



**House
Legislative
Analysis
Section**

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REGULATE PHYSICAL FITNESS SERVICES

RECEIVED

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House Bill 4027

Sponsor: Rep. Nick Caramanna
Committee: Consumers

Mich. State Law Library

Complete to 2-27-89

A SUMMARY OF HOUSE BILL 4027 AS INTRODUCED 2-1-89

The bill would create the Physical Fitness Services Act to regulate and provide for the registration of certain physical fitness services and providers. Under the bill, "physical fitness services" would be defined as services or facilities that were purported primarily to assist customers in physical exercise, in weight control, or in body or figure development, including, but not limited to, a fitness center, studio, salon, spa class or club, and athletic or sports club.

Registration requirements. The bill would require providers -- those who provided physical fitness services and entered into prepaid or credit contracts for physical fitness services of more than one month's duration -- to register with the Department of Licensing and Regulation. The following information would be required for registration:

- a) An application for registration in the form prescribed by the department;
- b) A certified copy of the charter or articles of incorporation and the bylaws of the provider, if any;
- c) If a corporation, a certified copy of the certificate of authority or good standing certificate from the Department of Commerce;
- d) A copy of the membership agreement of the provider;
- e) A copy of the consumer contract to be issued by the provider;
- f) Any other relevant information required by the department.

Under the bill, providers would be required to notify the department within 30 days of a change in any of the above information. A provider would also be required to notify the department of a substantial change of its financial status and to submit an annual financial report. The department would be required to review completed applications and to issue registrations within 30 days for those who conform to the act's requirements. The bill would require copies of registrations to be posted conspicuously at each location where money or contracts were received by the provider, authorized representative or agent. Those subject to the act would be required to maintain accurate and detailed records of all business transactions, which would be open to inspection at all reasonable times by the department or its authorized representative or agent. Documents would be open to public inspection and the department would be required to promulgate rules pursuant to the Administrative Procedures Act.

The bill would require an original registration fee of \$150 and an annual renewal fee of \$100. For those who failed to renew their registration by the

expiration date, a late renewal period of 30 days would be allowed and a late fee of \$25 imposed. Registrations not renewed by the late renewal period would be revoked, unless the department found reasonable grounds to reinstate the registration. Registrations would automatically be revoked upon transfer of ownership or location. Reinstatement would require filing of the original application accompanied by the original registration fee for those who met all other requirements of the bill. The department would not be required to accept an application for registration from a provider located in another state or country, unless the application designated a resident agent in the state for the acceptance of process.

Under the bill, each registration applicant would be required to file a surety or cash bond, acceptable to the department, in the amount of \$50,000 for each of its locations offering physical fitness services. The applicant would be the principal obligor, and the aggregate limit of liability of the surety to the state and to all persons could not exceed the sum of the bond. The bond would be in the name of the state for the benefit of a customer suffering a loss as a result of a violation of the act by the provider, or a failure of the provider to comply with a contract. Registration fees collected under the act would be forwarded to the state treasurer and credited to the general fund.

Credit contracts. Every prepaid or credit contract of more than one month's duration would be required to conform to the following requirements:

a) The contract would be in writing and a copy given to the customer at the time of signing;

b) The contract would clearly state the street address of the provider's location and any other location that the customer might use at the time the contract was executed;

c) Credit contracts for physical fitness services would be required to comply with the Retail Installment Sales Act.

d) A contract for physical fitness services at a planned location that was under construction or at an existing location where additional services or facilities were planned or under construction would provide that if the facilities and services contracted for were not available within 12 months from the date the contract was entered into, or within three months of a date specified in the contract, whichever was earlier, the contract could be cancelled at the option of the customer, and all payments refunded by the provider within 30 days of receipt of the written cancellation notice from the customer.

e) If a customer executed a negotiable promissory note in connection with the contract, the bill would require that the contract clearly indicate that the promissory note was negotiable paper, and that the note could be discounted and sold to third parties. Negotiation of the note would not affect the right of the customer to cancel the contract or the method by which cancellation could be made. A right of action or defense that the customer could raise based on the contract for physical fitness services would be reserved against an assignee or successor to the contract or to a credit contract executed by the customer in connection with the contract.

f) The bill would required that the contract contain a right to cancel provision in the following language:

Right to Cancel of a Customer

The customer may cancel this contract by sending written notice of cancellation to (name of provider) before midnight of the third business day after the contract is signed by the customer. This notice must be hand delivered or sent by registered mail to the provider.

Within 15 days of receipt of the written notice of cancellation, (name of provider) shall return any payments made by the customer in connection with the contract. If the customer used (name of provider's) facilities or services, (name of provider) may charge the customer a reasonable fee based on days of actual use.

g) The contract would state that upon a transfer in ownership, the provider would insure that all customer contracts would be either honored in full by the new provider at no additional cost to the customer or that the customer would receive a pro-rated refund of the original contract price. The new provider could charge customers for supplemental services and facilities not offered by the original provider as part of the original contract.

h) The contract would state that if a location closed before the expiration of all customer contracts, the provider would offer and provide to the customers, at the option of the customer, either a pro-rated refund of the unused portion of the tendered contract price, or a transfer to another conveniently located provider offering similar services and facilities for the remaining length of the contract of the customer at no additional cost to the customer.

A contractual provision allowing more liberal rights of cancellation than set forth in the act could be substituted for the above notice. A provision of a contract that did not comply with the act and the rules under the act would be unenforceable against the customer. Under the bill, a provider could not engage or attempt to engage in a method, act, or practice that was unfair, unconscionable, or deceptive, as defined by the Michigan Consumer Protection Act.

Investigations and remedies. Under the bill, the department could investigate the operations or conduct of providers that were subject to the act. The department could require that a provider, and the officers, members, employees, or agents of a provider, appear at a named time and place in the county designated by the department or where the provider resided or was found, to give information under oath and to produce books, memoranda, papers, records, documents of title, evidence of assets, liabilities, receipts, or disbursements in the possession or control of the provider. Should the department require the attendance of a person, it would have to request the attorney general (or a prosecuting attorney) to issue an order setting forth the time and the place where attendance was required and would be required to serve the person in the manner provided for service of process in civil cases not less than five days before the date set for attendance. The order would have the same force and effect as a subpoena and, upon application of the attorney general, the order could be enforced by a court having jurisdiction over the person, Ingham County Circuit Court, or the circuit court for the county where the person receiving it resided or was found, in the same manner as though the notice were a subpoena. If the order issued by the department was not obeyed, the court could issue an order requiring the person to appear before the court or to produce documentary evidence, or to show cause for

refusal to obey the order issued by the department. Failure to obey the court order would be punished by that court as a contempt. The investigation could be made by the agency designated in writing by the department to conduct the investigation. The department could administer the necessary oath or affirmation to witnesses.

Violation of the act would be a misdemeanor, punishable by imprisonment for not more than one year or by a fine of not less than \$500, nor more than \$5,000, or both. This could not be construed to limit or restrict prosecution under any other provision of law.

The attorney general or county prosecutor could seek temporary or permanent injunctive relief against a provider who engaged in a method, act, or practice in violation of the act or a rule promulgated under the act; it would not be necessary to allege or prove actual damages to a person. The action could be brought in the circuit court of the county where the defendant was established or conducted business, or in Ingham County Circuit Court if the action were brought on behalf of all the citizens of the state. The court could award costs to the prevailing party. For continuing and knowing violation of the act, the court could assess the defendant a civil penalty of not more than \$10,000. A default in the payment of a civil fine or costs ordered under the act or an installment of the fine or costs could be remedied by any means authorized under the Revised Judicature Act. The attorney general or county prosecutor could recover actual damages on behalf of a customer.

In addition to the above relief, the department could order the suspension or revocation of registration for violations of the act. Unless waived by the court on good cause shown not less than ten days before the commencement of an action, the department would be required to notify the provider of the intended action and to give the provider an opportunity to cease and desist from the alleged unlawful method, act, or practice or to confer with the department in person, by counsel, or by other representative as to the proposed action before the proposed filing date. The notice could be given to the provider by mail, postage prepaid, to the usual place of business, or, if the provider did not have a usual place of business, to the last known address, or, if a corporation, to a resident agent who was designated to receive service of process or to an officer of the corporation.

Under circumstances where the department had authority to institute an action or proceeding, the department could accept an assurance of discontinuance of a method, act, or practice that was alleged to be unlawful under the act from the provider who was alleged to have engaged or be about to engage in the method, act, or practice. The assurance would not constitute an admission of guilt nor be introduced as evidence in any other proceeding. The assurance could include a stipulation for one or more of the following:

- a) The voluntary payment by the provider for the costs of investigation;
- b) A sum of money to be held in escrow pending the outcome of an action;
- c) A sum of money to be paid as restitution to an aggrieved person.

The bill would require that an assurance of discontinuance be in writing. It could be filed with Ingham County Circuit Court. The clerk of the court

would maintain a record of the filings. Unless rescinded by the parties or voided by a court for good cause, the assurance could be enforced in the circuit court by the parties. The assurance could be modified by the parties or by a court for good cause.

In addition to the remedies otherwise provided by law, a person injured by a violation of the act could bring a private civil action for damages, including costs, reasonable attorney fees, equitable relief, and other relief as determined appropriate by the court. Should the attorney general or prosecuting attorney commence an action, file a pleading, obtain a court order, or a voluntary assurance pursuant to the act, filing fees would not be required. The act would not limit or restrict the exercise of powers or the performance of the duties of the department, or any other governmental agency that was otherwise authorized under any other provisions of law.