

RETURNING TO ITS ROOTS:

Tennessee's Recent Occupational Licensing Reforms and Future Opportunities

A Past Based on Freedom Versus Current Burdens

Since its founding, Tennessee has been a land of economic opportunity. From the first settlers who crossed the Appalachian Mountains to those looking to escape the high taxes of Illinois, New York, and other states, economic freedom lies at the heart of the Tennessee experience. It is no accident, then, that the state's motto is "Agriculture and Commerce." The Tennessee Supreme Court has even stated that the right to earn a living is exactly that: a fundamental constitutional right.¹ Unfortunately, the right to earn a living and this spirit of economic freedom and opportunity have not always been treated as such in the Volunteer State.

1. See *Livesay v. Tennessee Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959) (calling it a "fundamental" right); *Harbison v. Knoxville Iron Co.*, 53 S.W. 955, 957 (Tenn. 1899) (the liberty protects "the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession.").

One example of this growing disregard for economic liberty is with occupational licensing. An occupational license is essentially a government permission slip to perform a job, and in recent years there has been an explosion in these regulations. This growth of the regulatory state has been predominantly borne by lower-income workers who can ill afford the costs of time, tuition, and lost wages required to comply with burdensome entry regulations. These onerous requirements “have the practical effect of excluding most or all potential entrants and should be treated as strict legal barriers to entry.”² Sadly, this lack of regard for economic liberty is not unique to Tennessee. According to a 2015 White House report, since 1950 the percentage of Americans who need a license to work has grown from five percent to nearly 29 percent.³ Other studies have estimated the number to be closer to one in three.⁴

However, despite its reputation as a pro-business and economically conservative state, Tennessee has been more aggressive than most in imposing these barriers to earning a living. Recent studies are beginning to highlight these barriers, as well as their disastrous effects on the state and people’s livelihoods. In its landmark 2012 study “License to Work,” the Institute for Justice found Tennessee to be the thirteenth most broadly and onerously licensed state, a ranking which was reaffirmed in an updated 2017 study.⁵ That same year, the Wisconsin Institute for Law & Liberty examined the effects of licensing requirements for 10 common blue-collar professions and determined Tennessee ranked *dead last* among the 50 states. The state could expect a nine percent rate of job growth by simply adopting the licensing requirements of the least onerous state, Hawaii.⁶

Turning On a Dime: The Right to Earn a Living Act and Recent Reforms

Encouragingly, Tennessee has begun to realize the errors of its ways and in recent years has begun responding to the growing problem occupational licensure presents. In 2016, it became the first state in the nation to enact a Right to Earn a Living Act, the purpose of which was to examine

2. Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Publ. Pol’y 209, 211 n. 3 (Winter, 2016).

3. The White House, “Occupational Licensing: A Framework for Policymakers.” July 2015. https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

4. Morris M. Kleiner and Alan B. Krueger, “Analyzing the Extent and Influence of Occupational Licensing on the Labor Market.” Institute for the Study of Labor. Discussion Paper No. 5505. February 2011. <http://ftp.iza.org/dp5505.pdf>.

5. Dick M. Carpenter II, Ph.D., Lisa Knepper, Angela C. Erickson, and John K. Ross, “License to Work: A National Study of Burdens from Occupational Licensure.” Institute for Justice. May 2012. <https://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf>; Dick M. Carpenter II, Ph.D., Lisa Knepper, Kyle Sweetland, and Jennifer McDonald, “License to Work: A National Study of Burdens from Occupational Licensure. 2nd Edition.” Institute for Justice. November 2017. https://ij.org/wp-content/themes/ijorg/images/tw2/License_to_Work_2nd_Edition.pdf.

6. Will Flanders and Collin Roth, “Land of the Free? 50 state study on how professional licensing laws lead to fewer jobs.” The Wisconsin Institute for Law and Liberty. October 2017. <http://www.will-law.org/wp-content/uploads/2017/10/final.pdf>.



unnecessary obstacles to an individual's ability to enter a career, and to recommend ways to remove those obstacles.⁷ The resulting report and built-in review process spurred a flurry of reforms in the ensuing years. The first notable reform came in 2017, when Tennessee repealed a year-old law mandating that one must be licensed simply to shampoo hair.⁸ The Right to Earn a Living Act also highlighted and brought attention to other occupations in need of reform.

In 2017, the Beacon Center released "The Dirty Dozen: Eliminating Red Tape for Blue Collar Workers," which highlighted the 12 most onerous licenses in Tennessee.⁹ From there, the calls for reform picked up steam with a flurry of legislation in 2018. First was the "Fresh Start Act"—which, outside of a few exemptions, prevents a licensing authority from denying an applicant with a prior criminal record a license, unless the criminal record is directly linked to the job sought.¹⁰ During 2018, the General Assembly also created new pathways to work by allowing licensing boards to accept apprenticeships as qualifying experience towards licensure.¹¹ That year also brought about the elimination of what was perhaps Tennessee's strangest license: one for beauty-pageant operators.¹²

Additional recent reforms include exempting those practicing animal massage therapy from having to obtain a veterinary license and downgrading the license to braid hair to a registration.¹³ These two licenses were so onerous compared to their health and safety justification that they were included in "The Dirty Dozen."¹⁴ All these reforms were recognized when the Mercatus Center showed how Tennessee has led the nation in reducing occupational licensing burdens in recent years.¹⁵

7. Tenn. Code Ann. § 4-5-502.

8. Tennessee 110th General Assembly. Public Chapter No. 227. <https://publications.tnsosfiles.com/acts/110/pub/pc0227.pdf>.

9. "The Dirty Dozen: Eliminating Red Tape for Blue Collar Workers." Beacon Center of Tennessee. December 19, 2017. https://www.beacontn.org/wp-content/uploads/2017/12/BCN_DirtyDozenv5.pdf.

10. Tenn. Code Ann. § 62-76-104.

11. Tenn. Code Ann. § 62-76-202.

12. Tennessee 110th General Assembly. Public Chapter No. 834. <https://publications.tnsosfiles.com/acts/110/pub/pc0834.pdf>.

13. Tennessee 110th General Assembly. Public Chapter No. 679. <https://publications.tnsosfiles.com/acts/110/pub/pc0679.pdf>; Tennessee 111th General Assembly. Public Chapter No. 207. <https://publications.tnsosfiles.com/acts/111/pub/pc0207.pdf>.

14. "The Dirty Dozen: Eliminating Red Tape for Blue Collar Workers." Beacon Center of Tennessee. December 19, 2017. https://www.beacontn.org/wp-content/uploads/2017/12/BCN_DirtyDozenv5.pdf.

15. Matthew D. Mitchell and Anne Philpot, "Changes in Occupational Licensing Burdens Across States." Mercatus Center. April 10, 2018. <https://www.mercatus.org/publications/corporate-welfare/changes-occupational-licensing-burdens-across-states>.



Occupational licensing also has a disproportionate effect on military service members and their spouses. Military families are more likely to move than civilian families due to orders for permanent change of stations, which typically occur every two to three years. With these relocations come difficulties transferring their licenses to a new state. In fact, 22 percent of military spouses say that moving to a new state and transferring their license is one of their greatest challenges to employment.¹⁶ In a 2017 report, the U.S. Department of Defense stated that this hurdle contributes to “employment gaps and underemployment within military families, which lead to additional stress and financial strain that could also impact military spouses’ health and wellbeing, as well as service members’ military readiness.”¹⁷ Fortunately, Tennessee has taken some steps to help military families. In 2019, the law was changed to give service members and their spouses the opportunity to work up to one year in the state before requiring them to obtain a Tennessee license.¹⁸

In his inaugural address, President Thomas Jefferson stated that the ideal government “shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvements, and shall not take from the mouth of labor the bread it has earned.”¹⁹ The creation of a review process through the Right to Earn a Living Act, eliminating multiple individual licenses, and giving those with criminal records a better chance of earning a job and becoming productive members of society are all reforms that have brought Tennessee closer to the ideal Jefferson espoused.

Keeping the Pedal to the Metal on Licensing Reform

Despite those reforms, numerous opportunities to remove unnecessary licensing burdens still exist in Tennessee. For example, the COVID-19 pandemic has highlighted the differences and difficulty in moving to different states. As part of the Volunteer State’s response to the coronavirus, Gov. Bill Lee allowed out-of-state medical providers to practice in Tennessee without a license if their work was related to the coronavirus, and waived

16. “Military Spouses in the Workplace, Understanding the Impacts of Spouse Unemployment on Military Recruitment, Retention, and Readiness.” U.S. Chamber of Commerce Foundation. June 2017. <https://www.uschamberfoundation.org/sites/default/files/Military%20Spouses%20in%20the%20Workplace.pdf>.

17. “2017 Demographics Profile of the Military Community.” U.S. Department of Defense. 2017. <https://download.militaryonesource.mil/12038/MOS/Reports/2017-demographics-report.pdf>.

18. Tenn. Code Ann. § 4-3-104(d).

19. Thomas Jefferson, First Inaugural Address. March 4, 1801.



many continuing education and renewal requirements for both medical and non-medical license holders.²⁰ Several states—including Arizona, Montana, New Jersey, and Pennsylvania—have taken this approach even further, granting universal recognition to out-of-state licensees, as licensure requirements have been shown to lead to a 36 percent decline in interstate migration.²¹ Even the Department of Defense has encouraged states to work toward true universal licensing recognition, and eventually interstate compacts, to further ease the burdens on military families.²²

While making it easier for new Tennessee residents to transfer their licenses and get to work quickly would help thousands, the biggest need for reform still remains for those entering the workforce for the first time or seeking to change careers. Opportunities include finding less onerous ways to regulate and protect consumer health and safety through inspections, bonding and insurance, or registrations.²³ Or when possible, the ideal solution is to eliminate the license altogether and rely on private certifications, tort laws, and the free market to protect public health and safety.

Thus far, two of Beacon's initial "Dirty Dozen" licenses have been repealed. The remaining licenses have burdens that are well outside the national norm. In fact, of the unaddressed professions listed in the Institute for Justice's "License to Work," all but one (barber/cosmetologist) are in the top 10 most burdensome in the nation. Even worse, Tennessee's licenses for security alarm installers and auctioneers are tied for the most burdensome in the country. These licenses not only make it harder for someone to get a job, but can often prevent businesses from starting and jobs from being created, as well as inhibit innovation.

20. TN. Exec. Order No. 15. March 19, 2020. <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee15.pdf>.

21. Khadija Murad, "Universal Licensing Recognition." National Conference of State Legislatures. April 3, 2020. <https://www.ncsl.org/research/labor-and-employment/universal-licensure-recognition.aspx>; Morris Kleinier and Janna Johnson, "Is Occupational Licensing a Barrier to Interstate Migration?" National Bureau of Economic Research. December 2017. <https://www.nber.org/papers/w24107.pdf>.

22. "Military Spouse Licensure: State Best Practices and Strategies for Achieving Reciprocity." November 2019. <https://download.militaryonesource.mil/12038/MOS/Reports/military-spouse-licensure-report-2019.pdf>.

23. John K. Ross, "The Inverted Pyramid: 10 Less Restrictive Alternatives to Occupational Licensing." Institute for Justice. November 2017. https://ij.org/wp-content/uploads/2017/11/Inverted-Pyramid_FINAL_cover.pdf.

Adam Jackson is a veteran who provided electronic security for U.S. embassies and overseas military bases. Upon retiring from the service, Adam developed groundbreaking facial-recognition software that can instantly scan the face of someone appearing on security cameras and cross-check it with known offender databases. The software is designed to strengthen the defenses at the most vulnerable locations, whether that be in schools or shelters for abused women or sex-trafficking victims. But for over a year, Tennessee's Alarm Systems Contractors Board prevented Adam from even *donating* his product, calling it an "alarm system" even though it was clearly software, just like any other computer program, that could be installed on existing systems. Obtaining a license was not an option for Adam, as he would have had to become an apprentice in a company installing systems like burglar alarms for five years, which had nothing to do with his program. While the alarm board eventually reversed its decision, the bureaucratic process delayed Adam's company for months, denying him valuable start-up time and preventing him from launching his business entirely.

An effort to fully repeal the license for locksmiths—a profession that is only regulated in 14 states—made it far through the 111th General Assembly, but did not make it to a floor vote in either chamber due to the COVID-19 pandemic.²⁴ The 112th General Assembly, which will begin in January 2021, should consider taking the measure back up, as well as considering other reforms to reduce the burdens of professions in the "Dirty Dozen" and others.

Finally, the General Assembly should be vigilant against calls for additional licensing. Recent examples include proposals to license art therapists and lactation consultants.²⁵ Consumers and aspiring workers are often not aware that trade groups are seeking to persuade state legislators that licensing is the only way to protect the public from dishonest and incompetent practitioners, when in reality, licensing imposes more burdensome requirements for people trying to get into specific occupations and raises costs for all consumers. These new licenses are proposed in the name of public health and safety, assuming that service providers are more knowledgeable than consumers and can more easily exploit them through fraud and malpractice. Thus, occupational licensing is justified on the grounds that it protects purchasers from unqualified providers, poor service, unnecessary upcharges, or inflated prices. However, these

24. House Bill 1843/Senate Bill 1821. Tennessee 111th General Assembly. <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1843&ga=111>.

25. House Bill 781/Senate Bill 55. Tennessee 111th General Assembly. <http://www.capitol.tn.gov/Bills/111/Bill/HB0781.pdf>; House Bill 2615/Senate Bill 1978. Tennessee 109th General Assembly. <http://www.capitol.tn.gov/Bills/109/Bill/SB1978.pdf>.



proposals often come from special producer groups seeking to obtain a monopoly at the expense of possible competitors and the public.

Ultimately, in addition to reducing the regulations around individual professions, Tennessee's economy would benefit from broader regulatory reform. One example would be expanding the process of the Right to Earn a Living Act. If the government is going to make it harder for people in certain occupations to earn a living, the burden to prove the health and safety rationale behind those regulations should rest on the government's collective shoulders.

Conclusion

Public policy often takes years, or even decades, to realize mistakes and begin to correct its course. The latter half of the twentieth century saw the rapid growth of occupations subject to licensing requirements, requiring people seeking to earn a living to first obtain the government's permission. In Tennessee, the licensure requirements have produced one of the most burdensome regulatory environments for workers nationwide. However, the tide has begun to turn. Since the Right to Earn a Living Act was passed in 2016, Tennessee has eliminated several licenses, given those rejoining society the ability to enter licensed professions, and expanded pathways to licensure.

However, additional opportunities for reform still exist. Tennessee should avoid creating licenses for new professions, identify more unnecessary licenses to eliminate (or at least find less onerous ways to regulate those occupations), recognize the licenses held by those moving to Tennessee from other states, and look for broader reforms that create a better economic environment for all. By enacting these and other reforms, Tennessee can get back to its roots of economic freedom and live up its motto of "Agriculture and Commerce."





Ron Shultis • Director of Policy and Research
ron@beacontn.org • 615-383-6431

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