



Massachusetts
Chapter

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Feb. 4, 2016

His Excellency Charlie D. Baker
Governor
The Commonwealth of Massachusetts
State House, Suite
Boston, MA 02133

Dear Governor Baker:

On behalf of ABC, I want to thank you for a wonderful morning with our members on Feb.2. It was an honor to have you on our stage as Governor, and we were especially proud to have you swear in our Board of Directors.

Over the past year, you have restored the sense of pride and esprit d 'corps in Massachusetts that had waned. Your remarks at ABC, like your State of the State, were a reminder of our potential to solve problems and implement new ideas by working together and emphasizing results over credit.

In line with your administration's initiative on regulatory reform – one that is very important to our members and our industry – I believe the U.S. Supreme Court decision in case "North Carolina Board of Dental Examiners V. Federal Trade Commission" provides a ruling that should strengthen your ability to achieve positive reform.

As you may know, the case involves a ruling by the North Carolina Board of Dental Examiners that only holders of a dental license could perform teeth whitening services. Along with its ruling, the Board issued cease and desist orders to over 40 teeth whitening providers not licensed by the Board. These businesses appealed to the Federal Trade Commission, and the FTC found that the board's ruling amounted to restraint of trade. The ruling was upheld by the Fourth Circuit Court of Appeals, and last year by the U.S. Supreme Court (decision attached).

This SIC decision up-ends a fundamental dynamic of state regulatory and licensing boards with regard to their role in regulating the competitive marketplace. The decision puts limits on state immunity as it relates to board actions. No longer, per this decision, can a state board comprised of a majority of market participants be guaranteed of anti-trust immunity if its actions affect competition in board members' own professions. Under this decision, the anti-trust immunity exists *only* if the board was subject to active supervision by the state. The North Carolina Dental Examiners did not have active state supervision, thus the SIC held they were not entitled to anti-trust immunity. This SIC decision also holds that board members can be personally liable in the absence of state immunity.



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I understand that your legal staff is working on recommendations independently and in conjunction with the Attorney General. From our vantage point, representing an industry that is heavily regulated by state boards where a majority of members are from the trades being regulated, we applaud this SIC decision and hope it prompt change here in Massachusetts. We hope it will halt some of the anti-competitive decisions of state regulatory boards governing construction that have served the agenda of board members more than that of the Commonwealth, the broader industry marketplace or consumers.

Two prominent examples of this are (1) restrictive apprentice to journeyman ratios; and (2) over-reach and power grabs by boards to claim work beyond their statutory scope.

The restrictive ratios originated in public construction as part of the union-based prevailing wage law, which includes requirements for apprentices on public projects. The government apprentice model is based on the union system of labor pools, a fact that can hamper participation for non-union employers.

Beyond prevailing wage, the union-based ratios have extended into board regulations governing all construction, private and public, in sheet metal, pipefitting, and have been proposed in electrical. Union representatives on trade boards generally seek to include their union rules in the regulations so that they will apply to all contractors. With ratios, this means that all contractors, and the workers they employ, abide by the apprentice to journeyman ratios the unions adopt in their collective bargaining agreements (In MA, 83 percent of the construction workforce is non-union according to U.S. government data compiled by unionstats.com)

These ratios, which limit the number of apprentices that can be hired based on the number of journeymen employed, are a numbers game that favor large unions over small, independent non-union employers. A union contractor can count the *all* the journeymen who are members of that union toward its apprentice hiring, whether they are working for that contractor or not. Open shop contractors can only count the journeymen they employ, since they are not part of labor pools and maintain their own company-based workforce.

So if a small open shop sheet metal contractor wants to hire two new apprentices, it would need to hire six additional journeymen to be in compliance with the board-imposed 3-1 ratio. A small union contractor can hire two new apprentices without bringing on any new journeymen since there are always likely to be more than 6 journeymen in the union's labor pool.

The issue of board over-reach and power grabs can be seen in actions by the Pipefitter and Sheet Metal boards.

The Bureau of Pipefitters, Sprinkler Fitters and Refrigeration Technicians created havoc in the industry when it claimed aspects of process piping work that had traditionally been done by plumbers as opposed to pipefitters. This move came as part of a new process pipefitter license that was enacted in 2012. A messy back and forth then ensued as the board sought to expand the scope of the law. The board at the same time actively resisted putting in place a grandfathering provision that was part of the new licensing law. Grandfathering is well-established in Massachusetts as a bridge to transition those who had been working in an unlicensed field into the now-licensed profession.

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Without grandfathering, thousands of individuals would have been unable to continue to earn a living doing process piping work. This did not move the board to act. Instead, it took a coalition of ABC and several construction industry and business groups, working with House and Senate members, over a year, and an additional legislative amendment, to resolve the grandfathering issues.

One of the issues that stood out in this process pipe licensing implementation speaks directly to *North Carolina Dental*: there was a glaring lack of active state supervision. In fact, ABC and others involved tried repeatedly to no avail to prompt agency involvement in board actions that were both ant-competitive and outside the parameters of the law.

Over-reach by the MA Board of Sheet Metal Examiners has led to current legislation, House 3952 – An Act Relative to Sheet Metal Work, which was heard on Jan. 26 by the Committee on Consumer Protection and Professional Licensure. The bill was filed in response to the Sheet Metal Board's policy that only licensed sheet metal workers can install pre-engineered metal buildings. This scenario is very similar to that of *North Carolina Dental*.

Like *North Carolina*, a majority of the Sheet Metal Board members are from the industry they regulate and the work in question was not included in the licensing law. The MA Sheet Metal Board, just like the NC Dental Board, saw and seized an opportunity to shift work to those on the board and others in the industry who hold sheet metal licenses. In this case that work is the installation of pre-engineered metal buildings. This is basically a nuts and bolts assembly *not* involving the particular skills or training of a sheet metal worker.

The MA Sheet Metal Board's actions were even more flagrant than the NC Dental board's because, unlike the "wild west" scenario the NC Dental Board described with teeth whitening, the installation of metal buildings is done under a certification process established by the metal building industry. In addition, the requirements to obtain a sheet metal license include nothing about what is included in the metal building certification or about proficiency or even knowledge of metal building installations.

This means that even if an individual goes through the five-year process of obtaining a sheet metal license, he or she would not be qualified to install a pre-engineered metal building per the requirements of the industry certification. The absurdity of this and the direct hit on Massachusetts businesses is clear when you look at how the industry operates. Pre-engineering metal buildings are installed by either metal building contractors or general contractors. These contractors do not perform sheet metal work. Sheet metal work is performed by HVAC contractors. These contractors do not install pre-engineered metal buildings; they fabricate and install heating and air conditioning systems and the related duct work. This is apples and oranges, but the board's actions have created a mess that persists and exemplifies what needs to be changed in the MA regulatory climate.

We hope that the self-interest versus state-interest concerns that are central to the *North Carolina Dental* decision will prompt a review of public members on state boards in Massachusetts. These public members should be a safeguard against a board acting in its self-interest versus state interest. In recent years, there has been less consideration given to the criteria for serving as a public member. Some board statutes do not include stipulations on who can serve in the public seat; this has led to a blurring

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of the lines of the public member's role. This happened in 2009 with the new sheet metal board, when a leader of a related union was appointed as the public member. Another case in point is the Board of Examiners of Electricians, which has broad influence over consumer and business interests. The current public member of this board is the business manager for the electrical workers union, Local 103.

We are happy to provide additional information or assist in any way that may be helpful. We look forward to continuing improvements in achieving a regulatory climate that allows for healthy and fair competition and provides safeguards without unduly burdening business.

Thank you again for your leadership on behalf of the Commonwealth of Massachusetts, and for a memorable installation of our 2016 Officers and Directors.

Sincerely,



Greg Beeman

CEO

cc: Lt. Gov. Karyn Polito
Secretary Kristin LePore, Administration and Finance
Chief of Staff Dominic Ianno, Administration and Finance