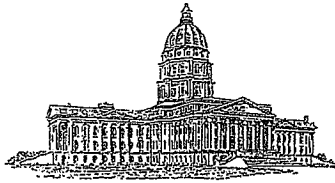


STATE OF KANSAS
HOUSE OF REPRESENTATIVES

SHARON J. SCHWARTZ
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*State Representative
106th District
State Capitol, Room 149-S
Topeka, Kansas 66612
(785) 296-7637*

May 7, 2013

Honorable Derek Schmidt, Attorney General
2nd Floor, Memorial Hall
120 SW 10th Avenue
Topeka, Kansas 66612

Dear General Schmidt:

The Joint Committee on Administrative Rules and Regulations (JCARR) is seeking your opinion regarding a possible conflict between KAR 4-28-34, as proposed by the Kansas Department of Agriculture pursuant to KSA 2012 Supp. 65-689, and the Fair Labor Standards Act, the Minimum Wage and Maximum Hours Law, or the Employment Security Law, and on enforcement of the proposed rule and regulation.

The proposed regulation, KAR 4-28-34, addresses retail food stores and food processing plants exempt from licensure. It defines food service establishments that are exempt from licensure. Subsection (c) specifies:

Funds raised in food establishments exempt from licensure under KSA 65-689 (d)(7), and amendments thereto, shall not be used for wages or other compensation of volunteers or employees, except for providing complimentary food to volunteer staff.

KSA 2012 Supp. 65-689, specifically paragraph (d)(7), states:

A license shall not be required by a person who prepares, serves or sells food for the sole purpose of soliciting funds to be used for community or humanitarian purposes or educational or youth activities.

The Joint Committee is concerned specifically about a possible conflict regarding the exempt food service establishment (employer) and the employee. KSA 2012 Supp. 44-313 defines "employer" and "employee" as follows:

(a) "Employer" means any individual, partnership, association, joint stock company, trust, corporation, limited liability company or other organization, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, the state of Kansas or any department, agency or authority of the state, any

city, county, school district or other political subdivision, municipality or public corporation and any instrumentality thereof, employing any person.

(b) "Employee" means any person allowed or permitted to work by an employer.

Based on those definitions of employer and employee (KSA 44-313), are food establishments that are exempt from licensure required to abide by the Fair Labor Standards Act, the Minimum Wage and Maximum Hours Law, or the Employment Security Act?

The Committee also would like to know whether the Department has the authority to limit a food establishment's use of funds in this way; and who would enforce the matter if a question arose as to whether all funds raised were used for community or humanitarian purposes or educational or youth activities. For example, what would happen if it was alleged the operator of an establishment took all the profits as wages and donated little, if any?

If you have any questions regarding this matter, please contact me or Raney Gilliland at 296-3181. Please provide a copy of your response to Mr. Gilliland at Legislative Research. Thank you very much for your consideration.

Sincerely,

Sharon Schwartz
Representative 106th District
Chairperson, Joint Committee of
Administrative Rules and Regulations

RLG/kal



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

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May 13, 2013

The Honorable Sharon J. Schwartz
State Representative, 106th District
State Capitol, Room 149-S
Topeka, Kansas 66612

Re: K.A.R. 4-28-34

Dear Representative Schwartz:

Attorney General Schmidt has asked me to respond to your letter of May 7, 2013, requesting our opinion as to the following:

1. Whether food establishments exempt from licensure pursuant to K.S.A. 2012 Supp. 65-689(d)(7) and K.A.R. 4-28-34(c) are required to abide by the Fair Labor Standards Act (FLSA),¹ the Minimum Wage and Maximum Hours Law,² or the Employment Security Law,³ and
2. Whether the Department of Agriculture has the authority to limit a food establishment's use of funds towards employee wages, and if so, how the agency could enforce such rules.

The Committee's questions pertain to K.A.R. 4-28-34(c), which the Department of Agriculture amended to read as follows: "Funds raised in food establishments exempt from licensure under K.S.A. 65-689(d)(7), and amendments thereto, shall not be used for wages or other compensation of volunteers or employees, except for providing complimentary food to volunteer staff."

The agency has advised us that the purpose of K.A.R. 4-28-34(c) is to interpret the statutory licensure exception found in K.S.A. 2012 Supp. 65-689(d)(7), which applies to persons who prepare, serve or sell food "for the sole purpose of soliciting funds to be used for community or humanitarian purposes or educational or youth activities." The agency advises that they interpret that statute to apply to charitable or

¹ 29 U.S.C.A. § 201 *et seq.*

² K.S.A. 44-1201 *et seq.*

³ K.S.A. 44-701 *et seq.*

other groups who utilize purely volunteer labor to produce and sell food in order to fund charitable or community activities, and that a person who pays staff from the proceeds of food sales is not selling food for the "sole purpose" of raising funds for such activities. In our opinion, this interpretation does not conflict with K.S.A. 2012 Supp. 65-689(d)(7).

Based upon the agency's interpretation of K.S.A. 2012 Supp. 65-689(d)(7), food establishments that qualify for the licensure exemption would be staffed with volunteers "without promise or expectation of compensation."⁴ Such volunteers would not be covered by the FLSA. "Individuals may work for charitable, civic or religious nonprofit enterprises without expectation of compensation and be considered a 'volunteer' not included in the definition of 'employee' subject to the requirements of the [FLSA]."⁵

In the absence of wages paid to volunteers, the person operating the food establishment would not be required to pay a minimum wage or overtime compensation pursuant to the Minimum Wage and Maximum Hour Law, and would not be required to pay contributions on wages to the employment security fund pursuant to the Employment Security Act.

If a person who operates a food establishment exempt from licensure pursuant to K.S.A. 2012 Supp. 65-689(d)(7) and K.A.R. 4-28-34(c) also employs staff who are compensated for their work, then those compensated employees would be covered by all applicable employment laws. However, *for the purpose of qualifying for the exemption from licensure as a food establishment*, funds raised from the exempt food establishment could not be used to pay wages for any compensated staff. If an exempt food establishment failed to meet this qualification for license exemption, then the agency could require the food establishment to obtain a license. Nothing in K.A.R. 4-28-34(c) would prohibit a person from paying compensated staff from other sources of funds or otherwise limit a person's ability to hire and pay staff.

I hope this letter adequately responds to the Joint Committee's questions.

Sincerely,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT



Sarah Fertig
Assistant Attorney General

Cc: Raney Gilliland, Legislative Research, State Capitol, Room 68-W

⁴ *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 295 (1985).

⁵ United States Dept. of Labor Opinion Letter No. FLSA2001-18 (July 31, 2001).