

Montana Department of
LABOR & INDUSTRY

NOTIFICATION OF ACTIVE SUPERVISION

To: Montana Board of Dentistry
From: Judy Bovington, Chief Legal Counsel
Date: September 21, 2017
Re: Administrative Rules of Montana 24.138.2302(1)(j) and 24.138.416

Dear Board Members:

Thank you for your hard work on behalf of the State of Montana. Pursuant to the requirements of HB 141, Chapter 322, Laws of 2017, this letter is to serve as written notification to the Board that ARM 24.138.2302(1)(j) and ARM 24.138.416 have been selected for active supervision review by the Commissioner of Labor and Industry.

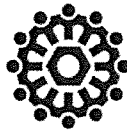
As the memo to board members on March 28, 2016 mentioned, the United States Supreme Court recently required active supervision of boards in order for boards to be considered state actors. *N.C. State Bd. of Dental Exam'rs v. Federal Trade Commission (FTC)*, 135 S. Ct. 1101 (2015). The ruling means that state licensing boards controlled by market-participants – including Montana's – are entitled to state legal protections acting on behalf of the state in board decisions *only if* the challenged restraint:

- 1) Supports clearly articulated and affirmatively expressed state policy, and
- 2) The policy-making process was actively supervised by non-market participants to ensure fairness.

The Court's ruling rests on principles similar to Montana law – particularly § 37-1-131(1)(a)(ii), MCA, that requires any restraint of trade be necessary to protect public health and safety. However, the decision means that board members could face personal liability for decisions the entire board makes (regardless of how individuals vote) unless the state actively supervises the board. The Court's ruling means that only appropriately supervised board members are considered state employees, entitled to the state's legal protections for official acts.

Section 37-1-121, MCA, and New Section 4 of Chapter 322 now include a formal review process that requires the Commissioner of the Department of Labor and Industry to evaluate board decisions that restrain trade. The review process is set out in New Section 4, which is attached to this letter. The new law also includes a mechanism to ensure legislative oversight.

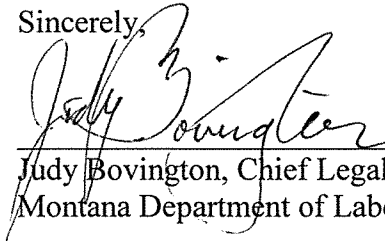
The Department will review ARM 24.138.2302(1)(j) and ARM 24.138.416 to ensure that the rules were “made or taken pursuant to a clearly articulated state policy” and are “reasonable and necessary to protect the public,” per § 37-1-121(1)(d), MCA. After following the procedure established in New Section 4, the Commissioner will issue a decision recommending either that the Board continue enforcing the administrative rules in question, amend the rules, or repeal the rules.



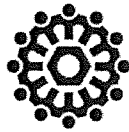
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Please determine and inform the Commissioner if the Board would like Board members to meet with the Commissioner and if the Board intends to submit information for consideration. Thank you again for your service to Montana and for cooperating with the Department as we work to comply with the U.S. Supreme Court decision. Please do not hesitate to contact our legal team if you have questions or concerns.

Sincerely,



Judy Bovington, Chief Legal Counsel
Montana Department of Labor and Industry



Montana Department of LABOR & INDUSTRY

Attachment A: HB 141 New Section 4 (not yet codified)

Active supervision -- rebuttable presumption -- reconsideration. (1) (a) Before making a determination approving or disapproving a board action subject to active supervision as provided in 37-1-121(1)(d), the commissioner of labor and industry shall:

(i) notify the affected board and the economic affairs interim committee in writing of the particular action identified for commissioner review;

(ii) give the board a timeframe of at least 30 days in which to provide the commissioner with written comments and materials justifying the proposed action; and

(iii) meet with the board or its representatives regarding the board action.

(b) The commissioner may require that the board provide the commissioner with other relevant information, including but not limited to comments, documents, or other material submitted to the board regarding the board action.

...

(3) If the commissioner determines that a board action is subject to active supervision procedures under 37-1-121(1)(d) and this section, the commissioner shall issue a written determination within 30 days after meeting with the board or its representatives as provided in subsection (1).

(4) (a) The board may request that the commissioner reconsider the determination. A request under this subsection (4) must be in writing, provide any additional supporting materials or arguments, and be received by the commissioner within 10 days after issuance of the commissioner's written determination.

(b) The commissioner may meet with the board or representatives of the board as part of the reconsideration process.

(c) The commissioner shall issue a written reconsideration decision within 10 days of receiving the written request for a reconsideration or within 10 days after meeting with the board or its representatives regarding the redetermination.

...

(6) (a) After the economic affairs interim committee is notified of the commissioner's decision to issue a written determination or redetermination, the committee shall notify the commissioner if the committee plans to provide an opportunity for public comment on the commissioner's action at the next committee meeting.

(b) The commissioner shall notify the economic affairs interim committee of a final determination under this section. The committee shall follow the procedures in Title 2, chapter 4, if the committee decides to conduct a review. A final determination of the commissioner may be suspended as provided in 2-4-305(9) whether the determination is for a rule or for another board action.