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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

April 1, 2003

The Honorable James H. Harrison
Chairman, Judiciary Committee
South Carolina House of Representatives
P.O. Box 11867
Columbia, South Carolina 29211

Re: Request for Opinion
Staff Leasing Companies and S.C. Code Ann. §40-68-120

Dear Representative Harrison:

You have requested an opinion from this Office related to entities known as Staff Leasing Companies (also referred to as Professional Employer Organizations). You indicate that you are interested in guidance from this Office in "... clarifying aspects of S.C. Code Ann. §40-68-120." Specifically, you "request that the opinion address the following questions, all of which seem to be related to subparagraph (F) of §40-68-120.

1. Does this statute limit the type of benefit plan a worksite employer (the client company) may (itself) sponsor for its assigned employees?

2. Does this statute limit the extent of consultation a worksite employer (the client company that sponsors a benefit plan) may receive from other sources?

3. Does this statute prohibit a worksite employer (the client company) from implementing its own employer sponsored, self-funded medical plan that contains a "stop loss" provision where an insurance carrier indemnifies 100% of the risk of the sponsoring employer?"

Each of your questions will be addressed in turn.

LAW/ANALYSIS

General Law

To respond to your questions, a few basic principles of statutory construction must be employed. The primary goal of statutory interpretation is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The statute's words must be given

their plain and ordinary meaning without resort to a forced or subtle construction which would work to limit or to expand the statutes operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). Moreover, the construction of a statute "... by the agency charged with executing it is entitled to the most respectful consideration [by the court] and should not be overruled without cogent reasons." Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1976). As a matter of policy this Office typically defers to the administrative agency charged with enforcement of the statute in question. See Op. S.C. Atty. Gen., Dated February 5, 2001.

Generally, staff leasing companies must operate in accordance with the provisions of Chapter 68, Title 40 of the Code of Laws for South Carolina (§§40-68-10 *et seq.*). A staff leasing company is defined as "... an individual business entity that offers staff leasing services." S.C. Code Ann. §40-68-10(9). Staff leasing services means

> "... an arrangement by which employees of a licensee [staff leasing company] are assigned to work at a client company and in which employment responsibilities are shared by the licensee and the client company. The employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the work force at a client company worksite or a specialized group within that work force consists of assigned employees of the licensee. This does not include family- related businesses or similar groups that do not meet the requirements of item (8). Staff leasing services does not include temporary employees."

S.C. Code Ann. §40-68-10(8). The "client company" is "... a person that contracts with a licensee and is assigned employees by the licensee under that contract." S.C. Code Ann. §40-68-10(2).

With reference employee benefit plans, Section 40-68-120(F) provides that

> [a] licensee may sponsor and maintain employee benefit plans for the benefits of assigned employees. The employee benefit plans must comply with the applicable provisions of the insurance laws of this State. A client company may include assigned employees in a benefit plan sponsored by the client company. However, no licensee may sponsor and maintain a plan of self- insurance for health benefits or workers' compensation benefits after January 1, 1994.

The South Carolina Department of Consumer Affairs (the Department) is charged with administering Chapter 68 of Title 40, licensing staff leasing companies and is authorized to promulgate regulations necessary to administer the chapter. S.C. Code Ann. §40-68-20. The Department has adopted a regulation virtually identical to Section 40-68-120(F). See S.C. Code of Regulations R. 28-965. The Department has also reemphasized the point in promulgating R. 28-966 which states in pertinent part that "Title 40 and regulation 28-965(7) prohibit a licensee or applicant from sponsoring and maintaining a plan of self-insurance for health benefits or workers' compensation benefits after

January 1, 1994." Further, the Department requires that the presidents of staff leasing companies certify by sworn affidavit that their companies "will not offer any self or partially self funded plans of insurance for worker's compensation, health, life or disability to any employee in the State of South Carolina."

Question 1

In your first question, you ask if Section 40-68-120(F) limits the type of benefit plan a client company may sponsor for its employees. By its plain language, this Section provides that "[a] client company may include assigned employees in a benefit plan sponsored by the client company." It appears that the only limitation placed on the client company with regard to the benefit plan which it may sponsor for its assigned employees is that the plan "... comply with the applicable provisions of the insurance laws of this State." While a staff leasing company is specifically prohibited from sponsoring or maintaining a plan of self-insurance for health benefits, no such prohibition is included with reference to the client company. That the statute specifically bans staff leasing companies from sponsoring self-insured benefit plans while remaining silent as to the client company in this regard would indicate that the General Assembly did not intend to prohibit a client company from sponsoring a self-insured benefit plan for its assigned employees. See, Pa. Natl. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984) (A cardinal rule of statutory construction is "expressio unius est exclusio alterius" or "the enumeration of particular things excludes the idea of something else not mentioned."). Accordingly, other than the requirement that applicable provisions of our insurance laws be complied with, Section 40-68-120(F) does not appear to place limits on the types of employee benefit plans sponsored by the client company.

Question 2

In your second question, you have asked if Section 40-68-120(F) limits the extent of consultation a client company may receive from other sources with reference to the employee benefit plan it sponsors. The word "consultation" is neither defined nor used in Chapter 68 of Title 40. Consultation, generally, means to confer with and exchange advice and express views. See *The American Heritage College Dictionary*, Third Edition. As there is no contrary meaning given to the word "consultation" in the relevant statutes, it must be given its plain and ordinary meaning for purposes of this review. Accordingly, to the extent that our applicable insurance laws are complied with, it does not appear that Section 40-68-120(F) places a limit on the amount of consultation a client company may receive concerning the employee benefit plan it sponsors.

It must be kept in mind, however, that both Section 40-68-120(F) and regulations promulgated by the Department prohibit a staff leasing company from sponsoring a plan of self-insurance for health benefits for employees assigned to a client company. Additionally, the Department requires that staff leasing companies certify that they will not offer any self or partially self-funded benefit plan to any employee in the State of South Carolina. To the extent that any "consultation" received by a client company comes from the staff leasing company with which it contracts and to the extent that the "consultation" could be viewed as equivalent to sponsoring or

offering a self-funded benefit plan to assigned employees, Section 40-68-120(F) and the related regulations may be implicated. An act which cannot be done directly cannot be done indirectly. See Ops. S.C. Atty. Gen., Dated August 9, 1995 & January 8, 1996. Obviously, this would be a factual question and this Office cannot and does not resolve factual disputes or make findings of fact. Ops. Atty. Gen., Dated August 14, 1995 & December 12, 1983.

Question 3

Finally, you ask if Section 40-68-120(F) prohibits a client company from implementing a self-funded medical plan which contains a "stop loss" provision where a insurance carrier indemnifies 100% of the risk of the sponsoring employer. "Stop loss" insurance is commonly understood to be excess insurance designed to protect a self-insured plan against unexpectedly large claims and catastrophic health costs for covered employees. See Rockline Inc. v. Wisconsin Physicians Service Ins., 499 N.W.2d 292 (Wisc. Ct. App. 1993). As addressed in the response to Question 1, there appears to be no such prohibition contained in the statute. Of course the client company must comply with the applicable provisions of the insurance laws of this State.

Further, self-funded benefit plans which purchase "stop loss" insurance will most likely be considered to remain self-funded or partially self-funded. See Drexelbrook Engineering Company v. Travelers Insurance Company, 700 F.Supp. 590 (E.D. Penn. 1989). Therefore, a staff leasing company would be prohibited from sponsoring or maintaining such a plan. Moreover, the analysis employed in response to Question 2 would also be applicable to the sponsoring, offering or maintaining of self-funded plans with stop loss provisions.

CONCLUSION

Presuming the State's insurance laws are complied with, Section 40-68-120(F) does not appear to place limits on the types of employee benefit plans sponsored by a client company. Neither does Section 40-68-120(F) place limits on the amount of consultation a client company may receive concerning the employee benefit plan it sponsors. It must be remembered, however, that any consultation given a client company by a staff leasing company does not rise to the level of actually offering or sponsoring a self-funded benefit plan to or for assigned employees. Finally, subject to the preceding caveats, Section 40-68-120(F) does not appear to prohibit a client company from implementing a self-funded medical plan which contains a "stop loss" provision.

Sincerely,

David K. Avant
Assistant Attorney General