



Levels of Occupational Regulation

Occupational regulation refers to a regulatory intervention applied to an occupation that balances individual economic opportunity with ensuring public health and safety. The regulation of an occupation can occur through government or nongovernmental interventions at varying levels.¹ The regulatory options for an occupation are broad and vary from non-regulation (market competition) to licensure (the most restrictive form of regulation that protects occupational title and scope of practice).

In 1889, the U.S. Supreme Court ruled that it was within a state's right to regulate health care professionals to ensure the welfare of the people and protect them from impaired or incompetent professionals.² Since that time, states have grappled with finding appropriate levels of regulation for occupations that protect "the public's health and safety by increasing the quality of professional's services through mandatory entry requirements, such as education."³ While occupational regulation occurs in many sectors, health care occupations experience a greater prevalence of certification or licensure as compared to other sectors as such state regulation commonly serves to ensure individuals have met certain education or training standards before being permitted to provide health-related services to the public.^{4,5}

Unfortunately, variations in terminology make defining and comparing regulatory schema within and across states and territories difficult. The following definitions may be used to describe varying levels of regulation (Note: only the most frequent regulatory options for health care occupations are defined here – other occupational types may exist).⁶ For example, some states may be using the terminology "certification" but in reality, individuals are required to obtain that credential prior to engaging in a certain scope of services. In these instances, although the term "certification" is used in the title, the type of regulation is licensure.

What is the role of the Governor as it relates to levels of occupational regulation?

Terminology in occupational regulation can be confusing. In many instances, a profession type may be referred to as a "Certified [occupation]" when in reality, it is a required certification in order to provide certain services, and should be considered a License. When it comes to the potential role for governors and administrations, it may be helpful to adopt common language or definition within state code or guidance documents. Standardized language and resources would be helpful to both licensing entities/boards and individual citizens alike.

	License	Certification	Registration
Title Protection	Yes	Yes	No
Scope Protection/ Required to Engage in Practice	Yes	No	Yes

LICENSE

A form of state governmental regulation that restricts the title and practice of an occupation to only those individuals who receive licensure as set forth by state guidelines. Licensed individuals are held accountable by a state-appointed regulatory body to meet established standards. Protecting the health and safety of consumers and ensuring a sufficient level of service quality is the main rationale for occupational licensing.⁷ Licensing has been upheld as a mechanism for administering and enforcing standards among the health professionals within a state. Licensing defines the educational and experiential requirements for entry into the profession and outlines the scope of services/ practice associated with professional practice.

According to Nebraska code, "Licensure is considered the most appropriate form of regulation when four conditions are present:

- There is sufficient potential harm to the public to justify state restricted entry,
- When practitioners are highly independent and cannot be closely supervised,
- When the scope of practice can be clearly and succinctly defined enough so that its action are easily distinguishable from those of other regulated professions, and
- When the acts constituting the scope of practice are not predominantly functions that are generally considered part of the public domain."⁸

Notably, there may be some occupations within states that are given the distinction of "certification" or "certified," but the regulation of these occupations is licensure. For example, states commonly refer to state-regulated nursing assistants as "certified nurse aide" or a similar title. In reality, individuals must obtain this "certification" in order to provide certain services in a federally regulated setting (generally a nursing facility). Therefore, because of the protection of title (one must obtain this credential in order to be referred to as a "certified nurse aide") and protection of practice scope (one must obtain

this credential in order to provide related services), in the instance of nursing assistants serving in federally regulated settings, individuals are required to obtain a level of regulation that is more synonymous with a license in order to practice in that setting. Therefore, while titled “certified nurse aide,” these individuals are working in licensed occupations.

Additionally, the Supreme Court decision *Dent v. West Virginia* upheld the State of West Virginia’s authority to require physicians hold a state physician license in order to practice medicine within West Virginia.⁹

Finally, in June of 2020, the Federal Trade Commissioner released remarks which acknowledged the justification of the need for licensure in many instances within the healthcare sector.¹⁰ It is important to note that this report also acknowledges the importance of states and territories ensuring policies that support portability of professionals once entry requirements have been met. (See *State Policies Options to Support License Portability* for more information).

Examples of health occupations that fall under this level of regulation: Physicians, nurses, dentists, dental hygienists, nurse practitioners, physician assistants, behavioral health practitioners, and many others.

CERTIFICATION

Certifications are always voluntary and are not required to engage in practice. However, only an individual receiving a certification may use the title of “Certified [occupation title].” Certifications are generally used by states or territories when a state has deemed the services provided by an occupation do not mandate a credential review prior to providing the service, but that a credential review and associated designation may offer certain practitioners a distinction that promotes marketability of the professional’s qualifications to the general public or enable access to certain benefits such as Medicaid reimbursement.

Certification is frequently utilized in one of two forms: state certification and industry certification. These certification options are described below:

STATE CERTIFICATION

A form of state governmental regulation that restricts the title of an occupation but not the practice, enabling entry into this occupation by many professionals but enabling distinction of certain professionals that have met certain criteria that may enable access to certain benefits, such as the ability to reimburse services through Medicaid. State certification is

voluntary for individuals to engage in practice associated with this occupation. However, only a state certified practitioner may use the title of “certified” practitioner. This form of regulation is generally appropriate when:

- There is some level of potential harm to the public (although less serious than the potential harm which results in licensure, as if an individual’s state certification is revoked, he/she would not lose practice privileges).
- The employer is able to make an informed choice of employee/provider based on certification status. In general, health sector employers are aware of the value of a state certification and set employment standards based on certain credentials.

Of note, a state may defer to a private, non-governmental association to credential individuals on behalf of the state. In this case, the certification would be classified as “state-approved certification.” This may be the case among certain non-licensed behavioral health occupations, such as peer specialists, to enable certified individuals to qualify for Medicaid reimbursement.

Current examples of health occupations that fall under this level of regulation: nursing assistants, direct support professionals, dental assistants..

INDUSTRY CERTIFICATION

A form of non-governmental regulation in which a non-governmental entity offers certification based on education, experience, and/or membership. “Industry” certification is a regulatory option where credentials are driven by the skill needs within an industry/group of employers. Of note, industry certifications may be used in combination with another form of regulation, such as the case of physicians. While physicians generally receive a medical license from the state, they generally also maintain the board certifications associated with their specialty (industry), which are valued by their employer or contracting organization.

Current examples of health occupations that fall under this level of regulation: Certified Medical Assistants (ex. “Certified Medical Assistant” as designated by the American Association of Medical Assistants), Certified Phlebotomy Technicians (ex. “Certified Phlebotomist” as designated by the National Phlebotomy Association), etc.

REGISTRATION

A form of governmental regulation where an individual has to simply notify the state government of their name, address, and services provided before they can work. This creates a list of individuals that provide certain services, but does not require the individual to provide any type of proof of training/credentials in order to be on the list.

Registration is not generally used in health care, but is commonly used for some non-health professions, such as construction-related contractors. Other levels of regulation are more common as they include a verification of training (ex. Licensure or state certification) or some other mechanism whereby training is provided (ex. Industry certification).

REGISTRATION VS. REGISTRY

“Registration” is not synonymous with “registry.” “Registration” is a level of occupational regulation that simply requires individuals engaging in a certain practice (or providing certain services) to maintain their name on a list. In contrast, a “registry” simply refers to a list of individuals and does not necessarily have any correlation with the level of occupational regulation. In fact, many levels of regulation require that a registry be maintained for individuals. For example, physicians, while generally regulated at the level of “licensure” are also added to a state’s public facing “look-up” features, where their information is maintained on a registry of active physicians. The same is generally true of state “certified” individuals.

¹ Ross JK. (2017). The Inverted Pyramid: 10 Less Restrictive Alternatives to Occupational Licensing

² Dent v. West Virginia, 129 U.S. 114, 122 (1889).

³ Cox C, Foster S. (1990). The Costs and Benefits of Occupational Regulation. Available at: https://www.ftc.gov/system/files/documents/reports/costs-benefitsoccupation-al-regulation/cox_foster_-_occupational_licensing.pdf

⁴ Department of Labor, Bureau of Labor Statistics. (2017). Household Data, Annual Averages, Certification and licensing status of the employed by occupation, 2017 annual averages. Available from: <https://www.bls.gov/cps/cpsaat53.pdf>

⁵ Note: the Department of Labor defines the categories of “certification” vs. “licensure” as: “Certifications are issued by a non-governmental certification body and convey that an individual has the knowledge or skill to perform a specific job. A license is awarded by a government agency and conveys a legal authority to work in an occupation.” per <https://www.bls.gov/cps/cpsaat53.pdf>

⁶ Additional regulatory options exist and may be found at: http://ij.org/wp-content/uploads/2017/11/InvertedPyramid_FINAL_cover.pdf

⁷ Kleiner MK. (2015). Reforming Occupational Licensing Policies. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/thp_kleinerdiscpaper_final.pdf

⁸ Nebraska Credentialing Review Program. Available at: <https://dhhs.ne.gov/licensure/Pages/credentialing-review.aspx>

⁹ Dent v. West Virginia, 129 U.S. 114, 122 (1889).

¹⁰ Occupational Licensing in Health Care: Sorting the Wheat from the Chaff. Christine S. Wilson.