



Interstate Commission for EMS Personnel Practice
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August 21, 2019

Dear Colleagues,

If your state is not already a member of the EMS Compact, I invite you to consider joining. Our EMS Compact Commission and EMS Compact Educator are ready to help you with information and support about how to enter the Compact. ***The goal is clear- we want all 50 states to become members of the EMS Compact.***

The EMS Compact is all about improving access to emergency care and reducing barriers. The EMS Compact holds the promise of affording patients along state borders better access to qualified EMS personnel. EMS personnel in member states will receive immediate legal recognition of the license they hold when their duties require them to cross state borders into another member state. Qualified military veterans and their spouses receive expedited EMS license application processing. At the state EMS office level, you will have full access to data about personnel who have had actions taken on their license in other Compact states. You will also be better able to protect your citizens by halting the practice of out of state EMS personnel for cause even though you did not issue them a license.

Today I want to remove a barrier to Compact membership that we have heard about from a few states. Concerns have been raised about language in the EMS Compact legislation that grants authority to the EMS Compact Commission to make rules. Some have said this authority is unconstitutional. In an effort to remove this barrier to states entering the EMS Compact, we have sought a legal opinion from the Council of State Government's Special Counsel. That opinion is attached for your review. The Council of State Governments is a non-partisan group that assists state legislators, governors and other state level officials. Their mission in serving states makes them an unbiased source of this information. Their legal opinion on this matter is unambiguous and includes references to the relevant court case decided by the U.S. Supreme Court.

Please feel free to share this opinion with legislators, your attorneys general and others who may be involved in sponsoring or reviewing EMS Compact legislation in your state. If you or others in your state have any questions about this matter, please feel free to contact me or our EMS Compact Educator, Dan Manz.

Sincerely,

Joseph Schmider, Chair

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The Council of State Governments

Legal Memorandum

TO: Dan Manz, Director, Recognition of EMS Personnel Licensure
Interstate Compact (“REPLICA”)

FROM: Rick Masters, Legal Counsel, CSG/REPLICA¹

RE: Constitutionality of Rule Making by Interstate Compact Commissions

DATE: August 9, 2019

Background:

A member of a State Legislature considering the REPLICA compact legislation has voiced concerns concerning the constitutionality of legislative delegation of rulemaking authority by a State legislature to an interstate compact commission governing body consisting of compact member state delegates who are appointed pursuant to specific provisions of the compact statute which also explicitly provides for the legislative delegation of such authority. This question has been raised before with respect to both REPLICA and other interstate compacts and the purpose of this advisory opinion is to provide you with a comprehensive legal analysis of this issue which is generally applicable to all interstate compacts including, but not limited to, REPLICA.

Applicable Law:

Article I, Section 10, Clause 3 of the U.S. Constitution provides, in relevant part, as follows:

“No State shall, without the Consent of Congress, . . . enter into any Agreement of Compact with another State . . .”

Analysis and Conclusion:

In considering the constitutional concern raised it is imperative to recognize that the U.S. Constitution expressly authorizes interstate compacts, such as REPLICA. The Compact Clause of

¹Rick Masters is Special Counsel to the National Center for Interstate Compacts, an affiliate 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, the 2d edition of which was published by the American Bar Association in 2017. See *The Evolving Law and Use of Interstate Compacts*, 2d ed. (A.B.A. 2017).

the U.S. Constitution, Art. I, § 10, cl. 3, provides that “No State shall, without the Consent of Congress, . . . enter into any Agreement of Compact with another State . . .”²

Originally used for resolution of inter-colonial boundary disputes, the Compact Clause has undergone a significant transformation since that time. See Michael L. Buenger and Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 *Roger Williams University Law Review*, (No. 1), pp. 71, 79-85, 90-91 (2003); See also Felix Frankfurter & James Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 *Yale L.J.* 685, 691-95 (1921). Today there are some 200 compacts in place, many of which now fall into the category of “regulatory compacts” or “administrative compacts” similar to the REPLICA. Consequently, such compacts are part of a long and accelerating use of interstate compacts to solve a number of multilateral state issues beyond boundary disputes. *Id* at pp. 71-77.

Like other compacts the REPLICA statute establishes an unincorporated association of compact states with the power to “promulgate uniform rules,” pursuant to Section 10 and Section 12, “to facilitate and coordinate implementation and administration of the compact” which “shall have the force and effect of law and shall be binding on all member states.” See Sec. 10, D. 1. This approach to interstate regulation is common for interstate compacts which ‘govern complex, high-volume transactions or that address ongoing multistate concerns requiring the development of shared regulatory solutions’ and which require oversight for the implementation and administration of compact activities. See Buenger, Litwak, Masters and McCabe, *The Evolving Law and Use of Interstate Compacts*, 2d Ed., pp. 151-152.(A.B.A. 2017).

This is the basis upon which at least three (3) other interstate compact statutes enacted by all fifty (50) states, D.C. and most of the U.S. territories, have established interstate commissions to which their respective legislatures have delegated the authority to promulgate such administrative regulations. The language of these other regulatory compacts is similar, if not identical to the rulemaking provisions of REPLICA and is also consistent with the opinion of the U.S. Supreme Court in *State of West Virginia, ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951) in which the Court held, “That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government.” In *Dyer*, the Court recognized that a legislature may also delegate such authority to an interstate compact agency composed of the compact member states where the compact statute **“involves a reasonable and carefully limited delegation of power to an interstate agency.”** *Id* at p. 31.

The above referenced U.S. Supreme Court decision upheld a challenge to such an administrative regulation by the State of West Virginia which claimed such a regulation was unconstitutional. Subsequently every state has enacted the Interstate Compact for Adult Offender Supervision, the Interstate Compact for Juveniles, and the Interstate Compact on Educational Opportunity for Military Children, and it is significant that since these compacts have been enacted no state or federal court has ever determined that any of the forgoing compact statute constitutes an unlawful delegation of legislative authority or found any other constitutional infirmities, nor have the

² While worded in the negative, the compact clause authorizes states to enter into enforceable interstate compacts without the consent of Congress as long as those agreements don’t infringe on the enumerated powers constitutionally reserved to the federal government. Buenger & Masters, *infra.* at p. 99, *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

Attorneys General of those compact member states opined that any of these compact statutes is invalid on this or any other grounds.

Summary:

Based upon the above referenced case precedent of the U.S. Supreme Court and other legal authorities, the language of the rulemaking provisions of the proposed REPLICA statute and these other regulatory compacts is similar, if not identical and is also consistent with the opinion of the U.S. Supreme Court in *State of West Virginia, ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951) which upheld a similar challenge to a compact rulemaking statute by the State of West Virginia.

This analysis is also consistent with that provided in the above referenced legal treatise on interstate compact law. See *The Evolving Law and Use of Interstate Compacts*, supra. at pp. 150-152.