



HENRY McMASTER
ATTORNEY GENERAL

March 31, 2006

The Honorable Jeffrey D. Duncan
Member, House of Representatives
327-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Duncan:

We received your letter requesting a written opinion from our Office "as to the constitutionality of Section 12 of H.4427, as reported to the House floor on March 16, 2006." You attached a copy of the bill to your request. This bill contains numerous amendments to the South Carolina Workers' Compensation Law. Section 12 of the bill provides:

The provisions of this act take effect January 1, 2007, if the provisions of this act result in a ten percent cumulative cost savings of providing workers' compensation coverage in this State over the period January 1, 2007, to December 31, 2012.

The Department of Insurance using an outside actuary shall perform the studies and computations necessary to make this calculation and report the results to the Speaker of the House of Representatives, President Pro Tempore of the Senate, and the Governor not later than December 31, 2006. Each member of the General Assembly shall receive a summary of the report from the Department of Insurance by December 31, 2006.

Your concern is as follows:

Section 12 appears to invest legislative power in the executive branch of State government by delegating to the DOI the ultimate authority to convert this bill into law, and thus it may be of questionable constitutionality. In addition, this Section appears to simultaneously impair the Governor's veto power while also creating what amounts

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to a veto power in favor of DOI and private acutary, which is also of dubious constitutionality.

Based on our review of the relevant authorities, we find section 12 most likely constitutes an impermissible delegation of legislative authority to the Department of Insurance. Thus, although only a court may find a statute unconstitutional, it is our opinion that section 12 is of questionable constitutionality and a court most likely would find this provision of the bill unconstitutional.

Law/Analysis

As we recognized on numerous occasions, only a court may deem a statute unconstitutional. Op. S.C. Atty. Gen., February 24, 2006. Thus, if enacted, the legislation to which you refer will remain valid until a court finds otherwise. In reviewing the constitutionality of a statute courts will, if possible, construe the statute to render it valid. Joytime Distrib. & Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." State v. Curtis, 356 S.C. 622, 629, 591 S.E.2d 600, 603 (2004).

Generally, our courts have held "the General Assembly may enact a law to become effective on the happening of a certain contingency." Moffett v. Traxler, 247 S.C. 298, 308, 147 S.E.2d 255, 260 (1966). In Beaufort County v. Jasper County, 220 S.C. 469, 68 S.E.2d 421, 430 (1951), the Supreme Court determined: "The fact that the Legislature saw fit to make the Act effective only on the happening of a certain contingency does not affect the validity of the Act." "Moreover, in general it makes no essential difference what is the nature of the contingency if it is essentially just and legal." Id. Thus, the contingent nature of the proposed legislation does not by itself make the proposed legislation invalid. However, we find the event upon which the effectiveness of the statute is contingent upon to be an impermissible delegation of legislative power.

Article III, section 1 of the South Carolina Constitution vests legislative power of the State in the General Assembly. Article I, section 8 of the South Carolina Constitution provides: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." In light of these constitutional provisions, the South Carolina Supreme Court held on numerous occasions that the General Assembly may not delegate its authority to make laws. See e.g., Joytime Distrib. & Amusement Co., Inc., 338 S.C. at 643, 528 S.E.2d 652. In Bauer v. South Carolina State Housing Authority, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978), our Supreme Court specifically addressed delegation of legislative power to administrative agencies.

[T]he Legislature may not vest unbridled, uncontrolled or arbitrary power in an administrative agency for, otherwise, the courts, when

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presented with a challenge of the agency's actions, would, there being no limitations on the agency's authority, be unable to judicially review its actions. In such a case, a citizen aggrieved by an agency action would be deprived of his due process rights under the State and Federal Constitutions.

Id. at 233, 246 S.E.2d at 876. Furthermore, the Court stated:

In determining whether a statute vests unbridled, uncontrolled or arbitrary power in an administrative agency, we must consider the administrative actions the act affirmatively permits. In addition, we examine the entire act in light of its surroundings and objectives and are not restricted to the ascertainment of standards in express terms if they may reasonably be implied from the entire act.

Id. (citations omitted). Also addressing the delegation of legislative power to an administrative agency, our Supreme Court in Terry v. Pratt, 258 S.C. 177, 183, 184-85, 187 S.E.2d 884, 887, 887-88 (1972) determined:

The Legislature has the authority to confer upon boards and commissions the power to execute laws enacted by it. "However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration."

(quoting Atlantic Coast Line R. Co. v. South Carolina Pub. Serv. Comm'n, 245 S.C. 229, 234 139 S.E.2d 911, 913 (1965)).

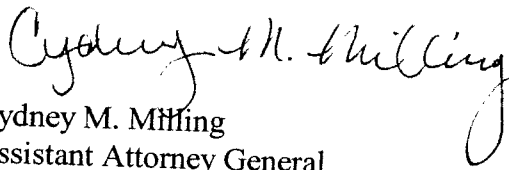
Section 12 of the proposed legislation provides the act will take effect "if the provisions of this act result in a ten percent cumulative cost savings of providing workers' compensation coverage in this State over the period January 1, 2007, to December 31, 2012." This provision would pass constitutional muster but for the fact that it goes further to place the determination of whether this contingency is met in the Department of Insurance, an executive agency. The only guidance given by this provision to the Department of Insurance is that it is to use an outside actuary who "shall perform the studies and computations necessary to make this calculation." This provision gives the Department of Insurance unbridled discretion to determine whether or not the proposed legislation meets the requisite savings requirement. Moreover, the proposed legislation does not provide for any further action on the part of the Legislature after its members receive the actuary's report,

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leaving the Department of Insurance with the final determination as to whether the act will take effect. Thus, in our opinion, giving the Department of Insurance the authority to make the final determination as to whether to enact the law constitutes a delegation of the Legislature's power to make laws. Accordingly, we conclude such a delegation of authority is prohibited under the South Carolina Constitution. However, again we note only a court may make a final determination as to the constitutionality of this provision.

As to your assertion that the proposed legislation also impairs the Governor's veto power, based on our findings that the legislation is constitutionally suspect due to an impermissible delegation of legislative power, we need not address this assertion.

Very truly yours,


Cydney M. Miffling
Assistant Attorney General

REVIEWED AND APPROVED BY:


Robert D. Cook
Assistant Deputy Attorney General