



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 10, 2023

Ms. Kelly Parker
Executive Director
Texas Optometry Board
333 Guadalupe Street, Suite 2-420
Austin, Texas 78701-3942

Opinion No. KP-0427

Re: Authority of the Texas Optometry Board under section 351.005 of the Occupations Code to take action against licensed optometrists who are independent contractors (RQ-0463-KP)

Dear Ms. Parker:

On behalf of the Texas Optometry Board (“Board”), you seek guidance in relation to the Board’s enforcement of the Texas Optometry Act (“Act”).¹ See TEX. OCC. CODE §§ 351.001–.608. You tell us your questions result from “issues that the Board has been faced with since the issuance of KP-0297.” Request Letter at 2. In that opinion, we offered general advice about the construction and scope of Occupations Code subsection 351.005(a)(2), which provides the Act does not

prevent or interfere with the right of a physician licensed by the Texas Medical Board to:

- (A) treat or prescribe for a patient; or
- (B) direct or instruct a person under the physician’s control, supervision, or direction to aid or attend to the needs of a patient according to the physician’s specific direction, instruction, or prescription[.]

TEX. OCC. CODE § 351.005(a)(2); see generally Tex. Att’y Gen. Op. No. KP-0297 (2020). The opinion concludes subsection 351.005(a)(2) does not “exempt a licensed physician from all aspects of the Act” but limits the Board from interfering with the physician’s rights as set out in subsection 351.005(a)(2)(A) and (B). Tex. Att’y Gen. Op. No. KP-0297 (2020) at 3. As to a physician’s direction or instruction of another person, as provided in subsection 351.005(a)(2)(B), the opinion

¹See Letter and Addendums from Ms. Kelly Parker, Exec. Dir., Tex. Optometry Bd., to Honorable Ken Paxton, Tex. Att’y Gen. at 2–3 (May 31, 2022), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0463KP.pdf> (“Request Letter” and “Addendums,” respectively).

emphasizes that “the physician’s direction, instruction, or prescription” must be specific and serve the purpose to “aid or attend the needs of a patient.” *Id.* Accordingly, the opinion concludes it is unlikely the Legislature intended subsection 351.005(a)(2)(B) be construed “to allow an optometrist under the direction or instruction of a physician to avoid all application of the Act simply by virtue of [an] employment relationship” *Id.* at 4. Instead, the subsection “operates as a shield when the physician’s direction and instruction of a person under the physician’s ‘control, supervision or direction,’ including an optometrist, is to aid and attend to the needs of a patient as specifically directed, instructed, or prescribed by the physician.” *Id.*

Application and Scope of Subsection 351.005(a)(2)(B)

Taken together, your first two questions seek clarification about the import of three factors under subsection 351.005(a)(2)(B): (1) an optometrist’s² status as an independent contractor or employee; (2) a physician’s degree of supervision of an optometrist; and (3) a physician’s involvement in patient treatment or care. *See* Request Letter at 2. These questions raise issues implicated in matters currently before the State Office of Administrative Hearings (SOAH). *See Tex. Optometry Bd. v. Nguyen*, No. 514-22-1982 (filed May 11, 2022); *Tex. Optometry Bd. v. Venard*, No. 514-22-08282 (filed Aug. 10, 2022); *see also* TEX. OCC. CODE § 351.503(b) (providing that, under the Act, “[a] person is entitled to a hearing conducted by the State Office of Administrative Hearings if: (1) a charge is filed against the person; or (2) the board proposes to: (A) refuse the person’s application for a license; or (B) suspend or revoke the person’s license”).

It is a long-standing policy of this agency to decline to answer, through the opinion process, a question that is the subject of pending litigation. *See* Tex. Att’y Gen. Op. No. KP-0118 (2016) at 2. For purposes of this policy, “litigation” includes matters before SOAH. *Cf.* Tex. Att’y Gen. Op. No. GA-0334 (2005) at 7 (explaining “[t]his office has concluded that a contested case under the Texas Administrative Procedure Act is ‘litigation’ within the context of the Public Information Act and the Open Meetings Act”). SOAH is an executive-branch state agency charged with holding administrative hearings in which legal rights, duties, or privileges are decided, but attorney general opinions are advisory. *See* TEX. GOV’T CODE §§ 2001.051 (setting out the rights of a party in a contested case), 2001.003(1) (defining “contested case”), 2003.021(a), (b)(1) (describing the purpose and duties of SOAH); Tex. Att’y Gen. Op. No. KP-0118 (2016) at 3 (“Attorney general opinions . . . are advisory in nature.” (citing Tex. Att’y Gen. Op. No. GA-1003 (2013) at 1)). Moreover, statutes that create administrative resolutions to controversies generally create opportunities for judicial review, making a dispute before SOAH and the lawsuit before the court effectively one continuous controversy. *See* Tex. Att’y Gen. ORD-301 (1982) at 2; *see also* TEX. OCC. CODE § 351.504 (providing for judicial review of a Board action). We therefore decline to issue an opinion in response to your first and second questions.

²Throughout this opinion, we use the term “optometrist” to refer to both an optometrist and a therapeutic optometrist. *See* TEX. OCC. CODE § 351.002(4) (defining “optometrist”), (9) (defining “therapeutic optometrist”).

Effect of “Refraction Only” Waiver

Your third question asks whether a patient’s execution of a “refraction only” waiver³ exempts an optometrist from “meet[ing] the minimum standard of care requirements for initial examinations pursuant to” Occupations Code section 351.353. Request Letter at 2. This same question is the subject of a matter currently before SOAH and, like your first two questions, is not appropriate for the opinion process. *See Tex. Optometry Bd. v. Nguyen*, No. 514-22-1982 (filed May 11, 2022).

Control of Optometry

Your fourth question asks about Occupations Code section 351.408. *See* Request Letter at 3. Subsection 351.408(c)(1) prohibits a “manufacturer, wholesaler, or retailer of ophthalmic goods” from directly or indirectly controlling or attempting to control the “professional judgment, manner of practice, or practice of an optometrist[.]” TEX. OCC. CODE § 351.408(c)(1). The “control or attempt to control the professional judgment, manner of practice, or practice of an optometrist” includes, among other things: (1) setting or attempting to influence an optometrist’s professional fees or office hours; and (2) restricting or attempting to restrict an optometrist’s freedom to see a patient by appointment. *Id.* § 351.408(b). The prohibition does not apply to

a manufacturer, wholesaler, or retailer of ophthalmic goods who is an optometrist, therapeutic optometrist, or licensed physician or a legal entity wholly owned and controlled by at least one optometrist, therapeutic optometrist, or licensed physician, *unless the optometrist, therapeutic optometrist, or legal entity has offices at more than three locations.*

Id. § 351.408(d) (emphasis added).

Read in the context of the statute, we understand your fourth question to ask whether a legal entity wholly owned and controlled by at least one licensed physician that is also a manufacturer, wholesaler, or retailer of ophthalmic goods violates Occupations Code section 351.408 if it enters into a contract with an optometrist (whether an independent contractor or employee) and directly sets and controls the fees of the optometrist, sets the specific hours the optometrist may see a patient, and establishes the total amount of time the optometrist may meet with a patient. *See* Request Letter at 3.

Briefing submitted in response to your request argues that the absence of the term “licensed physician” in the list of those subject to the three-location limit in subsection 351.408(d) means

³The Act requires optometrists who sign prescriptions for ophthalmic lenses to make and record, if possible, “the results of a static retinoscopy, O.D., O.S., or autorefractor” during a patient’s initial examination. TEX. OCC. CODE § 351.353(5). The Act lists nine additional findings optometrists must, if possible, make and record when signing prescriptions for ophthalmic lenses during initial examinations. *See id.* § 351.353. You do not define it, but we assume a “refraction only” waiver is an agreement by the patient that the optometrist will make and record the findings described only in subsection 351.353(5), not the other nine items listed in Occupations Code section 351.353. *See* Request Letter at 2.

that legal entities wholly owned and controlled by a least one licensed physician need not meet the three-location limit for exemption.⁴ *See* TEX. OCC. CODE § 351.408(d) (providing the prohibition does not apply “unless the optometrist, therapeutic optometrist, or legal entity has offices at more than three locations”).

When interpreting a statute, a court’s primary goal is to effectuate the Legislature’s intent. *See Hebner v. Reddy*, 498 S.W.3d 37, 41 (Tex. 2016). A court “look[s] for that intent first and foremost in the plain language of the . . . statutory provision” giving “effect to all words of a provision and avoid[ing] constructions that would render any part of it meaningless.” *Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 540 (Tex. 2021).

By its terms, a legal entity wholly owned and controlled by at least one licensed physician that is also a manufacturer, wholesaler, or retailer of ophthalmic goods is exempt from Occupations Code section 351.408 so long as the legal entity has offices at three or fewer locations. *See* TEX. OCC. CODE § 351.408(d). The phrase “legal entity” appears twice in subsection 351.408(d). *See id.* The first time it appears it is modified by “wholly owned and controlled by at least one optometrist, therapeutic optometrist, or licensed physician[.]” *Id.* The second time “legal entity” appears, it is not. *See id.* Yet, it has already been established, earlier in the sentence, that the “legal entity” to which subsection 351.408(d) refers is a “legal entity wholly owned and controlled by at least one optometrist, therapeutic optometrist, or licensed physician[.]” *Id.* Accordingly, the second reference to “legal entity” must signify a “legal entity wholly owned and controlled by at least one optometrist, therapeutic optometrist, or licensed physician[.]” *Id.* The statute’s exclusion of “licensed physician” in the list of entities subject to the three-office limit does not alter the definition of “legal entity” as set out earlier in the sentence. Because “legal entity,” the second time it is used, encompasses those that are owned and controlled by a licensed physician, subsection 351.408(d) requires that physician-owned businesses have at most three offices to be exempt from section 351.408.

This construction comports not only with the plain language of the statute but also the Legislature’s direction to construe the section liberally “to prevent manufacturers, wholesalers, and retailers of ophthalmic goods from controlling or attempting to control the professional judgment, manner of practice, or practice of an optometrist or therapeutic optometrist.” *Id.* § 351.408(a). It limits the number of physician-owned businesses that can use the exemption and thereby protects more optometrists working as employees or independent contractors from the influence of the ophthalmic goods industry.

⁴*See* Brief from Rachael Reed, Exec. Dir., Tex. Ophthalmological Assoc., to Virginia K. Hoelscher, Chair, Op. Comm. at 2 (on file with the Op. Comm.) (arguing “[t]he legislative intent was clear to exclude physicians from the three entity limitation, so it would be unreasonable to conclude that an entity wholly owned and controlled by a physician would be required to meet the three location limit for exemption”).

S U M M A R Y

The Legislature directs that Occupations Code section 351.408 be liberally construed to prevent manufacturers, wholesalers, and retailers of ophthalmic goods from controlling or attempting to control optometry. Given that directive and the express terms of subsection 351.408(d), a court would likely conclude that a legal entity wholly owned and controlled by at least one licensed physician that is also a manufacturer, wholesaler, or retailer of ophthalmic goods is exempt from Occupations Code section 351.408 only if the legal entity has offices at three or fewer locations.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

D. FORREST BRUMBAUGH
Deputy Attorney General for Legal Counsel

AUSTIN KINGHORN
Chair, Opinion Committee

CHRISTY DRAKE-ADAMS
Assistant Attorney General, Opinion Committee