California State Assembly

BUSINESS AND PROFESSIONS

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AGENDA

Tuesday, January 11, 2022
9:30 a.m. -- State Capitol, Room 4202

BILLS HEARD IN FILE ORDER

1.	AB 294	Santiago	Vehicle Tow and Storage Act.
2.	AB 676	Holden	Franchises.
3.	AB 1120	Irwin	Clinical laboratories: blood withdrawal.
4.	AB 864	Low	Controlled substances: CURES database.
5.	AB 1498	Low	Members of boards within the Department of Consumer Affairs: per diem.

Date of Hearing: January 11, 2022

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS
Marc Berman, Chair
AB 294 (Santiago) – As Introduced January 21, 2021

NOTE: This bill is double-referred to the Assembly Committee on Transportation.

SUBJECT: Vehicle Tow and Storage Act.

SUMMARY: Establishes the Vehicle Towing and Storage Board (VTSB) within the Department of Consumer Affairs, requires businesses that tow and store vehicles to receive a permit from VTSB, authorizes VTSB to resolve disputes associated with the tow and storage of vehicles, and adds additional requirements to the existing tow and storage laws.

EXISTING LAW REGARDING THE TOW INDUSTRY:

1) Defines a "tow truck" as: (1) a motor vehicle which has been altered or designed and equipped for, and primarily used in the business of, transporting vehicles by means of a crane, hoist, tow bar, tow line, or dolly or is otherwise primarily used to render assistance to other vehicles; (2) a "roll-back carrier" designed to carry up to two vehicles; (3) a trailer for hire that is being used to transport a vehicle. (Vehicle Code (VEH) § 615(a))

2) Excludes from the definition of "tow truck":

    a) A "repossessor's tow vehicle" means a tow vehicle that is registered to a repossessor licensed or registered under the Collateral Recovery Act under the Business and Professions Code that is used exclusively in the course of the repossession business. (VEH § 615(b))

    b) An "automobile dismantlers' tow vehicle" means a tow vehicle that is registered by an automobile dismantler licensed under the automobile dismantlers laws and which is used exclusively to tow vehicles owned by that automobile dismantler in the course of the automobile dismantling business. (VEH § 615(c))

3) Requires the operator of a tow truck to have a Motor Carrier Permit issued by the Department of Motor Vehicles (DMV), a valid California driver's license of an appropriate class for the vehicle being driven, and a tow truck driver certificate issued by the DMV or a temporary tow truck driver certificate issued by the Department of the California Highway Patrol, to permit the operation of the tow truck. (VEH §§ 12520, 12804, 24620)

4) Requires all storage and towing fees charged to a legal owner of a motor vehicle to be reasonable, as specified. Requires all towing and storage fees charged when those services are performed as a result of an accident or recovery of a stolen vehicle to be reasonable. Deems a towing and storage charge to be reasonable if it does not exceed those rates and fees charged for similar services provided in response to requests initiated by a public agency, including but not limited to, the California Highway Patrol (CHP) or local police department. Deems a storage rate and fee to be reasonable if it is comparable to storage-related rates and fees charged by other facilities in the same locale, but does not preclude a rate or fee that is higher or lower if it is otherwise reasonable. (VEH § 22524.5(a)-(c)(2))

5) Specifies that the following rates and fees are presumptively unreasonable: administrative or filing fees, except those incurred related to documentation from DMV and those related to the lien sale of a vehicle; security fees; dolly fees; load and unload fees; pull-out fees; and, gate fees, except when the owner or insurer of the vehicle requests that the vehicle be released outside of regular business hours. (VEH § 22524.5(c)(3))

6) Authorizes a vehicle owner, agent, or a repossessor before paying any towing, recovery, or storage-related fees to inspect the vehicle without paying a fee or have an insurer inspect the vehicle at the storage facility at no charge during normal business hours; however, the storage facility may limit the inspection to increments of 45 consecutive minutes to provide service to customers, as specified. (VEH § 22651.07(c))

7) Requires a towing or storage facility to accept an insurer's check as a form of payment. (VEH § 22651.07(c)(5))

8) Requires a storage facility to be open and accessible during normal business hours and outside of normal business hours, the facility must provide a telephone number that permits the caller to leave a message and calls must be returned no later than six business hours after a message has been left. (VEH § 22651.07(d))

EXISTING LAW REGARDING THE CREATION OF NEW LICENSING BOARDS:

1) Establishes requirements and procedures for legislative oversight of state board formation and licensed professional practice. (Government Code (GOV) §§ 9148-9148.8)

2) Requires, before consideration by the Legislature of legislation creating a new state board or legislation creating a new category of licensed professional, that the author or sponsor of the legislation develop a plan for the establishment and operation of the proposed state board or new category of licensed professional. (GOV § 9148.4)

3) The plan must include all of the following:

    a) A description of the problem that the creation of the specific state board or new category of licensed professional would address, including the specific evidence of need for the state to address the problem. (GOV § 9148.4 (a))

    b) The reasons why this proposed state board or new category of licensed professional was selected to address this problem, including the full range of alternatives considered and the reason why each of these alternatives was not selected. (GOV § 9148.4(b))

    c) Alternatives that shall be considered include, but are not limited to, the following:

        i) No action taken to establish a state board or create a new category of licensed professional. (GOV § 9148.4(b)(1))

        ii) The use of a current state board or agency or the existence of a current category of licensed professional to address the problem, including any necessary changes to the mandate or composition of the existing state board or agency or current category of licensed professional. (GOV § 9148.4(b)(2))

iii) The various levels of regulation or administration available to address the problem. (GOV § 9148.4(b)(3))

iv) Addressing the problem by federal or local agencies. (GOV § 9148.4(b)(4))

d) The specific public benefit or harm that would result from the establishment of the proposed state board or new category of licensed professional, the specific manner in which the proposed state board or new category of licensed professional would achieve this benefit and the specific standards of performance which shall be used in reviewing the subsequent operation of the board or category of licensed professional. (GOV § 9148.4(c))

e) The specific source or sources of revenue and funding to be utilized by the proposed state board or new category of licensed professional in achieving its mandate. (GOV § 9148.4(d))

f) The necessary data and other information required in this section shall be provided to the Legislature with the initial legislation and forwarded to the policy committees in which the bill will be heard. (GOV § 9148.4(e))

4) Authorizes the appropriate policy committee of the Legislature to evaluate the plan prepared in connection with a legislative proposal to create a new state board and provides that, if the appropriate policy committee does not evaluate a plan, then the Joint Sunset Review Committee shall evaluate the plan and provide recommendations to the Legislature. (GOV § 9148.8)

EXISTING LAW REGARDING RELATED LICENSING PROGRAMS:

1) Establishes the Department of Consumer Affairs (DCA) within the Business, Consumer Services, and Housing Agency. (Business and Professions Code (BPC) § 100)

2) Provides for the licensure and regulation of various professions and vocations by boards, bureaus, and other entities within the DCA. (BPC §§ 22, 100-144.5)

3) Specifies that the DCA is under the control of a civil executive officer who is known as the Director of Consumer Affairs and specifies the duties and authority of the Director. (BPC §§ 150-166)

4) Authorizes the DCA to levy a charge for estimated administrative expenses, not to exceed the available balance in any appropriation for any one fiscal year, in advance on a pro-rata share basis against any of the boards, bureaus, commissions, divisions, and agencies, at the discretion of the director and with the approval of the Department of Finance. (BPC § 201)

5) Establishes the Bagley-Keene Open Meetings Act, which covers all state boards and commissions and requires them to publicly notice their meetings, prepare agendas, accept public testimony, and conduct their meetings in public unless specifically authorized to meet in closed session. (GOV §§ 11120-11132)

6) Establishes the Automotive Repair Act, which licenses and regulates automotive repair dealers, as defined, and establishes the Bureau of Automotive Repair within the DCA to administer and enforce the act. (BPC §§ 9880-9550.3)

7) Requires automotive repair dealers to be registered and comply with the automotive repair act to utilize any lien for labor or materials, including the ability to charge storage fees under applicable laws, or the right to sue on a contract for motor vehicle repairs. (BPC § 9884.16).

8) Establishes the Collateral Recovery Act, which licenses and regulates repossessors, as defined, and specifies that the act is administered and enforced by the Bureau of Security and Investigative Services. (BPC §§ 7500-7511.5)

THIS BILL:

1) Makes legislative findings and declarations related to unlawful towing practices.

2) Deems a towing and storage charge reasonable if it does not exceed the fees and rates charged for similar services provided in the same geographical organization area established by the Department of the California Highway Patrol, as specified.

3) Deletes the exception allowing for storage rates to be comparable to the rates charged by other facilities in the same locale.

4) Requires the towing and storage fees and access notice to include a specified reference to the new Vehicle Tow and Storage Board created under this bill.

5) Adds specified driver information to the itemized invoice required by law.

6) Establishes the Vehicle Tow and Storage Act and establishes the Vehicle Towing and Storage Board within the DCA to administer and enforce the act, and specifically establishes the following:

    a) Defines “business”, for purposes of the act, as any business entity formed as a sole proprietorship, partnership, limited liability company, limited liability partnership, or corporation.

    b) Defines “tow truck or tow vehicle” as a vehicle specified in Vehicle Code § 615, which provides the following definitions:

        i) A “tow truck” is a motor vehicle that has been altered or designed and equipped for, and primarily used in the business of, transporting vehicles by means of a crane, hoist, tow bar, tow line, or dolly or is otherwise primarily used to render assistance to other vehicles. A “roll-back carrier” designed to carry up to two vehicles is also a tow truck. A trailer for hire that is being used to transport a vehicle is a tow truck. “Tow truck” does not include an automobile dismantlers’ tow vehicle or a repossessor’s tow vehicle.

        ii) “Repossessor’s tow vehicle” means a tow vehicle that is registered to a repossessor licensed or registered under the Collateral Recovery Act that is used exclusively in the course of the repossession business.

iii) "Automobile dismantlers' tow vehicle" means a tow vehicle which is registered by an automobile dismantler licensed by the Department of Motor Vehicles and which is used exclusively to tow vehicles owned by that automobile dismantler in the course of the automobile dismantling business.

c) Specifies the following related to the Vehicle Tow and Storage Board:

i) "It is the mandate of the board to regulate the practice of towing and storing vehicles in the interest and for the protection of the public health, safety, and welfare. For this purpose, the board shall have the authority to issue a permit to any business that tows and stores a vehicle, as described in this chapter, maintain a public database of permitholders, promptly review and resolve disputes associated with the tow and storage of vehicles, as contemplated by this chapter, and enforce the provisions of this chapter to provide for the protection of the consumer."

ii) The board consists of nine members, comprised of the following:

(1) Seven members appointed by the Governor:

(a) Two members from the law enforcement community, at least one of whom is from the Department of the California Highway Patrol.

(b) Two members from the towing industry who have at least 10 years of direct management or ownership experience with a business that primarily conducted services with a tow truck, as defined.

(c) Two members from the insurance industry.

(d) One member from an automotive repair facility regulated by the Bureau of Automotive Repair.

(2) Two members of the public, one of whom is appointed by the President Pro Tempore of the Senate and one of whom is appointed by the Speaker of the Assembly.

d) Establishes requirements on the board members, including that:

i) Board members serve for a term of four years and until the appointment and qualification of their successor.

ii) There are no term limits.

iii) Board members receive a per diem and expenses.

iv) The board meets at least once each month to transact business.

e) Requires a "business" to obtain a Vehicle and Storage Permit from the VTSB before operating a tow truck or tow vehicle in California or enforcing a lien on a vehicle, as defined under existing law (CIV § 3068.1).

f) Requires each Vehicle and Storage permit holder to post in the office area of the storage facility, in plain view of the public, a copy of the permit.

g) Requires the board to establish and maintain a database on a publicly available internet website that contains the following information on each holder of a Vehicle Tow and Storage Permit:

   i) The legal business name and any additional business names, including fictitious business names, under which the permit holder tows or stores vehicles in California.

   ii) The motor carrier permit number issued to the business by the Department of Motor Vehicles, if applicable.

   iii) The license number issued to the business by the Bureau of Automotive Repair, if applicable.

   iv) The vehicle identification number and license plate number of all tow trucks or tow vehicles used to tow a vehicle in California.

   v) The names of each person that owns an equity stake in a business holding a Vehicle Tow and Storage Permit and the business names of any additional businesses that tow or store vehicles in California in which the person has owned an equity stake in the past 10 years.

   vi) The name of each driver of a tow truck or tow vehicle that is employed by a business holding a Vehicle Tow and Storage Permit.

   vii) The address and phone number for each location of a business holding a Vehicle Tow and Storage Permit.

   viii) All tow and storage rates.

   ix) A record of any disputes decided by the board adversely to the permit holder.

h) Specifies that 1) information provided to the board by a permit applicant or permit holder shall be submitted under the penalty of perjury and 2) any changes to the information available to the public in the database established under this bill must be submitted to the board by a permit holder with the payment of its annual fees due to the board.

i) Establishes a dispute resolution program, specifying the following procedures:

   i) Requires the board to establish a process to receive, review, and issue determinations on any of the following disputes submitted by a vehicle owner or the vehicle owner's agent that has had their vehicle towed or stored in California:

      (1) Whether the business that towed or stored the vehicle had a valid Vehicle Tow and Storage Permit at the time of the tow or storage.

      (2) Whether the fees charged for the tow or storage exceeded the rates authorized by law, the rates approved by the applicable law enforcement entity that initiated the tow or were otherwise reasonable, as defined.

(3) Whether the business that towed or stored the vehicle charged for "unreasonably excessive time."

(4) Whether an insurer's check was accepted when the vehicle was retrieved by an insurer.

ii) Specifies that the board shall not review, nor issue determinations, on any of the following disputes:

(1) Tow or storage charges when the tow was initiated by a motor club holding a certificate of authority, as specified.

(2) Tow or storage charges when a written agreement between the vehicle owner and the business charging for tow or storage was entered into before the incident that triggered the tow.

iii) Requires the board to resolve disputes according to the following process:

(1) A vehicle owner or their agent, referred to as the complainant, must file a dispute against a business charging for towing or storage charges, referred to as the respondent, with the board within 30 calendar days following the payment of tow or storage charges on which the dispute is based. In its dispute, the complainant must provide the board with sufficient information to identify the respondent, the basis for the dispute, and if it is a vehicle owner's agent filing the dispute, the name of the vehicle owner that it represents. The board shall not have jurisdiction to resolve any dispute filed after 30 calendar days following the payment of tow or storage charges on which the dispute is based.

(2) The respondent bears the burden to prove by a preponderance of the evidence that the dispute is meritless, except the complainant must bear the burden on any disputes based on acceptance of an insurance check at the time the vehicle was retrieved. All disputed charges are presumed to be unreasonable unless sufficiently rebutted by the respondent.

(3) The board must promptly notify the respondent of the dispute, including all pertinent details of the dispute.

(4) The respondent must, within 15 business days from receipt of the board's notice, respond to the board. If the respondent fails to respond within 15 business days, the board must issue a determination in the complainant's favor. In its response, a respondent may either:

(a) Contest the dispute and provide the board with exculpatory evidence.

(b) If a dispute is based on 1) whether the fees charged for the tow or storage exceeded the rates authorized by law, the rates approved by the applicable law enforcement entity that initiated the tow, or were otherwise reasonable, as defined, or 2) whether the business that towed or stored the vehicle charged for unreasonably excessive time, the respondent may elect to not contest the

dispute and return the full amount charged for towing or storage to the board to be returned to the complainant.

(5) After reviewing all evidence provided to it by the parties, the board must issue a determination in one party's favor and assess any penalties within 30 days, or as close to 30 days as possible, after receiving the response.

(6) The respondent must pay any penalties assessed by the board within 30 days of receipt of the determination. If a respondent fails to pay penalties within the 30 days, the board must suspend the respondent's Vehicle Tow and Storage Permit, or delay the issuance of a Vehicle Tow and Storage Permit if the respondent does not have a permit, until paid.

iv) Specifies the following penalties on the respondent upon the issuance of a determination in the complainant's favor:

(1) If the board determines that the respondent failed to obtain a Vehicle Tow and Storage Permit at the time of the tow or storage in dispute, the respondent will be assessed a penalty equivalent to the cost of the tow or storage in dispute plus four times the amount charged, but not more than $10,000.

(2) If the board determines that the respondent charged a fee for towing or storage that exceeded the rates authorized by law, approved by the applicable law enforcement entity that initiated the tow, or were otherwise reasonable, as defined, the respondent will be assessed a penalty equivalent to the cost of the tow or storage in dispute plus four times the amount charged, but no more than $10,000.

(3) If the board determines that the respondent charged for unreasonably excessive time, the respondent will be assessed the following penalties:

(a) For a first adverse determination related to charging unreasonably excessive time within a rolling 18-month period, the respondent will be assessed a penalty equivalent to the amount charged for the time determined to be excessive, but no more than $10,000.

(b) For a second adverse determination related to charging unreasonably excessive time within a rolling 18-month period, the respondent will be assessed a penalty equivalent to two times the amount charged for the time determined to be excessive, but no more than $10,000.

(c) For a third or subsequent adverse determination related to charging unreasonably excessive time within a rolling 18-month period, the respondent will be assessed a penalty equivalent to four times the amount charged for the time determined to be excessive, but no more than $10,000.

(4) If the board determines that the respondent did not accept an insurer's check when the vehicle was retrieved by an insurer, the respondent will be assessed a penalty equivalent to the cost of the tow or storage in dispute plus four times the amount charged, but no more than $10,000.

v) Specifies that one-quarter of any penalties paid to the board is retained by the board to fund its activities, with the remaining amount promptly paid by the board to the complainant. If the complainant is a vehicle owner's agent, any penalty amounts paid to the complainant shall be returned to the vehicle owner.

vi) Authorizes a respondent to appeal a board's determination by filing a writ of administrative mandate with the superior court of the county in which the incident occurred. If the writ is filed within 30 days of receipt of the board's determination, the determination may not be enforced by the board until the court issues a final resolution on the matter.

vii) Specifies that the filing of a dispute with the board precludes the complainant from bringing the same or similar claim for the same incident against the same respondent in any court of law in California.

viii) Authorizes a single complainant to file 10 disputes with the board in a calendar year, after which the board will assess a $100 filing fee for each additional dispute. The filing fee is returned to the complainant if the board issues a determination in the complainant's favor.

j) Establishes an initial and annual renewal permit fee schedule according to the following:

i) $125 for a fleet size of no more than one.

ii) $176 for a fleet size of no less than two and no more than four.

iii) $363.50 for a fleet size of no less than 5 and no more than 10.

iv) $641.50 for a fleet size of no less than 11 and no more than 20.

v) $859 for a fleet size of no less than 21 and no more than 35.

vi) $1,135.50 for a fleet size of 36 or more.

k) Provides that, until January 1, 2023, a business operating a tow truck or tow vehicle in California or enforcing a lien on a vehicle, as specified, without obtaining a Vehicle Tow and Storage Permit will not be penalized and instead be issued a notice to correct the violation.

l) Provides that, by January 1, 2023, a business operating a tow truck or tow vehicle in California or enforcing a lien on a vehicle, as specified without obtaining a Vehicle Tow and Storage Permit will be punished by a fine not exceeding $5,000.

m) Specifies that a business operating a tow truck or tow vehicle in California or enforcing a lien on a vehicle, as specified, with a Vehicle Tow and Storage Permit that has been suspended by the board will be punished as follows:

i) For a first offense, the business will be assessed a fine not exceeding $5,000.

ii) For a second offense, the business will be assessed a fine not exceeding $10,000.

iii) For a third offense, the business will be assessed a fine not exceeding $25,000.

7) Makes other technical and conforming changes to existing law.

FISCAL EFFECT: Unknown. This bill is keyed fiscal by the Legislative Counsel.

COMMENTS:

Purpose. This bill is co-sponsored by the *California Tow Truck Association* and the *Personal Insurance Federation of California*. According to the author, "[this bill] will help relieve low-income consumers burdened by high tow and storage fees charged for the towing and storage of their vehicles. Because consumers often need towing services in times of crisis, such as when they get into a car accident, they are often stuck choosing the most convenient towing service. Towing companies can charge hundreds of dollars a day in vehicle storage fees, and consumers face a long and cumbersome pathway to challenge excessive charges. California consumers, especially those in low-income communities, should not face a cumbersome process to dispute unjust charges. [This bill] will provide consumers with a quick and fair process to resolve certain disputes by establishing the Vehicle Tow and Storage Board. This bill also establishes a permit system whereby all businesses would be required to obtain a Vehicle Tow and Storage Permit before operating a tow truck in California or charging for the storage of a towed vehicle to help prevent bad actor towing companies from taking advantage of desperate consumers."

Background. This bill would establish a licensing program for tow and storage companies with two overarching goals. The first is to deter predatory towing practices. The second is to provide a simpler way for a consumer or their agent, such as an insurance agent or attorney, to resolve disputes with tow companies.

*Sunrise Process***.** The Legislature uses a process known as "Sunrise" to assess requests for new or expanded occupational regulation, pursuant to GOV § 9148 and policy Committee Rules. The process includes a questionnaire and a set of evaluative scales to be completed by the group supporting regulation. The questionnaire is an objective tool for collecting and analyzing information needed to arrive at accurate, informed, and publicly supportable decisions regarding the merits of regulatory proposals.

According to the author's Sunrise questionnaire, "the applicant group consists of both the emergency roadside response industry, comprised of the California Tow Truck Association/Emergency Road Service Coalition of America (CTTA/ERSCA)… as well as the insurance industry, represented by the Personal Insurance Federation of California…. The regulation being sought with [this bill] would apply to businesses providing emergency roadside assistance in California, which includes any business that operates a tow truck or tow vehicle in California, as defined in Vehicle Code section 615, or enforces a lien on a vehicle pursuant to Civil Code section 3068.1."

Sunrise Background. New regulatory and licensing proposals are generally intended to assure the competence of specified practitioners in different occupations. However, these proposals have resulted in a proliferation of licensure and certification programs, which are often met with mixed reviews. Proponents argue that licensing benefits the public by assuring competence and an avenue for consumer redress. Critics disturbed by increased governmental intervention in the marketplace have cited shortages of practitioners and increased costs of service as indicators that regulation benefits a profession more than it benefits the public.

In recent years, studies have demonstrated that licensing can have negative or unintended economic impacts, suggesting that lower levels of regulation may be more appropriate.[1] In July of 2015, the White House issued a report, *Occupational Licensing: A Framework for Policymakers*, in response to increases in the number of workers holding a license. It noted that, while licensing offers important protections to consumers and can benefit workers, there are also substantial costs, and licensing requirements may not always align with the skills necessary for the profession being licensed. Specifically, the report found:

> There is evidence that licensing requirements raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across State lines. Too often, policymakers do not carefully weigh these costs and benefits when making decisions about whether or how to regulate a profession through licensing. In some cases, alternative forms of occupational regulation, such as State certification, may offer a better balance between consumer protections and flexibility for workers.

State legislators and administrative officials are expected to weigh arguments regarding the necessity of the proposed regulation, determine the appropriate level of regulation (e.g., registration, certification, or licensure), and select a set of standards (education, experience, examinations) that will assure competency. Requests for regulatory decisions often result in sharp differences of opinion as supporters and critics of the proposed regulation present their arguments. As a result, accurate information is necessary.

The Sunrise process accomplishes the following: (1) places the burden of showing the necessity for new regulations on the requesting groups; (2) allows the systematic collection of opinions both pro and con; and (3) documents the criteria used to decide upon new regulatory proposals. This helps to ensure that regulatory mechanisms are imposed only when proven to be the most effective way of protecting public health, safety, and welfare.

If a review of the proponents' case indicates that regulation is appropriate, a determination must be made regarding the appropriate level of regulation. As noted above, often the public is best served by minimal government intervention. The definitions and guidelines below are intended to facilitate the selection of the least restrictive level of regulation that will adequately protect the public interest.

- Level I: Strengthen existing laws and controls. The choice may include providing stricter civil actions or criminal prosecutions. It is most appropriate where the public can effectively implement control.

- Level II: Impose inspections and enforcement requirements. This choice may allow inspection and enforcement by a state agency. These should be considered where a service is

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[1] Morris M. Kleiner, *Reforming Occupational Licensing Policies*, Discussion Paper 2015-01 (The Hamilton Project, Brookings Institution, March 2015); Michelle Natividad Rodriguez and Beth Avery, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records* (National Employment Law Project, April 2016); *Jobs for Californians: Strategies to Ease Occupational Licensing Barriers,* Report #234 (Little Hoover Commission, 2016); Dick M. Carpenter II, Lisa Knepper, Kyle Sweetland, and Jennifer McDonald, *License to Work: A National Study of Burdens from Occupational Licensing*, 2nd Edition (Institute for Justice, November 2017); Adam Thierer and Trace Mitchell, *Occupational Licensing Reform and the Right to Earn a Living: A Blueprint for Action* (Mercatus Center/George Mason University April 2020).

provided that involves a hazard to the public health, safety, or welfare. Enforcement may include recourse to court injunctions and should apply to the business or organization providing the service, rather than the individual employees.

- Level III: Impose registration requirements. Under registration, the state maintains an official roster of the practitioners of an occupation, recording also the location and other particulars of the practice, including a description of the services provided. This level of regulation is appropriate where any threat to the public is small.

- Level IV: Provide an opportunity for certification. Certification is voluntary; it grants recognition to persons who have met certain prerequisites. Certification protects a title: non-certified persons may perform the same tasks but may not use "certified" in their titles. Usually, an occupational association is the certifying agency, but the state can be one as well. Either can provide consumers a list of certified practitioners who have agreed to provide services of a specified quality for a stated fee. This level of regulation is appropriate when the potential for harm exists and when consumers have a substantial need to rely on the services of practitioners.

- Level V: Impose licensure requirements. Under licensure, the state allows persons who meet predetermined standards to work at an occupation that would be unlawful for an unlicensed person to practice. Licensure protects the scope of practice and the title. It also provides for a disciplinary process administered by a state control agency. This level of regulation is appropriate only in those cases where a clear potential for harm exists and no lesser level of regulation can be shown to adequately protect the public.

Sunrise Criteria and Questions. Central to the Sunrise process was the creation of nine Sunrise criteria developed in coordination with the DCA to provide a framework for evaluating the need for regulation. These criteria are:

1) Unregulated practice of the occupation in question will harm or endanger the public health, safety or welfare.

2) Existing protections available to the consumer are insufficient.

3) No alternatives to regulation will adequately protect the public.

4) Regulation will alleviate existing problems.

5) Practitioners operate independently, making decisions of consequence.

6) The functions and tasks of the occupation are clearly defined.

7) The occupation is clearly distinguishable from other occupations that are already regulated.

8) The occupation requires knowledge, skills, and abilities that are both teachable and testable.

9) The economic impact of regulation is justified.

The criteria were used to develop the Sunrise Questionnaire noted above and help legislators and administrators answer three policy questions:

1) Does the proposed regulation benefit the public health, safety, or welfare?

2) Will the proposed regulation be the most effective way to correct existing problems?

3) Is the level of the proposed regulation appropriate?

SUNRISE ANALYSIS:

The following analysis is based on the above criteria and corresponding questions and answers provided by the author and sponsors in the questionnaire.

Criteria 1. Unregulated practice of the towing industry will harm or endanger the public health, safety, or welfare.

Consumer groups have published reports detailing the prevalence of predatory towing practices and their impact on consumers, particularly those with low income.[2] As a benchmark for demand, the applicants also point to the prior bills that have attempted to address issues within the towing industry, including:

- AB 516 (Chiu) of 2019 would have eliminated impounds on vehicles with 5 or more parking tickets, abandoned for 72 hours, or with registration expired for more than 6 months.

- AB 2392 (Santiago), Chapter 434, Statutes of 2018 addressed unreasonable fees and other issues in the towing industry, such as authorizing payment using an insurer's check.

- AB 2825 (Jones-Sawyer) of 2018 would have required towing companies to provide free oral and written translation services to non-English speakers, and would also have applied the requirements that currently apply to debt collectors to "at the counter" tow company transactions.

- AB 2586 (Gatto) of 2016 included a provision that would have required towing companies to provide free towing and storage to owners of stolen vehicles.

- AB 1222 (Bloom), Chapter 309, Statutes of 2015 imposed additional requirements on tow trucks responding to accident scenes to address "bandit towing" practices.

- AB 519 (Solorio), Chapter 566, Statutes of 2010 increased accountability in the towing industry by establishing basic consumer protections, including requiring all towers to provide a detailed written invoice and a Towing and Storage Fees and Access Notice to consumers, as well as authorizing civil penalties for the failure to comply with the requirements.

In terms of the severity of harm, the applicants note that:

> Incompetent practice within the towing industry primarily manifests in overbilling, thus resulting in financial harm for insurance carriers and vehicle owners,

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[2] See for example, *Towed into Debt: How Towing Practices in California Punish Poor People* (March 2019). https://wclp.org/wp-content/uploads/2019/03/TowedIntoDebt.Report.pdf; Grace Brombach, *Getting off the Hook of a Predatory Tow: 14 Ways States Should Protect Consumers When Their Car is Towed* (U.S. PIRG Education Fund, May 2021).

> oftentimes upon those that are least likely able to defend themselves, thus perpetuating a cycle of poverty. According to a 2019 report entitled, "Towed into Debt: How Towing Practices in California Punish Poor People" (https://wclp.org/wp-content/uploads/2019/03/TowedIntoDebt.Report.pdf), "[f]or many Californians whose vehicles are towed, the financial impact can continue long after the car is recovered, or more often for low-income people, after the car is sold to pay off the towing fees," including ongoing negative impacts upon economic prospects, public benefits, access to education, and housing opportunities.
>
> Additionally, the negligent maintenance of tow trucks, as commercial motor vehicles, also raises significant safety concerns for all motorists in California.

However, the applicants also note that it is difficult to track the frequency of the harm, noting that "unfortunately, without strict enforcement of existing laws regarding billing practices within the towing industry, it is inevitable that overbilling will continue to regularly occur in California. Anecdotal evidence obtained by CTTA and PIFC suggests that California consumers are being financially harmed on a regular basis."

Although the towing industry is not completely unregulated, the anecdotal data and various studies performed by consumer groups, like those mentioned earlier, suggest that harm is occurring despite existing regulations.

Criteria 2. Existing protections available to the consumer are insufficient.

Existing law establishes various requirements on towing companies, including:

1) Limits on storage rates.

2) Various notices and disclosures, including rates and signage in tow-away areas.

3) Acceptance of credit cards and release of personal items.

4) Release of a vehicle if the owner returns before their car is towed.

5) Designated hours for when an owner can retrieve a vehicle.

6) Reimbursement if a car is damaged and reimbursement and damages if a vehicle tow is proven illegal.

7) Itemized bills.

According to the applicants, "in 2011, California enacted the Towing Fees and Access Notice via AB 519 (Solorio), contained within Vehicle Code section 22651.07, to increase accountability upon the towing industry by establishing basic consumer protections, including requiring all towers to provide a detailed written invoice and a Towing and Storage Fees and Access Notice to consumers, as well authorizing civil penalties for the failure to comply with these requirements. The Notice must contain statutorily-prescribed language detailing vehicle owners' rights when their vehicle is towed. The Notice must be posted in plain view, copies must be made available, and must be provided upon request (language on each written invoice advises consumers of their

right to request the Notice).” In addition, when using a voluntary tow, a consumer can pick and choose the company or motor club they would like to use.

However, it can be difficult to limit exposure to risk in the case of an involuntary tow. According to the applicants, “in the contexts where law enforcement initiates a vehicle impound or a vehicle is removed from private property, vehicle owners are unlikely to have any ability to determine which practitioner is selected. This would be determined by the impounding law enforcement agency or private property owner. However, in the motor club or commercial towing contexts, a vehicle owner consensually approves the towing company, presumably after comparing rates with providers of similar services.”

In cases where a consumer is harmed (e.g. their vehicle is damaged or a towing law is otherwise violated), consumers have various civil remedies available. Some situations include civil awards of up to four times the amount charged.

However, the applicants argue that, despite the availability of these remedies, consumers may have difficulty accessing them. “While the Towing and Storage Fees and Access Notice was helpful in educating a consumer about their rights in this context – including providing critical info on appropriate charges, when and how one could retrieve their vehicle and personal property, and payment options—consumers still faced a long and cumbersome pathway to challenge excessive charges. Oftentimes, this lack of accountability for towing companies leaves vulnerable consumers with a terrible choice, either pay the excessive fees or leave their vehicle entirely. Either option unfortunately only initiates or perpetuates a cycle of poverty.”

As noted above, anecdotal data and the previously cited studies suggest harm is occurring, and therefore there may be more that can be done to protect the public.

Criteria 3. No alternatives to regulation will adequately protect the public.

The applicants argue that industry self-regulation and market factors have often been insufficient due to the unique nature of the “involuntary tow” market. The demand is not generated by the owner of a towed vehicle, it is driven by those requesting the tow. However, the owner is the one that pays for the tow.

The applicants note that “market forces, when applied in the consensual towing context, generally keep rates down and towing companies honest, as otherwise business would inevitably dry up. However, there are many instances where a consumer is not able to effectively ‘shop’ towing companies, generally in the nonconsensual context like when your vehicle has been impounded or you’re in an ambulance after an accident, where governmental regulation is warranted as a backstop against abusive practices. Existing laws in this context, while prohibitive of numerous bad acts within the towing industry, generally require either: 1) criminal prosecution, which for many reasons is oftentimes not pursued by local district attorneys’ offices; or 2) civil lawsuits, which for many reasons, primarily financial, are oftentimes not pursued by consumers who feel they were subject to abusive practices. It has become evident that a governmental body, whose expertise and jurisdiction are towing-minded, would provide the necessary enforcement and backstop that is currently lacking.”

Applicants further argue that the following non-governmental avenues are insufficient:

1) Code of ethics: "While helpful in educating the tow industry about acceptable and unacceptable practices, there is no meaningful enforcement against those who either knowingly or unknowingly violate the code of ethics."

2) Codes of practice enforced by professional associations: "The California Tow Truck Association/Emergency Road Service Coalition of America, the largest tow association in the world, has existing tools to discipline or terminate the membership of bad actors within the industry. However, while CTTA/ERSCA does provide valuable benefits to members, there is no requirement that anyone be a member of CTTA/ERSCA in California, and therefore many tow companies are not members of CTTA/ERSCA and would not be subject to any CTTA/ERSCA enforcement."

3) Dispute-resolution mechanisms such as mediation or arbitration: "While perhaps valuable, many consumers do not have the resources to take advantage of alternative dispute resolution options."

4) Recourse to currently applicable law: "While current law does provide considerable recourse options for frustrated consumers, including pursuing criminal charges or suing a tow company in a civil lawsuit, such remedies are expensive and lengthy, particularly for low-income consumers."

5) Regulation of those who employ or supervise practitioners: "Law enforcement agencies and motor clubs, which are already considerably regulated, that contract with towing companies generally have existing contractual authority to terminate agreements with bad actors. While this proves to be an effective carrot to discourage bad behavior, law enforcement agencies generally cannot force a towing company to return fees that were inappropriately charged after the fact to a consumer."

6) Other measures attempted: "Self-enforcement within the tow industry has been helpful in certain contexts. For example, AB 306 (Lowenthal) from 2013 required any business that contracts with a tow company to obtain proof of a valid Motor Carrier Permit (MCP) before allowing the tower to retrieve vehicles from or deliver vehicles to its premises. However, it is unclear how such a self-enforcement mechanism would work in the business-to-consumer context."

Criteria 4. Regulation will mitigate existing problems.

There are two problems posed by the applicants: 1) predatory towing and storage practices and 2) lack of ability for consumers to access remedies and resolve disputes when they arise due to those practices. According to the applicants, the "proposed regulation will now provide consumers with a specific outlet should they need recourse after their vehicle was towed, which directly benefits consumers in two ways. First, the proposed regulation includes a free, quick, and consumer-friendly dispute process, whereby a consumer can swiftly recover any fees that were inappropriately paid to a towing company. Second, because each towing company would now be required to obtain a permit from the state, there is now a significant incentive to comply with all towing related laws, including returning money to rightfully owed consumers that utilized the dispute process, or else risk losing the permit and the ability to legally operate in the state."

As to whether this bill would address the first problem, predatory towing and storage practices, the large fines and damages available to consumers would ideally deter the bad actors who follow the law and obtain a permit. Further, if lack of a permit is tied to the authority to tow vehicles at all, unlicensed practice could be deemed car theft, which may be more attractive to prosecute. Further, if the bill is amended to include a revocation process, it would create an additional incentive to comply with existing laws.

As to the second problem, the proposed dispute resolution program, if properly implemented, would provide consumers and their agents an additional avenue to handle disputes, and potentially make it easier to take advantage of existing remedies. However, the bill does lack key components of the dispute process.

Benefit vs. Cost. In addition, licensing and additional regulation often present negative or unintended consequences. In response to the benefits as weighed against the potential impacts, the applicants note that:

1) Restriction of opportunity to practice: "Our state is better off when towing companies that base their business upon repeatedly price gouging consumers, and otherwise committing abusive practices, are eliminated from the marketplace." However, there are many unknowns under this bill, including the total costs to the permittees or how utilization of the dispute resolution program will look in practice. If the resulting fees are too high, it may inadvertently shut down smaller "good actor" businesses.

2) Restricted supply of practitioners: "Emergency roadside responders are a necessary component of a functioning transportation system in California by removing disabled vehicles and impounding vehicles that are being used inappropriately, amongst other beneficial reasons. Removing those few fringe, abusive actors within the industry will not likely have a significant impact on the ability of the tow industry to continue to perform these vital tasks." However, as noted above, the current state of the bill makes it unclear whether only the "bad actor" businesses will be impacted.

3) Increased costs of services to the consumer: "We do not believe the proposed regulation will result in increased costs. In fact, it is designed to discourage abusive practices, including overcharging, thus will likely have the effect of decreased costs to consumers." However, if the fees that need to be charged to permittees are higher than anticipated, those costs may generate higher fees on the consumer.

4) Increased governmental intervention in the marketplace: "The government is already heavily involved in the tow industry, through existing laws authorizing civil and criminal penalties, as well as law enforcement contracts with tow companies. The proposed regulation merely aids in the effective enforcement of these existing governmental interventions."

One difficulty in determining whether the benefits outweigh the consequences with the current bill is that it is unclear how many towing companies are operating and would be captured under this bill, and therefore difficult to estimate the licensing fees needed to sustain the new board. Ordinarily, DCA licensing boards are special-funded and receive no general fund support. As a result, they base their budgets on license issuance and renewal fees, which are the most reliable source of income. The board created under this bill has a proposed fee schedule, but without a reliable count of the licensee pool, it is unclear what the fees would need to be and therefore unclear on the potential impacts on the licensees and consumers.

Criteria 5. Practitioners operate independently, making decisions of consequence.

According to the applicants, "while oftentimes contracts with law enforcement agencies or motor clubs dictate the broad parameters of an individual towing company's engagement with a consumer, such a contractor makes innumerable independent judgments during each interaction, including, but not limited to, how to most effectively and safely tow a vehicle and the final amount to charge the consumer for the service. Unfortunately, this discretion in final charges allows abusive operators to overbill consumers."

In addition, "how tightly a tow company employer supervises its employee drivers varies significantly between companies, however, the employee driver, who is generally operating on the side of the road by him or herself, is inevitably making countless independent decisions on matters ranging from safely towing the vehicle to billing."

The purpose of licensing is to protect the public, and professional licensing accomplishes that by ensuring a minimal level of competency in high skill or knowledge professions to avoid harm. For towing, the applicants note that, "Towing vehicles on the side of a road with fellow motorists screaming by is an extremely dangerous activity, both to the practitioner, stranded motorist(s), and fellow motorists on the road. Safety is of the utmost importance and is usually directly related to the experience and training of the individual tow operator. As such, driver training is prevalent within the industry and is generally required of drivers towing for law enforcement agencies, like the CHP."

Criteria 6. Functions and tasks of the occupation are clearly defined.

The functions and tasks of towing companies, while not specifically defined in any one place in statute, do appear to be definable. According to the applicants, "Tow companies utilize trained tow truck drivers/operators to operate specialized tow trucks to tow other vehicles, as well as oftentimes transporting the vehicle driver him or herself. In addition to the tow itself, oftentimes the vehicle will need to be stored within a secure storage yard until it can be retrieved by the vehicle owner."

In terms of this bill, the licensing scheme relies on existing definitions of tow trucks and businesses that enforce liens on vehicles. It does not specify any additional acts that would constitute a "scope of practice." In terms of competent practice within the industry, the applicants note, "aside from various local and state licenses and insurance requirements applicable to any business, there are no additional specific requirements to operate a tow company in California. However, many law enforcement and motor club contracts will demand various requirements of a tow company, including safety and consumer protections. In order to drive/operate a tow truck, aside from a basic driver's license, there are no additional requirements unless required by contract. For example, driver training is often a requirement to tow for a law enforcement agency. Further, depending on the specifics of the tow, additional requirements and/or licenses may be required including a commercial driver's license and hazardous materials certification."

According to the applicants, ways to determine the potential incompetent practice of a tow company or operator include "overcharging consumers for services demonstrates incompetence and is typically caused by unscrupulous tow company owners who prey upon desperate or helpless vehicle owners for their own financial benefit. Unsafe practices involving the tow itself that could injure motorists or damaged vehicles can be caused by insufficient training or simply cutting corners on safe business practices, like truck maintenance."

Criteria 7. The occupation is clearly distinguishable from other occupations that are already regulated.

There are currently regulated professions that perform towing and storage. Automotive repair dealers (ARDs), which store vehicles to be repaired, often have relationships with tow companies and consumers may order a tow for their vehicle so it can be repaired at an ARD facility. ARDs are licensed and regulated by the Bureau of Automotive Repair (BAR) within the DCA.

Repossession agents also perform tows and store vehicles. Repossessors are licensed and regulated by the Bureau of Security and Investigative Services (BSIS) within the DCA.

In response to the question of whether the towing companies are different from ARDs and repossessors and whether there may be multiple regulatory entities involved in the regulation of these industries:

> A tow company oftentimes tows a disabled vehicle to an automotive repair shop to fix the vehicle. Tow companies do not perform any vehicle repair. An automotive repair shop occasionally will use its own tow truck to perform these services. It is not uncommon for a tow company and an automotive repair shop to have the same owners.
>
> While both tow companies and repossession agents use tow trucks, their customers/clients are different. Tow companies will generally tow a vehicle at the behest of the vehicle owner himself, a law enforcement agency, or a private property owner. Repossession agents will generally tow a vehicle at the behest of a financial institution that is recovering property as a legal owner, generally resulting from debts owed.
>
> While there is certainly overlap between the industries, both within duties and ownership, a tow company is typically performing services that do not fall within activities regulated by the BAR or BSIS.
>
> Under the proposed regulation, repossession agents who utilize tow trucks to perform repossessions, as well as automobile repair shops that enforce vehicle liens under Civil Code section 3068.1, would additionally be subject to the Vehicle Tow and Storage Board. However, the proposed regulation merely requires each to obtain a permit and be subject to the dispute process, it would not otherwise impact the authority and scope of their existing regulation.

As noted by the applicants, ARDs and repossessors would be subject to additional regulation under this bill. Although the regulation would primarily involve compliance with existing requirements, and this bill does change some of those requirements, it raises the question of whether existing licensing requirements are sufficient to protect consumers within these industries. If not, should existing requirements be strengthened or is it better to include these currently regulated professions in the new regulatory program?

Criteria 8. The occupation requires possession of knowledge, skills, and abilities that are both teachable and testable.

According to the applicant:

> While there is no such core set of knowledge, skills, and abilities related to the public harm caused by overbilling, there is considerable training required of tow truck drivers to avoid public harm caused by unsafe towing. We can provide a tow truck driver training manual upon request…. As far as tow truck driver training, various training companies arrange both in-person and virtual training. For example, CTTA/ERSCA offers its own training, which has been approved by the CHP and is used nationwide.
>
> Tow truck driver training generally consists of a test to ultimately evaluate competence and knowledge. However, this test is specific to the curriculum taught within that training course and may differ depending on the type of training (i.e. heavy vs. light duty towing), and amongst training providers and programs.
>
> National providers of training for tow truck operators that are active are limited and include the following that we are aware of:
>
> - ERSCA/CTTA: https://ersca.org/training/
> - American Towing & Recovery Institute by Randall Resch: https://americantowingandrecoveryinstitute.org/
> - Wreckmaster: https://www.wreckmaster.com/w/us/
>
> Over the past 5 years, ERSCA/CTTA has had between 1,000 – 1,600 students each year in its program. We are unaware of the number of students in other programs.
>
> In addition to formal tow truck driver training, most knowledge and skill is developed by on-the-job training and experience.

The applicants further note that, while there is no standard test or examination, "we suspect a robust dispute process and permit enforcement will thwart overbilling practices. Tow truck driver training is regularly used and a lack of training/unsafe towing does not appear to be a significant enough issue that needs to be addressed within this proposed regulation."

While learning through punitive action is an option, in many other professions where ethical or legal violations are common, boards can administer an examination testing law, jurisprudence, or ethics. Like other subject matter or technical competency examinations, these examinations can test for and reinforce knowledge of laws or requirements before violations occur.

Criteria 9. The economic impact of regulation is justified.

As noted above, the lack of data regarding the size and activity of the towing industry makes it difficult to determine the size of the proposed program. According to the applicants, "It is unknown how many individuals directly utilize the services of emergency roadside responders as these figures are not widely reported. Of note, within the law enforcement-initiated tow context, according to the 'Towed into Debt' report, 'analysts estimate that public agencies in California

towed nearly one million vehicles in 2016.' Further, multi-millions of California motorists are indirectly annually impacted due to the clearance of disabled, abandoned, or impounded vehicles from highways, roads, and parking lots." The applicants also state, "we do not suspect regulation will affect the number of people exposed annually to emergency roadside responders."

Still, it is unclear at this time how regulation will impact the towing industry as a whole. Given historical data, smaller boards tend to have higher license fees. This is because license fees are the primary source of revenue for licensing boards. As noted above, if the fees required to sustain the new board are necessarily high due to a small licensing population, it may have a disproportionate impact on smaller businesses. It is also difficult to discern how businesses will incorporate the new fees into their budgets, and whether that may impact the price to vehicle owners. Studies show that licensing tends to increase costs to the public.[3]

Regarding current costs, the applicants note that:

> The cost of the services varies greatly depending on the location and specific service being requested and performed. For example, for law enforcement-requested impounds where tow and storage rates are approved in advance by the law enforcement agency, data from the CHP illustrates that tow rates range from $170 in Merced to $314 in Red Bluff. For services that require additional expertise and equipment, such as a big rig rollover, these rates will increase. According to the "Towed into Debt" report, the average tow fee in California is $189, with additional storage and administrative fees increasing the total fees charged to consumers.
>
> As far as the amount of money spent annually for services, according to the IBISWorld report, the towing industry nationwide earned roughly $7.5 billion in revenue in 2020. While not broken out specifically by revenue per state, the same report notes that California accounts for 12.4% of industry establishments in 2020. (Of note, the IBISWorld report also found an average 5.9% profit margin within the tow industry, which is well below the average for other industries).

The applicants write that "it is expected that the regulations proposed in [this bill], specifically the dispute process, will lower these tow rates, as the consequences for overbilling will be increased." However, given the lack of availability of specific data size of the towing industry, a reliable estimate of economic impact may not be possible.

The applicants do provide one estimate, stating: "While we are unaware of any formal accounting of the number of towing companies in California, according to an IBISWorld report from October 2020 entitled 'Automobile Towing in the US,' there were 46,726 businesses within the towing industry nationwide with California accounting for 12.4% of industry establishments. Utilizing these figures, it is estimated that there are nearly 5,800 towing companies in California."

On the other hand, the California Research Bureau utilized data reported by the North American Industry Classification System (NAICS). NAICS is a classification system maintained by the U.S. Bureau of Labor Statistics and administered by the Census Bureau. Under NAICS, "motor vehicle towing" is defined as follows: "This industry comprises establishments primarily

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[3] See generally footnote 1.

engaged in towing light or heavy motor vehicles, both local and long distance. These establishments may provide incidental services, such as storage and emergency road repair services." The California Research Bureau found that the "Census Bureau reports there are 1,198 motor vehicle towing establishments in California as of 2019, the latest Census year. These establishments employ 10,847 people and pay $461,940,000 in payroll. Most of these establishments (614) have less than five employees."

Under this bill, fee amounts are tied to fleet sizes. If the Census data is accurate, and the majority of towing businesses have fewer than five employees, then it would be difficult to assume that those businesses have a fleet size larger than the number of employees.

Under this bill, the licensing fee for a fleet size is $125 for one truck and $176 for fewer than five. Even is were no fleets with one truck (all 614 establishments have between 2-4 employees), the annual revenue for that half of the population would only be $108,064. The highest fee charged is for a fleet size of 36 or more, $1,135.50. Even if the remainder of the businesses captured by the Census (584) had 36 or more tow trucks in their fleets, the additional annual revenue would only be $663,132. The would mean, using the most generous census numbers, the program would have annual revenue of $771,196 for 1,198 permittees.

By way of comparison, the two DCA boards with the smallest budget authorizations in 2020-21, the Naturopathic Medicine Committee (NMC) and the Professional Fiduciaries Bureau (PFB), were budgeted for $354,000 (2 authorized staff) and $606,000 (3 authorized staff) respectively.

To maintain the revenue noted above, the NMC, which had 1,268 licensees in FY 2019-20, charges a minimum of:

1) $500 for a license application.

2) $1,000 for initial license issuance.

3) $,1000 for license renewal.

The PFB, which had 766 licensees in FY 2019-20, charges a minimum of:

1) $400 for a license application.

2) $600 for initial license issuance.

3) $700 for license renewal.

One of the DCA boards with a closer number of licensees to the number of towing companies in California provided by the applicants (5,800) is the California Court Reporters Board (CRB). The CRB has 5 authorized staff positions, an FY 2020-21 budget of $1,207,000, and 6,085 licensees. The CRB charges:

1) $40 for an examination application and $25 per separate part per administration.

2) $225 for an initial certificate (pro-rated if issued earlier than 180 days of the expiration date).

3) $225 for annual certificate renewal.

However, even if the new VTSB were to match the estimated licensing numbers, no board that currently handles dispute resolution as proposed under this bill, so there are no analogous programs that can be used for comparison. In addition, the proposed VTSB program has numerous differences from commonly established licensing programs. As a result, it is difficult to determine what the cost to licensees, consumers, and the public will be. Without an initial determination of cost, any justification of the economic impact related to the purported benefits is speculation.

Prior Related Legislation. AB 471 (Low), Chapter 372, Statutes of 2021, authorized BAR to establish an informal citation conference for automotive repair dealers, creating a three-member panel to issue citations and fines on low-level citations that can result in a Bureau-approved remedial training course.

AB 2932 (Santiago) Chapter 432, Statutes of 2018, required all towing and storage fees to be reasonable and enhanced consumer protections for towing and storage customers, as specified.

AB 519 (Solorio), Chapter 566, Statutes of 2010, required towing companies to provide consumers a Towing Fees and Access Notice and an itemized invoice of all towing and storage fees.

AB 515 (Hagman), Chapter 322, Statutes of 2009¸ made numerous changes to the Collateral Recovery Act, including requiring impound agencies to accept a valid bank credit card or cash.

AB 2656 (Chen) of 2018 would have required towing and storage facilities to accept a debit card from licensed repossessors. That bill was vetoed by the Governor.

ARGUMENTS IN SUPPORT:

The *California Tow Truck Association (CTTA)* (co-sponsor) writes in support,

> California is left with a patchwork of laws that oftentimes leave vehicle owners confused and without adequate recourse to quickly and affordably challenge fees that they believe to be excessive. Oftentimes, this lack of accountability for towing companies leaves vulnerable consumers with a terrible choice, either pay the excessive fees or abandon their vehicle entirely. Either option can unfortunately only initiate or perpetuate a cycle of poverty. Low-income vehicle owners are least likely to have the resources necessary to fight a towing company in court, as is required under current law. Further, losing a vehicle is most likely to have the biggest impact on low-income consumers, who inevitably rely upon their vehicle to obtain and keep a job, not to mention those individuals living in their vehicles that may be deprived of their primary shelter.
>
> [This bill] addresses this inadequacy in California law by creating a state oversight entity, named the Vehicle Tow and Storage Board within the Department of Consumer Affairs, comprised of nine experts in the field to be appointed by the Governor and Legislature. This Board will provide consumers with a specific outlet should they need recourse after their vehicle was towed, which directly benefits consumers in two ways. First, the proposed regulation includes a free, quick, and consumer-friendly dispute process, whereby a consumer can swiftly recover any fees that were inappropriately paid to a towing company, plus penalties. Second,

every towing company would be required to obtain a permit from the state. Failure to do so would prohibit them from operating legally and charging customers. Moreover, failure to abide by their approved and posted rates would require them to refund money to consumers or risk losing their permit.

Emergency roadside responders continue to be a necessary component of a functioning transportation system in California by removing disabled vehicles and impounding vehicles that are being used inappropriately, amongst other beneficial reasons. [This bill] is a critical step towards changing the behavior, or removing altogether, those fringe, abusive actors within the industry that are taking advantage of vehicle owners, without unnecessarily impacting the ability of those professional operators to continue to perform these vital tasks.

The *Personal Insurance Federation of California (PIFC)* (co-sponsor) writes in support,

Currently, the tow business is largely unregulated and there is no reliable database of tow vehicles operating in California, which makes it difficult to identify bad actors and take enforcement actions when appropriate. [This bill] would require all towing businesses to obtain a Vehicle Tow and Storage Permit prior to operating a tow truck in California or charging for the storage of a towed vehicle. It would also create a Vehicle Tow and Storage Board to resolve disputes between tow companies and vehicle owners.

Further, under existing law, a storage fee may be deemed reasonable if it is comparable to storage-related rates and fees charged by other facilities in the same locale. By modifying the law to ensure that a towing and storage charge is only deemed reasonable if it does not exceed the fees and rates established by the Department of the California Highway Patrol, this bill will better protect consumers from bad actors seeking to charge excessive rates.

Although most auto body repair and towing companies behave in a responsible manner, some hold cars hostage for unreasonable and unfair fees. These excessive towing and storage fees harm consumers and inflate insurance claim costs. For example, PIFC documented more than 130 examples of storage fees at auto body repair shops of $200 or more per day from 2019 and 2020 with some charging in excess of $2,000 per day. By comparison, the storage rate paid by CHP in San Francisco is about $93 per day. There are also hundreds of examples that include total car storage expenses exceeding $5,000-$10,000, some more than $20,000.

Previous efforts to address this issue have been helpful, but unfortunately, there are towing and automobile collision repair businesses that continue to charge excessive fees. These “bad actors” hold significant leverage over the vehicle owner by possessing their vehicle, knowing there is no entity a consumer can swiftly and affordably access to seek justice.

The *California Public Interest Research Group (CALPIRG)* writes in support,

Every year, millions of people have their cars towed without their consent from a private property or public street. Too often, the unknown rationale behind these tows and uncertainty over what to do next can leave drivers stranded and confused.

> California has a patchwork of laws that often leave vehicle owners without adequate recourse to quickly and affordably challenge fees that they believe to be excessive.
>
> Despite California's legislative efforts on this issue, some towing businesses continue to charge excessive towing and storage fees to consumers. Some towers have charged hundreds of dollars a day for storing a vehicle, thereby placing onerous burdens on low-income consumers. This lack of accountability for towing companies frequently leaves vulnerable consumers with a terrible choice: either pay the exorbitant fees or abandon their vehicle entirely. Either option can unfortunately initiate or perpetuate a cycle of poverty. Low-income vehicle owners are least likely to have the resources necessary to fight a towing company in court, as is required under current law.
>
> CALPIRG's recent report, Getting Off The Hook of a Predatory Tow, outlines several common sense towing protections to address these issues and protect California consumers.

ARGUMENTS IN OPPOSITION:

Various automotive repair associations are opposed to this bill unless it is amended to 1) exclude ARD's from the bill and 2) restore the ability to charge reasonable storage rates based on rates charged locally. The associations point out ARDs do not normally operate tow trucks as a typical aspect of their business, and the storage of a vehicle is not the type of towing storage contemplated under this bill. They further argue that the BAR's existing authority is sufficient to protect consumers from unreasonable storage rates and therefore

Specifically, the *Automotive Service Councils of California*, *California Autobody Association*, and *California Automotive Business Coalition*, write that:

> The recent passage of [AB 471 (Low), Chapter 372, Statutes of 2021] addressed the issues raised in [this bill] with respect to automotive repair dealers (ARDs). See Business & Professions Code section 9884.16. AB 471 clarified and strengthened existing consumer protection laws by providing the Bureau of Automotive Repair additional authority to investigate consumer complaints and take disciplinary action, if necessary, against an ARD that charges unreasonable storage rates as specified.
>
> The passage of AB 471 has essentially made [this bill] "moot" with regard to ARDs. As such, we are requesting that [this bill] be amended to exempt ARD's from the bill and not delete current law which allows ARD's to charge fair and reasonable storage rates.

POLICY ISSUES FOR CONSIDERATION:

1) *Sunrise Review*. As noted above, the criteria and the sunrise questionnaire are intended to assist policy makers in answering the following questions:

    a) *Does the proposed regulation benefit the public health, safety, or welfare?* As noted above, predatory towing and storage practices are harmful to consumers and, despite

existing regulations, continue to occur. This bill, if properly amended and implemented, may help deter bad actor towing companies as well as provide an additional avenue for dispute resolution.

b) *Will the proposed regulation be the most effective way to correct existing problems?* This is unclear. DCA entities typically deal with professions where a lack of specialized training can result in harm to consumers. This bill does not have competency training or testing requirements. There are no specified complaint or citation provisions, and enforcement is limited to suspension in the event fines are not paid. The program is essentially a registry, with the permit serving as a hook to incentivize permittees to follow the law and participate in the dispute resolution program.

The dispute resolution program is not something the DCA entities typically handle. No DCA board or bureau currently handles restitution-type payments from a respondent to a complainant, and the DCA does not have the current infrastructure to do so. Further, the lack of administrative process and hearings raises due process implications.

This bill is one way of accomplishing the stated goals, but it is unclear whether the proposal is the most effective way to do so. For example, if the bill contained competency testing and the ability to revoke permits, making the unlicensed practice of towing essentially car theft, the deterrence effect may eliminate the need for dispute resolution. Alternatively, there may be other agencies or departments that have more analogous dispute resolution programs.

c) Is the level of the proposed regulation appropriate? This is also unclear. The bill establishes a permitting/licensing program but is mainly focused on dispute resolution. There may be other ways to establish a dispute resolution program without a permit program. Or, a more robust permit program may help eliminate issues without the need for a dispute resolution program.

Further, it is unclear whether ARDs or repossessors should be included. Both professions have licenses that can be revoked, eliminating their lawful ability to do business in the industry. Instead of layering additional regulatory structures over the existing licensing systems, there may be ways to strengthen or broaden existing requirements.

4) *Board Member Appointments*. This bill specifies that there are multiple appointing authorities but does not specify that the appointees serve at the pleasure of the appointing authority. If this bill maintains a board structure, examples of existing law include:

a) The Cannabis Appeals Panel: The members of the panel may be removed from office by their appointing authority. (BPC § 26040 (b))

b) The Dental Board: Each appointing authority has power to remove from office at any time any member of the board appointed by that authority under Section 1603 pursuant to Section 106. (BPC § 1605)

5) Burden Shifting. This bill shifts the burden of proof in the dispute resolution process to the respondent tow company and only allows 15 days for the respondent to respond, compared to the complainants 30 days. The sponsor's goal is to make the process more consumer-friendly. However, given the lack of clarity on the procedures under this bill, and the fact that it will

not always be the consumer but potentially the consumer's agent or attorney, it is unclear whether this shifting is appropriate.

6) *25% Fee Revenue*. The bill allows the board to retain 25% of the fees awarded to a consumer. This is not typical among other DCA boards, and may potentially create a conflict or unnecessary incentive for the board to pursue judgments against towing companies.

7) *Dispute Resolution Process vs. Complaint Process.* This bill is primarily based on a novel dispute resolution program, but it is unclear what the board would do in the case of ordinary complaints. There is are no enforcement mechanisms other than fines and the suspension of a permit for failure to pay fines.

8) *Lack of Revocation Authority.* In addition to the lack of other enforcement mechanisms, this bill lacks the authority for the board to revoke permits. The purpose of licensing is to prevent the incompetent and dangerous practice of any given profession and prevent those deemed incompetent or dangerous to the public from practicing by revoking or otherwise disciplining their licenses.

9) *Hearing and Appeal Processes.* This bill is silent on hearing and appeal processes, which all other practice acts contain. These processes help maintain due process for both respondents and complainants.

10) *Lack of a Sunset Date*. The other side of Sunrise is known as Sunset Review. Due to the potential for harm to the public and the burdens of licensure, the Legislature reviews the performance and continued necessity of existing licensing entities. To ensure programs are not run indefinitely without oversight, licensing practice acts contain a repeal date, known as a sunset date. To renew a program set for repeal, a committee sunset bill is used to determine their performance and set a new repeal date. This bill does not contain a sunset date.

IMPLEMENTATION ISSUES:

1) *Board vs. Bureau.* This bill establishes a new licensing board. However, it is unclear whether a board structure is necessary given the duties of the new VTSB, or whether the board would need to meet once monthly. A bureau structure, which can utilize advisory committees and disciplinary review committees for industry input, may provide a more efficient structure for the types of disputes captured under the new program.

2) *Fees, Upfront Costs, and Fiscal Sustainability*. The establishment of a new board is always costly, and the new board will likely require a loan from another fund, whether the general fund or another special fund.

   Further, it is unclear how many licensees will be available to help fund the board under this proposal. License fees are the usual source of revenue for specially-funded licensing boards, as licensing fees are not typically volatile. However, under this bill, there are only a few rough estimates of the potential licensing pool. As noted above, two potential estimates are the 5,800 number provided by the sponsors, and the 1,198 number found by the California Research Bureau using federal census data. Determining the ultimate costs to the permittees and the public will be difficult without an accurate accounting of the potential licensee pool.

3) *Development of an Information Technology Database*. This bill requires the board to have an information technology (IT) database that contains data from permittees as well as other agencies, including the DMV. The DCA's current process for IT development requires entities to undergo the Project Approval Lifecycle (PAL) with the California Department of Technology. Other existing DCA boards that have begun this process are still awaiting approval.

4) *Lack of Definitions*. There are terms used throughout the bill that may need definitions, such as "unreasonably excessive time," "sufficiently rebutted," and "pertinent details."

5) *Delayed Implementation Timeline*. As noted in the numerous issues above, there are aspects of this bill that will take time to develop, including the development of the IT database, regulations, appointment of board members, and dispute resolution process, among the other noted issues. This bill likely needs a delayed timeline that accounts for the time needed for the DCA to implement this bill.

REGISTERED SUPPORT:

California Tow Truck Association (co-sponsor)
Personal Insurance Federation of California (co-sponsor)
California Public Interest Research Group
Coalition Against Insurance Fraud
Property Casualty Insurers Association of America DBA Association of California Insurance Companies

REGISTERED OPPOSITION:

Automotive Service Councils of California (unless amended)
California Autobody Association (unless amended)
California Automotive Business Coalition (unless amended)

Analysis Prepared by: Vincent Chee / B. & P. / (916) 319-3301

Date of Hearing: January 11, 2022

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS
Marc Berman, Chair
AB 676 Holden – As Amended January 3, 2022

SUBJECT: Franchises.

SUMMARY: Makes various changes to the California Franchise Relations Act and the Franchise Investment Law, and creates new requirements and prohibitions for franchise agreements.

EXISTING LAW:

1) Establishes the California Franchise Relations Act. (Business and Professions Code (BPC) §§ 20000 *et seq.*)

2) Defines "franchise" as a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

   a) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and

   b) The operation of the franchisee's business pursuant to that plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

   c) The franchisee is required to pay, directly or indirectly, a franchise fee.

   (BPC § 20001)

3) Defines "franchisee" as a person to whom a franchise is granted. (BPC § 20002)

4) Defines "franchisor" as a person who grants or has granted a franchise. (BPC § 20004)

5) Provides that any condition, stipulation or provision purporting to bind any person to waive compliance with any provision of the California Franchise Relations Act is contrary to public policy and void. (BPC § 20010)

6) Provides that the provisions of the California Franchise Relations Act apply to any franchise where when the franchisee is domiciled in this state or the franchised business is or has been operated in this state. (BPC § 20015)

7) Allows a franchisor to offset against the amounts owed to a franchisee any amounts owed by the franchisee to the franchisor upon termination or nonrenewal of a franchise. (BPC § 20022)

8) Requires a franchisee to notify the franchisor prior to the sale, assignment, or transfer of a franchise, all or substantially all of the assets of a franchise business, or a controlling or noncontrolling interest in the franchise business. (BPC § 20029)

9) Establishes the Franchise Investment Law to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered and to prohibit the sale of franchises where the sale would lead to fraud or a likelihood that the franchisor's promises would not be fulfilled, and to protect the franchisor and franchisee by providing a better understanding of the relationship between the franchisor and franchisee with regard to their business relationship. (Corporations Code (CORP.) §§ 31000 *et seq.*)

10) Provides that "Commissioner" means the Commissioner of Business Oversight. (CORP. § 31004)

11) Authorizes the commissioner to summarily issue a stop order denying the effectiveness of or suspending or revoking effectiveness of any registration if the commissioner makes one of a number of enumerated findings. (CORP. § 31115)

12) Provides that an offer or sale of a franchise is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or, if the franchisee is domiciled in this state, the franchised business is or will be operated in this state. (CORP. § 31013)

13) Makes it unlawful for any person to offer or sell any franchise in this state unless the offer of the franchise has been registered with the commissioner. (CORP. §§ 31110 – 31125)

14) Holds persons civilly liable for violations of certain provisions of the Franchise Investment Law, but provides that no civil liability in favor of any private party shall arise against any person by implication from or as a result of the violation of any provision of the law. (CORP. §§ 31300 – 31306)

15) Provides that any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of the Franchise Investment Law is void. (CORP. § 31512)

16) Establishes the Unruh Civil Rights Act, which provides that all persons within the state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (Civil Code §§ 51 *et seq.*)

THIS BILL:

1) Provides that any provision of a franchise agreement requiring the franchisee to waive the provisions of the California Franchise Relations Act shall be deemed contrary to public policy and shall be void and unenforceable.

2) Prohibits a franchisor from modifying a franchise agreement, or requiring a general release, in exchange for any assistance related to a declared state or federal emergency.

3) Requires that the franchisee must agree to the amount owed, or the franchisor has received a final adjudication of any amounts owed, before a franchisor may offset against the amounts owed to a franchisee upon the termination or nonrenewal of a franchise.

4) Strikes the factors of whether a franchisee is domiciled in this state and whether the franchised business is operated in this state from the determination of whether an offer or sale of a franchise is made within this state.

5) Provides that the bill's amendments to the California Franchise Relations Act shall apply only to franchise agreements entered into, amended, or renewed on or after January 1, 2022, or to franchises of an indefinite duration that may be terminated by the franchisee or franchisor without cause.

6) Additionally allows the Commissioner of Business Oversight to summarily issue a stop order denying the effectiveness of or suspending or revoking effectiveness of any registration if the commissioner finds that the franchisor's method of business includes or would include activities that are or would be illegal where performed.

7) Require a prospective franchisee to provide specified information to the franchisor when applying for a franchise.

8) Requires a franchisor to notify the prospective franchisee in writing of any additional information or documentation necessary to complete the application, as specified, and requires the franchisor to notify and provide certain information to the prospective franchisee of the decision to approve or disapprove the application, as specified.

9) Provides that any provision of a franchise agreement disclaiming representations, disclaiming violations of any provision of the Franchise Investment Law, or disclaiming reliance on the Federal Trade Commission's franchise disclosure document or similar document or form, including any exhibit to the document or form, shall be deemed contrary to public policy and shall be void and unenforceable.

10) Repeals the protection from civil liability by implication from or as a result of the violation of any provision of the Franchise Investment Law.

11) Prohibits a franchisor from failing or refusing to grant a franchise or provide financial assistance to a franchisee or prospective franchisee based solely on characteristics protected under the Unruh Civil Rights Act.

FISCAL EFFECT: Unknown; this bill is keyed fiscal by the Legislative Counsel.

COMMENTS:

Purpose. This bill is sponsored by **Franchisee Advocacy Consulting** and the **American Association of Franchisees & Dealers.** According to the author:

> "When AB 525 was signed, it was clear that current law was stacked in favor of corporate owners and that franchise small business owners in California needed a more equal legal footing to protect their investments. The bill brought some much-needed balance between corporations and small business franchisees such as convenience stores and fast-food restaurants – small businesses that are the backbone of our economy. This bill continues that work by addressing new practices that go against the spirit of AB 525, and addresses new unfair practices that occurred during the pandemic. Like AB 525, the goal of AB 676 is to provide franchisees basic protections and contract rights that most other businesses enjoy."

Background.

The majority of the state's regulation of franchises are contained in the California Franchise Relations Act (CFRA) and the California Franchise Investment Law (CFIL). The CFRA (which excluded petroleum franchises, which are regulated by another chapter) was enacted in 1980 to govern relationships between franchisors and franchisees after they have entered into contract with each other. The CFRA is designed to prevent unfair practices in the transfer, renewal or termination of a franchise. The CFRA prohibits termination of a franchise agreement except for good cause and only after notice and an opportunity to fix the problem. It also lays out certain circumstances where immediate termination is permitted, for example: bankruptcy, abandonment, mutual agreement, material misrepresentation, illegal activity, noncompliance with the franchise agreement, failure to pay franchise fees and imminent danger to the public.

The CFIL was enacted in 1970 to regulate franchise investment opportunities in order to protect California investors from potentially fraudulent franchise investments. The CFIL generally requires franchisors to disclose to prospective franchisees the information necessary to make an informed decision about franchise offers, and prohibits the sale of franchises that would lead to fraud or the likelihood that a franchisor's promises would not be fulfilled. The CFIL contains explicit provisions for enforcement generally through damages (payment for economic losses) and rescission (cancellation of the contract). It also provides for injunctive relief (to require or prohibit a specific action), and reasonable costs and attorneys' fees in certain circumstances.

Historically, arguments have been made that there is a basic imbalance in bargaining power between the franchisor and the franchisee. One frequently cited 1996 court decision by the California Court of Appeal (2nd Dist.) describes the franchise dynamic this way:

> The relationship between franchisor and franchisee is characterized by a prevailing, although not universal, inequality of economic resources between the contracting parties. Franchisees typically, but not always, are small businessmen or businesswomen or people seeking to make the transition from being wage earners and for whom the franchise is their very first business. Franchisors typically, but not always, are large corporations. The agreements themselves tend to reflect this gross bargaining disparity. Usually they are from contracts the franchisor prepared and offered to franchisees on a take-it-or-leave-it basis. (Emerson, *Franchising and the Collective Rights of Franchisees* (1990) 43 V and L. Rev. 1503, 1509 & fn. 21.) . . . Some courts and commentators have stressed the bargaining disparity between franchisors and franchisees is so great that franchise agreements exhibit many of the attributes of an adhesion contract and some of the terms of those contracts may be unconscionable. *Postal Instant Press v. Sealy*, 43 Cal. App. 4th 1704, 1715-1717 (1996.)

In response to this perceived imbalance of power, in 2015, AB 525 (Holden) was enacted to revise the rights and responsibilities of franchisors and franchisees under the CFRA with respect to the termination of franchise agreements. AB 525 refined existing requirements imposed on franchisors and franchisees in the event of a termination of an agreement and the notice that must be provided, ensuring that franchisees have a reasonable opportunity to cure any failures to comply with their requirements. The bill also provided that in the event a franchisor terminates or fails to renew a franchisee in violation of the CFRA, the franchisee is entitled to receive from the franchisor the fair market value of the franchised business and franchise assets and any other damages caused by the violation of this chapter.

This bill would make several modifications to the rights and obligations imposed by AB 525. The bill would also create new requirements for franchisors under the CFIL. The bill would also require that the franchisee must agree to the amount owed, or the franchisor has received a final adjudication of any amounts owed, before a franchisor may offset against the amounts owed to a franchisee upon the termination or nonrenewal of a franchise.

During the COVID-19 public health emergency, many franchisors have extended relief to struggling franchisees, such as waiving or deferring royalty payments and other concessions. However, the author has contended that in some cases, the franchisor has asked the franchisee to waive certain rights under the CFRA in exchange for this relief. This bill would end this practice by prohibiting a franchisor from modifying a franchise agreement, or requiring a general release, in exchange for any assistance related to a declared state or federal emergency.

The author has also expressed concerns that in some cases, a franchisor will act prejudicially in its willingness to grant a franchise or provide financial assistance to franchisees based on their protected class. For example, two prospective franchisees seeking to open a franchise in the same geographic area may be treated inequitably based on factors such as race or sexual orientation. This bill would explicitly prohibit franchisors from failing or refusing to grant a franchise or provide financial assistance to a prospective franchisee based on any characteristic protected under the Unruh Civil Rights Act.

Prior Related Legislation. AB 2672 (Holden) contained several provisions similar to those in this bill relating to the California Franchise Relations Act. *This bill did not receive a hearing in this committee.*

AB 525 (Holden, Chapter 776, Statutes of 2015) revised the rights and responsibilities of franchisors and franchisees under the California Franchise Relations Act with respect to the termination of franchise agreements.

ARGUMENTS IN SUPPORT:

Franchise Advocacy Consulting is a co-sponsor of this bill, writing: "AB-676 builds on the improvements from AB-525 (Holden) in 2015 and takes additional steps to ensure franchise investors in California are protected. It ensures that franchises located in California are subject to California law. It stops franchise corporations from being able to disclaim away information they, or their agents, have given prospective franchisees. It requires franchisors to provide a franchisee applicant with approval qualifications upon an application to buy a franchise. It doesn't allow a franchisor to require modifications to the agreement or sign a general release in exchange for assistance during a state or federal emergency."

ARGUMENTS IN OPPOSITION:

None on file.

IMPLEMENTATION ISSUES:

Both existing law and the provisions of this bill grant authority to the Commissioner of Business Oversight to take enforcement action for failure to comply with the Franchise Investment Law. However, in 2020, Assembly Bill 1864 was enacted, which renamed this position as "Commissioner of Financial Protection and Innovation." While that bill provided that any

references to the prior Commissioner of Business Oversight shall be interpreted to mean the new Commissioner of Financial Protection and Innovation, the author may wish to correct these anachronisms as they arise to ensure implementation clarity.

REGISTERED SUPPORT:

American Association of Franchisees & Dealers *(Co-Sponsor)*
Franchisee Advocacy Consulting *(Co-Sponsor)*
Equity For All

REGISTERED OPPOSITION:

None on file.

Analysis Prepared by: Robert Sumner / B. & P. / (916) 319-3301

Date of Hearing: January 11, 2022

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS
Marc Berman, Chair
AB 1120 (Irwin) – As Amended March 11, 2021

SUBJECT: Clinical laboratories: blood withdrawal.

SUMMARY: Expands the scope of practice of certified phlebotomists to include the collection of blood through a peripheral venous catheter using blood collection devices approved by the United States Food and Drug Administration, as specified.

EXISTING LAW:

1) Provides for the licensure and regulation of clinical laboratories and various licensed and unlicensed laboratory personnel under the Department of Public Health. (Business and Professions Code (BPC) §§ 1200-1327)

2) Establishes a category of laboratory personnel called certified phlebotomy technicians and specifies the education and scope of practice of certified phlebotomy technicians. (BPC § 1246)

3) Requires an application for certification as a phlebotomy technician by the Department of Public Health to include proof of the following:

    a) The applicant holds a valid, current certification as a phlebotomist issued by a national accreditation agency approved by the department. (BPC § 1246(b)(2)(A))

    b) The applicant completed education, training, and experience requirements as specified by regulations that shall include, but not be limited to, the following:

    c) At least 40 hours of didactic instruction. (BPC § 1246(b)(2)(B)(i))

    d) At least 40 hours of practical instruction. (BPC § 1246(b)(2)(B)(ii))

    e) At least 50 successful venipunctures. (BPC § 1246(b)(2)(B)(iii))

4) Authorizes a certified phlebotomy technician to draw blood using venipuncture or skin puncture under the general supervision of a physician and surgeon or the physician's delegate. (BPC § 1246(c)(1)(A))

5) Defines "general supervision" as requiring the supervisor of the technician to determine that the technician is competent to perform venipuncture or skin puncture before the technician's first blood withdrawal, and on an annual basis. The supervisor is also required to determine, monthly, that the technician complies with appropriate venipuncture or skin puncture policies and procedures approved by the medical director and required by state regulations. The supervisor, or another designated licensed physician and surgeon, registered nurse, or licensed clinical laboratory personnel, must be available for consultation with the technician,

either in person or through telephonic or electronic means, at the time of blood withdrawal. (BPC § 1246(c)(1)(B))

6) Authorizes a certified phlebotomy technician to draw blood under policies and procedures approved by a physician and surgeon, appropriate to the location where the blood is being drawn and in accordance with state regulations, at the request and in the presence of a peace officer for forensic purposes in a jail, law enforcement facility, or medical facility, with general supervision. (BPC § 1246(c)(2))

7) Provides for the licensure and regulation of clinics, hospitals, and other health facilities under the Department of Public Health and requires licensed facilities to develop standardized policies and procedures that ensure the competence of staff and quality of care. (Health and Safety Code (HSC) §§ 1200-1797.8)

8) Prohibits a licensed hospital from assigning unlicensed personnel to perform nursing functions, including the administration of medication, venipuncture, intravenous therapy, and invasive procedures including inserting catheters, unless authorized under the healing arts provisions of the BPC, which include the clinical laboratory provisions. (BPC § 2725.3)

THIS BILL:

1) Authorizes a certified phlebotomy technician to collect blood through a peripheral venous catheter if all of the following conditions are met:

   a) The blood collection is performed in a licensed acute care facility.

   b) The blood collection procedures or protocols are approved by the licensed facility and the technician has been sufficiently trained by the facility to perform the procedure. The technician may not manage, stop, or restart a patient's active intravenous infusion or insert or remove a peripheral intravenous catheter.

   c) The blood collection is performed under the general supervision of a licensed physician and surgeon, and the physician and surgeon may only delegate the supervision duties to a registered nurse.

   d) A physician and surgeon or a registered nurse may restrict or limit a technician's ability to collect blood from a peripheral venous catheter of a patient.

   e) The blood collection is performed using a device or devices approved by the licensed facility and the United States Food and Drug Administration for blood collection.

2) Clarifies that a technician is not authorized to withdraw blood through a peripherally inserted central catheter or central venous catheter.

3) Makes other technical and nonsubstantive changes.

FISCAL EFFECT: Unknown. This bill has been keyed non-fiscal by the Legislative Counsel.

COMMENTS:

Purpose. This bill is sponsored by *BD (Becton, Dickinson, and Company), and its affiliate Velano Vascular*. According to the author, "[i]f an individual spends multiple days in a hospital, they may need multiple blood draws a day, resulting in bruised arms from multiple needle sticks. California must keep up with advancements in medical technology and new methods that are centered on the safety of a patient. Currently, if blood collections are conducted by nurses, patients may have the opportunity to experience needleless blood drawing. On the other hand, in health facilities that rely on phlebotomists for a majority of blood collection duties, patients can only get their blood drawn by traditional, painful methods. [This bill] will revise California law to allow for new blood collection methods to be incorporated in existing workflows after approval and training from health facilities, ultimately improving patient safety and comfort."

Background. This bill would expand the scope of phlebotomists, allowing them to collect blood through a peripheral venous catheter, rather than just direct venipuncture or skin puncture. While the sponsor is the manufacturer of a medical blood draw device trademarked as PIVO, the changes under this bill do not specify a specific procedure or device.

Phlebotomy and Blood Collection. Phlebotomy is the collection of blood for clinical laboratory testing and analysis. In clinical settings, blood analysis may include testing for cholesterol levels, liver function, and other blood components for screening or diagnostic purposes. To ensure the samples are properly tested and assigned, the person performing the blood draw completes the relevant paperwork and the samples are labeled and stored.

The blood draw procedure itself can be performed differently depending on the setting and the personnel performing the blood draw. In outpatient or clinical laboratory settings, blood samples are primarily collected by laboratory personnel and phlebotomy technicians using direct venipuncture, where a needle is inserted directly into a vein and blood is then drawn using a syringe or vacuumed tube. In larger inpatient settings, blood collection is done by phlebotomists and nurses, but nurses do not perform direct venipuncture blood draws as often because they are usually utilized for more complex procedures and nursing tasks.

Certified Phlebotomy Technicians. Because the practice of phlebotomy involves medical procedures such as skin puncture and venipuncture, it is generally prohibited unless licensed or otherwise authorized under state law. Phlebotomists are those who practice phlebotomy exclusively.

In California, a phlebotomist must apply for certification with the Department of Public Health before practicing. To become a certified phlebotomy technician eligible to perform venipuncture, an applicant must have at least a high school degree or equivalent, between 20-40 hours of education from a phlebotomy training program approved by the department, and national certification approved by the department.

Once certified, a phlebotomist may perform procedures within the phlebotomist scope of practice, which currently includes blood draws using skin puncture and venipuncture under general supervision. Because the certificate contains education, training, and testing requirements as well as a scope of practice, it is indistinguishable from a license.

Intravenous Blood Draws. In a hospital or other inpatient settings, phlebotomists are still commonly used to perform direct venipuncture blood draws. However, nurses can also draw blood using devices called vascular access devices. Vascular access devices are a collection of flexible tubes and connectors that are used to access a blood vessel for extended periods. Vascular access devices are generally categorized into three types, peripheral, midline, and central. The categories are based on the type and location of the blood vessel and the invasiveness of the insertion.

Vascular access devices for the intravenous (IV) administration of medication, fluids, or other therapies are called IV devices. While blood can be drawn from IV devices, the IV devices are typically inserted by nurses and the nurse is the one to perform the draw. IV blood draw also requires additional connectors and syringes or vacuum vials that attach to an access point on an IV tube and allow the blood to be pulled through the IV.

The sponsor's device, PIVO, is an FDA-approved and self-contained connector and tube that connects to peripheral IV devices. A peripheral IV device allows for short-term access (a few days) to peripheral veins (hands, arms, legs, or feet). A peripheral IV device is usually a small plastic tube (a cannula or catheter) that is guided into a blood vessel using a needle. The needle is then removed, leaving the tube in place, and tape is used to secure the tube. The IV tube can then be used to administer the ordered therapy via a series of additional tubes, connectors, and adapters that are connected to the devices delivering the therapy. Peripheral IV devices are distinguished from central venous catheters, or central lines, which access larger and more central veins, and may be used longer-term but tend to be more invasive.

Once connected to the peripheral IV catheter device, a smaller tube inside the PIVO device is pushed through the inside of the IV catheter tube into the patient's blood vessel. A vacuum vial can then be used to draw the blood through the PIVO. Once the blood draw is done is it disconnected and discarded.

Studies support the safety and efficacy of the PIVO device when used properly by qualified personnel.[1] The question posed under this bill is whether this can be safely performed by phlebotomists.

While phlebotomists tend to be the preferred personnel to perform blood draws, phlebotomists do not perform IV blood draws because they are not allowed to access the IV under state law. Current phlebotomy programs in California do not contain training in IV blood draws and IV

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[1] Caprice Cadacio, Irving Nachamkin, *A Novel Needle-Free Blood Draw Device for Sample Collection From Short Peripheral Catheters* (J Infus Nurs. 2017 May/Jun) 40(3):156-162. doi: 10.1097; Deborah F. Mulloy, PhD, RN, CNOR, Susan M.Lee, PhD, RN, NP-C, AHCPN, FAAN, Matthew Gregas, PhD, Kate E.Hoffman, CNP, MSN, Stanley W.Ashley, MD, *Effect of Peripheral IV Based Blood Collection on Catheter Dwell Time, Blood Collection, and Patient Response* (Applied Nursing Research. 2018) 40:76-79. doi:10.1016/j.apnr.2017.12.006; Ruth Natali, Cara Wand, Kelly Doyle, and Jaime H. Noguez, *Evaluation of a New Venous Catheter Blood Draw Device and its Impact on Specimen Hemolysis Rates* (Practical Laboratory Medicine, 2018) 10:38-43. doi:10.1016/j.plabm.2018.01.002; Suzanne Adams, Bridget Toroni, and Meenal Lele, *Effect of the PIVO Device on the Procedure of Phlebotomy from Peripheral IV Catheters,* (Nursing Research and Practice, 2018) 2018:1-6 doi:10.1155/2018/7380527.

blood draws are not currently within the phlebotomist scope of practice nor required by the department.

As a result, phlebotomists still perform direct venipuncture blood draws even when a peripheral IV device can be used. This bill would allow phlebotomists to perform blood draws using devices such as the PIVO as long as the device and the procedures are authorized by the health facility and the phlebotomist is properly trained.

Health Facility Personnel Competence. Licensed health facilities ensure the quality and safety of the services being provided in several ways. The first is by requiring a license or other voluntary certification and training. Licenses are used to ensure the minimum level of training and competence needed to perform a restricted practice. They also require licensees to understand the limits of their own competence. While licensed providers are legally allowed to provide all services within their defined scope of practice, they are limited to their training and individual competence. It is unprofessional conduct for licensees to perform a service they know they are not trained or competent to perform.

Licensed health facilities are also required by state law to ensure all personnel and staff are qualified, trained, and competent in the procedures and tasks being performed. Because of the liability on the facility, medical director, or other supervisors, supervisees are restricted to what the facility and supervisors allow them to do. This is accomplished in several ways, such as checking credentials and training, supervision and training by a qualified licensee, and standardized procedures or protocols. This bill would require the facility to approve the devices and procedures authorized under this bill.

Other States. Phlebotomy laws and scope of practice vary significantly between states. According to the sponsor, approximately 50% of the 2,000,000 PIVO draws without an adverse event were performed by phlebotomists or similar professionals in other states. The other states included Connecticut, Florida, Illinois, New Jersey, Michigan, Ohio, Utah, and Wisconsin.

Arizona. The Banner Estrella Medical Center (BEMC) in Phoenix, Arizona performed a pilot program to utilize IV blood draws, which involved an even larger expansion of scope than under this bill.[2] The first phase utilized nurses. At the end of the first phase, "the initial data also showed that there was some room for improvement because the nurses did not collect patient specimens successfully 40 percent of the time. After reviewing the data in more detail, the steering team also discovered that several patients had the correct [IV], but it did not get utilized for sample collection because of failed communication. In addition, sample-collection success varied, depending on which nurse was assigned to the task."

They also found that "the biggest issue for nursing was the added procedure time necessary for sample collection. As the steering team members looked forward to a possible pilot expansion, they knew the time needed for sample collection would be a problem. They realized that as nursing ratios (or the patients per nurse) increased, so would the risk that missed attempts would

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[2] Esther Valdez (ENFJ), Mike Schubmehl, BSN, CCRN, CNML, Chuck Ramirez, BA, RTT, VA-BC, *Utilizing Phlebotomists to Obtain Blood Samples Through PIVCs* (August 2020). Accessed: https://www.mlo-online.com/diagnostics/specimen-collection/article/21150452/utilizing-phlebotomists-to-obtain-blood-samples-through-pivcs

increase. As a result, the steering team decided to move to the next phase of the pilot using phlebotomists for sample collection."

The second phase of the pilot utilized phlebotomists, although they did not use the PIVO device. Following the approval process for the second phase, they developed a training course for phlebotomists that "included everything from biology concepts and historical background to flushing technique. Initial training included completion of a four-hour didactic course followed by precepting with a qualified nurse. Precepting included five successful sample collections via [peripheral IV catheter]. Completion of the didactic training and the nurse preceptorship allowed the phlebotomist to collect samples from the [peripheral IV catheter] on their own."

At the end of the pilot, they tallied 511 total phlebotomist blood collections and found that 472 of the collections were successful. The pilot report did not describe what constituted an unsuccessful collection. In the review section, they noted that "following the training for phlebotomists, the pilot began on the same hospital units where nurses had previously implemented the pilot. After several months, the steering team expanded the pilot to multiple floors of the hospital because the phlebotomy team had collected the samples successfully. A bonus to having the phlebotomy team use the [peripheral IV catheter] for collection is that if it was unsuccessful, the phlebotomist has the skillset to try again with a traditional sample collection method. This allowed for zero downtime from an unsuccessful [peripheral IV catheter] collection to a venous collection if needed. In the initial pilot period, the nurse would have to submit a request for a venous sample collection to the phlebotomy department if the [peripheral IV catheter] collection was unsuccessful, leading to a delay."

They also surveyed patients: "An additional outcome measure was the impact of the sample collection process on the patient experience. A three-question survey was designed to ask patients about their blood-draw experience. The results: One hundred percent of patients said they would prefer their blood be drawn from the [peripheral IV catheter] if admitted again. Although the survey is a subjective measure, it does reflect the patient experience as a positive point."

Utah. A hospital system called Intermountain Health performed a 2-year, 22 hospital study utilizing phlebotomists drawing blood via the PIVO device.[3] In that study, "the 23 hospitals within the multicenter system received training for the PIVO-compatible IV setup and PIVO use 2 weeks before launch. Users received 1 hour of classroom education led jointly by local nursing staff and vendor clinical educators. After launch, the vendor-provided direct on-site shadowing of users for 1–2 weeks." The "total sample size was 2,013,290 blood specimens from non-PIVO collection methods such as central line draws and venipuncture and 140,999 specimens from PIVO use."

[3] Brian Pendleton and Ryan LaFaye, *Multicenter Study of Needle-Free Blood Collection System for Reducing Specimen Error and Intravenous Catheter Replacement* (Journal for Health Quality, 2021).

They did not report any adverse events, and their conclusion, which is compared to existing IV blood collection procedures and venipuncture in Utah, was:

> During the 2-year study period, the introduction of a non-invasive, needle-free method of blood collection from peripheral IV catheters (the PIVO system) in a large, multicenter hospital system demonstrated a 56% relative reduction in the specimen preanalytical error rate and a 19% relative reduction in IV replacement rate. This is the largest study to date of PIVO use and demonstrates quality improvement compared with the current standard of care in blood collection and IV placement.
>
> One of the primary drivers for PIVO adoption is the reduction of venipuncture for blood collection. Because each preanalytical error incurs a repeat needlestick, reducing preanalytical error through PIVO use will also, as a logical consequence, reduce the number of needlesticks to the patient and the risk of needlestick injury to the provider. During the early phase of implementation, we tracked PIVO reliability to draw a specimen for more than 3,600 collections by one of our hospital system's phlebotomy teams. They reported a 94.8% draw success rate with PIVO, whereas standard venipuncture can vary from 72 to 88%. In addition, during the 2-year study period as PIVO was rolled out across the health system, well over 100,000 needlesticks were removed from patient care. This practice has the potential to remove hundreds of thousands of needles and patient needlesticks annually in our health system. Further research will be needed to fully quantify the relationship between PIVO use and both needlestick reduction and fewer specimen recollections.

Prior Related Legislation. AB 822 (Irwin), which was held in the Assembly Committee on Appropriations, was substantially similar to this bill.

AB 1627 (Chen) of 2018, which failed passage in the Senate, would have required the Department of Public Health to revise the regulations for certification as a certified phlebotomy technician to include education and training on blood withdrawal from, and flushing of, as required, a peripheral venous catheter on or before January 1, 2021, and would have, commencing on January 1, 2021, authorized a certified phlebotomy technician to withdraw blood from, and flush, as required, a peripheral venous catheter upon specific authorization from a licensed physician and surgeon.

ARGUMENTS IN SUPPORT:

The sponsor, *BD (Becton, Dickinson, and Company), and its affiliate Velano Vascular*, write in support:

> For more than 70 years, BD has advanced the science of specimen collection helping to transform the blood collection process, making it safer and more comfortable for patients and clinicians. Part of this transformation includes an innovative needle-free blood draw technology developed by Velano Vascular, a BD company. PIVO, an FDA-cleared, single-use, disposable blood collection device that enables a lab quality blood draw utilizing an indwelling peripheral

intravenous (IV) catheter as a conduit into the vein. For hospitalized patients with a peripheral IV, this device avoids the painful and ubiquitous needle sticks required today for blood collection. By removing the needle from this procedure, this device also aims to improve practitioner safety while reducing practitioner anxiety when drawing blood from difficult venous access patients such as the chronically ill and children.

[This bill] will make the PIVO technology accessible to all California patients by enabling phlebotomists to utilize this procedure during hospital stays. Since its initial FDA clearance in 2015, the PIVO technology is being used across hospitals as a standard-of-care, including critical care settings, medical/surgical floors and emergency and operating departments. Outside of California, PIVO is being used across provider types, including phlebotomists, technicians, nurses, and physicians following completion of training and in accordance with individual hospital policies and procedures. Phlebotomists have performed hundreds of thousands of PIVO blood collections over the last year in other states with zero reported adverse events.

Current law specifically defines the duty of a phlebotomist to "perform skin tests for specific diseases, arterial puncture, venipuncture, or skin puncture for purposes of withdrawing blood". Unfortunately, current law did not foresee newer technologies and this definition limits phlebotomists only to needle sticks. It does not make sense that, while this technology is currently used in California by nurses, it cannot be used by the one profession whose sole purpose it is to withdraw blood - phlebotomists. [This bill] will fix this discrepancy by updating current law and allowing phlebotomists to utilize this advancement in health technology.

Finally, to be clear, while [this bill] would allow phlebotomists to utilize improved technologies, like PIVO, to better perform their duties, the bill does not grant them any new authority over the IV catheter. Management of the intravenous catheter, including its insertion, and how it is used will remain in the full control of nurses.

ARGUMENTS IN OPPOSITION:

A coalition of healthcare unions and groups, including the *American Federation of State, County and Municipal Employees (AFSCME) California*, *California Association for Medical Laboratory Technology*, *California Labor Federation, AFL-CIO*, *California Nurses Association*, *California Teamsters Public Affairs Council*, *Engineers & Scientists of California, Local 20, IFPTE, AFL-CIO*, *Union of American Physicians and Dentists*, *United Food and Commercial Workers, Western States Council*, and *United Nurses Associations of California/Union of Health Care Professionals*, write in opposition:

On behalf of the above organizations, we write in opposition to AB 1120 (Irwin). AB 1120 would permit phlebotomy technicians to draw blood through a peripheral venous catheter. The insertion of catheters, the post insertion care of the insertion site, and the management of venous infusions is the professional

responsibility of the direct care registered nurse and cannot be delegated to phlebotomy technicians.

The insertion of a catheter into a patient creates a pathway directly into the venous blood stream. It requires excellent technique both for the insertion and for the post-insertion management of the catheter and the catheter insertion site in order to minimize the likelihood of serious infection or the introduction of bacteria directly into the blood stream. For that reason, the management of the intravenous site and access to the intravenous catheter should be limited to adequately trained health care professionals.

This is the third iteration of a bill by Assemblymember Irwin that our coalition has opposed. Put simply, this bill is a gift to health care employers who wish to de-skill health care work at the cost to patients. As always, phlebotomy technicians are not paid more for their increased workload.

Likewise, all the repercussions fall on the managing health care professionals' license. A careful reading of the current statutory language regarding training requirements for certified phlebotomists demonstrates that nothing in the statutory or regulatory language prepares phlebotomists for the care and management of peripherally inserted venous catheters. They are trained to use needles to puncture the skin and to withdraw blood for laboratory analysis. Furthermore, their training does not include stopping venous infusions, flushing catheters with saline, and evaluating the integrity of the intravenous site or re-starting the intravenous infusion after blood has been withdrawn.

This bill would rely on a phlebotomist, who does not have the training and knowledge that a nurse has to identify an individual's need for care and would increase the odds that such risks could cause significant adverse health events.

POLICY ISSUES FOR CONSIDERATION:

Risks of IV Blood Draws. Due to the invasive nature of peripheral IV devices, they increase risk of local infection and sepsis, irritation of the insertion site and blood vessel, and embolism, among other things. As a result, they are only used for a short period of time, but the IV device can be replaced to avoid infection. However, the insertion or reinsertion of an IV device is also painful. As a result, significant clinical judgment is involved in the ordering, placement, use, and maintenance of a peripheral IV device. Depending on whether the device is securely fastened or there are other risks associated with an individual patient, an IV blood draw may not be a better choice than direct venipuncture in all cases.

Still, whether the use of a procedure or device is worth the associated risk overall is subject to the clinicians providing the care and facility protocols. If the person performing the IV blood draw would increase the risk to a patient, the facility will ideally develop protocols to mitigate the risk, such as by requiring sign off from the attending clinician managing the IV or account for the shift in liability if someone is allowed to access the IV under a direct physician order without the clinician's knowledge.

To address the issue, this bill would require those protocols and that phlebotomists be properly trained in the use of an IV blood draw. The PIVO manufacturer provides training support that is outlined in the Utah Intermountain Health study above and consists of multiple weeks of computer-based training modules, live classroom training sessions, and rounding/in-service support during the initial weeks of launch.

This bill also specifically prohibits the phlebotomist from, inserting catheters, removing catheters, or anything relating to the IV catheter or infusion other than the blood collection. It also clarifies that any physician and surgeon or registered nurse may restrict or limit a phlebotomist's ability to perform an IV blood draw on a patient.

Performance of an IV Flush. While this bill is silent on the use of an IV flush, a current best practice is that an IV be flushed with a small amount of saline before and after a blood draw. While not necessary to patient safety, flushing preserves the longevity of the catheter because there could be a risk of occlusion or blood clotting. Any time an object is pulled through a catheter it creates the risk of negative pressure, drawing blood into the catheter system. This blood may result in blockages over time if it is not cleared immediately. However, in the case of IV medication administration, IVs must be flushed to ensure there is no medication left over.

In other states where phlebotomists do perform flushes with the PIVO device, the phlebotomist normally has the following options:

1) If there is no infusion running through the IV and venipuncture is not more appropriate, the phlebotomist:

    a) Performs a pre-flush using a prefilled saline flush syringe.

    b) Performs a PIVO blood draw.

    c) Performs a post-flush.

2) If an active infusion is running into the IV line, the phlebotomist has three options:

    a) Opt not to use the PIVO and do venipuncture instead.

    b) Come back later when the infusion is complete. Many infusions run for about 20 to 30 minutes.

    c) Ask the patient's nurse if the nurse can pause the infusion for a few minutes to do the blood draw. If the nurse makes the clinical decision to pause the infusion, the nurse flushes the "T-Port" on the IV to clear the line of the infusate. Then the phlebotomist:

        i) Performs a PIVO blood draw.

        ii) Notifies the nurse they are done and the nurse restarts the infusion.

REGISTERED SUPPORT:

BD (Becton, Dickinson, and Company), and its affiliate Velano Vascular (sponsor)

Kisses for Katie
Lynn Hadaway Associates
1 Individual

REGISTERED OPPOSITION:

Aids Healthcare Foundation
American Federation of State, County and Municipal Employees (AFSCME) California
California Association for Medical Laboratory Technology
California Labor Federation, AFL-CIO
California Nurses Association
California Teamsters Public Affairs Council
Engineers & Scientists of California, Local 20, IFPTE, AFL-CIO
Union of American Physicians and Dentists
United Food and Commercial Workers, Western States Council
United Nurses Associations of California/Union of Health Care Professionals

Analysis Prepared by: Vincent Chee / B. & P. / (916) 319-3301

Date of Hearing: January 11, 2022

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS
Marc Berman, Chair
AB 864 (Low) – As Amended March 4, 2021

SUBJECT: Controlled substances: CURES database.

SUMMARY: States the intent of the Legislature to transfer maintenance and operation of the state's prescription drug monitoring program (PDMP), CURES, from the Department of Justice (DOJ) to the Department of Public Health (CDPH) no later than January 1, 2023.

EXISTING LAW:

1) Establishes the Controlled Substance Utilization Review and Evaluation System (CURES), a PDMP maintained by the DOJ for the purposes of collecting records of dispensed controlled substances for review by licensed prescribers and dispensers, regulatory investigators, law enforcement, and statistical researchers. (Health and Safety Code (HSC) § 11165(a))

2) Requires pharmacists and other dispensers to report information to CURES within one working day relating to prescriptions of Schedule II, III, IV, and V controlled substances. (HSC § 11165(d))

3) Requires health care practitioners in receipt of a federal Drug Enforcement Administration (DEA) registration providing authorization to prescribe controlled substances, as well as pharmacists, to register for access to the CURES database. (HSC § 11165.1(a))

4) Requires certain health care practitioners to consult the CURES database to review a patient's controlled substance history before prescribing a Schedule II, Schedule III, or Schedule IV controlled substance to the patient for the first time and at least once every six months thereafter if the substance remains part of the treatment of the patient, with certain exemptions. (HSC § 11165.4)

5) Requires the DOJ to upgrade CURES to allow health information technology systems that meet certain patient privacy and data security requirements to interoperate with the database, allowing prescribers and dispensers to make queries through their electronic health record applications. (HSC § 11165.1)

6) Enables security printers and prescribers to report stolen or lost prescription pads to the DOJ through CURES. (HSC § 11165.3)

7) Provides dedicated funding for the CURES program through an annual license fee assessed for licensees authorized to prescribe or dispense controlled substances in California. (Business and Professions Code (BPC) § 208)

8) Authorizes the DOJ to seek voluntarily contributed private funds from insurers, health care service plans, qualified manufacturers, and other donors for the purpose of supporting CURES. (HSC § 11165.5)

9) Allows the DOJ to conduct audits of CURES and its users and issue citations and fines for system misuse. (HSC § 11165.2)

10) Requires the CURES database to comply with all applicable federal and state privacy and security laws and regulations and requires the DOJ to establish policies, procedures, and regulations regarding the use, access, evaluation, management, implementation, operation, storage, disclosure, and security of the information within CURES. (HSC § 11165(c))

THIS BILL:

1) States that it is the intent of the Legislature to enact legislation to transfer maintenance and operation of the Controlled Substance Utilization Review and Evaluation System (CURES) from the DOJ to the CDPH no later than January 1, 2023.

2) Provides a sunset date for provisions of law establishing the CURES database to align with the January 1, 2023 date by which the database is intended to be transferred.

FISCAL EFFECT: Unknown; this bill is keyed fiscal by the Legislative Counsel.

COMMENTS:

Purpose. This bill is sponsored by the **California Medical Association**. According to the author:

> "Currently, CURES remains housed under the DOJ because it evolved from early tools established primarily for law enforcement investigations. However, experts and policymakers now recognize that combating prescription drug abuse should be approached through a health-oriented lens, rather than through criminal prosecution. Forty-nine states have PDMPs like CURES; however, California is only one of four states that houses their PDMP in a law enforcement agency. While the Attorney General has worked laudably to advance the state's progress against the opioid abuse crisis, CURES would be better positioned as a public health tool if it were positioned in a department with health as its core mission."

Background.

History of Prescription Monitoring. California's scheme for tracking drug prescriptions dates back to the early twentieth century. Senate Bill 367 (Lukens) in 1905 first established the licensing and regulation of pharmacists in California, creating the California State Board of Pharmacy (BOP) and prohibiting any person to "manufacture, compound, sell, or dispense any drug" without a license. In 1929, Senate Bill 182 (Young) outlawed the dispensing of certain drugs[1] without a written prescription from a licensed physician, dentist, or veterinarian. These prescriptions were required to include the name and address of the individual receiving the drug, and for three years all prescription records were required to remain "open to inspection by the prescriber and properly authorized officers of the law, including all inspectors of the division of narcotic enforcement and of the state board of pharmacy." This requirement was later expanded to include all prescription drugs.

The California Triplicate Prescription Program (TPP) became the nation's first comprehensive prescription tracking system when it launched in 1939 under Attorney General Earl Warren.

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[1] "[C]ocaine, opium, morphine, codeine, heroin, alpha eucaine, flowering tops and leaves of hemp or loco weed (cannabis sativa) or Indian hemp, or chloralhydrate … or their salts, derivatives or compounds."

Under the TPP, physicians and other prescribing health professionals were required to use serialized triplicate prescription forms when prescribing a Schedule II[2] controlled substance. One copy was provided to the patient; another was retained for the prescriber's records. The third copy of each triplicated prescription was sent to the Bureau of Narcotics Enforcement within DOJ, which used the records to investigate potential fraud or criminal diversion of controlled substances.

CURES was first established by Assembly Bill 3042 (Takasugi) in 1996, a bill sponsored by Attorney General Dan Lungren. AB 3042 effectuated a Controlled Substances Prescription Advisory Council recommendation that DOJ develop a "technologically sophisticated data monitoring system to collect as much data as is needed and provide easy access to the data collected for educational, law enforcement, regulatory, and research purposes." CURES was initially a provisional pilot project operating concurrently with the TPP; both programs collected Schedule II prescription data for law enforcement to identify cases of diversion. Assembly Bill 2655 (Matthews) extended the pilot and authorized licensed health professionals to request CURES data for prescriptions dispensed to their patients.

In 2003, Senate Bill 151 (Burton) made CURES a permanent program and eliminated the TPP. This bill enacted a number of other significant reforms to state laws governing the prescribing of controlled substances, intending to "increase patient access to appropriate pain medication and prevent the diversion of controlled substances for illicit use." SB 151 replaced the triplicate prescription form requirement for Schedule II drugs with a new requirement that these prescriptions be issued on a special form obtained from an approved security printer. This bill also added Schedule III drug data to CURES, contingent upon available funding from DOJ.[3]

During this period of time, CURES was primarily used for investigatory searches of prescription records to identify potential fraud or diversion of controlled substances. However, after a series of high-profile prescription drug deaths, a growing national movement called for states to empower safer prescribing practices through web-based solutions to what became identified as a public health crisis. While CURES allowed prescribers to request patient activity reports through mail or fax, other states began to launch searchable "prescription drug monitoring program" databases (PDMPs) to enable health professionals to more easily access their patients' prescription histories. In 2004, Kentucky became the first state to implement a PDMP with the release of its eKASPER program, and 23 other states soon followed suit.

California's efforts to upgrade CURES into a searchable, client-facing PDMP were initially inhibited by budget challenges. The database's funding structure at the time made much of the system's operation contingent on the availability of funding from the limited special funds for the state's healing arts boards, with additional money provided by DOJ through its General Fund allocation and federal grant dollars. Implementing a new online database would require additional resources. In 2005, Attorney General Bill Lockyer sponsored Senate Bill 734 (Torlakson) to evaluate what would be necessary to create a real-time PDMP, contingent upon the acquisition of private outside funding, which was later contributed by Kaiser Permanente.

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[2] Prescription drugs with a high risk of addiction and abuse. Current examples include opioids like fentanyl, morphine, oxycodone (OxyContin), meperidine (Demerol), and hydrocodone (Vicodin, Norco, Lorcet); also includes psychotropic drugs like methamphetamine, amphetamine (Adderall), and methylphenidate (Ritalin).
[3] Schedule IV drugs were added by Assembly Bill 2986 (Mullin) in 2006, and Schedule V drugs were added by Assembly Bill 528 (Low) in 2019.

In 2008, Attorney General Jerry Brown announced that the new PDMP upgrades to CURES would be made possible through $3.5 million in private funding secured through a partnership with the Troy and Alana Pack Foundation. This patient safety foundation was founded by activist Robert Pack in honor of his 7- and 10-year-old children, who were killed in a car accident caused by prescription drug abuse. DOJ launched the reinvented CURES PDMP in 2009, and its release was celebrated as a step forward both for combating prescription drug abuse from a public health perspective and for preventing criminal drug diversion through law enforcement investigations.

However, as California's economy fell into recession, the state's budget crisis imperiled continued operation of the database. In 2010, Senator Mark DeSaulnier introduced Senate Bill 1071 to provide permanent funding for CURES through a fee or tax on prescription drug manufacturers and importers, but the bill failed passage in committee. The next year, Senate Bill 360 by Senator DeSaulnier was signed into law, which codified the new CURES PDMP and established a CURES Program Special Fund where administrative fines imposed by DOJ for system misuse could be deposited. The system still lacked a dedicated funding source.

Sustainable funding for CURES was effectively eliminated when the 2011-12 Budget Act cut DOJ's General Fund allocation by $71 million, defunding the entire Bureau of Narcotics Enforcement along with its support for CURES. DOJ attempted to preserve the program within existing resources, utilizing unpaid interns and temporarily redirecting staff. Without stable funding, however, the program struggled with technical challenges and gained a reputation in the health professional community for being difficult to use and offering poor user support.

In 2012, Senator DeSaulnier authored Senate Bill 616 to support the CURES budget through healing arts board licensing fee increases that could be triggered in the event that DOJ could not find sufficient funding to cover the costs of operating CURES. This bill failed passage in committee. Much of the opposition to the bill came from members of the health professional community, who resisted the proposal that the system's users should fund its operation through increased licensing fees without receiving the benefit of a demonstrably better resulting database.

Attorney General Kamala Harris sponsored Senate Bill 809 in 2013, again authored by Senator DeSaulnier, to ultimately resolve the CURES funding crisis. The bill assessed a new $6 annual fee on healing arts board licenses, generating reliable revenue for the CURES Fund. In exchange, the bill codified a number of improvements to the system that would be implemented by DOJ through an approximately $3 million budget allocation that was included in the 2013-14 Budget Act. New features included the ability for licensees to delegate their authority to initiate a CURES query to an assistant and a new "streamlined application and approval process" to replace the previous paper-based registration process. The bill also required all licensees with controlled substances prescribing rights to register for the system by January 1, 2016.

The new funding arrangement required DOJ to partner with the Department of Consumer Affairs (DCA), which administered the CURES Fund, in its development of the upgraded system. The improved database, which would come to be called "CURES 2.0," was built through a pair of vendor contracts, redesigning a new user interface and developing a series of algorithms to automatically alert prescribers of patterns indicative of at-risk patient behavior. The new 2.0 system also allowed prescribers to flag exclusivity compacts, added peer-to-peer communication, and significantly improved user profile management.

The rollout of CURES 2.0 is generally considered to have been successful, with a soft launch of the newly redesigned database beginning in July of 2015. The full rollout of the system was delayed until January 1, 2016 when it was discovered that many health professionals were utilizing outdated internet browser technology that did not meet CURES 2.0's enhanced security requirements. Technical issues delayed the release of the new web-based registration system, resulting in legislation to push back the deadline for prescribers to register to July 1, 2016.

With a consistently funded and thoroughly modernized CURES database in place, advocates resumed calling for use of the system to become a requirement for practitioners who prescribe new controlled substances. A requirement that health professionals consult CURES before writing a new prescription for controlled substances was originally included in SB 809 but was subsequently amended out. Proposition 46, referred to as the Troy and Alana Pack Patient Safety Act of 2014, included provisions that would have required prescribers to check CURES before prescribing a Schedule II or III drug for the first time; this initiative failed in part due to opposition arguments against mandating CURES use before the system upgrades were complete. After the proposition was defeated, supporters remained committed to pursuing legislation.

Senate Bill 482 (Lara), introduced in 2015 and subsequently signed into law in 2016, represented a significant achievement for the patient safety advocacy community when it enacted the state's first mandated use of the CURES database for prescribers. Absent certain exceptions, SB 482 required health practitioners to consult a patient's history in CURES prior to prescribing them a Schedule II, III, or IV controlled substance for the first time, and then at least once every four months as long as the prescription continued to be renewed. Other legislative measures were subsequently introduced to take advantage of CURES 2.0's new scalable architecture, which allows for additional upgrades to be more easily made to the database.

Placement of CURES Database. California is one of only four states that houses its PDMP within a law enforcement agency. This is because the database traces its origins back to the TPP, created in 1939 within the Bureau of Narcotics Enforcement, which was principally considered a tool for law enforcement to investigate cases of criminal drug diversion. The earliest iterations of prescription monitoring in California were not available to health professionals, but served to aid law enforcement in cracking down on illicit drug activity.

As national attention to combatting the opioid crisis has grown, experts have established that abuse and addiction are best addressed through a public health lens, rather than through criminal prosecution. While regulatory investigators and local law enforcement may still utilize PDMP data, prescription drug misuse and diversion by patients should be treated by medical professionals rather than stigmatized as a chiefly criminal concern. This paradigm shift has led most states away from housing their PDMPs within a justice department, with some states having transitioned their own databases away from their Department of Justice in recent years.

Most states house their PDMP within either their state's health department or a licensing agency. Over half of all states currently have their PDMP within either their Board of Pharmacy or their licensing department (equivalent to the DCA in California). The majority of other states house their PDMP within either their Department of Health or their Department of Human Services.[4]

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[4] https://www.aanp.org/advocacy/advocacy-resource/policy-briefs/issues-at-a-glance-prescription-drug-monitoring-programs-pdmp

The intent of this bill is to bring California into conformity with PDMPs in the vast majority of other states by transferring maintenance and operation of CURES from the DOJ to the CDPH. While doing so would not immediately change the scope or use of CURES by health practitioners, regulators, and law enforcement, it would represent the treatment-oriented approach to combatting the opioid crisis that has become recognized as best practice across the country. It would also ensure that any future changes to the system will be governed by health experts. While as currently drafted, the bill is limited primarily to a statement of this intent with substantial details remaining under development, the bill serves as a vehicle to engage with stakeholders to achieve a successful transition of the database that will minimize program disruption.

Prior Related Legislation. AB 528 (Low, Chapter 677, Statutes of 2019) reduced the required timeframe in which pharmacists are required to report dispensed prescriptions to CURES from seven days to the following business day, added Schedule V drugs to CURES, and changed the requirement for health practitioners to continue consulting the CURES database from every four months to every six months beginning July 1, 2021.

AB 1751 (Low, Chapter 478, Statutes of 2018) provides a framework for the CURES PDMP to connect with other states that comply with California's patient privacy and data security standards.

AB 1752 (Low) would have reduced the required timeframe in which pharmacists are required to report dispensed prescriptions to CURES from seven days to the following business day and would have added Schedule V drugs to CURES. *This bill was held under submission on the Senate Appropriations suspense file.*

AB 1753 (Low, Chapter 479, Statutes of 2018) allows the DOJ links uniquely serialized prescription pads with CURES.

AB 2086 (Gallagher, Chapter 274, Statutes of 2018) allows prescribers of controlled substances to review a list of patients for whom they are listed as being the prescriber in CURES.AB 3042 (Takasugi, Chapter 345, Statutes of 2002) first established CURES as a pilot project operating concurrently with the state's Triplicate Prescription Program.

SB 151 (Burton, Chapter 406, Statutes of 2003) made CURES the state's permanent prescription tracking program and added Schedule III drugs to the database.

SB 734 (Torlakson, Chapter 487, Statutes of 2005) created the framework to upgrade the CURES prescription database into a searchable, client-facing PDMP.

AB 2986 (Mullin, Chapter 286, Statutes of 2006) added Schedule IV drugs to the CURES database.

SB 809 (DeSaulnier, Chapter 400, Statutes of 2013) established new healing arts license fees to fund the development and maintenance a new and improved "CURES 2.0" database.

SB 482 (Lara, Chapter 708, Statutes of 2016) mandated that health practitioners consult a patient's history in CURES prior to prescribing them a Schedule II, III, or IV controlled substance for the first time and then at least once every four months as long as the prescription continued to be renewed.

AB 40 (Santiago, Chapter 607, Statutes of 2017) required the DOJ to facilitate interoperability between health information technology systems and the CURES database, subject to a memorandum of understanding setting minimum security and privacy requirements.

ARGUMENTS IN SUPPORT:

The **California Orthopaedic Association** supports this bill, writing: "This bill would help improve public health by moving the Controlled Substances Utilization and Review System (CURES) databases from the Department of Justice to the Department of Health. Since physicians must check and use the database prior to prescribing certain controlled substance medications, and since we are one of only four states to house the database with law enforcement rather than public health, we think the database belongs in the Department of Health."

IMPLEMENTATION ISSUES:

Subsequently to the introduction of the language in this bill, AB 527 (Wood, Chapter 618, Statutes of 2022) was enacted, which added language to the same code section that this bill would modify. As a result, there is a conflict between the language of this bill and current law governing the CURES database; specifically, it would revert the requirement that the DOJ to provide the University of California with access to identifiable data for research purposes. When additional language is added to this bill, the author should ensure that this requirement is restored to avoid inadvertently striking newly added requirements.

ARGUMENTS IN OPPOSITION:

None on file.

REGISTERED SUPPORT:

California Medical Association *(Sponsor)*
California Orthopaedic Association

REGISTERED OPPOSITION:

None on file.

Analysis Prepared by: Robert Sumner / B. & P. / (916) 319-3301

Date of Hearing: January 11, 2022

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS
Marc Berman, Chair
AB 1498 (Low) – As Amended January 3, 2022

SUBJECT: Members of boards within the Department of Consumer Affairs: per diem.

SUMMARY: Existing law states that each member of a board under the jurisdiction of the Department of Consumer Affairs shall receive a per diem of one hundred dollars for each day spent in the discharge of official duties. This bill requires "each day" to be defined as either the accumulation of eight hours that the member spent in the discharge of official duties or a day on which the member performed any official duty.

EXISTING LAW:

1) Establishes the Department of Consumer Affairs (DCA) within the Business, Consumer Services, and Housing Agency. (Business and Professions Code (BPC) Section 100 et seq.)

2) Creates various boards, bureaus, and commissions under the jurisdiction of DCA whose purpose are to regulate private businesses and professions deemed to engage in activities that have potential impact on the public health, safety, and welfare of the people of California. (BPC Section 101 et seq.)

3) Provides that members of boards, bureaus and commissions under the jurisdiction of DCA must take an oath of office. (BPC Section 105)

4) Grants the appointing authority the power to remove from office at any time any member of any board for continued neglect of duties required by law, or for incompetence, or unprofessional or dishonorable conduct. (BPC Section 106)

5) States that each member of a board, commission, or committee under the jurisdiction of DCA shall receive a per diem of one hundred dollars ($100) for each day actually spent in the discharge of official duties, and shall be reimbursed for traveling and other expenses necessarily incurred in the performance of official duties. (BPC Section 103)

THIS BILL:

1) Clarifies that a board, for the purposes of disbursing per diem to its members, must define "per day" as either of the following:

   a) The accumulation of eight hours that the member spent in the discharge of official duties

   b) A day on which the member performed any official duty.

2) Makes various technical, non-substantive changes.

FISCAL EFFECT: Unknown. This bill is keyed fiscal by Legislative Counsel.

COMMENTS:

Purpose. This bill is author-sponsored. According to the author: "California law provides that members appointed to boards, bureaus, and commissions under the Department of Consumer Affairs are entitled to a per diem payment of $100 for each day spent conducting official duties. However, statutes are unclear about the actual definition of "each day," and whether it means part of the day or a specific hourly requirement. As a result, boards have developed various interpretations of "each day", leading to inconsistencies and disparities on the amount of per diem payments across DCA boards. This technical bill aims to provide statutory clarity on per diem payments by allowing the boards to choose between two definitions of "per day:" either the accumulation of 8 hours spent discharging official duties, or any day on which the member performed an official duty."

Background.

Appointment of Board Members. DCA consists of 37 boards and bureaus that regulate over 3.9 million licensees across 250 professions and occupations. Each board consists of board members – generally chosen and appointed by the Governor, the Senate Committee on Rules, and the Speaker of the Assembly – who are collectively responsible for executing the board's various functions.

California law dictates the makeup of each board, which can vary from entity to entity. As an example, the Medical Board of California, which regulates physicians and surgeons, is made up of 13 members appointed by the Governor, 1 member appointed by the Senate Committee on Rules, and 1 member appointed by the Speaker of the Assembly. As part of their duties, board members are often required to travel to attend board meetings, participate in hearings, issue disciplinary actions, and vote on various administrative decisions.

Per Diem Payments. Although appointment on a DCA board is largely considered a volunteer function, California law provides that "each board member must receive a per diem payment of $100 for each day actually spent in the discharge of official duties." In addition, board members must be reimbursed for traveling and other expenses incurred in the performance of these official duties.

However, California law is silent on the definition of "each day," and it is unclear if any part of the day or a specific number of hours must be reached in order to trigger the per diem payment. As a result, each board under DCA has established varying interpretations and definitions of "each day" leading to different per diem payment structures. For example, some boards require completion of timesheets, and require that a specific number of hours be spent performing official duties (e.g. 7 or 8 hours) before per diem payment is issued. Other boards issue per diem payments upon attendance of any board-related meeting. Some boards may consider any official activity performed during the day, regardless of time, as eligible for per diem payment.

Due to these various interpretations of "per day," there can be some significant variations and disparities in per diem payments across DCA boards, where one member of a board may receive larger or smaller per diem payments than a member from another board, even if equal volunteer work has been performed. Additionally, some DCA entities may incur larger per diem expenses depending on the definitions that are used. This lack of statutory guidance has created a challenge to boards wishing to switch per diem payment model.

To address these issues, this bill provides statutory definitions for “each day” in order to create consistency on per diem payments across all DCA boards. Specifically, this bill provides two options a board can choose from: either (1) the accumulation of eight hours that the member spent in the discharge of official duties or (2) the performance of any official duty during a day. In practice, the first option would have a board member document and time track their official activities. Upon reaching 8 hours of performing official duties, the member would receive the $100 per diem payment. Alternatively, the second option would have the member report that an official duty was performed on any given day, such as attending a board meeting. This bill would allow DCA boards to select between the two options that would best fit their administrative structure.

Current Related Legislation.

None.

Prior Related Legislation.

None.

REGISTERED SUPPORT:

None on file.

REGISTERED OPPOSITION:

None on file.

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