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STATE OF NEBRASKA
OFFICIAL
MAR 25 1994
DEPT. OF JUSTICE

DATE: March 23, 1994

SUBJECT: Constitutionality of amendments to LB 984; Is it constitutional to require construction contractors who bid on the construction of certain ethanol projects to provide health care coverage for their employees?

REQUESTED BY: Senator C.N. "Bud" Robinson
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

LB 984 and its various amendments would modify provisions of the Ethanol Development Act, ***Neb. Rev. Stat. §§*** 66-1330 to 66-1348 (Supp. 1993). That act provides for certain excise taxes on the production of corn and grain sorghum in Nebraska. Among other things, those excise taxes are used to furnish transferable motor fuel tax credits to producers of ethanol. To be eligible to receive such tax credits, producers of ethanol must enter into a written agreement with the state. The amendments to LB 984 which are the subject of your opinion request would have that written agreement between ethanol producers and the state require the producers, when in the process of construction, to hire only contractors who provided health care benefits to their employees through employer contributions. You wish to know "whether or not there are any constitutional problems with this type of limitation."

As we have indicated frequently in the past, a question on the general constitutionality of a pending bill will necessarily result in a general response from this office since we obviously cannot address specific questions about a bill unless they are set out in the opinion request. Op. Att'y Gen. No. 89028 (April 5, 1989); Op. Att'y Gen. No. 85157 (December 20, 1985). In this instance, you

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have not indicated what specific constitutional problems form the basis for your concern involving the amendments to LB 984. Therefore, we will provide a general response on the constitutionality of the legislation.

The amendments to LB 984 at issue obviously involve a statutory classification since those contractors who provide health insurance for their employees would be treated differently from those who do not, i.e., those contractors who provide health insurance would be allowed to do construction work for ethanol producers wishing to avail themselves of tax credits from the state, while other contractors would not be allowed to do that same work. Such legislative classifications potentially violate article III, § 18 of the Nebraska Constitution which prohibits special laws or laws granting special privileges or immunities. The test for the constitutionality of legislative classifications under that constitutional provision is set out in ***Haman v. Marsh***, 237 Neb. 699, 467 N.W.2d 836 (1991):

> A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified.

Id. at 711, 467 N.W.2d at 846.

We cannot say that there is no public policy or substantial difference of situation or circumstances underlying the legislative classification created by the amendments to LB 984. For one thing, it could be argued that the amendments would further an important public policy interest in seeing that as many citizens of the state as possible have access to affordable health care coverages. Consequently, we do not believe that the proposed amendments to LB 984 violate article III, § 18 of the Nebraska Constitution.

The legislative classification inherent in the amendments to LB 984 requiring health care coverage might also involve a denial of equal protection under the Fourteenth Amendment to the United States Constitution or under article III, § 18 of the Nebraska Constitution, since those contractors who do not provide health care coverage would be denied the right to do construction work for certain ethanol producers while other contractors would enjoy that privilege. However, the test for the constitutionality of legislation under an equal protection analysis is less rigorous than the test for special legislation. ***Haman v. Marsh, supra***. For example, in ***Robotham v. State***, 241 Neb. 379, 488 N.W.2d 533 (1992), the court stated:

> [u]nless laws `create suspect classifications or impinge upon constitutionally protected rights,' . . . it need only be shown that they bear `some rational relationship to a legitimate state purpose.'"

Id. at 382, 383, 488 N.W.2d at 538. In the present instance, the distinction between contractors who provide health care benefits and those who do not does not involve a suspect classification such as a classification based upon race, religion and so forth. As a result, under the ***Robotham*** standard, the classification between categories of contractors must only bear some rational relationship to a legitimate state purpose. We believe that the state's obvious interest in encouraging the provision of health care benefits for its citizens provides that legitimate state purpose.

Therefore, for the reasons discussed above, it is our view that the provisions in the amendments to LB 984 at issue are generally constitutional.

Sincerely yours,

DON STENBERG
Attorney General

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Assistant Attorney General

05-13-14.op

cc. Patrick J. O'Donnell
Clerk of the Legislature

Approved by:

Attorney General