May 12, 2020
Testimony provided for the House Health Committee
Enhanced Nurse Licensure Compact – S. 125

Good morning and thank you for granting me the opportunity to speak with you today on a subject I care very deeply about, the nursing shortage in Vermont. My name is Deb Snell and as well as being the President of AFT-VT and the Vermont Federation of Nurses I have been a nurse at the UVM Medical Center for over 20 years with 18 of them in the Medical Intensive Care Unit. Trust me when I say I have first-hand working knowledge of this issue.
I am here today to raise a number of serious concerns my members have about the NLC.

1. Loss of state sovereignty: The compact imposes regulatory standards and mechanisms each compact state must abide by, therefore, our states ability to enjoy complete autonomy over the regulation of the nursing profession and allowing local experts to make local decisions that are best for your state will not continue. As the rulemaking is accomplished by the commission (made up of BON EOs) and the rules are adopted directly by the commission and are legally binding in all compact states. The NLC gives the Commission some serious legal powers binding all member states

2. Other major issues in the new compact, related to the creation of the Commission are:
    - The additional cost and the fact that the Commission, located in Illinois is funded by state revenue.
    - The additional required participation (such as the required participation as a voting member in Commission activities and attendance at Commission meetings) and additional duties of state BON's EDs (administrators) to the Commission (such as required reporting through the "coordinated licensure system" and processing of data sets received from the compact administrator);
    - The fact that the Commission is not subject to state transparency requirements and other such state requirements, although funded by the state and acting as an agent of the state.
    - The Commission can adopt rules binding on the VT BON and the State of VT without undergoing state rule-making processes.

3. Have we privatized nursing regulation?
    - A significant problem with the compact is that it is a legal agreement in statute that all compact states have entered into with the Commission under the NCSBN (non-governmental, non-regulatory agency), as is, and if there is any attempt to amend the compact to meet Vermont needs, NCSBN can take the state of Vermont to federal court in DC. (This is now a significant reason other states are hesitating to enter the compact).
    - A significant issue is VT having ceded many of its rights and responsibilities with regard to nurse licensure to a private organization based out of Illinois. (of which Illinois is not a compact state).

Labor Supply Effects of Occupational Regulation: Evidence from the Nurse Licensure Compact*

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ABSTRACT

There is concern that state licensure requirements impede efficient mobility of licensed professionals to areas of high demand. Nursing has not been immune to this criticism, especially in the context of perceived nurse shortages and large expected future demand. The Nurse Licensure Compact (NLC) was introduced to solve this problem by permitting registered nurses to practice across state lines without obtaining additional licensure and making licensure easier to obtain for nurses moving between member states. We exploit the staggered adoption of the NLC across states and over time to examine whether a reduction in licensure-induced barriers alters the nurse labor market. Using data on over 1.5 million nurses and other health care workers from the 1990 and 2000 Census and the 2006-2012 American Community Surveys as well as data from the 1992-2012 Current Population Survey, we estimate the effects of NLC adoption on labor supply and commuting outcomes. We find no evidence that the labor supply or mobility of nurses increases following the adoption of the NLC, even among the residents of counties bordering other NLC states who are potentially most affected by the NLC. This suggests that nationalizing occupational licensing will not substantially reduce the labor market frictions caused by occupational regulation.

* We are grateful to Thomas Buchmueller, Sam Kleiner, Francine Lafontaine, Yesim Orhun, Sarah Stith, and seminar participants at the Rollins School of Public Health, ASHEcon 2014, and APPAM 2014 for helpful comments and suggestions.

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THE NURSING LICENSURE COMPACT AND APRN COMPACT: A BAD OPTION FOR WASHINGTON

EXECUTIVE SUMMARY

The National Council of State Boards of Nursing (NCSBN), a private, Chicago-based trade association, has recently proposed two compacts for multistate nursing practice: a Nursing Licensure Compact (NLC) for registered nurses and licensed practical nurses and an Advanced Practice Registered Nurse (APRN) * Compact. The Compacts pose significant new complications for regulating nursing practice while eroding Washington's state sovereignty. They are a bad option for Washington, for Washington nurses and for Washington patients. **Washington lawmakers should reject them.**

The Compacts authorize nurses in participating states to practice in all other compact states under multistate privileges authorized by the nurse's state of residence. The Compacts define the site of a nurse's practice as the state in which the patient is located at the time services are provided. This would apply not only to nurses who are physically present in another state; it would also apply when providing services through electronic communications.

The NCSBN Compacts do not improve public protection or access to care. The few public protection improvements promised by the Compacts can be accomplished through less complex and overreaching means. The Compacts require all party states to participate in a coordinated licensing information system, which Washington already does. The Compacts require criminal background checks; Washington currently requires such checks on out-of-state applicants, and a proposal to require them for all applicants is pending. The Compacts would allow out-of-state nurses practicing here to circumvent Washington's continued competence and new suicide prevention training requirements. And despite claims that the Compacts will improve access to care, there is no evidence that they would do so for Washington.

The Compacts create new complications in regulating nursing practice. The Compacts define nursing practice as taking place in the location where the patient receives services. This may seem logical when a nurse is physically present in another state. But when providing care remotely through electronic technologies, it creates significant new complications. Nurses who work in telehealth practices would need to be familiar with the practice acts, rules and policies of multiple states. But because any use of communications technologies across state lines would be considered interstate practice, this would also apply to nurses who work in *any* settings in which they have preadmission, post-discharge or ongoing contact with patients. Some of those patients may reside out of state, and virtually any patient may be out of state or even out of the country temporarily. A nurse could be providing services to a "local" patient who happens to be in another state at the time—often without the nurse being aware of it—and she or he would be considered to be practicing in that state and subject to its laws and regulations.

Under the Compacts, a license is issued by the state in which the nurse resides. A nurse who lives in Oregon or Idaho and commutes into Washington for work could no longer be licensed here; she or he would instead need to hold a license issued by the state of residence.

Under the APRN Compact, a new Interstate Commission would "recognize or define" educational standards for APRN practice, which have not yet been determined. The APRN Compact includes contradictory language about requirements for advanced practice. It states that an APRN with a multistate license can practice without a supervisory or collaborative relationship with a physician—which is consistent with Washington law—but it also

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* APRNs include nurse practitioners, certified nurse-midwives, certified registered nurse anesthetists and clinical nurse specialists – regulated in Washington as Advanced Registered Nurse Practitioners (ARNPs).

states that an APRN must comply with the practice laws of the state in which the client is located at the time service is provided. Since several states still require a supervisory or collaborative relationship with a physician, it is not clear how these two provisions can be reconciled. Will Washington ARNPs be expected to comply with those states' requirements?

The Compacts would significantly erode Washington's state sovereignty. The Compacts impose complicated regulatory mechanisms including two powerful new "Interstate Commissions," one for the NLC and one for the APRN Compact, with the power to adopt rules and assess payments from the states. The Commissions' rules and decisions are binding on all member states. Yet there is *no* oversight or accountability for the their decisions.

The Compacts authorize licensing boards in one party state to issue subpoenas for hearings and investigations for attendance and testimony from another party state. A Washington nurse could be compelled to travel to another state to participate in a hearing or to respond to an investigation for alleged conduct that occurred while she was in Washington providing services remotely.

The Compacts will require new expenses and likely loss of revenue. The Compacts will require set-up costs and payment of assessments to each of the new Interstate Commissions. They will likely result in loss of revenue from out-of-state nurses who will no longer pay Washington licensing and renewal fees. These expenses and losses threaten reductions in services and/or increases in licensing fees.

Comparisons to other Compacts fall short. Proponents draw an analogy between the NCSBN Compacts and driver's licenses, based on the fact that a driver's license issued in one state allows the licensee to drive in other states, subject to those states' laws. But driving in another state means that the driver is *physically present* in that state. Nursing services are increasingly provided remotely, through electronic technologies—a fact that proponents frequently cite as a major reason for adopting the NCSBN Compacts. This is a fundamental difference between nursing licenses and driver's licenses.

Comparisons to the Interstate Medical Licensure Compact (IMLC) also reveal fundamental differences with the NCSBN Compacts, which grant one multistate license authorizing practice in all compact states. The IMLC requires licensure in each state of practice. The IMLC also provides for more limited rulemaking authority for its Interstate Commission and more avenues to challenge its decisions.

The alternative: Focus on telehealth. The proliferation of telehealth technologies poses new challenges in regulating interstate practice. The NCSBN Compacts reflect a flawed attempt to address these challenges. But this does not require the comprehensive, complex, cumbersome and inflexible mechanisms proposed by the NCSBN Compacts. Instead, efforts should focus on the discreet issues posed by interstate telehealth practice.

CONCLUSION: Adopting the NCSBN Compacts is a bad option for Washington. In order to join the NLC and/or the APRN Compact, Washington would have to adopt them as they are, without any substantive changes. Thus, the only two options available to Washington are to adopt each compact as is, despite multiple concerns or to reject them.

WSNA and the American Nurses Association are continuing to seek approaches to interstate practice that are workable and realistic, offer real solutions, and respect state sovereignty. None of this describes the NCSBN Compacts. They are a bad option for Washington. **Washington lawmakers should reject the Compacts.** We can and must work toward better, more effective approaches to interstate practice.

MEMORANDUM

TO: Jim Puente, Director, Interstate Commission of Nurse Licensure Compact Administrators

FROM: Rick Masters, Special Counsel, Interstate Commission of Nurse Licensure Compact Administrators[1]

RE: NM Senate Bill 222 – New Mexico Nurse Licensure Compact

DATE: January 17, 2019

This is to advise you various provisions of the above referenced bill appear to materially conflict with the model compact legislation enacted by thirty-one (31) states to date. Specifically, the conflicting amendments provide as follows:

1. Any RN or LPN practicing in NM under the multistate privilege shall register with the NM Board of Nursing within 30 days;

2. Nursing faculty and adjunct faculty practicing in pre-licensure approved programs for nursing shall hold a NM state nursing license;

3. Add language that passed the 2018 Legislature and was vetoed by the governor that requires all rules passed by the Compact Administrators that affect the practice of nursing in NM to be adopted by the BON in NM. All agendas, minutes, reports, and rulemaking records of the Compact Commission shall be filed by the Administrator with the BON subject to the Inspection of Public Records Act; and

4. RN's and LPN's who declare New Mexico as their home state of licensure shall opt in should they choose to practice with the multi-state privilege; otherwise, single state licenses will be provided upon initial licensure and renewal within the State of New Mexico.

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[1] *Rick Masters is also Special Counsel to the National Center for Interstate Compacts of the Council of State Governments and an expert in the field of interstate compacts who also provides legal guidance to other compact governing agencies. He has testified before state and congressional legislative committees about interstate compacts and has litigated many court cases and authored numerous publications on the subject including the largest existing compendium of legal authorities on compacts published by the American Bar Association in 2017.*

Article X, f. of the Nurse Licensure Compact ("NLC") as enacted by New Mexico specifically provides that "No amendment to this Compact shall become effective and binding upon the party states unless and until it is enacted into the laws of all party states.

Additionally, the proposed amendments are in conflict with the provisions of the current NLC as enacted by the State of New Mexico and thirty (30) other compact member states. These conflicts are as follows:

1. Requiring a nurse practicing under a multistate privilege to register with the New Mexico Board of Nursing within thirty (30) days after beginning to practice has the effect of adding an additional requirement to the eleven (11) uniform licensure requirements set forth in Article III, c. 1.-11 placing an additional burden upon the licensee's ability to practice nursing in New Mexico which is not imposed by any other compact member state.

2. Requiring nursing faculty and adjunct faculty practicing in pre-licensure approved programs for nursing to hold a NM state nursing license, even if otherwise qualified under the provisions of Article III, c. of the current New Mexico statute is in conflict with Section a. of Article III which provides that a multistate license to practice registered or licensed practical/vocational nursing issued by a home state resident will be recognized by Each party state as authorizing a nurse to practice as a registered nurse (RN) or as a licensed practical/vocational nurse (LPN/VN), under a multistate licensure privilege in each party state.

3. Adding language requiring all rules passed by the Compact Administrators that affect the practice of nursing in NM to be adopted by the BON in NM and all agendas, minutes, reports, and rulemaking records of the Compact Commission to be filed by the Administrator with the BON directly conflicts with the existing provisions of Article VIII of the New Mexico NLC statute which does not require rules promulgated by the NLC Commission to also be adopted by the NM BON, nor does it require filing with the BON.

4. Finally the existing provisions of the NM NLC statute do not require RN's and LPN's who declare New Mexico as their home state of licensure to opt in should they choose to practice with the multi-state privilege; nor does it require that single state licenses will be provided upon initial licensure and renewal within the State of New Mexico.

The legal basis upon which the above referenced conflicts caused by the proposed amendments are not permitted, notwithstanding the fact that the NM NLC statute already provides that no amendment will become effective and binding unless and until it is enacted into the laws of all party states is that fundamentally an interstate compact is a "statutory contract" entered into by the state legislatures of the compact member states and the contractual nature of the compact controls over any unilateral action by a state; no state being allowed to adopt any laws "impairing the obligation of contracts," including a contract adopted by state legislatures pursuant to the Compact Clause. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts ..."); *see also West Virginia ex rel. Dyer v. Sims, 341 U.S. 22*, 33 (1951); U.S. Trust v. New Jersey, 431 U.S. 1

(1977); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo. 73 (1937), rev'd 304 U.S. 92 (1938).

The contractual and statutory nature of the compact are the legal basis for the binding and uniform nature of compacts which makes them preferable to federal intervention and which allows the states to achieve uniformity in regulation without the need for federal legislation.

The 'down side,' if there is one, is that the language of the compact statute, like any other contract, must be sufficiently similar in all member states to demonstrate that there has been an agreement on the material terms of the compact. As the U.S. Supreme Court has observed, an interstate compact cannot be "... given final meaning by an organ of one of the contracting states."

Member states may not take unilateral actions, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact. *See Dyer v. Sims, supra. at 33; Northeast Bancorp v. Bd. of Governors of Fed. Reserve System*, 472 U.S. 159, 175 (1985). *See Wash. Metro. Area Transit Auth. v. Once Parcel of Land,* 706 F.2d 1312, 1318 (4th Cir. 1983); *Kansas City Area Transp. Auth. v. Missouri,* 640 F.2d 173, 174 (8th Cir. 1981). *See also McComb v. Wambaugh*, 934 F. 2d 474, 479 (3rd Cir. 1991); *Seattle Master Builders Ass'n v. Pacific Northwest Electric Power & Conservation Planning Council,* 786 F.2d 1359, 1371 (9th Cir. 1986); *Rao v. Port Authority of New York*, 122 F. Supp. 595 (S.D.N.Y. 1954), aff'd 222 F.2d 362 (2nd Cir. 1955); *Hellmuth & Associates, Inc. v. Washington Metropolitan Area Transit Authority*, 414 F. Supp. 408, (Md. 1976).

In a similar case involving the Driver's License compact a member state enacted a provision allowing the Secretary of the Pennsylvania Department of Transportation to enter into the compact on behalf of the state rather than activating the compact through legislative enactment, including signing by the Governor as provided by the statutes adopted by all other party states. In a subsequent legal challenge, the Pennsylvania Supreme Court held that the State's attempted adoption of a compact by an alternative method from the other member states was null and void. *Sullivan vs. DOT, 708 A.2d 481 (Pa. 1998).*

The above proposed amendments not only are not effective until and unless enacted by all other compact member states, but also because such amendments provision have the potential to jeopardize the participation of New Mexico in the Nurse Licensure Compact and as legal counsel to the Interstate Commission of Nurse Licensure Compact Administrators, it would be my recommendation to the Commission that if enacted by the State of New Mexico, these amendments could not be enforced and that any attempt to do so would subject the State of New Mexico to enforcement action under the terms of Article IX of the NM NLC.