



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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LABOR:

Applicability of the Right to
Privacy in the Workplace Act
to a Non-Profit Hospital

The Honorable David Luechtefeld
Assistant Minority Leader
State Senator, 58th District
700 North Front Street
Okawville, Illinois 62706

Dear Senator Luechtefeld.

I have your letter inquiring whether subsection 5(b) of the Right to Privacy in the Workplace Act (the Act) (820 ILCS 55/5(b) (West 2010)) permits a non-profit hospital to make hiring decisions based on whether an individual uses tobacco products off of the hospital's premises during non-working hours. Subsection 5(a) of the Act (820 ILCS 55/5(a) (West 2010)) generally prohibits an employer from making employment decisions based upon whether an "individual uses lawful products[, such as tobacco products,] off the premises of the employer

during nonworking hours."¹ Subsection 5(b) of the Act, however, provides that the general prohibition set out in subsection 5(a) of the Act does not apply to any employer that is a non-profit organization that, *as one of its primary purposes or objectives*, discourages the use of one or more lawful products by the general public. Assuming that a particular non-profit hospital is found to be a non-profit organization that, as one of its primary purposes or objectives, discourages the use of tobacco products by the general public, then, under subsection 5(b) of the Act, it is my opinion that the hospital may make its hiring decisions based on whether a particular individual uses tobacco products off of the hospital's premises during non-working hours. Whether a particular non-profit hospital satisfies the statutory criterion presents a factual question that cannot be resolved in a legal opinion of the Attorney General.

ANALYSIS

Section 5 of the Act addresses employment decisions based on an employee's use of lawful products and provides, in pertinent part:

(a) Except as otherwise specifically provided by law and *except as provided in subsections (b) and (c) of this Section*, it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking hours.

¹Other provisions of the Act prohibit employers from making inquiries regarding claims filed by prospective employees under the Workers' Compensation Act or the Workers' Occupational Diseases Act (820 ILCS 55/10 (West 2010)) and address an employer's use of any Electronic Employment Verification System (820 ILCS 55/12 (West 2010)).

(b) *This Section does not apply to any employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public. This Section does not apply to the use of those lawful products which impairs an employee's ability to perform the employee's assigned duties. (Emphasis added.)*

The term "lawful products" is defined by administrative rule to include "*all tobacco products, all alcoholic beverages, all food products, all over-the-counter drugs, and any drugs lawfully prescribed by the employee's own physician.*" (Emphasis added.) 56 Ill. Adm. Code §360.110(g) (2012), added at 16 Ill. Reg. 16586, effective October 20, 1992. Similarly, the term "employer" is defined in the Act's administrative rules to include "any individual, partnership, association, corporation, business trust, enterprise or any person or group of persons for whom the employee is performing work with a reasonable expectation of compensation." 56 Ill. Adm. Code §360.110(d) (2012), added at 16 Ill. Reg. 16586, effective October 20, 1992. Accordingly, a hospital with compensated employees is an "employer" under the Act.

The primary purpose of statutory construction is to ascertain and give effect to the General Assembly's intent. *People v. Marshall*, 242 Ill. 2d 285, 292 (2011). The language of a statute remains the best indication of legislative intent. *Board of Education of Auburn Community Unit School District No. 10 v. Department of Revenue*, 242 Ill. 2d 272, 279 (2011). Where statutory language is clear and unambiguous, it must be given effect as written. *First American Bank Corp. v. Henry*, 239 Ill. 2d 511, 516 (2011).

Subsection 5(a) generally prohibits a hospital or other employer from basing its hiring and other employment decisions on whether an individual uses tobacco products or other lawful products off the employer's premises during non-working hours. Subsection 5(b) exempts from the general prohibition set forth in subsection 5(a) an employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products (including tobacco products) by the general public.

Neither the Act nor its rules define the term "non-profit organization."² It is well established, however, that undefined statutory terms must be given their ordinary and popularly understood meaning. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 373 (2009). The term "non-profit" generally means "[n]ot seeking profit" (American Heritage Dictionary 847 (2nd coll. ed. 1982)) or "not conducted or maintained for the purpose of making a profit" (Webster's Third New International Dictionary 1538 (1993)). Similarly, the term "organization" refers to "any unified, consolidated group of elements; systematized whole; esp[ecially], a) a body of persons organized for some specific purpose, as a club, union, or society b) the administrative personnel or executive structure of a business[.]" (Italics in

²In contrast, the General Assembly includes specific definitions for the term "non-profit organization" in other statutes. For example, section 123D-5 of the Illinois Insurance Code (215 ILCS 5/123D-5 (West 2010)) defines "nonprofit organizations" as "organizations described in paragraph (3) of subsection (c), and exempt from taxation under subsection (a), of Section 501 of the Internal Revenue Code." Section 10 of the High Speed Internet Services and Information Technology Act (20 ILCS 661/10 (West 2010)) defines "nonprofit organization" to mean "an organization that (i) is a nonprofit organization as described in Section 501(c)(3) of the federal Internal Revenue Code of 1986 and exempt from tax under Section 501(a) of that Code; (ii) has no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual; (iii) is organized under, subject to, and has all the powers and duties of a not-for-profit corporation under the General Not For Profit Corporation Act of 1986; (iv) has statewide representation; and (v) has a board of directors that is not composed of a majority of individuals who are also employed by, or otherwise associated with, any federal, State, or local government or agency."

original.) Webster's New World Dictionary 1002 (2nd coll. ed. 1976). Giving the term "non-profit organization" its ordinary and popularly understood meaning, a business, such as a hospital, that is not conducted or maintained for the purpose of making a profit may be a "non-profit organization" to which subsection 5(b) of the Act applies.

In order for a non-profit organization to qualify for the subsection 5(b) exemption, however, the non-profit organization must also have "as one of its primary purposes or objectives, discourag[ing] the use of one or more lawful products by the general public." 820 ILCS 55/5(b) (West 2010). The Illinois Appellate Court has stated that "'[p]rimary' is defined as 'original,' 'fundamental,' and 'basic.'" *Central Illinois Light Co. v. Department of Revenue*, 336 Ill. App. 3d 908, 912 (2003), citing Webster's Third New International Dictionary 1800 (1986). This qualifying provision indicates that the General Assembly did not intend to exempt non-profit organizations that only incidentally discourage the use of tobacco or other lawful products from the Act's general prohibition, but rather the General Assembly intended to exempt those non-profit organizations that have as their basic or fundamental purpose discouraging the use of tobacco products or other lawful products.

The legislative history of subsection 5(b) further illustrates the General Assembly's intent. Subsection 5(b) of the Act was added by Senate Amendment No. 1 to House Bill 1533, which was enacted as Public Act 87-807, effective July 1, 1992. During the legislative debate on House Bill 1533 before Senate Amendment No. 1 was adopted, a member of the House of Representatives expressed concerns that "the American Heart Association, the Cancer

Society, [and] the Lung Association, would be required to hire an individual who is a tobacco smoker" and that "[o]rganizations which work against problems in our society dealing with alcoholism would be required to hire people who drink even to excess." Remarks of Rep. Pullen, May 2, 1991, House Debate on House Bill No. 1533, at 51-52.³

Whether a particular non-profit hospital satisfies the statutory criterion is a question of fact that cannot be resolved in a legal opinion of the Attorney General. *See* Statement of Policy of the Illinois Attorney General Relating to Furnishing Written Opinions, <http://www.illinoisattorneygeneral.gov/opinions/opinionpolicy.pdf>. Assuming, however, that a specific non-profit hospital is found to be an organization that, as one of its primary purposes or objectives, discourages the use of tobacco products by the general public, then that particular non-profit hospital may make its hiring decisions based on whether a particular individual uses tobacco products off of the hospital's premises during non-working hours.

³Legislation was introduced in the 97th General Assembly to amend subsection 5(b). Senate Bill 2945 proposed to amend subsection 5(b) to provide:

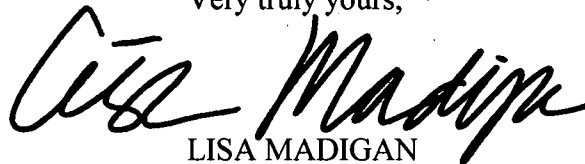
(b) This Section does not apply to any employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public. This Section does not apply to any for-profit employer that, as its sole business purpose or objective, provides medical or hospital treatment to patients who have a cancerous condition, and that refuses to hire or discharges any individual, or otherwise disadvantages any individual, with respect to compensation, terms, conditions, or privileges of employment because the individual uses tobacco products, including cigarettes, pipes, cigars, chewing tobacco, snus, snuff, clove cigarettes, electronic cigarettes, and similar products. This Section does not apply to the use of those lawful products which impairs an employee's ability to perform the employee's assigned duties. (Emphasis added, underscore in original.)

The Governor vetoed Senate Bill 2945 on August 17, 2012. The Senate vote to override the veto did not gain the three-fifths majority as required. *See* Ill. Const. 1970, art. IV, §9(c).

CONCLUSION

Subsection 5(a) of the Right to Privacy in the Workplace Act generally prohibits an employer from making employment decisions based upon whether an "individual uses [tobacco or other] lawful products off the premises of the employer during nonworking hours." Subsection 5(b) of the Act, however, provides that this prohibition does not apply to a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products, including tobacco products, by the general public. Whether a particular hospital meets the statutory criterion is a question of fact that cannot be resolved in a legal opinion of the Attorney General. Assuming, however, that a specific non-profit hospital is found to be an organization that, as one of its primary purposes or objectives, discourages the use of tobacco products by the general public, then, under subsection 5(b) of the Right to Privacy in the Workplace Act, it is my opinion that the non-profit hospital may make its hiring decisions based on whether a particular individual uses tobacco products off of the hospital's premises during non-working hours.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan", written in a cursive style.

LISA MADIGAN
ATTORNEY GENERAL