

The Senate of Texas

Committee on State Affairs

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Mr. Drew Durham
Assistant Attorney General
Intergovernmental Relations
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FILE #

RG (MS-10-DH) May 14, 1993
ML-20315-93

I.D.#

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Dear Mr. Durham:

V.T.C.S., Art. 5221a-10 was enacted by the 72nd Texas Legislature with its stated purpose being, "...to provide for the health, safety, and welfare of workers throughout the state and to establish uniform standards of conduct and practice for certain employers in the state,..." With the exception of sections 4 and 10, the Act took effect on September 1, 1991. I am attempting to determine if the Act is the authority for determining the employer of common workers provided to third party users by a temporary common worker employer. This letter is to request that you issue an Attorney General's opinion in response to the following questions:

- 1.) Is V.T.C.S., Art. 5221a-10 the authority for determining who serves in the role of employer of "common workers" supplied to "third party users" by "temporary common worker employers" (as these term are defined in V.T.C.S., Art. 5221a-10)?
- 2.) During the period September 1, 1991, through December 31, 1991, who was the employer of a "common worker" who was provided to a "third party user" by a "temporary common worker employer" (as these terms are defined in V.T.C.S., Art. 5221a-10)?
- 3.) During the period September 1, 1991 through December 31, 1991, who was the employer of a "common worker" who was provided to a "third party user" by a "temporary common worker employer" (as these terms are defined in V.T.C.S., Art. 5221a-10) for purposes of unemployment insurance and workers compensation coverage?
- 4.) As of January 1, 1992, who is the employer of a "common worker" provided to a "third party user" by a "temporary common worker employer" (as these terms are defined in V.T.C.S., Art. 5221a-10)?
- 5.) As of January 1, 1992, who was the employer of a "common worker" who was provided to a "third party user" by a "temporary common worker employer" (as these terms are defined in V.T.C.S., Art. 5221a-10) for purposes of unemployment insurance and workers compensation coverage?

Although it is primarily a licensing Act, it seems clear that the Legislative intent of V.T.C.S., Art. 5221a-10 was to define the employer/employee relationship with respect to common workers and their employers. On July 28, 1992, in response to an inquiry from the General Counsel of the Senate Committee on Jurisprudence, regarding the legislative intent of Senate Bill 1250, Senator Brooks wrote:

"It was our intent to establish a clear line of responsibility between the common temporary worker and the labor hall which is the employer. This was done to remove any ambiguity regarding 'dual employer' or 'co-employer' situations. Clearly, the definition in Section 6 (f) designates the "license holder" as THE employer and we feel the definition conveys all traditional responsibilities if the employee/employer relationship on the license holder of this Act which would include withholding, Unemployment Insurance, Workers Compensation, and SSI Contributions. (Emphasis in original.)

In S.B. 1520, one of the objectives was to protect the worker by removing any doubt as to the identity of the employer and the source of ultimate responsibility for the worker's compensation and benefits.

...This legislation was drafted to address a compilation of abuses and problems unique to the unskilled labor market" ¹

To accomplish these goals, the Legislature first defined the employee/employer relationship with respect to common workers by statutorily defining unskilled laborers as "Common workers"² and their employers as "Temporary common worker employers" effective September 1, 1991.³ The Act places temporary common worker employers under regulatory control by requiring that after January 1, 1992, they must be licensed.⁴ Under the licensing provisions, the Legislature restates that the temporary common worker employer (the license holder) is the employer of the common workers he provides to third party users.⁵

¹Senator Chet Brooks was the author of Senate Bill 1520, which was codified as V.T.C.S., Art. 5221a-10.

²"Common Worker" means an individual who performs labor involving physical tasks that do not require a particular skill, training in a particular occupation, craft, or trade, or practical knowledge of the processes of an art, science, craft, or trade. Section 2(2).

³"Temporary common worker employer" means a person that provides common worker employees to a third party user. Section 2(9).

⁴A person may not operate as a temporary common worker employer or as a temporary common worker agency in the state without a license issued under this Act for each location that the person operates as a temporary common worker agency. Section 4, effective January 1, 1992

⁵A license holder is the employer of the common worker. A license holder may hire, reassign, control, direct, and discharge the license holder's employees. Section 6(f), effective January 1, 1992.

Even without Senator Brooks' Attestations as to legislative intent, the Act on its face conveys no other meaning. It is clear that the Legislature intended to define and clarify the employer/employee relationship with respect to common workers. The Legislature accomplished this by defining "temporary common workers" as of September 1, 1991. They then places temporary common worker employers under regulatory control by enacting licensing requirements effective January 1, 1992. Although section 6(f) makes a license-holder the employer of the common workers he provides to third party users, this provision did not change the section 2(9) provision that the temporary common worker employer is the employer of the common workers he provides to a third party user. In defining the rights and duties of the license holder in section 6 of the Act, the Legislature was aware that after January 1, 1992, temporary common worker employers who operate labor halls would have to become license holders if they were to continue in the business of providing common workers to third party users. In stating that the license holder is the employer of the common worker, the Act does not purport to change the relationship between the temporary common worker employer and the common worker which was created in section 2 of the Act. It simply recognizes the new status of the temporary common worker employer as a license holder. Further, if one accepts the section 6(f) provision as a valid delineation of the employee/employer status for common workers and their employers after January 1, 1992, it would seem illogical then to argue that the section 2(9) provision is inapplicable between September 1, 1991 and January 1, 1992.

Clearly, the Act delineates the status of the parties after its general effective date. It establishes licensing provisions and penalties which delineates the rights and duties of a license holder. Prior to January 1, 1992, a person who operated a labor hall and provided common workers to third party users was the employer. Subsequent to January 1, 1992, a person is prohibited from operating as a temporary common worker employer without a license issued pursuant to the Act. A person who violates the licensing provisions of the Act by failing to renew his license would be subject to the penalties provided by the Act. The Act does not purport to impose penalties on a third party user client of a temporary common worker employer who is out of compliance with the Act or to change the employer/employee relationship created by the Act. Under the Act, the temporary common worker employer is, for all purposes, the employer of the common workers he provides to third party users whether licensed or unlicensed.

After September 1, 1991, in order to be the employer of common workers, a person need only be the provider of the common workers to third party users. No other requirement is imposed by the statute until January 1, 1992, when it prohibits persons from operating as a temporary common worker employer without a license provided by the Act.

Sincerely,



Senator O. H. "Ike" Harris
Chair, Senate State Affairs Committee