



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MEMORANDUM

DATE: February 2, 2015

TO: Honorable Laurie Monnes Anderson, Chair
Senate Committee on Health Care

FROM: Joanna Tucker Davis, Senior Assistant Attorney General

RE: **SB 1504 – Interstate Physical Therapy Licensure Compact**

This testimony is to address the Department of Justice’s concerns regarding the possible unconstitutionality of the current language in Senate Bill 1504.

BACKGROUND

SB 1504 would ratify a Physical Therapy Licensure Compact, in which Oregon would enact the compact as a “member state” of a “joint public agency known of the Physical Therapy Compact Commission” (Commission).

As a member state, the Oregon Physical Therapist Licensing Board (Board) would be entitled to select a single delegate who would be entitled to one vote with regard to the promulgation of rules, the creation of by-laws, and otherwise have the opportunity to participate in the business and affairs of the Commission.

As a member state, the Board’s licensee would be eligible for a “compact privilege.” Subject to the terms of the Compact and the rules of the Commission, the compact privilege would allow the licensee to provide physical therapy in other member states, under the laws and regulations of the “remote state.” Oregon would likewise allow licensee’s from other member states to practice physical therapy in Oregon, subject to Oregon’s laws and regulations. Under the Compact, Oregon can charge fees to persons wanting to exercise the compact privilege in Oregon.

Under the Compact, the Commission is authorized to collect assessment and impose fees on Oregon: “The Commission may levy on and collect an annual assessment from each member state or impose fees on other parties to cover the cost of the operations and activities of the Commission and its staff, which must be in a total amount sufficient to cover its annual budget as approved each year for which revenue is not provided by other sources. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the Commission, which shall promulgate a rule binding upon all member states.”

There is no cap in the Compact on the assessments and fees that Oregon may have to pay the Commission.

Under the Compact, section 10, member states may be sued for non-compliance with the Compact or the rules of the Commission in the US District Court for the District of Columbia or the federal district where the Commission has its principal offices.

Under the Compact, section 7, rules that are enacted by the Commission “shall have the force and effect of law and shall be binding in all member states.” Oregon must enforce the Commission’s rules as if they are the same as statutory law. Section 10 provides that: “The executive, legislative, and judicial branches of state government in each member state shall enforce this Compact and take all action necessary and appropriate to effectuate the Compact’s purpose and intent. The provisions of this Compact and the rules promulgated hereunder shall have standing as statutory law.”

CONCERNS REGARDING THE CONSTITUTIONALITY OF TERMS IN THE COMPACT

The Department of Justice is not challenging the ability of Oregon to enter into an agreement with other states to provide streamlined reciprocal licensing between the states. The Department of Justice has concerns about the constitutionality under the Oregon constitution of two specific areas in the Compact as it is currently drafted in SB 1504.

(1) There is no cap on Oregon’s liability under the Compact nor is a special fund designated to pay for the fees and assessments of the Commission.

Article XI, §7 of the Oregon Constitution provides that “The Legislative Assembly shall not lend the credit of the state nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars, * * *.” There are constitutional exceptions to this prohibition, none of which appear to apply here. The Oregon Supreme Court has stated that the test for determining if a liability is constitutional under this clause is: (1) is there a special fund that has been designated to pay the liability? If so, it would be constitutional. (2) Is the public body (here, Oregon as member state of this Commission) legally obliged to pay the debt or liability? If not, it is constitutional.

Here, there has been no designated fund to ensure payment for the potential fees and assessments that will be assessed from Commission, the fees and assessment are not capped in the Compact at \$50,000 and Oregon would legally obliged to pay whatever assessment and fees are assessed by the Commission. If any of these factors were modified in SB 1504, the constitutional concerns would be alleviated.

(2) Oregon is delegating law making authority to an entity not under Oregon’s control.

Oregon would not control the Commission; it has only a single vote under the Compact when the Commission’s rules are enacted. Oregon, under the compact, would still be responsible for enforcing the rules of the Commission as if they were Oregon statutes.

The Oregon courts have held that it is unconstitutional for the legislature to give an entity that Oregon does not control unrestricted prospective lawmaking power over Oregon, which is exactly what this law would do. This Commission, which would be given full lawmaking authority, would not be accountable to the legislative, judicial or executive branches when

passing rules that the full force and effect of law in Oregon. In the simplest terms, the Oregon government has to remain in charge and accountable for its actions and decision making, not give that power to an entity or person that exists outside of Oregon's government. Here, Oregon is giving unrestricted lawmaking authority to a group over which none of the branches in the Oregon government will have oversight or control.

If the rules of the Commission are reviewed and ratified by an Oregon government body (such as an agency under the executive branch like the Board) or the legislature itself before the rules are given legal effect in Oregon, this would alleviate the potential constitutional concern.

Please also note that the Compact directly conflicts with a number of other statutes that govern licensure of Physical Therapists and conforming legislation for those statutes would also need to be enacted.

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