

HOUSE BILL 261

By Daniel

AN ACT to amend Tennessee Code Annotated, Title 1; Title 4; Title 7; Title 38; Title 62; Title 63 and Title 67, relative to the ability to conduct business in this state.

WHEREAS, the General Assembly has already recognized that the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right; and

WHEREAS, the freedom to earn an honest living traditionally has provided the surest means for economic mobility; and

WHEREAS, in recent years, many regulations of entry into businesses and professions have exceeded legitimate public purposes and have had the effect of arbitrarily limiting entry and reducing competition; and

WHEREAS, the burden of excessive regulation is borne most heavily by individuals outside the economic mainstream, for whom opportunities for economic advancement are curtailed; and

WHEREAS, it is in the public interest to ensure the right of all individuals to pursue legitimate entrepreneurial and professional opportunities to the limits of their talent and ambition; to provide the means for the vindication of this right; and to ensure that regulations of entry into businesses, professions, and occupations are demonstrably necessary and narrowly tailored to legitimate health, safety, and welfare objectives; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 4-5-501(2), is amended by deleting the subdivision and substituting the following:

(2) "Licensing authority":

(A) Means any state agency, regulatory board, commission, council, or committee in the executive branch of state government established by statute or rule that issues any license, certificate, registration, certification, permit, or other similar document for the purpose of entry into, or regulation of, any occupational or professional group; and

(B) Does not include any state regulatory board, commission, council, or committee that regulates a person under title 63 or title 68, chapter 11 or chapter 140;

SECTION 2. Tennessee Code Annotated, Section 4-5-501, is amended by adding the following as new subdivisions:

() "Carefully tailored" means the manner chosen to pursue the asserted purpose must be specifically framed to accomplish that purpose and may not include those persons or activities not necessary to accomplish that purpose;

() "Demonstrably necessary" means that the party supporting the law, ordinance, regulation, rule, policy, fee, condition, test, permit, or other administrative practice can make an evidence-based showing of a legitimate and persistent public health or safety concern;

() "Effectively served by restrictions that allow greater private participation" means that the legitimate public health or safety concern could be substantially addressed by a less onerous restriction on entry in the marketplace, including alternative forms such as market competition, industry or consumer-related ratings and reviews, private or government certification, a specific private civil cause of action to remedy consumer harm, a deceptive trade practice act, a regulation of the process of providing the specific goods or services to consumers, prohibitions on individual malfeasants, existing consumer protection laws, inspections, bonding or insurance, registration, or similar means;

() "Health or safety" means protection of members of the public against harm, to be narrowly construed. This term does not encompass the protection of existing businesses or agencies, whether publicly or privately owned, against competition. This term does not include general welfare, fraud, or competency issues because other adequate consumer safeguards exist to address fraudulent or incompetent behavior;

() "Public service restrictions" means any law, ordinance, regulation, rule, policy, fee, condition, test, permit, or other administrative practice, with or without the support of public subsidy, or user fees;

() "Subsidy" means taxes, grants, user fees, or any other funds received by or on behalf of a licensing authority;

SECTION 3. Tennessee Code Annotated, Title 4, Chapter 5, Part 5, is amended by adding the following as new sections:

4-5-503.

(a) All entry regulations or statutes with respect to businesses and professions are limited to those demonstrably necessary and carefully tailored to fulfill a legitimate public health or safety objective that cannot be effectively served by restrictions that allow greater private participation.

(b) All public service restrictions are limited to those demonstrably necessary and carefully tailored to fulfill a legitimate public health or safety objective that cannot be effectively served by restrictions that allow greater private participation.

4-5-504.

(a) Any person may petition any licensing authority to repeal or modify any entry regulation into a business or profession within its jurisdiction, including rules promulgated relative to statute. Within ninety (90) days of a petition filed under this subsection (a), the licensing authority shall:

- (1) Repeal the entry regulation;
- (2) Modify the regulation to achieve the standard set forth in § 4-5-503;
- (3) Recommend legislative action, if required, to repeal or amend the entry regulation to comply with § 4-5-503; or
- (4) State in writing the basis on which it concludes the regulation conforms to the standard set forth in § 4-5-503.

(b) Any person may petition any licensing authority to repeal or modify a public service restriction within its jurisdiction, including restrictions relative to statute. Within ninety (90) days of a petition filed under this subsection (b), the licensing authority shall:

- (1) Repeal the public service restriction;
- (2) Modify the restriction to achieve the standard set forth in § 4-5-503;
- (3) Recommend legislative action, if required, to repeal or amend the public service restriction to comply with § 4-5-503; or
- (4) State in writing the basis on which it concludes the public service restriction conforms to the standard set forth in § 4-5-503.

(c) Any person may petition a licensing authority to recommend legislative action to repeal or modify any law affecting a business or profession within its jurisdiction.

Within ninety (90) days of a petition filed under this subsection (c), the licensing authority shall:

- (1) Recommend legislative action to repeal or amend the statute to achieve the standard set forth in § 4-5-503; or
- (2) State in writing the basis on which it concludes the statute conforms to the standard set forth in § 4-5-503.

4-5-505.

(a) After ninety (90) days following a petition filed pursuant to § 4-5-504, the person filing a petition challenging an entry regulation, public service restriction, or statute has a cause of action under § 1-3-121 to challenge its legality. Any petition pursuant to this section is subject to the following limitations:

(1) Venue exists in the court nearest to the place of residence of the person filing the petition or, alternatively, at the person's discretion, in the chancery court of Davidson County;

(2) If requested by the person filing the petition within thirty (30) days after filing the petition, the court shall hold an evidentiary hearing, including testimony and argument, to the extent necessary to make the determination required in this section. The person filing the petition has a right to discovery as set forth in the Tennessee Rules of Civil Procedure. If the person exercises the right to discovery, then the court shall hold the evidentiary hearing within thirty (30) days following completion of discovery as certified in writing by the person. The court may hear testimony from witnesses, compel production of documents, and admit relevant admissible evidence that was not considered by the licensing authority; and

(3) In any proceeding under this section, the court shall decide all questions of law, including the interpretation of a regulation adopted by a licensing authority, a public service restriction, or a statute, without deference to any previous determination that may have been made on the question by the licensing authority. Notwithstanding any other law, this subdivision (a)(3) applies in any action for judicial review of any action by a licensing authority that is authorized by the law.

(b) With respect to any challenge of an entry regulation, the plaintiff prevails if the court finds by a preponderance of evidence that the challenged entry regulation on its face or in its effect burdens the creation of a business, the entry of a business into a particular market, or entry into a profession or occupation, and:

(1) That the challenged entry regulation is not demonstrably necessary and carefully tailored to fulfill a legitimate public health or safety objective; or

(2) Where the challenged entry regulation is necessary to fulfill a legitimate public health or safety objective, the objective can be effectively served by restrictions that allow greater private participation.

(c) With respect to the challenge of a public service restriction, the plaintiff prevails if the court finds by a preponderance of the evidence that the challenged public service restriction on its face or in its effect burdens the creation of a business, the entry of a business into a particular market, or entry into a profession or occupation, and:

(1) That the challenged public service restriction is not demonstrably necessary and carefully tailored to fulfill legitimate public health or safety objective; or

(2) Where the challenged public service restriction is necessary to fulfill a legitimate public health or safety objective, the objective can be effectively served by restrictions that allow greater private participation.

(d) With respect to any challenge of a statute affecting a business or profession, the plaintiff prevails if the court finds by a preponderance of evidence that the statute on its face or in its effect burdens the creation of a business, the entry of a business into a particular market, or entry into a profession or occupation, and:

(1) That the challenged statute is not demonstrably necessary and carefully tailored to fulfill a legitimate public health or safety objective; or

(2) Where the challenged statute is necessary to fulfill a legitimate public health or safety objective, the objective can be effectively served by regulations less burdensome to economic opportunity.

(e) The burden of proof rests with the licensing authority at all times.

(f) Upon a finding for the plaintiff, the court shall issue a declaratory judgment, enjoin further enforcement of the challenged entry regulation or public service restriction, and award reasonable attorney's fees and costs to the plaintiff.

4-5-506.

(a) The right of individuals to pursue a chosen business or profession is a matter of statewide concern and is not subject to further inconsistent regulation, ordinance, enforcement action, or law by a county, municipality, or other political subdivision of this state, or one that fails to achieve the standard set forth in § 4-5-503. Such regulation, ordinance, enforcement action, or law is prohibited. This part preempts all inconsistent rules, regulations, codes, ordinances, licenses, fees, or permits, and other laws adopted by a county, municipality, or other political subdivision of this state regarding or burdening the right of individuals to pursue a chosen business or profession.

(b) Any person may petition the state or local agency charged with issuing the license or permit, or collection of the fee to recommend discontinuation of the enforcement action or legislative action to repeal or modify any rule, license, fee, or permit, affecting a business or profession within its jurisdiction as inconsistent with statewide law, or failing to achieve the standard of § 4-5-503. Within ninety (90) days of a petition filed under this subsection (b), the state or local agency shall:

(1) Discontinue enforcement action or recommend legislative action to repeal or amend the challenged restriction to be consistent with state law and to achieve the standard set forth in § 4-5-503; or

(2) State the basis on which it concludes the challenged restriction is not inconsistent with state law and conforms to the standard set forth in § 4-5-503.

(c) After ninety (90) days following a petition, the person filing a petition challenging an entry regulation, public service restriction, or statute has a cause of action under § 1-3-121 to challenge its legality, as set forth in § 4-5-505.

(d) Notwithstanding any other law, in any case in which a license, certification, permit, or fee is required prior to a person engaging in any constitutionally protected activity, the criteria for the granting or denial of that license, certification, permit, or fee must be specified in clear and unambiguous language, and the applicant is entitled to a review and determination of that license, certification, permit, or fee application within ninety (90) days. Venue lies at the discretion of the person in the court nearest to the place of residence of the person filing the petition; the judicial district containing the county, municipality, or other political subdivision of the licensing authority; or in the chancery court of Davidson County. The determination of what constitutes clear and unambiguous language is a judicial question, without deference to the party defending the license, certification, permit, or fee. At all times, the burden of proof to demonstrate that the person has not met the criteria is on the party defending the license, certification, permit, or fee. The person filing the petition has a right to discovery as set forth in the Tennessee Rules of Civil Procedure. If the person exercises the right to discovery, then the court shall hold the evidentiary hearing within thirty (30) days following completion of discovery as certified in writing by the person. The court may hear testimony from witnesses, compel production of documents, and admit relevant admissible evidence that was not considered by the licensing authority.

(e) Upon a finding for the plaintiff, the court shall issue a declaratory judgment, enjoin further enforcement of the challenged license, certification, permit, or fee, and award reasonable attorney's fees and costs to the plaintiff.

SECTION 4. Tennessee Code Annotated, Section 1-3-121, is amended by deleting the last sentence and substituting the following:

A cause of action does not exist under this chapter to seek damages, except as provided in the Right to Earn a Living Act, compiled in title 4, chapter 5, part 5.

SECTION 5. This act shall take effect on becoming a law, the public welfare requiring it.