

LEVELS OF STATE REGULATION OF HEALTH PROFESSIONS

Three levels of direct state regulation beyond inspection are defined by LB 407. These are licensure, state certification, and registration.

Licensure

Licensure is the most restrictive form of state regulation. Licensure requires the careful and complete definition of a scope of practice, a set of acts that constitutes the practice of the profession. Once the profession is licensed, it has the exclusive right to engage in this scope of practice and to use the title incident to this practice. Only a licensed member of the profession, or a person specifically exempted by the licensure statute, may practice the profession. The function of licensure is highly restrictive: it identifies persons who may practice the profession, and everyone else is excluded from practice privileges.

Licensure is usually the most appropriate form of regulation when four conditions are present. First, when there is sufficient potential harm to the public to justify the state's restricting entry into the practice of a previously unregulated field. Second, when practitioners generally are highly independent and cannot be closely supervised. Third, when the scope of practice can be clearly and succinctly defined enough so that its actions are easily distinguishable from those of other regulated professions. Fourth, when the acts constituting the scope of practice are not predominantly actions that are generally considered part of the public domain.

State Certification

The next level of regulation to be considered is state certification. A proposal for state certification may resemble very closely one for licensure. Almost all of the provisions may be identical, with one critical distinction: state certification is always voluntary. The scope of practice is not

restricted only to certified practitioners; anyone may practice these acts without regulation of any kind. However, only the state certified practitioner may use the distinctive title, as specified in the act itself, that identifies certified practitioners. Therefore, state certification may be seen as a consumer awareness mechanism. Both certified and non-certified persons may perform the services involved, and the purchaser of the services has a powerful tool--the knowledge of state certification--to assist him or her in making the choice of practitioner.

Again there are tests for appropriateness. Certification by the state is less restrictive than licensure in that the loss of certification for cause would not entail loss of practice privileges. A person whose state certification was revoked or denied could still practice, but could not use a protected title in doing so. Thus, the test of harm is less stringent for state certification, although still necessary. The second test is whether the employer of the practitioner or the direct purchaser of the practitioner's services will be able to make an informed choice of provider using the knowledge of the distinction between certified and non-certified practitioners. In professions where most members are employed by institutions, agencies, or other large organizations, this test is usually met. Such employers are generally quite aware of the significance of different levels of regulation, and are accustomed to setting employment standards based on the possession of appropriate credentials. In professions where practitioners advertise and offer their services directly to the public, the test becomes more complex. Normally the public will not be aware of the difference between a certified and a non-certified practitioner, and such distinctions can often be obscured by advertising. Frequently state certification, to meet this test, will need to entail a public relations

campaign to educate consumers about the difference. And even then the nature of the services offered or the nature of the clientele served may render such a level of regulation inoperable.

State certification should not be confused with other credentialing practices using the term certification. For example, many private associations offer certification based upon education and/or experience, as well as membership in the association. While valuable in their own right, such certifications are not regulated by the state and therefore cannot be subject to discipline through public processes. In the educational community certification is a state-granted means of ensuring minimum standards in a teaching area. State certification of a health care profession is somewhat analogous to this, except that such certification in education is normally mandatory.

Registration

The least restrictive form of state regulation is registration. As defined by LB 407, registration involves nothing more than requiring an individual to inform the state that he or she is engaging in practice. It is frequently described as licensure without prerequisites for entry.

Registration is an option for occupations where the potential harm to the consumer is low, and where there are many possible paths of entry into the occupation.

When registration is imposed it is made mandatory for practice, and penalties for failure to register are provided, but there is no prerequisite requirements for registration. This allows the state to know who is practicing without actually restricting entry into the practice in any way. With registration it is also possible to set certain types of practice standards. For example, registered practitioners might be required to provide

disclosure statements to clients detailing the practitioner's education or training, experience, proposed methods of treatment, fee structure, acts constituting unprofessional conduct, and the like. Or continuing education may be required for renewal of the registration.

In some situations, regulation is most effective if imposed at two levels. In this system, all practitioners are required to be registered and to comply with certain minimum practice standards. Practitioners with specific educational and/or experiential qualifications have the opportunity to become certified, at which point they subject themselves to more rigorous practice standards but are permitted to use a distinctive title that clearly differentiates them from registered practitioners. This system seems to work best with occupations containing many types and levels of practice without a clearly-defined hierarchy:

INDIRECT REGULATION

The three levels of regulation discussed above are termed direct regulation because they involve the direct granting of a certain credential by the state to an individual practitioner. Other types of regulation, known as indirect regulation, are also possible and should be considered as circumstances warrant.

Facility Regulation

In this mode of regulation, the state credentials the facility or institution directly, but does not directly credential many of the persons employed there. The scope of activities of the facility itself may be specified, but for the most part the institutional administration has the responsibility of determining which personnel will be responsible for specific

tasks. Of course, if the institution employs personnel who are already directly regulated, those credentials must be respected.

An example of facility regulation would be a nursing home. The home itself is licensed. It employs a number of credentialed personnel (the administrator, RNs, LPNs, etc.) who must work within their scope of practice. Other personnel employed are not credentialed, such as nurse's aides. The administrator is under no state restrictions as to whom he or she may employ as a nurse's aide. These personnel may be assigned a wide scope of duties within the overall structure of the facility, so long as these duties do not infringe upon any of the scopes of practice of credentialed occupations.

Facility regulation is frequently accompanied by personnel standards, proficiency standards, or other means of indirect regulation of practitioners.

Personnel Standards

Personnel standards are regulations mandating qualifications a person must have in order to perform a particular function or to hold a specific job title. In almost all instances personnel standards are imposed in an area in which other forms of regulation, such as facility regulation, are already in effect. Standards frequently require that personnel show evidence of having completed a specified training program or of having a certain amount and type of training. Usually the number of hours of training or education required is low, and seldom is possession of a degree or certificate made the sole means of complying with personnel standards.

No credential is granted to the individual by the state. Rather, the individual is responsible for demonstrating to potential employees that he/she meets the personnel standards required.

Standards may be written so that an employee can qualify after being hired but before being allowed to perform the full scope of duties of the occupation.

An example of personnel standards can be found in the regulations governing care staff members in nursing homes. Care staff members are nurse's aides who have received special training in the administration of medications. State law requires that nursing homes employ as care staff members only persons who have completed a specified course of training. The care staff member is not considered to be credentialed by this process, but to have satisfied the facility regulations governing medication administration.

Proficiency Standards

Proficiency standards are best described as outcome measures. In areas of practice where the outcome is predictable and measurable, proficiency standards can be used to regulate the quality of the services being performed. Usually the persons performing the service are not directly credentialed and they may or may not perform the service in a regulated facility or under personnel standards.

An example of proficiency standards is the system some states use to measure the quality of medical laboratory procedures. In this system laboratory samples of a known value are sent to testing laboratories. The test results are compared to the known values of these specimens, and an assessment can be made of the proficiency of the testing at each laboratory. Labs that are repeatedly unable to demonstrate proficiency in these tests may be subject to disciplinary action by the state.

Regulation of Supervisors

Often occupations can be easily regulated through the imposition of additional regulations upon the credentialed professionals who supervise

them. For example, persons apprenticing as embalmers or masseurs in Nebraska are not directly regulated by the state, but the person supervising the apprentice is required to maintain control of the apprentice's activities through specific regulations. Many unregulated persons work in the private offices of licensed professional practitioners. The only state regulation upon these persons is found in the licensee's legal obligations not to delegate beyond the scope of his or her authority to be an unregulated person, and not to assist an unregulated person in the violation of an existing scope of practice.