

Legislative Analysis



PRACTICING WITHOUT A LICENSE: INCREASE PENALTIES FOR CERTAIN PROFESSIONS

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House Bill 4937 (Substitute H-1)
Sponsor: Rep. Michael Sak

House Bill 4938 (Substitute H-1)
Sponsor: Rep. Barbara Farrah
Committee: Regulatory Reform

First Analysis (10-3-07)

BRIEF SUMMARY: The bills would increase the penalty for practicing the profession of architect, professional engineer, or professional land surveyor without a license.

FISCAL IMPACT: The bills would have an indeterminate state and local governmental fiscal impact. A more detailed discussion follows later in the analysis.

THE APPARENT PROBLEM:

Current law prohibits engaging in the practice of a profession that is regulated under the Occupational Code without the required license or registration. Licensure ensures that the professional has received a minimum level of training to competently perform the tasks within a profession's scope of practice. Reportedly, however, there are people performing work in the state of Michigan that falls within the scope of practice of architects, professional engineers, and land surveyors who are not licensed to lawfully engage in the practice of those occupations. This is particularly troubling because a great deal of education, training, and proficiency is needed to perform the functions reserved for these professionals in a safe and competent manner.

Architects, professional engineers, and land surveyors need a comprehensive background in the physical sciences and mathematics to safely design and construct buildings, bridges, and other structures that can withstand the normal stresses of time, nature, and use. Structural flaws, whether by poor design or poor materials, may not be apparent for years, but can lead to the collapse of a roof, a stairwell, a building, or a bridge. A lack of geological knowledge can result in a building later collapsing because it was built on ground incapable of supporting the height or weight of the structure.

Some have long believed that the criminal penalties for unlicensed activities are too lenient to be effective in discouraging fraudulent activities and for overburdened county prosecutors to enforce. It has been suggested that in light of the threat to public safety inherent in unlicensed persons practicing architecture, engineering, and land surveying, that the criminal penalties for engaging in these professions without a license be increased.

THE CONTENT OF THE BILLS:

Under provisions of the Occupational Code, a person is prohibited from engaging in or attempting to engage in the practice of a regulated occupation without being licensed or registered in that occupation. Similarly, a school, institution, or person cannot operate or attempt to operate a barber college, school of cosmetology, or real estate school without a license to do so. A violation of the former provision is a misdemeanor punishable by a fine of not more than \$500 and/or imprisonment for not more than 90 days. A violation of the latter provision is also a misdemeanor but the punishment is higher: up to \$1,000 in fines and/or a term of imprisonment not to exceed one year.

House Bill 3947 would create a higher penalty for engaging in the profession of architect, professional engineer, or professional land surveyor without a license and House Bill 4938 would place the new felony provisions within the corresponding section of the sentencing guidelines.

House Bill 4937

The bill would amend the Occupational Code (MCL 339.601 and proposed 339.2006). A person who engaged in the profession of architect, professional engineer, or professional land surveyor without a license for that occupation would be guilty of a crime as follows:

** 1st offense – misdemeanor; fine of not less than \$5,000 or more than \$25,000, imprisonment for not more than 93 days, or both.

** 2nd offense – felony; fine of not less than \$5,000 or more than \$25,000, imprisonment for up to one year, or both.

** 3rd or subsequent offense – felony; fine of not less than \$5,000 or more than \$25,000, imprisonment for not more than four years, or both.

In addition, unless a person, a qualifying officer, a licensee, or an agent for a licensee was licensed as an architect, professional engineer, or professional surveyor during the performance of an act or contract, he or she could not sue to collect compensation for that act or contract. However, a person who used the services of an unlicensed architect, professional engineer, or professional surveyor or an unlicensed individual who had used a title reserved for one of those professionals, could bring an action in a court of competent jurisdiction, or offer as a counterclaim to an action brought by an unlicensed individual, for a refund of compensation after deducting the value of the goods or services that the person retained.

Furthermore, if the Department of Labor and Economic Growth suspended a license for failure to make restitution, whether in whole or in part, restitution made in the form of repair or remedial corrective work would have to be performed by a person who was appropriately licensed as an architect, professional engineer, or professional surveyor and would be paid by the licensee under the suspension.

General amendments

The bill would also specify that any violation of the Occupational Code would have to include a requirement that restitution be made, based upon proofs submitted to and findings made by the trier of fact as provided by law. (Currently, the department may impose one or more penalties for a violation of the act; restitution is included in the list of possible punishments.)

The Occupational Code also exempts several occupations from its regulations, such as interior designers, electricians, plumbers, and heating and cooling specialists. Persons who engage in building design are also exempted from regulation under the code. The bill would instead exempt persons who engage in residential building design and would define the term to mean the rendering of residential design services for a detached one- and two- family residence building by a person exempted from the requirements of Section 2012. (Section 2012 provides an exemption from licensure as an architect, professional engineer, and professional surveyor under certain circumstances.)

House Bill 4938

The bill would amend the Code of Criminal Procedure (MCL 777.13p) to specify that the unauthorized practice of an occupation or unauthorized operation of a school teaching an occupation – second offense – by a person who was not licensed as an architect, professional engineer, or professional surveyor would be a Class G felony of the public trust with a maximum term of imprisonment of two years. A third or subsequent offense would be a Class F felony of the public trust with a four-year maximum term of imprisonment.

BACKGROUND INFORMATION:

Article 20 of the Occupational Code, entitled "Architects, Professional Engineers, and Land Surveyors," requires licensees to obtain a seal authorized by the appropriate board that has the licensee's name and the legend indicating either "licensed architect," "licensed professional engineer," or "licensed land surveyor." Certain documents, such as plans, plats, drawings, maps, and the title sheet of specifications prepared by a licensee and submitted to a governmental agency for approval or for filing as a public record must carry the embossed or printed seal of the person "in responsible charge." Submitting such documents to a public official or municipality for approval, or a permit or a plan for filing as a public record without having the proper seal or seals subjects a person to penalties under the code. Further, governmental agencies are prohibited from engaging in the construction of a public work costing over \$15,000 involving architecture or professional engineering unless certain requirements are met, including having the plans and specifications and estimates prepared by a licensed architect or licensed professional engineer, and the materials used reviewed by and completed phases of construction make under the direct supervision of a licensed architect or licensed professional engineer.

FISCAL INFORMATION:

The bills would provide for new misdemeanor and felony offenses; the fiscal impact on state and local correctional systems would depend on how they affected numbers of convictions and severity of sentences. Generally speaking, felons are a state responsibility (except when serving a sentence in the county jail) and misdemeanants are a local responsibility.

The average appropriated cost of incarceration in a state prison is about \$31,000 per prisoner, a figure that includes allocated portions of various fixed costs. The state's average cost of parole and probation supervision is about \$2,000 per supervised offender per year. Costs of any jail incarceration or misdemeanor probation supervision would be borne by local units of government; those costs vary by jurisdiction. Any increase in penal fine revenues could benefit local libraries, which are the constitutionally-designated recipients of those revenues.

Under House Bill 4938, the felony offense (for a third or subsequent violation) to be created by House Bill 4937 would be a Class F offense against the public trust. Exclusive of sentences for habitual offenders, sentencing guidelines ranges for the minimum sentence for Class F offenses vary from 0-3 months (for which a non-prison sanction would be required) to 17-30 months (for which a prison term would be required).

House Bill 4937 would have no fiscal impact on the Department of Labor and Economic Growth.

ARGUMENTS:

For:

Professional associations representing architects, professional engineers, and land surveyors have petitioned for years for legislation that will eliminate, or at least reduce, the numbers of unlicensed persons engaging in activities that rightfully fall within the scope of practice of these professions. Whether for a single-family dwelling, a remodeling project, or a multimillion dollar facility such as a hotel, mall, or bridge, design flaws may not be apparent for years, but can pose a serious safety threat. Correcting flaws on partially or fully completed structures can run up construction costs significantly and, in the case of public projects, be burdensome to taxpayers.

Part of the problem is that the Department of Labor and Economic Growth can sanction licensed persons, but has no authority to punish unlicensed persons. Another problem is that the current criminal fines and jail time are insufficient to provide a deterrent or to encourage over-burdened county prosecutor offices to prosecute cases involving persons acting as architects, engineers, and land surveyors without a license. The bill would address the issue by increasing both the fines and the length of imprisonment. By imposing a possible term of imprisonment of 93 days for a first offense, certain fingerprinting and record keeping requirements will be triggered that will enable repeat offenders to be tracked. The longer jail time for a second offense and the felony level

offense created for repeat offenders should act as a deterrent to engaging in these professions without a license. The increased penalties should also provide a greater incentive for law enforcement to prosecute these unlicensed individuals before the public suffers harm.

For:

House Bill 4937 would make several other important changes to current law. Currently, when the Department of Labor and Economic Growth imposes administrative sanctions on a licensee or registrant for a violation of the Occupational Code, it may require the offender to make restitution if a client or other person suffered an economic loss caused by the infraction. The bill would instead require that restitution be ordered in all cases when appropriate.

The bill would also narrow the exemption from regulation under the code that is currently extended to those engaged in building design to only those engaged in residential design, and then only if the residence fit the newly added definition of that term. This change should ensure that designers of larger structures have the necessary educational background and training to design structures that would not endanger the health and safety of the public.

Further, the bill would end the current ability of an unlicensed person who illegally performed functions restricted to licensed architects, engineers, and land surveyors from suing to collect his or her fee. The bill would protect the right of a consumer who perhaps unwittingly hired an unlicensed person, or hired one under the pretense he or she was licensed, to sue for a partial refund of a payment paid to the unlicensed person (the value of goods or services that the consumer retained would have to be deducted from the payment).

Against:

The Department of Labor and Economic Growth agrees that the penalties for engaging in unlicensed activity are too low, and that increasing the penalties will enable the department to enforce unlicensed activity by enlisting the assistance of prosecutors to prosecute the cases. However, in light of the ongoing revenue shortfalls and uncertainty over funding for the Department of Corrections, the DLEG feels that any discussion of expanding felony provisions should involve the DOC. Specifically, it should be discussed whether an alternative could be found to the bill's automatic felony for a third offense; for instance, perhaps the felony penalty could be reserved for a third event that involved the death of or injury to someone.

Response:

Part of the rationale for increasing the penalties for the unlicensed practice of these three professions is to create a deterrent sufficient that no person would suffer injuries or die because of a faulty structure designed by an incompetent person, rather than wait for such incidents to occur.

POSITIONS:

A representative of the American Council of Engineering Companies testified in support of the bills. (9-11-07)

A representative of the Michigan Society of Professional Engineers testified in support of the bills. (9-11-07)

A representative of the American Institute of Architects – Michigan testified in support of the bills. (9-11-07)

The Department of Labor and Economic Growth supports the concept of the bills. (9-11-07)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.