



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 599

December 18, 2023

ISSUE

Whether a former state employee may provide consulting services to company with which he participated in a procurement during his state service without violating Section 572.069 of the Government Code. (*AOR-695*).

SUMMARY

The requestor may provide consulting services to a company with which he participated in a procurement during his state service without violating Section 572.069 provided he does not become an employee of the company.

FACTS

The requestor is a former employee of a state agency, who during his state employment, participated in procurements involving several businesses. The requestor is now part-owner of a consulting business. The consulting business seeks to contract with one or more businesses that were involved in procurements in which the requestor participated in during his state service.¹

The requestor asks whether he may provide consulting services to a covered business through his consulting company.

ANALYSIS

Chapter 572 of the Government Code includes three revolving door prohibitions applicable to certain former state employees. At issue in this request is Section 572.069, which 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

¹For the sake of brevity, a business with which the requestor participated in a procurement as a statement employee will be referred to as a “covered business.”

employment from that person before the second anniversary of the date the contract is signed or the procurement is terminated or withdrawn.

Tex. Gov't Code § 572.069.

The requestor states that he participated in a procurement with a business to which he now seeks to provide consulting services through a company he owns. Therefore, the revolving door prohibition would apply if he accepts “employment” from the business to which he provides consulting services.

We have interpreted the term “employment” in Chapter 572 consistent with the common law test of employment. Tex. Ethics Comm'n Op. No. 545 (2017) (“When a statute uses the terms ‘employee’ or ‘employed,’ or otherwise refers to an ‘employment’ relationship, courts [and the Commission] will use the common law test of employment unless the statute dictates otherwise.”).

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.

Restatement (Third) of Employment Law: Conditions for Existence of Employment Relationship § 1.01(a) (2015). Under the “right to control” test, 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. *See* Tex. Att'y Gen. Op. No. GA-0292 at 4 (2005) (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); *see also* Tex. Att'y Gen. Op. No. DM-409, at 5 (1996) (considering whether employer has right to control details of work).

In applying this test, we have looked to the actual relationship between the former state employee and the potential employer. In Ethics Advisory Opinion No. 572, a former state agency employee was employed by a staffing company. The former state agency employee sought to be placed by the staffing company with a business with which he had participated in a procurement as a state employee. Like this request, the requestor in EAO 572 sought to provide “consulting services” to the business. We held that even though the requestor was an employee of the staffing company, he would be an employee of the business where he was placed as well, because that business would have the right or ability to control the manner and means by which the requestor would render services.

In this case, regardless of whether the business contracts with a company owned by the requestor, the requestor will be subject to the Section 572.069 restriction if he enters into an employment relationship with a covered business. The facts the requestor provided indicate that he would not be employed by the covered business. The requestor stated that the “clients do not control the manner and means by which the services are rendered as they do not prescribe the specific methods,

techniques, processes, or approaches used to deliver the services.” For the purpose of this opinion we assume those facts to be true. *See* Tex. Ethics Comm’n Op. No. 582 (2022).