

Why Professional Regulation Laws Vary from State to State



Donald A. Balasa, JD, MBA
AAMA CEO and Legal Counsel

I am often asked why medical assisting laws vary—sometimes greatly—from state to state. Certainly, this question can be asked about laws regulating most professions. Would it not make more sense—and be better public policy—for the U.S. Congress to enact laws for each regulated profession that are nationally applicable and consistently interpreted in all American jurisdictions?

National regulation of the professions has great intuitive appeal. For example, in this era of technological advancements and expanding telehealth, uniform federal standards for the health professions may be in the best interests of patients and health professionals. Even though national regulation of the professions would seem to be a no-brainer, the plain language of the U.S. Constitution would render broad federal regulation of the professions unconstitutional.

Federalism

The United States has a federalist system of government, meaning that the federal government has certain powers and other powers are vested in the states. Therefore, understanding which level of government has the primary authority to regulate the professions—and why—is essential.

The Legislative Authority of Congress Is Limited

The legislative authority of the U.S. Congress is addressed in Article 1 of the Constitution.

Article 1 lists the legislative powers given to Congress. These powers do not include the authority to pass laws governing professions. Moreover, the Tenth Amendment of the Constitution reinforces the limits of the legislative authority of Congress:

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.¹

Because the authority to regulate the professions is not assigned to Congress by Article 1 of the Constitution, the Tenth Amendment ensures that the regulation of professions rests primarily with the states. Consequently, an effort by Congress to dictate educational and testing requirements, scope of practice, disciplinary standards, and similar basic elements for the practice of a profession would be summarily struck down by the courts as a violation of the Tenth Amendment and an unconstitutional usurpation of the states' power to protect their citizens by overseeing and regulating the professions.

EHR Incentive Programs

The above constitutional analysis begs the following question: If the primary legal power to govern the professions is reserved for the states, what was the source of authority for the Centers for Medicare & Medicaid Services (CMS) to establish credentialing

requirements for medical assistants entering orders into the computerized provider order entry (CPOE) system for meaningful use calculation purposes under the Medicare and Medicaid Electronic Health Record (EHR) Incentive Programs? To answer this question, we must examine Article 1 of the Constitution.

The following clause in Article 1 (the spending clause) has been interpreted by the courts to give Congress broad authority to collect revenue and spend money for the well-being of the United States and its people:

Section 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States²

In 2009 Congress passed the Health Information Technology for Economic and Clinical Health (HITECH) Act. One of the main purposes of this statute was to incentivize and hasten the conversion from paper medical records to EHRs. Congress charged CMS with creating the Medicare and Medicaid EHR Incentive Programs. An objective of these programs was to encourage the meaningful use of the EHR.

The Medicare and Medicaid EHR Incentive Programs authorized incentive payments to eligible professionals (EPs) who could demonstrate that they were using the EHR in the manner required by CMS. Many aspects were involved in these Medicare and

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Medicaid EHR Incentive Programs. The one of greatest relevance for the medical assisting profession was the requirement that a certain percentage of medication, laboratory, and diagnostic imaging orders be entered by licensed health professionals or credentialed medical assistants. If these meaningful use thresholds were not met, the EP would not receive the annual incentive payment(s).

Why the Medicare and Medicaid EHR Incentive Programs Were Constitutional

It may seem that the CMS infringed on states' authority by promulgating regulations requiring credentialing for medical assistants entering orders for meaningful use. However, this was not the case. The CMS regulations did not override state law and did not require all medical assistants to be credentialed. Rather, ensuring that a certain percentage of orders be entered by credentialed medical assistants or licensed health professionals was a condition for receiving incentive payments under these federal programs. The CMS regulations did not attempt to establish a federal credentialing requirement for medical assistants. Eligible professionals who chose not to participate in the Medicare and Medicaid EHR Incentive Programs were not required by law to employ credentialed medical assistants.

Are There Constitutional Means of

Making the State Licensing Laws More Uniform?

Various legal approaches facilitate greater uniformity of state licensing laws without running afoul of constitutional prohibitions. The following is a brief overview of some of these approaches:

- **Reciprocity agreements between states.** Reciprocity agreements are profession by profession. They consist of legislation involving two or more states stipulating that individuals licensed in one state in a particular profession can become licensed in the other state in the same profession without additional education or testing. The professional may have to pay a fee to the licensing board of the destination state, but they usually can begin practicing without a long waiting period.
- **Interstate licensing compacts.** Interstate compacts are also profession by profession. They require each state participating in the compact to enact identical legislation for the profession. Compacts are similar to reciprocity agreements but usually involve several states.
- **Expedited licensing for military spouses and veterans.** Because service personnel are frequently reassigned geographically, expedited licensing for military spouses has been established to reduce the hardship on military spouses licensed in a profession.

Expedited licensing usually does not involve exemptions from education and testing requirements but shortens waiting periods.

- **Universal license recognition.** This is a relatively new development in professional regulation. Unlike reciprocity agreements and interstate compacts, universal license recognition applies to all licensed professions. The 2019 Arizona statute is one of the first universal license recognition laws. The following is a description of this law:

Arizona's licensing boards will recognize out-of-state occupational licenses for people who have been licensed in their profession for at least one year, are in good standing in all states where they are licensed, pay applicable Arizona fees, and meet all residency, testing, and background check requirements.³ ♦

Questions? Contact Donald A. Balasa, JD, MBA, at DBalasa@aama-ntl.org or 800/228-2262.

References

1. U.S. Const. amend X.
2. U.S. Const. art. I, § 8, cl. I.
3. Office of the Governor Doug Ducey. *Universal Licensing Recognition*. Accessed December 15, 2022. https://azgovernor.gov/sites/default/files/universal_licensingrecognition1_0.pdf