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NO.
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OFFICIAL
AUG 30 1994
DEPT. OF JUSTICE

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DEPUTY ATTORNEYS GENERAL

DATE: August 23, 1994

SUBJECT: LB 360 (1993 Legislative Session)

REQUESTED BY: Lawrence R. Myers, Executive Director
Nebraska Equal Opportunity Commission

WRITTEN BY: Don Stenberg, Attorney General
Alfonza Whitaker, Assistant Attorney General

You have asked whether the definition of "disability" in Neb. Rev. Stat. § 48-1102(9) (Supp. 1993) is retroactive. We find it is not.

Neb. Rev. Stat. § 48-1102(9) (Supp. 1993) is the product of LB 360 (1993 Legislative Session), effective July 26, 1994. The former definition of "disability" in the Nebraska Fair Employment Practice Act (NFEPA) is found at Neb. Rev. Stat. § 48-1102(8) (Cum. Supp. 1992), and reads as follows:

> Disability shall mean any physical or mental condition, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness, including epilepsy or seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide, wheelchair, or other remedial appliance or device and shall also mean the physical or mental condition of a person which constitutes a substantial handicap, as determined by a physician, but does not

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> reasonably preclude a person's ability to engage in a particular occupation. Disability shall not include an addiction to alcohol, controlled substances, or gambling which is currently being practiced by the employee. For purposes of this subdivision, does not reasonably preclude shall mean that an employer shall not be subject to more than a de minimis expense.

The new definition of "disability" in Neb. Rev. Stat. §48-1102(9) (Supp. 1993), enacted through LB 360, is broader and was designed to mirror the definition used in the federal Americans with Disabilities Act (ADA):

> Disability shall mean (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (b) a record of such an impairment, or (c) being regarded as having such an impairment. Disability shall not include homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.

The general rule in Nebraska is that statutes are not to be given retroactive effect unless the legislature has clearly expressed a contrary intention. ***See, e.g., Young v. Dodge County Bd of Sup'rs***, 242 Neb. 1, 5-6 (1992); ***Schall v. Anderson's Implement, Inc.***, 240 Neb. 658, 662-63 (1992).

Although exceptions to this general rule may be made for procedural or curative legislation, the definition of "disability" in the NFEPA is substantive in nature. Employers who relied on the definition in effect prior to July 26, 1994, should not be subjected to claims filed by employees seeking a retroactive application of the new definition of "disability." To allow such a retroactive application of the new definition of "disability" would be likely to create an ex post facto law and a violation of the employers' rights of due process.

Our conclusion that the new definition of "disability" enacted through LB 360 is not retroactive is further supported by the fact that the legislature gave the bill an effective date of July 26, 1994, and did not permit the provisions of LB 360 to become effective in the year the bill was enacted. It is apparent that

the legislature intended to give employers a grace period in which to adjust to their new statutory responsibilities.

Sincerely,

DON STENBERG
Attorney General

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Assistant Attorney General

APPROVED BY:

DON STENBERG, Attorney General

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