



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Occupational Licensing Through the Department of Safety and Professional Services

Licensing of professional occupations in Wisconsin is largely overseen by the Department of Safety and Professional Services (DPS), which regulates over 200 types of occupational licenses and houses almost 100 boards, councils, and advisory committees. This Information Memorandum provides a general overview of the following key aspects of DPS's administration of occupational licensing: (1) the types of occupations licensed through DPS; (2) the joint administration of licenses by DPS and the licensing bodies it houses; (3) the enforcement of licensing standards through disciplinary actions; and (4) the effect of criminal history and other "discriminatory" licensure criteria on an individual's ability to qualify for a license.

#### **BACKGROUND**

Wisconsin first began regulating occupational licenses in 1882 with the creation of the Pharmacy Examining Board.<sup>1</sup> Since then, licensing requirements have been imposed as a prerequisite to practicing in hundreds of professions. The Wisconsin Supreme Court has long held that the purpose of occupational licensing is to protect the public, and that when a license is issued, "the state assures the public of the competence of that person." [*Stringez v. Department of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 281, 287 (Wis. July 6, 1981).]

Occupational licensing in Wisconsin is largely administered by DPS, although some additional licenses are issued through other state and federal agencies. This Information Memorandum provides a general overview of some of the key aspects of occupational licensing as regulated by DPS and the boards, councils, and advisory committees it houses.

#### **OCCUPATIONS LICENSED THROUGH DPS**

DPS administers over 200 types of occupational licenses, certificates, permits, and registrations, which are issued to individuals as well as business entities. This Information Memorandum uses the term "license" to refer to all of these types of credentials. DPS licenses generally fall into three categories: (1) business professions; (2) health professions; and (3)

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<sup>1</sup> DPS, *Recent Accomplishments and Economic Footprint Report*, Sept. 2013, p. 10.

trades professions. A list of licenses in each of these categories is available at: <http://dsps.wi.gov>.<sup>2</sup>

Examples of some of the **business professions** include real estate brokers, real estate business entities, accountants, engineers, home inspectors, private detectives, private security persons, barbers, cemetery salespersons, and funeral directors. **Health professions** include physicians, nurses, dentists, audiologists, chiropractors, chiropractic technicians, dance therapists, drug or device manufacturers, midwives, dietitians, and others. Finally, the **trades professions** include electricians, plumbers, dwelling contractors, elevator contractors, welders, fireworks manufacturers, electrical contractors, soil erosion inspectors, and others.

According to a report published by DSPS in September 2013, as of June 2013, DSPS and its licensing boards and councils actively credentialed over 388,000 individuals. Of these individuals, 88,000 licensees practiced in the trades professions, including 83,000 individuals in the construction sector. The remaining 300,000 licensees practiced in health and business professions, including 197,000 active licensees in the health care industry and 21,000 active licensees in the real estate industry.<sup>3</sup>

A provision in the 2017 Biennial Budget requires DSPS to submit a report to the Governor and the Legislature by December 31, 2018 with recommendations for elimination of existing occupational licenses based on a list of factors, including public safety considerations, other states' laws, financial implications, and barriers to obtaining the license. [2017 Wisconsin Act 59, s. 9134 (17w).]

Each license is subject to occupation-specific professional standards and qualifications. Generally, the business and health professions are subject to a similar set of statutory requirements in chs. 440 to 480, Stats. In contrast, the trades professions are subject to chs. 101, 145, and 167, Stats. This difference can be understood as a result of the fact that DSPS was created as part of the 2011-13 Biennial Budget, which merged the previous Department of Regulation and Licensing (DRL) with part of the Department of Commerce. [2011 Wisconsin Act 32.]

### **JOINT ADMINISTRATION OF LICENSING REQUIREMENTS: DSPS BOARDS, COUNCILS, AND ADVISORY COMMITTEES**

Although some of the licenses described above are administered exclusively by DSPS, many are jointly administered by DSPS and one of the nearly 100 boards, councils, and advisory committees that the agency houses.<sup>4</sup> These credentialing bodies are separate legal entities created by statute, and play a large role in creating and administering professional standards for many of the licenses issued through DSPS. [ss. 15.405 through 15.407, and 440.042, Stats.]

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<sup>2</sup> The statutes use the term "professional credential" to refer to the business and health licenses, and use the term "occupational license" to refer to the trades licenses.

<sup>3</sup> DSPS, *Recent Accomplishments and Economic Footprint Report*, Sept. 2013.

<sup>4</sup> A list of DSPS's current boards, councils, and advisory committees is available at: <http://dsps.wi.gov/Boards-Councils/Board-Council-Listing>.

### ***TYPES OF LICENSING BODIES HOUSED WITHIN DSPS***

DSPS's different credentialing bodies are generally defined in state statute as follows, although each has its own unique powers and duties:

- **Board.** A board is defined to mean a “part-time body functioning as the policy-making unit” for DSPS with regard to the credentials it regulates. The specific role of each board is set out separately in statute. [s. 15.01 (1r), Stats.]
- **Examining Board.** The statutes distinguish *examining* boards from other boards. By statute, examining boards do all of the following: (1) set standards of professional competence and conduct for the profession under its supervision; (2) prepare, conduct, and grade examinations; (3) grant licenses; (4) investigate complaints of alleged unprofessional conduct; and (5) perform other functions assigned by law. [s. 15.01 (7), Stats.]
- **Affiliated Credentialing Board.** Five affiliated credentialing boards are attached to the Medical Examining Board to oversee the following professions: Athletic Trainers, Dietitians, Massage and Bodywork Therapy, Occupational Therapists, and Podiatrists. The affiliated credentialing boards set standards of competence and conduct for licensees, review license applications, take disciplinary actions, and perform other functions, with the advice of the Medical Examining Board. [s. 15.01 (1g), Stats.]
- **Council.** A council functions on a continuing basis to study a particular problem, and recommend solutions and policy alternatives. Councils do not generally have final decision-making authority. Some councils are affiliated with a board, and others are attached directly to DSPS. [s. 15.01 (4), Stats.]
- **Advisory Committee.** The DSPS Secretary is authorized to appoint an advisory committee to advise DSPS or any board, examining board, or affiliated credentialing board on matters related to the occupations regulated. For some professions, advisory committees are also specifically required by statute. An advisory committee does not have final decision-making authority. [s. 440.042, Stats.]

In addition to some of the more commonly recognized boards such as the Medical Examining Board and the Real Estate Examining Board, DSPS also houses other lesser-known credentialing bodies such as the Hearing and Speech Examining Board, the Manufactured Housing Code Council, the Respiratory Care Practitioners Examining Council, the Auctioneer Board, the Cemetery Board, the Contractor Certification Council, the Barbering Advisory Committee, the Funeral Directors Examining Board, and the Plumbing Code Advisory Committee. Typically, a majority of the members are licensees who actively practice in the occupations they regulate, and can provide technical expertise in the subject area. The membership of each board and council is identified in ss. 15.405 and 15.406, Stats.

In practice, most of DSPS's boards are associated with the business and health professions, whereas the trades professions are more often connected with a council or advisory committee.

DSPS estimates that, in 2012, it provided administrative services to more than 40 of its boards and councils, and facilitated approximately 180 meetings related to board activities, including approximately 115 meetings with health-related boards.<sup>5</sup>

### ***INDEPENDENT BOARD AUTHORITY***

Each of the licensing bodies housed within DSPS operates differently, and has a different set of responsibilities. Although councils and advisory committees may only advise with regard to licensing matters, each of DSPS's licensing boards has some degree of independent decision-making authority.

When a health or business board has authority to act on a matter, DSPS staff may offer advice on a proposed action, but the ultimate decision lies with the board. State statutes specify that a dispute between an examining board or affiliated credentialing board and DSPS's Secretary shall be arbitrated by the Governor or his designee. [ss. 15.01 (1r), 440.035 (1m), and 440.045, Stats.]

The Medical Examining Board, for example, has almost exclusive control over its licensees with regard to the main aspects of regulation: (1) promulgating administrative rules; (2) issuing or denying licenses; and (3) disciplining licensees for unprofessional conduct. With regard to these aspects of licensure, DSPS can provide advice but cannot prohibit the board from exercising its discretion. [ss. 448.02 and 448.40, Stats.]

Approximately 25 of DSPS's boards have rulemaking authority, including the Accounting Examining Board, Funeral Directors Examining Board, Board of Nursing, and Real Estate Examining Board. DSPS has rulemaking authority with regard to its other professions, sometimes with the advice of a licensing body.

### ***STATE SUPERVISION OF BOARD ACTIVITY***

Although Wisconsin's boards may often act independently, they are still subject to some degree of state supervision. More specifically, federal antitrust law generally requires "active supervision" of board decisions that restrict free market activity. Occupational licensing laws often conflict with federal antitrust principles, which generally prohibit restrictions on free market activities.

States are not required to comply with federal antitrust law, and are entitled to "state-action immunity." [*Parker v. Brown*, 317 U.S. 341 (1943).] In contrast, the U.S. Supreme Court has held that state licensing boards, which are controlled by licensees who actively participate in the professions they regulate, are entitled to state-action antitrust immunity only if two conditions are met: (1) the state has articulated a clear policy to allow the anticompetitive conduct; and (2) the state provides "active supervision" of the board's activities. The Court explained that these factors are necessary to ensure that boards make decisions based on state policy rather than "private anti-competitive motives." [*North Carolina State Board of Dental Examiners v. FTC (N.C. Dental)*, 135 S. Ct. 1101 (2015).]

Wisconsin's licensing boards are generally controlled by individuals who are licensed and actively practice in the professions they regulate. However, as long as the boards act within the scope of their authority, as outlined in state statutes and rules, they would likely be entitled to antitrust immunity under the *N.C. Dental* criteria. This is because state statutes generally require board standards or policies to be promulgated in administrative rules, which are subject to

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<sup>5</sup> DSPS Recent Accomplishments and Economic Footprint Report, Sept. 2013, pp. 3 and 7.

mandatory gubernatorial and legislative review, pursuant to 2011 Wisconsin Act 21. In addition, Wisconsin's boards generally do not regulate unlicensed practice. Instead, DSPS, which is not comprised of market participants, generally has authority to pursue unlicensed practice. [s. 440.21, Stats.]

### **ENFORCEMENT THROUGH PROFESSIONAL DISCIPLINE**

Licensing standards are generally enforced through professional discipline against licensees who engage in misconduct. As described below, there are various forms of discipline, the most severe of which is a full license revocation. For some but not all professions, professional discipline decisions are made by a board rather than DSPS.

Disciplinary actions often originate from complaints filed by members of the public. These complaints may be further investigated if the allegations indicate the licensee failed to comply with a rule of professional conduct. [s. SPS 2.035, Wis. Adm. Code.] The conduct for which a licensee may be disciplined varies by profession, but can include negligent or incompetent practice, dishonesty or fraud, misuse of prescription drugs, breach of client duties, or violations of other laws that relate to the profession.

In 2012, DSPS and its boards reportedly decided 3,629 disciplinary cases, 694 of which resulted in formal disciplinary action. It also performed 206 audits and 153 inspections, monitored approximately 1,890 licensees for compliance with disciplinary orders, and enrolled 69 licensees in a "confidential assistance program for chemically impaired professionals."<sup>6</sup>

#### ***TYPES OF DISCIPLINE***

The severity of the discipline must match the severity of the licensee's misconduct. The Wisconsin Supreme Court has identified three purposes of professional discipline: (1) protecting the public; (2) deterring the conduct; and (3) rehabilitating the licensee. The goal of discipline cannot be to punish the licensee. [*State v. Aldrich*, 71 Wis. 2d 206, 209 (1976).]

When discipline is appropriate, DSPS or the board may choose from a range of options to address the licensee's specific problem:

- **Reprimand.** To reprimand "means to publicly warn the holder of a credential." It is a formal and public finding that the licensee engaged in unprofessional conduct, and is the lowest level of professional discipline. [s. 440.01 (1) (e), Stats.]
- **Limitation.** To limit a license "means to impose conditions and requirements upon the holder of the credential, to restrict the scope of the holder's practice, or both." For example, a license limitation could require a licensee to obtain education, work under an approved supervisor, submit periodic reports for review, or even complete a drug treatment program. [s. 440.01 (1) (d), Stats.]
- **Administrative Forfeiture.** For some but not all professions, DSPS or a board may assess an administrative forfeiture against a licensee who engages in unprofessional conduct. The typical forfeiture amount, where applicable, is a maximum of \$1,000 per day of violation.

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<sup>6</sup> DSPS, *Recent Accomplishments and Economic Footprint Report*, Sept. 2013, at p. 9.

- **Suspension.** An individual whose license is suspended loses “for a period of time all rights, privileges, and authority” associated with the license. The length of the suspension can vary, and license reinstatement can be conditioned on the licensee fulfilling certain criteria, such as completing education. [s. 440.01 (1) (h), Stats.; s. SPS 305.10 (1) (f) and (2) (e) 1., Wis. Adm. Code.]
- **Revocation.** A revocation is the most severe form of discipline, and revokes all rights and privileges associated with the license. For the health and business professions, a licensee may be able to reapply at a later time. [s. 440.01 (1) (f), Stats.] For most trades professions, other than plumbers, once a license is revoked, the person is prohibited from ever reapplying. [s. SPS 305.10 (1) (f) 2. and (2) (e) 2., Wis. Adm. Code.]
- **Costs of the Proceeding.** In any case where a licensee is reprimanded, limited, suspended, or revoked, or assessed a forfeiture, the licensee could be ordered to pay any or all costs of the disciplinary proceeding. [s. 440.22, Stats.; s. 2.18, Wis. Adm. Code.]<sup>7</sup>

In lieu of formal discipline, the statutes also allow DSPS or a board to issue an “administrative warning,” which is a confidential nondisciplinary warning that informs the licensee of the alleged misconduct. Generally, an administrative warning may only be issued if the complaint involves a minor violation, and the public will be adequately protected by putting the person on notice that a subsequent violation may result in discipline. If the licensee commits subsequent misconduct, the original case that led to the administrative warning can be reopened for disciplinary action. An administrative warning can also be used as evidence that the person had knowledge that the conduct is prohibited. [s. 440.205, Stats.]

### ***DISCIPLINARY HEARINGS***

A licensee generally has a right to a hearing to contest any disciplinary action. Disciplinary hearings for all of the DSPS professions generally take the form of administrative hearings before an Administrative Law Judge (ALJ) employed by the Department of Administration. The licensee has a right to be represented by an attorney, and to present a case with witnesses and other evidence.<sup>8</sup>

At the end of the hearing, the ALJ generally issues a *proposed* decision, which is submitted for review to either DSPS or the board, depending on which has authority to discipline for the profession. DSPS or the board then issues a *final* order, which may either adopt or modify the ALJ’s proposal. A final order can be appealed by either party. On appeal, the reviewing court may be required to give deference to the agency’s decision, if it is supported by sufficient evidence. [ch. SPS 2, Wis. Adm. Code.]

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<sup>7</sup> Various factors are considered when determining whether costs should be assessed, including: (1) the number of counts charged, contested, and proven; (2) the nature and seriousness of the misconduct; (3) the level of discipline sought by the parties; (4) the respondent’s cooperation with the disciplinary process; (5) prior discipline, if any; (6) the fact that DSPS is funded by program revenue; and (7) any other relevant circumstances. [*In the Matter of Disciplinary Proceedings Against Elizabeth S. Buenzli-Fritz*, Case No. LS 0802183 CHI (Aug. 14, 2008).]

<sup>8</sup> In comparison, an individual whose license application has been *denied* may request a hearing within 45 calendar days after the notice of denial or notice of cheating on an examination was mailed. The applicant will be granted a hearing to contest the denial if he or she has alleged mistake in fact or law which constitutes reasonable grounds for reversing the decision to deny the application for a credential. License denial hearings are in many ways similar to disciplinary proceedings. [ss. SPS 1.07 and 1.08, Wis. Adm. Code.]

In practice, many disciplinary cases are resolved through a stipulated (mutually agreed) settlement. In those cases, the licensee signs settlement documents agreeing to accept a board order rather than to contest the allegations at a hearing. These types of settlement agreements often specify that the licensee agrees to forfeit all appeal rights. A signed agreement between a licensee and a DSPS attorney is not effective until it is approved by the disciplining authority, which, as explained above, can be either DSPS or a board.

### **CRIMINAL HISTORY AND OTHER “DISCRIMINATORY” LICENSING CRITERIA**

Wisconsin statutes generally prohibit a licensing agency from refusing to admit or license an individual based on a “discriminatory” purpose, which includes arrest or conviction record, as well as age, race, creed, color, disability, marital status, sex, national origin, ancestry, military service, use or nonuse of lawful products off the employer’s premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious or political matters. [ss. 111.321 and 111.322 (1), Stats.]

However, with regard to criminal history, DSPS and its boards are generally allowed to consider a prior conviction, or a prior arrest which is based on a list of offenses identified in statute, if the circumstances of the criminal conduct “substantially relate” to the circumstances of the licensed activity. This is a fact-specific question viewed in light of the circumstances that foster criminal activity, such as the opportunity for criminal behavior that may arise on the job, the individual’s reaction to responsibility, and other character traits. For some professions, there may be additional licensing restrictions based on certain crimes such as sex offenses. [s. 111.335 (1) (a) through (c), Stats.; and *County of Milwaukee v. LIRC*, 139 Wis. 2d 804 (1987).]

Individuals who have a criminal history may obtain a predetermination of whether they would be disqualified from obtaining a license before submitting a full application. If a license is denied or terminated based on a prior conviction, DSPS or the licensing board must allow the individual to show evidence of rehabilitation and fitness to engage in the licensed activity, including factors such as the seriousness of the crime and mitigating circumstances. A person can show he or she has been rehabilitated by submitting: (1) documentation showing that the person was honorably discharged or separated under honorable conditions from the military and had no subsequent criminal convictions; or (2) documentation showing that the person completed his or her probation, extended release or parole and, if the person served time in a correctional institute, that one year has passed since his or her release without subsequent conviction of a crime.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Andrea Brauer, Staff Attorney, on May 14, 2018 (revised May 30, 2018).