ALAN WILSON
ATTORNEY GENERAL

June 22, 2022

Marcia S. Adams
Executive Director
South Carolina Department of Administration
P.O. Box 2825
Columbia, SC 29211

Dear Director Adams:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> The South Carolina Department of Administration ("Department") respectfully requests an opinion regarding the interpretation and application of the recently passed S.ll (A149, R164), which adds Section 8-ll-150(A) and amends Section 8-11-155 of the South Carolina Code to provide eligible state employees with paid parental leave for the birth or adoption of a child, or for placement of a foster child.
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> S.ll (the "Act") was passed by the General Assembly on April 22 and was signed by the Governor on May 13, 2022. Section 3 of S.ll states "This Act takes effect October 1, 2022."
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> The Act makes paid parental leave available to eligible state employees in connection with a "qualifying event." The term "qualifying event" is defined in section 8-11-150(4) as "the birth of a newborn biological child to an eligible state employee or after a co-parent's birth of a newborn child or fostering a child in state custody." It is also defined in section 8-11-155 as "the initial legal placement of a child by adoption."
> ...
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> Since the passage of S.11, the Department has received numerous questions regarding whether it is to be applied retroactively or prospectively.
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> In light of the expressly stated effective date of October 1, 2022 in the Act, as well as the definitional language of the term "qualifying event", the Department's

interpretation is that in order for a state employee to be eligible for paid parental leave, the qualifying event must occur on or after this date. This interpretation seems to be supported by the various reported South Carolina judicial decisions and AG Opinions recognizing the presumption that statutes, particularly those that create new rights or obligations, are to be applied prospectively.

In this regard, on the topic of whether a statute should be deemed prospective or retroactive, our Court of Appeals stated in State v. Hilton, 406 S.C. 580, 585, 752 S.E.2d 549, 551-52 (Ct. App. 2013):

> "[L]egislative intent is paramount in determining whether a statute will have prospective or retroactive application." State v. Bolin, 381 S.C. 557, 561, 673 S.E.2d 885, 887 (Ct.App.2009). When the legislative intent is not clear, courts "adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application." Id. at 561, 673 S.E.2d at 886–87. "[A]bsent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature." Edwards v. State Law Enforcement Div., 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). "A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability. When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only." Id. "[A] 'procedural' law sets out a mode of procedure for a court to follow, or 'prescribes a method of enforcing rights.' " Id. at 580, 720 S.E.2d at 466 (quoting *Black's Law Dictionary* 1083 (1979)).

Thus, the well-established general rule is that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary. With respect to S.ll, there is no specific provision providing for its retroactive application. Also, we are unaware of any evidence of clear legislative intent for retroactive application of S.ll.

Recognizing, however, that this is an issue of significance that could potentially affect numerous state employees, we are respectfully requesting the guidance of the Attorney General's Office on the issue of retroactive application of S.ll. In addition, the Department is requesting guidance concerning when an employee

must meet the eligibility requirements for paid parental leave. Specifically, the Department is requesting an opinion that addresses the following questions below.

1. Does S.ll have retroactive or prospective application? More specifically, would eligible state employees who have experienced a "qualifying event" prior to the legislation's October 1, 2022, effective date be entitled to paid parental leave? For example, if a state employee gave birth to a child in April 2022, would the employee be entitled to six weeks of leave?

2. If S.ll is to be applied retroactively, would an employee have to meet eligibility requirements (i.e., occupying any percentage of a full-time equivalent position) at the time of the "qualifying event" (birth, adoption or foster care placement) in order to be eligible for paid parental leave? If the employee does not have to meet eligibility requirements at the time of the qualifying event, when is their eligibility determined?

3. If S.ll is to be applied retroactively, would an employee who met the eligibility requirements at the time of the qualifying event but not on October 1, 2022, be eligible to use paid parental leave? For example, if an employee gives birth while in an FTE position but moves into a temporary position prior to October 1, 2022, would the employee be eligible to receive paid parental leave?

Law/Analysis

This Office agrees with your assessment that a court would likely hold Act 149 of 2022 (the "Act") does not have retroactive application. As a matter of first impression, this opinion will apply the rules of statutory construction to ascertain the Act's meaning. Statutory construction primarily requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where legislation's language is plain and unambiguous, "the text of [the Act] is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Further, "[an Act] as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), reh'g denied (Aug. 5, 2015).

As your letter notes, our courts presume the General Assembly intends for its legislation to operate prospectively. The South Carolina Supreme Court explained this presumption as follows:

> Both federal and South Carolina courts employ a robust presumption against statutory retroactivity. Under this presumption, courts assume that statutes operate prospectively only, to govern future conduct and claims, and do not operate retroactively, to reach conduct and claims arising before the statute's enactment. Since legislatures generally intend statutes to apply prospectively only, this rule of statutory construction is a means of giving effect to legislative intent.

Kirven v. Cent. States Health & Life Co., of Omaha, 409 S.C. 30, 39, 760 S.E.2d 794, 799 (2014), opinion after certified question answered, No. 3:11-CV-2149-MBS, 2014 WL 12734325 (D.S.C. Dec. 12, 2014) (internal citations omitted). Further, section 3 of the Act explicitly states it "takes effect October 1, 2022" rather than on the date of its passage.[1] Based on the plain language in the Act establishing a future effective date, it appears the General Assembly did not intend for it to operate retroactively.

While it is this Office's opinion that the Act clearly states the General Assembly's intent for it to operate prospectively, in the event that a court instead finds the language is ambiguous, our state courts would likely defer to the Department's interpretation the statute. It is this Office's long standing policy, like that of our state courts, to defer to an administrative agency's reasonable interpretation of the statutes and regulations that it administers. See Op. S.C. Att'y Gen., 2013 WL 3133636 (June 11, 2013). In Kiawah Development Partners, II v. South Carolina Department of Health & Environmental Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014), the South Carolina Supreme Court explained, "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." The Court stated the determination of whether deference is afforded to an agency's interpretation of the statutes and regulations it administers involves two separate steps. Id.

> First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. See Brown v. Bi–Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own

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[1] The general rule is that legislation is effective from the date of its passage, but there are some exceptions.

> A statute takes effect from the date of its passage unless the time is fixed by a constitution or statutory provision, or is otherwise provided in the statute itself. The date of passage is the date of the completion of the last act necessary to fulfill the constitutional requirements and to give a bill the force and effect of law. ...
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> To avoid the hardships sometimes occasioned by the general rule, the legislature will usually designate within the act itself a future day for the act to take effect.

2 Sutherland Statutory Construction § 33:6 (7th ed.) (emphasis added).

> regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citations omitted)); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also Brown v. Bi–Lo, 354 S.C. at 440, 581 S.E.2d at 838.

Kiawah Dev. Partners, II, 411 S.C. at 32–33, 766 S.E.2d at 717. Here, both sections 1 and 2 of the Act direct the Department to "promulgate regulations, guidance, and procedures to implement this section." Therefore, this Office will defer to the Department's reasonable interpretations of the Act in regards to topics where it is silent or ambiguous. As explained above, we believe the statute clearly provides for a prospective application of the statute. As such, this Office further finds the Department's interpretation, that a "qualifying event" must occur on or after the Act's effective date of October 1, 2022 for an eligible state employee to be entitled to paid parental leave thereunder, is a reasonable construction and that our state courts would likely grant it deference.

Conclusion

As is discussed more fully above, it is this Office's opinion that the plain language of the Act 149 of 2022 established a future effective date of October 1, 2022, and thereby demonstrated the General Assembly's intent for it to operate prospectively. See Kirven, supra (discussing the "robust" presumption that statutes are intended to apply prospectively). Alternatively, to the extent that a court finds the Act's language is ambiguous in this regard, it is this Office's opinion that our state courts would likely defer to the Department of Administration's ("Department") reasonable construction of the statutes created thereunder. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations."). Here, sections 1 and 2 of the Act charge the Department with promulgating regulations and guidance for its implementation. This Office finds the Department's interpretation, that a "qualifying event" must occur on or after the Act's effective date of October 1, 2022 for an eligible state employee to be entitled to paid parental leave thereunder, is a reasonable construction of the Act and our state courts would likely grant it deference.

Sincerely,

Matthew Houck
Assistant Attorney General

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General