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The Honorable Larry A. Tucker  
Senate President-elect  
The Senate of West Virginia  
State Capitol  
Charleston, West Virginia 25305

Dear Mr. President-elect:

You have requested a formal opinion from this office on whether persons who take early retirement under Senate Bill No. 10 may thereafter be employed by the Legislature without losing their early retirement incentive benefits. Both W.Va. Code 5-10-22c and 18-7A-35b contain the following prohibition:

Any member participating in this retirement incentive program is not eligible to accept further employment from the state or any of its political subdivisions.

You have asked whether this prohibition, with certain enumerated exceptions, would prohibit any other employment by the state or its political subdivisions. As the term "employment" is commonly understood, the answer would be yes. As you have correctly noted, the determining factor is the nature of the employment relationship -- whether the person would be considered an "employee" within the meaning of the early retirement law.

Specifically, you have asked the following questions:

(1) Would it be your formal opinion that a typical case of a person employed by the Legislature during the session would fit into the "employee" rather than the "independent contractor" definition?

(2) Would it be your formal opinion that it is possible for the Legislature to employ someone under contract?

Regarding your first question, you have stated that "the Legislature employs a number of persons in both clerical level positions and professional staff positions during its legislative sessions." Generally speaking, all those in supervised staff positions, whether clerical or professional, would normally be considered to be employees rather than independent contractors.

The answer to your second question would depend upon both the nature of the agreement and the type of services rendered. While it may be possible for the Legislature to retain a retiree for limited purposes under an independent contract, the mere fact that someone is under contract would not necessarily exclude them from the definition of "employee" as used in the early retirement law. In syllabus points 1 and 2 of Spencer v. Travelers Insurance Company, 148 W.Va. 111, 133 S.E.2d 735 (1963), the W.Va. Supreme Court of Appeals held:

1. The question as to whether a person is an employee or an independent contractor depends on the facts in any given case and all elements must be considered together. Among the elements to be considered are the manner of selection of the person who is to do the work, how the person is to be paid for such work, the right to hire and fire, and the right or power of control or supervision in connection with the work to be done, but the most important element is the one last mentioned.

2. If the right to control or supervise the work in question is retained by the person for whom the work is being done, the person doing the work is an employee and not an independent contractor, and the determining factor in connection with this matter is not the use of such right of control or supervision but the existence thereof in the person for whom the work is being done.

See also Spangler v. Fisher, 152 W.Va. 141, 159 S.E.2d 903 (1968); Myers v. Workmen's Compensation Commissioner, 150 W.Va. 563 (1966).

It is the opinion of this office that a person who has retired under the early retirement incentives provided by S.B. 10, and who does not clearly fall within the definition of an "independent contractor", is not eligible to accept further employment from the Legislature. A more specific response to your request would depend upon the particular facts and circumstances of an individual case.

In addition, because the early retirement legislation was intended in part to reduce state payroll expenditures, it is

likely the courts would scrutinize independent contractor arrangements closely to assure that the Legislature's intent is not subverted. In cases such as those you describe, therefore, the need to honor the intent of the Legislature should be added to the criteria traditionally used to determine whether one is an employee or an independent contractor.

Very truly yours,

CHARLES G. BROWN  
ATTORNEY GENERAL



By: DAWN E. WARFIELD  
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