



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 545

September 28, 2017

Whether the revolving door law in section 572.069 of the Government Code would prohibit a former employee of a state agency from providing certain services. (AOR-622)

The Texas Ethics Commission has been asked whether the “revolving door” law in section 572.069 of the Government Code would prohibit the requestor of this opinion, who is a state employee (“the requestor”), from departing the state agency where the requestor is currently employed and providing certain services to two for-profit businesses (“clients”).

The requestor states that the state agency published a request for proposals (“RFP”), seeking a vendor to provide information technology services. The requestor reviewed and scored the bid proposals submitted in response to the RFP. The first of the two clients submitted a proposal, in which the second client was listed as a subcontractor. The requestor states that the requestor did not participate any further in the RFP or participate in negotiation with vendors or the vendor selection. The requestor also states that the requestor would provide the services as a “consultant” employed by a staffing agency and assigned to the clients. In addition, the requestor states that the services would be in furtherance of the executed state agency contract for which the requestor reviewed and scored bid proposals.

Revolving Door Law

Section 572.069 of the Government Code states:

A former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept employment from that person before the second anniversary of the date the officer's or employee's service or employment with the state agency ceased.

Gov't Code § 572.069.¹

¹ In the 2017 regular legislative session, the Legislature amended this section to prohibit a former state officer or employee of a state agency who, during the period of state service or employment, participated on behalf of a state agency in a procurement or contract negotiation involving a person, from accepting employment from that person before the second anniversary of the date the “contract is signed or the procurement is terminated or withdrawn.”

Participation and Involvement

The first question is whether the requestor participated on behalf of a state agency² in a procurement or contract negotiation involving the clients. In our opinion, the requestor participated in a procurement on behalf of a state agency by scoring and evaluating bid proposals for a state agency contract. Further, the procurement involved both clients because they were identified in the proposal as providing services under the contract. Accordingly, section 572.069 of the Government Code would prohibit the requestor from accepting employment from either client before the second anniversary of the date the employee's employment with the state agency ceases.

Accepting Employment

The second question is whether the requestor would "accept employment" from either client by providing the services at issue, which depends upon the specific circumstances surrounding the requestor's working arrangement with the staffing agency and the two clients. The facts indicate the following:

- The staffing agency would consider the requestor its employee, pay the requestor's salary, and provide for workplace benefits;
- The staffing agency would assign the requestor to work for the clients on a "consultant basis;"
- The requestor would provide services for the clients in furtherance of the clients' obligations under the state agency contract;
- The length of the requestor's employment with the staffing agency would be contingent on the duration of the state agency contract and could be modified by the clients;
- The requestor would retain the right to terminate employment before completion of the contract without liability for its completion;
- The clients would give the requestor instructions concerning when, where, and how the work would be performed;
- The clients would provide the requestor with training as needed;
- The clients would furnish the requestor with a computer;
- The clients and staffing agency would jointly control the requestor's schedule; and
- All hours worked and paid would require the approval of both the clients and staffing agency.

When a statute uses the terms "employee" or "employed," or otherwise refers to an "employment" relationship, courts will use the common law test of employment unless the

S.B. 533, Act of May 30, 2017, 85th Leg., R.S., § 1 (eff. September 1, 2017) (emphasis added). We address the requestor's facts under the current law.

² We assume for purposes of this opinion that the agency is a "state agency" as defined by section 572.002(10) of the Government Code.

statute dictates otherwise.³ Chapter 572 of the Government Code does not define the term “employment” or indicate that the Legislature intended the term “employment” in section 572.069 to be interpreted differently from how that term is understood in the common law. Therefore, we will in this case use the common law test of employment to determine whether a prohibited employment relationship would exist.

Under the common law test, generally, an individual renders services as an employee of an employer if:

- (1) The individual acts, at least in part, to serve the interests of the employer;
- (2) The employer consents to receive the individual’s services; and
- (3) The employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson.⁴

Under the “right to control” test,⁵ an employer’s right or ability to control the manner and means by which an individual renders services is sufficient to establish an employment relationship.⁶

In our opinion, based on the facts presented, the requestor would be acting to serve the interests of the clients, who would be consenting to receive the services. The clients would also have the right or ability to control the manner and means by which the requestor would render the services. Thus, an employment relationship would exist between the requestor and the clients. Accordingly, section 572.069 of the Government Code would prohibit the requestor from accepting the described employment arrangement before the second anniversary of the date on which the requestor’s service or employment with the state agency ceases.

SUMMARY

Section 572.069 of the Government Code prohibits a former state employee from providing the services described before the second anniversary of the date on which the employee’s service or employment with the state agency ceases.

³ See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). See also *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323-24 (1974); Attorney General Opinion Nos. GA-0292, at 3-4 (2005) (GA-0292) (applying common law test to determine meaning of “employed by” in statute), DM-409, at 4-5 (1996) (DM-409) (applying common law test to define “employee” in indemnification statute).

⁴ Restatement (Third) of Employment Law: Conditions for Existence of Employment Relationship § 1.01(a) (2015).

⁵ See GA-0292, at 4 (test to determine whether a person is an employee rather than independent contractor is whether the employer has a right to control the progress, details, and methods of operations of the work); DM-409, at 5 (1996) (considering whether employer has right to control details of work). See also Comment *d* to Restatement (Third) of Employment Law § 1.01.

⁶ An individual may also be the employee of more than one employer. *St. Joseph Hosp. v. Wolff*, 94 S.W. 3d 513, 538 (Tex. 2002). An individual is an employee of two or more joint employers if: (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each control or supervise such rendering of services. Restatement (Third) of Employment Law: Employees of Two or More Employers § 1.04(b) (2015).