of Justice whether a solution to the Board of Hearing Aid Dispensers' budgetary problems might be found using DOJ's Office of Consumer Protection. The Board's fiscal troubles were attributed to high legal fees arising because a few dispensers either were unlicensed or refused refunds required by law.

At the last meeting of the Economic Affairs Committee in 2012 DOJ and DOLI suggested using a memorandum of understanding to allow the Board of Hearing Aid Dispensers to team up with the Consumer Protection Office to pursue miscreants. The EAIC said that if DOLI needed a bill draft request to help provide a legislative solution that they could have one. DOLI did not act nor did any legislator during the 2013 interim, and the Board of Hearing Aid Dispensers is back before the EAIC with the same financial problems. Licensees pay \$1,000 a year for a license but are unable to stay within budget in part because of unlicensed practice complaints (hearing aid dispensers not paying the \$1,000 licensing fee) and a few bad actors unwilling to follow refund laws.

Currently both the Board of Hearing Aid Dispensers and DOJ respond to consumer complaints. The board can penalize licensees and push refunds, while DOJ focuses mainly on getting the refunds. One legislative solution suggested was to allow the Board of Hearing Aid Dispensers to retain fines, which now go into the general fund so that the "bad actors" pay the costs of prosecution. Currently the cost of bad actors is imposed on licensees.

consumer protection for a contractor's failure to execute a contract as expected. One statute, 39-9-207, MCA, provides that a person who hires a registered contractor is not responsible for workers' compensation, unemployment insurance, or fringe benefits.

Issues related to government involvement in licensing

Among various issues related to the government being involved in licensing, at least in Montana, are the costs of licensing to pay for the government administrative and regulatory bureaucracy. Without all the work involved in verifying a licensee's application data and continuing education credits, etc., the license itself may cost only the value of the paper on which it is printed. But the costs of regulation and administration also are built into the cost of a license. Other costs covered by a license include whatever the board, if there is one, determines is necessary for the good of the profession. This may include paying for board members or board staff to stay abreast of national changes in the profession by attending national conferences hosted by professional associations, although nothing in statute specifically says these charges may be included. Table 2 provides an indication of what costs boards assess and what costs the department assesses.

Table 2: Budget Determinations by Department, by Board

<i>Department</i>	<i>Board</i>
<ul style="list-style-type: none"> • Submits budgetary requests to the governor's office (2-15-121(1)((b) and (2)(b) • Directs and supervises the budgeting, reporting, and related administrative and clerical functions, including standardized fees for license verification and other administrative services. • Assesses the cost of the department on an equitable basis as determined by the department. 37-1-101(6) "May" equitably distribute administrative service costs not related to a specific board or program (37-1-134, MCA) • Collects revenues • Provides staffing and office space • Handles rulemaking and associated costs. 	<ul style="list-style-type: none"> • Pays to the department the pro rata share of costs assessed by the department (37-1-131(1)(e) and 37-1-101(6)) • Sets fees commensurate with costs for licensing, reciprocity, renewals, applications, audits, inspections, and examinations, plus endorsements or specialty licenses if applicable. (37-1-134, MCA)

For the purpose of understanding better the department's role in assessing its costs for administrative attachment, this paper will highlight:

- the indirect costs associated with administrative attachment; and

- regulatory differences arising from being attached to agencies other than the Department of Labor and Industry.

- **Indirect costs**

The Department of Labor and Industry is responsible for submitting board budgets to the Governor's Office to obtain appropriation authority for each board's spending (2-15-121, MCA). As Table 2 indicates, the department is to set standardized fees for a host of licensing-related costs, including verifications, late renewal fees, and other administrative service fees that the department determines as applicable to all boards and programs. In the past these other service fees have included the cost of new computer programs. Since 2003 the department has worked to develop an equitable cost allocation for the boards. The process involves assigning a percentage of direct costs to managers whose time constitutes indirect costs. More explanation is available in a report written by Kris Wilkinson of the Legislative Fiscal Division. See: <http://leg.mt.gov/content/Committees/Interim/2013-2014/Economic-Affairs/Meetings/August-2013/BSD-cost-allocation.pdf>.

Information is available for each board being reviewed under 37-1-142, MCA (the HB 525 bill from the 2011 session), regarding direct and indirect costs in the board's budget expenditures. A sample is in Table 3. (All board data is listed under the June 25, 2013, Meeting Materials: <http://leg.mt.gov/css/Committees/Interim/2013-2014/Economic-Affairs/Meetings/June-2013/june-2013.asp>.)

Table 3: Direct/Indirect Expenditures for Private Alternative Adolescent Residential or Outdoor Programs

Expenditures, FY 2012	Direct	Indirect			
		Admin	Div. IT/Bureau	Compliance	Bureau
Personal Services, incl. per diem	\$9,345	\$2,857	\$9,977	\$3,989	\$919
Operating Expenses					
Consulting, Printing, IT, Other	\$399			\$969	
Supplies, incl. Computer	\$1,086			\$398	
Postage, mailing, IT network, voice srv	\$105			\$570	
Travel/Per Diem for Board Members	\$1,065				
Rent and other expenses*	\$1,548			\$3,430	
Legal and hearings	\$21,139				
Total (may be affected by rounding)	\$34,687			\$23,109	

*Includes sq. footage rent of \$1,228, computer/office equipment repair of \$52, and dues, education & training, and fee collection expense of \$267 for direct expenses and pro-rated meeting rooms and computer/equipment repair of rent of \$4, DLI OIT expense of \$1,381, and indirect agency of \$2,044 for indirect expenses.

An analysis by the Legislative Fiscal Division for the Aug. 21, 2013, Economic Affairs Committee meeting provided numbers of full-time equivalent employees that are direct and indirect along with the costs for Fiscal Years 2014 and 2015. Table 4 shows for the board management bureau that 69.4% of the costs of board management are indirect costs and that the indirect FTE positions for board management account for one-third of the number of employees in that bureau. In sum, in that bureau one-third of the people generate two-thirds of the costs. The Organizational Chart shows that the people in this bureau are either administrative specialists or executive officers. One type of administrative specialist handles meeting and travel arrangements and another type prepares board books and minutes. The executive officers establish agendas and also identify national and state trends and issues.

Table 4: Indirect FTEs for Boards and Share of Line*/Total Costs

	Indirect FTEs	Share FTEs	% of Line/Total Costs
Administration	7	100%	100% / 7.96%
Board Management	9.56	32.96%	69.3% / 15.57%
Compliance	4.4	23.2%	23.47% / 4.55%
Information Technology	6.55	65.43%	65.33% / 8.56%
Licensing	6.59	27.42%	31.59% / 6.79%

*Share of line costs means the portion that the indirect costs are of the total costs for board management or for compliance or IT or for licensing.

- **Assignment to Department of Labor and Industry instead of another department**

The philosophy behind almost all licensing boards being in the Department of Labor and Industry has been that having one department handle license applications and complaints would provide economies of scale and concentration of knowledge about licensing concerns and even about the occupations being licensed. With the recent reorganization, some of the licensing board members protested that they had lost expertise because their particular licensing specialist or program administrator was moved to other areas. The Board of Realty Regulation and the Board of Public Accountants, in particular, saw advocates in their respective areas push legislation to separate more of their boards' functions from the department's oversight. HB 363 regarding the Board of Realty Regulation and HB 582 for the Board of Public Accountants both won legislative approval but did not have enough votes to overcome vetoes.

Reorganization raised concerns about continuity suffering at the expense of improved efficiencies and cross-training. These questions remain as many board members who have experienced several changes of administration have watched revolving methodologies affect forward progress for boards that often meet no more than three or four times a year. Some boards' members see repetition instead as

processes are revised at the administrative level or staffing changes because some staff no longer is closely aligned with a particular board. (Some of the changes in administrative methodologies will be discussed in the next section on history of occupational licensing.)

What is discussed less often because of the goals of improved efficiencies is whether the Department of Labor and Industry is the appropriate department for all licensing boards. As indicated in Table 1, some licensing functions fall under other agencies. What is particularly germane for the licensing boards is that they, in essence, fund all the costs of regulation for themselves. Only two boards actually license facilities rather than people, although the Board of Barbers and Cosmetologists also licenses the professionals working in the facilities. The Board of Private Alternative Adolescent Residential or Outdoor Programs licenses only facilities, however. The people who work in the residential or outdoor programs may or may not be professionals licensed by other licensing boards. For boards that license facilities the question is whether the costs of licensing a facility and whatever inspections may be required is more of a police function of the state with a broader public purpose. For example, a day care facility licensed by the Department of Public Health and Human Services may serve a public function not just a commercial one. So the question becomes at what point do legislators see a public function at the heart of regulation, which is done partly through licensing and an indication that self-regulation may not be adequate to maintain public safety. For those types of facilities, a general fund cost may be appropriate. The debate during creation of the PAARP licensing board included whether to put the licensing under the Department of Public Health and Human Services or with the Superintendent of Public Instruction. The legislator who carried the bill and many of the prospective licensees insisted on licensing and regulation handled by a board of peers rather than by a regulatory agency. However, this board, too, is finding not as many licensees as expected, which has resulted in financial problems for the board.

History: Independence to Consolidated Administrative Attachment

One of the earliest reports by the Legislative Council addressed the organization and administration of state government, including the status of professional and occupational licensing boards. A 1960 report included an organizational chart showing 17 professional and occupational licensing boards directly under the governor with the Sanitarians Registration Council somewhat freestanding.¹

In 1965 the Legislature passed Senate Joint Resolution No. 12 asking for a study of professional and occupational licensing boards. The resulting 1966 report by the Legislative Council referenced SJR 12's description of some of the problems that had arisen with these independent boards:

¹The boards in 1960 were: State Board of Dental Examiners, State Examining Board of Beauty Culturists, State Board of Veterinary Medical Examiners, Board of Plumbing Examiners, Board of Examiners in Accountancy, Board of Chiropody Medical Examiners, State Board of Pharmacy, State Board of Nursing, State Board of Chiropractic Examiners, State Board of Osteopathic Examiners, State Board of Registration for Professional Engineers and Land Surveyors, Board of Embalmers and Funeral Directors, Abstractors Board of Examiners, Board of Architectural Examiners, Board of Barber Examiners, Board of Medical Examiners, and State Board of Examiners in Optometry. Since 1960 some of these boards (chiropody or podiatrists, for example) have combined with other boards (the Board of Medical Examiners for podiatrists) or disappeared (the Abstractors Board of Examiners).

"The resolution noted that many of the boards do not have adequate clerical staff, that because of inadequate staff board members are often required to perform clerical duties, that there is duplication of effort in administrative functions because each board must have a secretary for clerical duties, that administrative consolidation would enhance the possibility that adequate clerical staff would be available, and that many states have in some degree centralized licensing functions.²

On the heels of a 1970 report by the Montana Commission on Executive Reorganization and passage of a constitutional amendment limiting the executive branch to not more than 20 departments, the Legislature in 1971 reorganized Montana state government. One result was to create a department specifically to handle the licensing of professions and occupations. In 1981 the legislature merged that department, the Department of Professional and Occupational Licensing, with certain functions of the Department of Business Regulation and renamed the new entity the Department of Commerce. At that time 31 boards existed. The next reorganization occurred in 2001 when the legislature through SB 445 transferred licensing boards to the Department of Labor and Industry as part of a reorganization that focused the Department of Commerce more on economic development than on business regulation. After a legislative performance audit in 2004 a department bill requested the 2005 Legislature to change the way the department and boards interact and streamlined department activities on behalf of boards while boards retained policy direction. House Bill No. 182 passed with strong support from both houses. Among the changes that strengthened the department's administrative functions and particularly consolidated licensing and renewal processes were:

- authorization for the department to handle routine license applications, as defined by boards;
- a requirement in 37-1-101, MCA, for the department to establish policies and procedures to set fees for administrative services commensurate with the cost of provided services. A separate section, 37-1-134, MCA, noted that boards set "board fees" and the department may establish standardized fees for such services as license verification and "other administrative service fees determined by the department as applicable to all boards and department programs."
- a requirement for the commissioner of labor and industry to establish the qualifications of all personnel hired for boards, although consultation was required for qualifications for executive or executive director positions;
- authorization for the department to set license renewal dates (previously boards usually set the dates). This provision has caused some licensees to complain because what works well for a biennial budgeting period does not always coincide with periods used by other states or by associations for license renewal cycles or continuing education credits.

Summary

The long history of licensing professionals has had benefits for both the professionals themselves and for the public when regulation is seen as a way for improving the services offered by the professionals and not as a way of limiting competition among

²Montana Legislative Council, "Professional and Occupational Licensing Boards", Report No. 19, November 1966.

them. In exchange for the benefits bestowed by licensing, professionals often are able to self-regulate through a board of their peers. In some cases, the self-regulation is done solely through statute and does not involve a board. In most cases the professional licensing boards are under administrative attachment to the Department of Labor and Industry. But other departments also license professionals and facilities. There are costs and benefits for having most professional boards under the Department of Labor and Industry. Some of the costs continue to be debated but in general the process is still evolving and benefitting from the input of licensed professionals who give up their work time to improve their profession.

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