



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

**JOHN BEN SHEPPERD  
ATTORNEY GENERAL**

April 22, 1953

Hon. Robert S. Calvert  
Comptroller of Public Accounts  
Capitol Station  
Austin, Texas

Opinion No. S-32

Re: Applicability of the non-communist oath required by H.B. 21, 53rd Legislature, to services by doctors, lawyers, engineers, architects, skilled services, labor, statutory witness fees in criminal cases, payment of expert witnesses, payment for assistance in law enforcement, cooperative projects administered by other agencies, constitutional salaries of State Officers and per diem of members of the Legislature.

Dear Sir:

We have your request for an opinion on the applicability of the following provision of House Bill Number 21, Acts of the 53rd Legislature, 1953:

"No funds of the State of Texas shall be paid to any person as salary or as other compensation for personal services unless and until such person has filed with the payroll clerk, or other person by whom such salary or compensation is certified for payment, an oath or affirmation stating: . . ."

You asked specifically:

"1. Professional services, such as doctors, lawyers, engineers, architects, etc.?"

"2. Skilled services to build, to repair, or to service contracts which are for labor only?

"3. Statutory services, witness fees in criminal cases, expert witnesses, payment of services for law enforcement, undercover work, etc.?

"4. Cooperative projects; warrants drawn to reimburse Federal and State agencies, or its subdivisions or compact commissions for salaries or personal services?

"5. Constitution of salaries such as executive officers of the State government and per diem from members of the State Legislature?"

The oath required by H. B. 21 is in part as follows:

"1. That the affiant is not, and has never been, a member of the Communist Party. . . ; and

"2. That the affiant is not, and during the preceding five year period, has not been, a member of any organization, association, movement, group or combination which the Attorney General of the United States, acting pursuant to Executive Order No. 9835, March 21, 1947, 12 Federal Register 1935, has designated as totalitarian, fascist, communist or subversive, . . . and

"3. That the affiant is not, and, during the preceding five year period, has not been, a member of any 'Communist Political Organization' or 'Communist Front Organization' registered under the Federal Internal Security Act of 1950 (50 U.S.C.A., sec. 781, et seq.). . . ."

In answer to your first and second questions, it is our opinion that the above provisions do apply to salary and compensation paid to doctors, lawyers, engineers and architects, and to skilled craftsmen and laborers, if their services are rendered in the capacity

of employees, and not as independent contractors.

There is no exclusive rule by which independent contractors and employees may be differentiated. Generally, however, the relations are distinguished by the extent of the control which the employer exercises over the employee in the manner in which he performs his work. Carruth v. Valley Ready-Mix Concrete Co., 221 S.W.2d 584 (Tex. Civ. App. 1949, error ref.)

"An independent contractor is any person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details." Shannon v. Western Indemnity, 257 S.W. 522, 524 (Comm. App. 1924).

But each case must be based on its own facts.

In answer to your third question, it is our opinion that the above provisions do not apply to statutory witness fees in criminal cases, nor to compensation paid by the State to expert witnesses since these fees are clearly not for personal services, but are to reimburse the witnesses for their expenses.

It is our opinion that the above provisions do apply to payment for special and undercover services in law enforcement if the services are performed in the capacity of an employee.

Your fourth question is too broad and general to be answered specifically. However, we will be glad to answer opinion requests based on any individual agency or fact situation.

In answer to your fifth question, it is our opinion that the above provisions do not apply to constitutionally fixed salaries of State Officers, nor to the constitutionally fixed per diem of members of the State Legislature, since such constitutional provisions are self executing and exclusive.

We are in no way passing upon the constitutionality of the above Act.

SUMMARY

The "non-subversive" oath required by H.B. 21, Acts of the 53rd Legislature, 1953, applies to State funds paid for services by doctors, lawyers, engineers, architects, skilled craftsmen and laborers, and for special and undercover services in law enforcement, if such services are rendered in the capacity of an employee and not as an independent contractor.

The "non-subversive" oath does not apply to statutory witness fees in criminal cases, nor to compensation paid by the State to expert witnesses, nor to the constitutionally fixed salaries of State Officers, nor the constitutionally fixed per diem of State Legislators.

Yours very truly,

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APPROVED:

  
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WMK/rt