



STATE OF KANSAS

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May 19, 1980

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ATTORNEY GENERAL OPINION NO. 80- 107

Mr. Darrel W. Bryant
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214 W. Main
Council Grove, Kansas 66846

Re: State Departments; Public Officers, Employees
--Oath of Office--Definition of "Employee"

Synopsis: The oath required by K.S.A. 75-4308 must be subscribed to by each person who becomes employed by the state or any county, city or municipality therein. As the statute admits to no exceptions, the oath is required for all such employees, regardless of the position or amount of remuneration. Cited herein: K.S.A. 21-305 (repealed, L.1968, ch. 106 §8), 54-106, 75-4308.

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Dear Mr. Bryant:

As Special County Counselor for Morris County, you have requested our opinion as to which employees must take the oath set out in K.S.A. 54-106 prior to their employment by a particular unit of government in Kansas, whether state, county or city. Specifically, you ask if all county employees in Morris County, including maintenance workers, courthouse personnel, and emergency medical technicians, are "employees" as that term is defined by K.S.A. 75-4308, and so are required to subscribe to the oath.

The oath in question is found at K.S.A. 54-106, and reads: "I do solemnly swear [or affirm, as the case may be] that I will support the constitution of the United States and the constitution of the state of Kansas, and faithfully discharge the duties of _____ . So help me God." In addition to being required for all officers elected or appointed under any Kansas statute (K.S.A. 54-106), this oath must also be subscribed to by,

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in the words of K.S.A. 75-4308: "each person to be employed by the state or any agency thereof or by any county, city or other municipality of the state including any school, college or university supported in whole or in part by public funds collected under any tax law of the state or any municipality thereof." Prior to 1968, the oath required for employees was much more explicitly a "loyalty" oath, and appeared at K.S.A. 21-305 (repealed, L.1968, ch. 106, §8). However, in Ehrenreich v. Londerholm, 273 F. Supp. 178 (D. Kan. 1967), the wording concerning membership in subversive organizations was held to be unconstitutional. Rather than draft a new oath, the legislature merely adopted that required for all elected or appointed officials since 1868. However, the requirement that the oath be taken by "employees" remained.


The term "employee" has a fairly well-settled meaning in the law. Chief among several tests which have evolved to distinguish between an employee and an independent contractor is the "right to control" rule. This standard looks to whether a person who is claimed to be an employee is subject to the control of another, who is able to direct the manner in which the work is done. Bush v. Wilson & Co., 157 Kan. 82 (1943), Chasteen v. Childers, 218 Kan. 519 (1976). Conversely, an independent contractor is defined as one who does work for another without being subject to the other's control or supervision as a matter of right. Aspelin v. Mounkes, 206 Kan. 132 (1970), Phillips Pipe Line Co. v. Kansas Cold Storage, Inc., 192 Kan. 480 (1964).

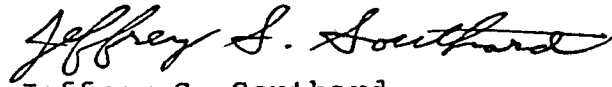
By its terms, K.S.A. 75-4308 appears to apply to all individuals whose jobs fall into the "employee" category, regardless of how menial the task or how minimal the compensation. The test is instead whether the person is "employed" by one of the enumerated units of government. While we agree with you that the requirement could be somewhat burdensome in the more populous counties or cities, the statute admits of no exceptions, and it must be presumed that the legislature in fact meant "each person" when it so stated. As we note that the oath need only be subscribed to (i.e., in writing) rather than be orally taken, there seems to be no reason that it could not be signed at the same time as the other preliminary documents (tax withholding forms, health insurance information, etc.) which are completed at the time a new employee begins work.

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In conclusion, the oath required by K.S.A. 75-4308 must be subscribed to by each person who becomes employed by the state or any county, city or municipality therein. As the statute admits to no exceptions, the oath is required for all such employees, regardless of the position or amount of remuneration.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:phf