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REGULATE ADULT ENTERTAINMENT BUSINESSES

House Bill 5124

Sponsor: Rep. Michael Bishop

House Bill 5125

Sponsor: Rep. Joanne Voorhees

House Bill 5126

Sponsor: Rep. Janet Kukuk

House Bill 5127

Sponsor: Rep. Eileen DeHart

House Bill 5128

Sponsor: Rep. Ken Bradstreet

House Bill 5129

Sponsor: Rep. Cameron Brown

House Bill 5130

Sponsor: Rep. Sue Tabor

House Bill 5131

Sponsor: Rep. Charles LaSata

House Bill 5132

Sponsor: Rep. James Koetje

House Bill 5133

Sponsor: Rep. Laura M. Toy

House Bill 5134

Sponsor: Rep. Gloria Schermesser

**Committee: Constitutional Law and Ethics
Complete to 11-23-99**

House Bills 5124-5134 (11-23-99)

A SUMMARY OF HOUSE BILLS 5124-5134 AS INTRODUCED 11-10-99

The bills constitute a package of legislation to regulate adult entertainment businesses. House Bills 5124 and 5126-5132 would amend the Occupational Code (MCL 339.1751 et al.) to provide for licensing of adult entertainment establishments and massagists, regulate the location and operation of these establishments, and provide penalties for violations. House Bill 5125 would amend the State License Fee Act (MCL 338.2226) to establish license fees. House Bill 5133 would

amend the Public Health Code (MCL 333.15208) to prohibit the operation of commercial facilities constructed for the purpose of facilitating sexual activity. House Bill 5134 would amend the Revised Judicature Act (MCL 600.3805) to allow a court to award attorney fees to a private citizen who prevails in a civil action to abate a public nuisance.

Licensure. The package would add a new article, Article 17a, to the Occupational Code to license and regulate adult entertainment businesses. Under House Bill 5124, a person could not operate an adult entertainment establishment or engage in the occupation of “massagist” unless licensed to do so by the Department of Consumer and Industry Services. An “adult entertainment establishment” would mean an adult bookstore, adult show, adult theater, massage establishment, “relaxation establishment”, or other commercial establishment, business, or service, that used 10 percent or more of its total floor space for “the storage, display, showing, or sale of sexually oriented material, devices, objects, or paraphernalia, specific sexual activities, services, or performances, or any combination of them, in any form”, including printed, filmed, recorded, or live.

It would be a misdemeanor, punishable by a fine of up to \$500, imprisonment for up to six months, or both, to engage in the occupation of massagist without a license. A “massagist” would not include an individual who has graduated from a massage therapy training program accredited or approved by the National Association of Massage Therapists, the American Massage Therapy Association, the Commission on Massage Training Accreditation, or the department.

Operation of an adult entertainment establishment without a license would be a misdemeanor, punishable by a fine of up to \$10,000, imprisonment for up to six months, or both. The violation would apply if a person was “engaged in the management of an adult entertainment establishment”, and to a principal owner, director, or officer of a corporation; a general partner or principal owner of a partnership; and a principal owner or manager of a limited liability company who was “engaging in, carrying on, or participating in the operation of” an adult entertainment establishment without a license.

Engaging in, carrying on, or participating in the operation of a massage establishment found to have an unlicensed massagist on the premises would be a misdemeanor, punishable by a fine of from \$2,500 to \$10,000. This fine could not be suspended. Further, the bill specifies that the arrest, prosecution, or conviction of the massagist for engaging in the occupation of massagist without a license would not be required for assessment of a fine under this provision.

The bill specifies that certification by the department that diligent search of its records had failed to disclose the existence of a valid license for an adult entertainment establishment would be prima facie evidence of a violation.

Finally, House Bill 5124 would add “adult entertainment establishments” to the list of occupational boards with corresponding dates for commencement of board members’ terms (MCL 339.303a). (However, the package does not appear to add language establishing a regulatory board for adult entertainment establishments.)

House Bill 5126 specifies that a license issued under the provisions added by the package would not be transferable. In addition to other penalties that could be assessed under the code, it would be a misdemeanor, punishable by a fine of up to \$500, imprisonment for up to six months, or both, to use or permit another to use a license by or on behalf of a person other than the licensee (or to attempt such use).

A license would have to contain the original or facsimile signature of the director of the department, and would state the name and address of the licensee, the date of issuance and the date of termination of the license. For an adult entertainment establishment, a license would have to describe the nature of the business or enterprise, and specify the location of the premises. It would also include the name and address of a corporation's resident agent and its office. A license issued to a massagist would include a photograph of the licensee.

Database of adult entertainment establishment licensees. The Department of Consumer and Industry Services would have to maintain an alphabetized or computerized database of adult entertainment establishment and massagist applicants and licensees. The database would contain licensees' pictures, full names, aliases or nicknames, residential addresses, business addresses, Social Security numbers, driver's license numbers, and the names and addresses of all banks where applicants and licensees held accounts. Applicants would have to provide pictures and the required information for each person whose signature appeared on an application or supporting documents submitted with an application for licensure. (See below.)

The department would submit names of applicants to the Federal Bureau of Investigation and the U.S. Department of Justice for the purpose of criminal record checks.

Records obtained by the department in connection with licensing applications would be kept confidential and could not be made available for public inspection; however, records could be disclosed to law enforcement officials, in connection with an action brought under the code, and upon court order.

Location of adult entertainment establishments. A license issued under the code would authorize the licensee to operate an adult entertainment establishment only in the licensed premises. An applicant would have to document that the location of the place of business was in compliance with all applicable laws and ordinances. A change of location during the license period would be grounds for license revocation, and a new license application would be required. Operating an adult entertainment establishment by a licensee at a location other than the licensed premises would be a misdemeanor, punishable by a fine of up to \$500, imprisonment for up to six months, or both (in addition to any other penalties that could be assessed under the code).

An adult entertainment establishment could not operate more than one adult bookstore, relaxation establishment, adult show, adult theater, or massage establishment in the same building or in separate buildings less than 1,500 feet from each other. In addition to any other penalties that could be assessed under the code, a violation of this provision would be a misdemeanor, punishable by a fine of \$5,000.

Display of license. House Bill 5127 would require adult entertainment establishment licensees to display their licenses in a conspicuous manner on the licensed premises. A licensed massagist would be required to have the license in his or her possession during the course of providing services as a massagist or while on the premises of a massage establishment, and would have to display the license at the request of a peace officer or a representative of the department. A violation of this provision would be a misdemeanor punishable by a fine of up to \$1,000 (in addition to any other penalties that could be assessed under the code).

Requirements for licensure. An applicant for licensure as a massagist would have to submit an application that included, in addition to the information listed above that would become part of the department's database, a certification or sworn statement that he or she had never been convicted of a crime or violation of a local ordinance involving lewdness, prostitution, promoting prostitution, sexual assault or assault with intent to commit criminal sexual conduct, sexual misconduct, indecent exposure, incest, rape or criminal sexual conduct, or sodomy, or had not registered as a sex offender, in this state or any other state or jurisdiction within the previous three years. Also, an applicant would have to submit a letter or certification of a physician stating that the applicant had been examined and found free of communicable diseases within the previous 30 days. Additionally, an applicant would have to submit fingerprints, and any other information or documentation required by the department.

An applicant for a license to operate an adult entertainment establishment would have to submit an application that included all of the information listed above that would become part of the department's database, and, in addition, a recent photograph, federal employer's identification number, and all the personal information listed above for each employee of the establishment. The application would have to specifically identify who was to be responsible for the day-to-day management of the facility.

If the applicant was a corporation, limited liability company, or partnership or other unincorporated association, the application would have to include a copy of the applicable articles or certificate of incorporation, a certificate of authority to transact business in the state (if the applicant was an out-of-state entity), personal information as listed above and recent photographs of each director, officer, principal owner, manager, or partner, as applicable, and the names and addresses of stockholders or holders of membership interests. Each director, officer, principal owner, manager, partner, or member, as applicable, would have to sign the application.

The department could not accept an application or issue a license to an adult entertainment establishment at a location if an application had been denied for that location within the prior six months.

House Bill 5128 would require applicants for licensure to appear personally before the director of the department to sign the application, provide his or her Social Security number, and certify to the truthfulness of the application under oath. This requirement would be satisfied for a business entity by the appearance of a corporation's director, a limited liability company's manager or member, or a general partner or member of a partnership or unincorporated association.

Disqualification for criminal record. A person could not be licensed as a massagist, or to operate a massage establishment, if he or she had been convicted of a crime or violation of an ordinance involving the crimes listed above (lewdness, prostitution, etc.) or had been registered as a sex offender, in this state or any other state or jurisdiction, within the prior three years. Further, a license could not be issued to a person whose license to operate a massage establishment had been revoked for a violation within the past two years, or who was an officer, director, etc. of an establishment whose license had been revoked within the previous two years. (See below.)

License suspension, revocation. Under Section 602 of the Occupational Code, violations of the act are punishable by license limitation, suspension, denial, or revocation, or by a civil fine, censure, or a requirement that restitution be made. House Bill 5129 specifies that applicants for adult entertainment establishment licenses, or licensees, would be subject to those penalties for:

- Unauthorized transfer of a license or change in location;
- Failure to comply with the requirements of House Bills 5130 or 5131 (see below);
- Conviction of the applicant or licensee for crimes listed above (lewdness, prostitution, etc.);
- Conviction of a partner, director, officer, principal owner, manager, procurer, or employee of the licensee for a crime (lewdness, prostitution, etc.) occurring on the licensed premises; or
- Conviction of a partner, director, officer, etc. for any of the listed crimes occurring off the premises, if the person was off the premises at the request or direction of the licensee for the purpose of furthering the business of the licensee.

A person holding a license as a massagist, or a person licensed to operated a massage establishment, would be subject to license suspension, revocation, etc. if convicted of a violation of House Bill 5130 (see below). In addition, a licensed massagist would be subject to those penalties if convicted of any of the crimes listed above (lewdness, prostitution, etc.).

Misrepresentation, false information. In addition to other penalties assessed under the code, a person who intentionally misrepresented or omitted any material facts in information required to be filed under the legislation would be guilty of a misdemeanor, punishable by a fine of up to \$1,000, imprisonment for up to 30 days, or both. A fact would be considered “material” if it could affect the department’s decision to grant or deny a license.

Massage establishments: requirements. Under House Bill 5130, a massage establishment could not permit a massagist in its employ to “treat” a patron while either the massagist or the patron were undressed, or to “treat” the genitals of a patron. The same prohibitions would apply to a licensed massagist. Further, a massage establishment could not be located on the premises of, or have an adjoining door to, an establishment that sells alcoholic beverages. Violations of these prohibitions (in addition to license suspension, revocation, etc.) would be punishable by a fine of up to \$1,000, imprisonment for up to six months, or both.

Required records. A massage establishment would be required to maintain on the premises and keep a current record of all massagists in its employ, and of all massagists who had been employed after the effective date of the legislation. An adult entertainment establishment would have to maintain records on the premises of the names and addresses of every person, distributor, wholesaler, or publisher from which the establishment had received any sexually oriented material for the purposes of sale, exhibition, or dissemination on the premises after the effective date of the legislation. These records would be subject to inspection on demand by a peace officer or by the department. In addition to the penalties otherwise assessed under the code, a violation of this provision would be a misdemeanor, punishable by a fine of up to \$200, imprisonment for up to six months, or both.

Additional requirements; adult entertainment establishments. Under House Bills 5131 and 5132, the following additional prohibitions and requirements would apply:

- An adult entertainment establishment could not be located in a shopping area containing one or more parcels of land owned by a common owner if the shopping area has four or more retail stores.
- An adult entertainment establishment would be prohibited from opening for business before 10:00 a.m., Monday through Saturday, and could not remain open after 10:00 p.m., Monday through Saturday. Such businesses could not be open for business on any Sunday or on legal holidays.
- All persons engaged to provide entertainment, massage, or other services to patrons would have to be employees of the establishment, rather than independent contractors.
- An owner, manager, operator, procurer, or employee of an adult entertainment establishment could not knowingly admit or allow to remain on the premises an individual under the age of 21. In addition to other penalties under the code, violation of this provision would be a misdemeanor, punishable by a fine of \$1,000 for a first offense, and \$5,000 for subsequent offenses. It would be an affirmative defense to a prosecution that the individual under age 21 presented photo identification that would lead a reasonable person to believe that the individual was at least 21 years old.
- An establishment would be required to notify the department in writing within 10 days if any of the information in its license application changed. In addition to other penalties under the code, violation of this provision would be a misdemeanor, punishable by a fine of \$1,000.
- The premises of a massage establishment would be subject to periodic inspection, upon reasonable notice, by the Department of Community Health for the prevention of the spread of communicable diseases, and to inspection by law enforcement officials.

Application. House Bill 5131 specifies that the legislation would apply to all businesses and enterprises subject to the legislation, whether in existence prior to, on, or after the effective date of the legislation. Further, issuance of a license under the legislation would not be a defense to a civil or criminal action, other than an action for a licensing violation.

License Fees. House Bill 5125 would amend the State License Fee Act (MCL 338.2226) to set license fees for adult entertainment establishments and massagists. Fees would be as follows:

- Application processing fees:
 - * Massagist - \$250
 - * Adult entertainment establishment - \$1,000

- Annual license fees:
 - * Massagist - \$250
 - * Adult entertainment establishment - \$1,000
 - * Additional fee for each branch or business location - \$250

Limiting use of premises for high risk sexual contact. House Bill 5133 would amend the Public Health Code to prohibit a person from constructing, using, designing, or operating a commercial facility (not including a hotel, motel, apartment complex, condominium, or rooming house) for the purpose of engaging in or permitting a person to engage in sexual activity that includes “high-risk sexual conduct” (defined to mean fellatio, anal intercourse, or vaginal intercourse with a person who engages in sexual acts for money). In addition, the bill would prohibit a person from owning, operating, managing, renting, leasing, or exercising control over a commercial facility (not including a hotel, motel, etc.) that contains either:

- A partition between subdivisions of a room or part of the facility that has an aperture designed or constructed to facilitate sexual activity between persons on either side of the partition; or

- A booth, stall, or partitioned portion of a room, or an individual room, specifically offered to a person for a fee or as an incident to performing high-risk sexual conduct, or an enclosure that offers movies or other entertainment to be viewed within the enclosure, that has a door, curtain, or partition, unless the area was lighted and had at least one side open and visible to an adjacent public room. (This provision would not include a private office that was only used by employees and was not held out for use or hire to the public for the purpose of viewing movies for a fee.)

The Department of Community Health could adopt rules and regulations to administer the provisions of the bill. In exercising its powers under the bill, the department would be required to use the most recent instructions, opinions, and guidelines of the federal Centers for Disease Control related to the spread of infectious diseases. Any rules or regulations adopted by the department related to the spread of sexually related communicable disease would apply to this provision.

In order to ascertain the source of certain infections and reduce the spread of infection, the department or its authorized representative could inspect, and issue orders regarding, a facility that may be a site of high-risk sexual conduct. If the department determined that a “hazardous site” (a premises that is a site of high-risk sexual conduct) existed, it could notify the management, owner, or tenant of the facility, and issue a warning to remedy items listed in the notice. The person cited would have 10 days to request a hearing before a hearing officer appointed by the department for a final determination of whether the facility was a hazardous site. If the person did not request a hearing, or if the hearing officer determined that the facility is a hazardous site, the department

would post a notice on the premises warning the public, and order the management to bring the facility into compliance with the bill. If the department determined that the facility had not been brought into compliance within 30 days, it could do one or more of the following:

- Declare the facility to be a “public nuisance” and order the abatement of the public nuisance. Such an order would be enforced by mandatory or prohibitory injunction in a court of competent jurisdiction.

- Secure a court order to close the facility until it complied with the bill.

- Take steps set forth under current law to abate a health or sanitation nuisance, including having the nuisance abated and assessing the owner for the expenses incurred.

The bill would allow the management, owner, or tenant to apply, with 30 days of the department’s order, to a court for a new trial on the findings of fact made by the hearing officer and on any charges brought against the management, owner, or tenant.

Attorney fees for public nuisance abatement. Under the Revised Judicature Act, the attorney general, a prosecuting attorney, or any citizen may bring an action to abate a public nuisance (“any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons . . .”). House Bill 5134 would amend the act to specify that a private citizen who brings an action to abate a nuisance, and who prevails in court, could be awarded his or her reasonable attorney fees.

Tie-bars. House Bills 5124-5132, which would amend the Occupational Code and the State License Fee Act, are all tie-barred to each other. None could take effect unless all were enacted. House Bills 5133 and 5134 are not tie-barred to the other bills.

Analyst: D. Martens

■ 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.