



## Rulemaking for Licensure Compacts

### Interstate Compacts and Interstate Commissions

An interstate compact is an agreement, or contract, between member states.<sup>1</sup> Compacts may specify broad goals or precise policy for contracting states to use. Many compacts create interstate commissions made up of member state representatives to implement the compact. An interstate commission is a government agency made up of member state representatives acting jointly as a union. An interstate commission is not an agency of any one member state.

Implementation of compacts by interstate commissions may take many forms. Some compacts create an advisory coordinating body, while other compacts specify rulemaking and enforcement authority for the interstate commission. An interstate commission is a flexible tool to facilitate the implementation of the compact because the commission provides a structure for the states to act jointly, deliberatively and cooperatively.

### Purpose of Interstate Commission Rules

An interstate commission's rulemaking authority has the same purpose and limitations as rulemaking for state and federal agencies. Through rulemaking, interstate commissions create workable procedures and standards to a level of detail not specified in the compact. As a result, rulemaking facilitates the implementation of the compact through joint decision making on matters that would otherwise require all member states to individually amend their statutory enactment of the compact each time a new procedure or clarification is needed.

### Scope of Rulemaking in Existing Licensure Compacts

Just as a state or federal agency's rulemaking authority must be expressed and limited by the statute granting that authority, an interstate commission's rulemaking authority must be expressed in the compact creating the interstate commission and is limited to the implementation of the compact. Since licensure compacts only create procedures and standards for persons to receive a compact license or privilege, the rulemaking authority of interstate licensing commissions is limited to persons seeking to practice through the compact and may only affect compact licenses or privileges. The rulemaking authority of an interstate commission has no effect on the licensing of persons who are not specifically seeking to practice through the compact or who have not received a compact license or privilege. Application of an interstate commission's rules to persons not governed by the compact would be rejected through judicial review.

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<sup>1</sup> In its very first interstate compact case, the U.S. Supreme Court stated that a compact is a contract. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823).



All existing licensure compacts expressly state that the interstate commission may only use rulemaking “necessary to the implementation and administration of the compact,”<sup>2</sup> “to effectively and efficiently achieve the purpose of the compact,”<sup>3</sup> “to facilitate and coordinate implementation and administration of this compact,”<sup>4</sup> or similar language.<sup>5</sup> Most of the existing licensure compacts further provide a check on an interstate commission’s rules by allowing a majority of the legislatures of the member states to reject an interstate commission’s rule.<sup>6</sup>

### **Rulemaking Procedures**

All licensure compacts that the National Center for Interstate Compact has advised specify a procedure for rulemaking that is consistent with common principles of state and federal rulemaking, including notice and an opportunity to comment and a hearing. This allows state legislators and officials to identify proposed rules that exceed the interstate commission’s authority, and the interstate commission to correct those rules.

### **State Variations on Interstate Commission Rulemaking Authority**

The U.S. Supreme Court has held that delegation of rulemaking authority to an interstate commission is “a conventional grant of legislative power.”<sup>7</sup> Nevertheless, a few states do not accept an interstate commission’s rule as binding, citing requirements or restrictions in their state constitutions.

For example, the Oregon Department of Justice recommends that the Oregon Constitution requires an Oregon licensing agency to independently adopt the rules of an interstate commission. In one case, the Colorado Supreme Court applied Colorado’s non-delegation doctrine and concluded that the Colorado General Assembly did not have the authority to delegate to the Interstate Insurance Product Regulation Compact Commission the power to issue a standard that differed from a Colorado legislative standard.<sup>8</sup>

The National Center for Interstate Compacts has identified several legal issues that can arise with these variations on interstate commission rulemaking authority, including whether these

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<sup>2</sup> Audiology and Speech-Language Pathology Interstate Compact (ASLP-IC), § 12.A; EMS Personnel Licensure Interstate Compact, § 14.A; Physical Therapy Licensure Compact, § 11.A; Psychology Interjurisdictional Compact (PSYPACT), art. XIII.A.

<sup>3</sup> Interstate Medical Licensure Compact, § 15(a); Occupational Therapy Licensure Compact, § 10.B; Interstate Massage Compact, art. X.A; Cosmetology Licensure Compact, art. 11.A; Dentist and Dental Hygienist Compact, § 9.A; Social Work Licensure Compact, § 12.A; Interstate Teaching Mobility Compact, art. VIII.B.

<sup>4</sup> Nurse Licensure Compact, art. VII.g.

<sup>5</sup> Interstate Compact on Licensure of Participants in Live Racing with Pari-Mutuel Wagering, §. 7.1.

<sup>6</sup> Audiology and Speech-Language Pathology Interstate Compact (ASLP-IC), §; EMS Personnel Licensure Interstate Compact, § 12.B; Occupational Therapy Licensure Compact, § 10.C; Physical Therapy Licensure Compact, § 9.B; Psychology Interjurisdictional Compact (PSYPACT), art. XI.B; Cosmetology Compact, Art. II.D; Dentist and Dental Hygienist Compact, Sec. 9.D; Social Work Interstate Compact, § 12.D; Interstate Teaching Mobility Compact, art. VIII.C.

<sup>7</sup> *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30-31 (1951).

<sup>8</sup> *Amica Life Ins. Co. v. Wertz*, 462 P.3d 51 (Colo. 2020).



states' enactments and application of the compact are substantially similar to the other member states; whether a state licensing agency or legislature can unilaterally reject or modify an interstate commission rule when the compact specifies that only a majority of states can reject a rule; and whether a state would be in default of a compact before it enacts a new interstate commission rule as legislation or a state regulation.

The National Center for Interstate Compacts has attorney advisers available to answer specific questions about interstate commissions and rulemaking.