

TEXAS OPTOMETRY BOARD333 Guadalupe Street, Suite 2-420
Austin, Texas 78701-3942**RQ-0463-KP****FILE# ML-49131-22****I.D.# 49131**

May 31, 2022

VIA EMAIL & MAILOPINION.COMMITEE@TEXASATTORNEYGENERAL.COMCERTIFIED MAIL/RETURN RECEIPT REQUESTEDThe Honorable Ken Paxton
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Opinion Request

Dear Attorney General Paxton:

On March 30, 2020, the Office of the Attorney General issued the enclosed opinion, KP-0297 regarding the authority of the Optometry Board under section 351.005 of the Occupations Code over activities of licensed optometrists employed by physicians and retailers of ophthalmic goods leasing space to physicians.

In particular, the request for opinion (RQ-0311-KP) focused on whether Tex.Occ.Code 351.005(a)(2) exempts licensed optometrists employed by physicians from the regulation of the Optometry Act, specifically Tex. Occ.Code 351.408(a)(2) provides:

(a) This chapter does not:

...

(2) 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.

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In KP-0297, Attorney General Abbott summarized “*subsection 351.005(a)(2)(B) effectively shields a licensed physician and those under his or her direction or instruction from some application of the Act. See TEX. OCC. CODE § 351.005(a)(2)(B).*” Furthermore, as to whether subsection 351.005(a)(2)(B)’s shield removes the optometrist from regulation by the Act in its entirety, Attorney General Abbott opined “*a court would likely not construe 351.005(a)(2)(B) as a blanket exception from the Act in its entirety for any and all acts taken by those under the direction or instruction of a licensed physician just because they are conducted at the physician’s direction.*”

The Optometry Board takes seriously its duty to protect the citizens of Texas. Therefore, the Optometry Board now seeks further guidance and a subsequent opinion from the Office of the Attorney General regarding similar issues that the Board has been faced with since the issuance of KP-0297. This request for opinion will guide the Board in its enforcement of the Texas Optometry Act.

The Optometry Board has authorized the Executive Director to seek an Attorney General Opinion on the following questions:

1. Does Tex. Occ. Code 351.005(a) (2) prevent the Optometry Board from taking disciplinary action under Tex. Occ. Code 351.501 against Texas licensed optometrists or therapeutic optometrists, who execute and issue prescriptions for lenses under their Texas license, when they are independent contractors of a physician but the physician does not actively supervise the contracted optometrist?
 - 1(a). Based on the above scenario, what if the Texas licensed optometrist or therapeutic optometrist is an employee of a physician and executes and issues prescriptions for lenses independently? (The optometrist/therapeutic optometrist signs the prescription not the physician.) In this scenario, the physician is never involved directly in patient treatment and does not actively supervise the optometrist/therapeutic optometrist.
2. Does Tex.Occ.Code 351.005(a) (2) exempt optometrists or therapeutic optometrists from being accountable for the standard of care of a patient if a physician is not directly involved in patient care?
3. If a patient executes a “refraction only” waiver, does it eliminate the optometrist or therapeutic optometrist’s statutory duty to meet the minimum standard of care requirements for initial examinations pursuant to Tex. Occ Code 351.353?

4. Is a physician owned company in violation of Tex. Occ Code 351.408 if they enter a contract with an independent contractor and/or employee and directly set and control the fees of the independent contractor/employee; set the specific hours an independent contractor/employee can see a patient; and, establishes the total amount of time the independent contractor/employee can see a patient.

The Optometry Board has enclosed Addendums with a more thorough discussion than presented in the request. Respectfully, please provide the Board with an opinion under the provisions of Tex.Gov.Code 402.042.

Your assistance and guidance in this matter is greatly appreciated. If I can be of further assistance, please call me directly at 512-305-8502. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Kelly Parker".

Kelly Parker
Executive Director

CASE ONE EXAMPLE – INDEPENDENT CONTRACTOR

Optometry Board received a complaint from a 68-year old female patient regarding an exam for glasses. Complainant reported receiving an initial patient examination for lenses via telehealth from an Optometry Board licensee. Complainant was concerned because the exam did not mention cataracts – however, it had been found in other exams. Licensee was acting as an independent contractor of a physician. Licensee issued and signed the prescription for lenses independently under her professional title.

At all times relevant, the Licensee was not onsite and the testing was completed by a technician. The technician provided the patient's information through an email or chat feature and then the Licensee made recommendations for the prescription based on that data. At all times relevant, the Licensee never directly interacted with the patient and never appeared on the screen with the patient. Licensee did not personally examine the patient nor did she establish a patient-practitioner relationship. The patient never saw another licensed provider or physician during this visit.

A review of the patient record revealed that the minimum standard of care was not met pursuant to Section 351.353 of the Optometry Act and Rule 279.3 Spectacle Examination. Specifically, the Licensee failed to perform the following as required by Section 351.353:

- Missing – the results of a biomicroscopy examination, including examination of lids, cornea, and sclera;
- Missing – the results of an internal ophthalmoscope examination, including an examination of media and fundus;
- Missing – assessment of binocular function;
- Missing – amplitude or range of accommodation; and,
- Missing – angle of vision, to right and to the left.

Licensee and her legal counsel attended the informal conference. Legal counsel for the Licensee claimed the Attorney General Opinion KP-0297 and Section 351.005 of the Optometry Act prohibited the Optometry Board from taking action against the Licensee since she was an independent contractor of a physician.

Optometry Board opines that this is a patient care and safety issue. Licensee fell below the required standards of care in the treatment of this patient.

ADDENDUM B-REQUEST FOR ATTORNEY GENERAL OPINION DATED MAY 31, 2022

CASE TWO EXAMPLE – EMPLOYEE

Optometry Board received a complaint regarding a 17-year old female patient regarding an exam for contacts and glasses. Patient received an initial patient examination for lenses via telehealth from an Optometry Board licensee. Licensee was acting as an employee of a physician. Licensee issued and signed the prescription for lenses independently under his professional license.

At all times relevant, the Licensee was not onsite and the testing was completed by a technician. The technician provided the patient's information through an email or chat feature and then the Licensee made recommendations for the prescription based on that data. At all times relevant, the Licensee never directly interacted with the patient and never appeared on the screen with the patient. Licensee did not personally examine the patient nor did he establish a patient-practitioner relationship. The patient never saw a licensed provider or physician during this visit.

Patient followed up with a different provider. The subsequent provider provided an exam and determined there was a refraction error during her previous exam which resulted in an incorrect prescription by the Licensee.

A review of the patient record revealed that the minimum standard of care was not met pursuant to Section 351.353 of the Optometry Act and Rule 279.1 Contact Lens Examination and Rule 279.3 Spectacle Examination. Specifically, the Licensee failed to perform the following as required by Section 351.353:

- Missing – the results of a biomicroscopy examination, including examination of lids, cornea, and sclera;
- Missing – the results of an internal ophthalmoscope examination, including an examination of media and fundus;
- Missing – assessment of binocular function;
- Missing – amplitude or range of accommodation; and,
- Missing – angle of vision, to right and to left.

Licensee and his legal counsel attended the informal conference. Legal counsel for the Licensee claimed the Attorney General Opinion KP-0297 and Section 351.005 of the Optometry Act prohibited the Optometry Board from taking action against the Licensee since he was an employee of a physician.

Optometry Board opines that this is a patient care and safety issue. Licensee fell below the required standards of care in the treatment of this patient.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 30, 2020

Mr. Chris Kloeris
Executive Director
Texas Optometry Board
333 Guadalupe Street, Suite 2-420
Austin, Texas 78701-3942

Opinion No. KP-0297

Re: Authority of Optometry Board under section 351.005 of the Occupations Code over activities of licensed optometrists employed by physicians and retailers of ophthalmic goods leasing space to physicians (RQ-0311-KP)

Dear Mr. Kloeris:

You ask about the Texas Optometry Board's ("Board") authority pursuant to Occupations Code section 351.005 over activities of licensed optometrists employed by physicians and retailers of ophthalmic goods¹ leasing space to physicians.² Section 351.005 provides that chapter 351 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). You describe circumstances wherein a physician who is licensed by the Texas Medical Board leases space from a retailer of ophthalmic goods and hires an

¹Chapter 351 does not define "retailer of ophthalmic goods," but this office has previously defined the term to mean "a person or legal entity that sells to ultimate consumers spectacle lenses, frames, contact lenses, and other ophthalmic devices." Tex. Att'y Gen. Op. No. DM-170 (1992) at 5. For brevity, we will refer to retailers of ophthalmic goods simply as retailers.

²See Letter and attached brief from Mr. Chris Kloeris, Exec. Dir., Tex. Optometry Bd., to Honorable Ken Paxton, Tex. Att'y Gen. at 2 (Sept. 26, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

optometrist to conduct examinations, treat conditions and diseases of the eye, and issue prescriptions for medications and ophthalmic goods. *See* Request Letter at 1–2. You also state that under the lease arrangement, the retailer provides business services to and shares employees with the physician and “the office where optometry is practiced.” *Id.* at 2. In this context, you ask whether subsection 351.005(a)(2)(B) prevents the Board from seeking an injunction and a civil penalty against a “retailer of ophthalmic goods providing business services and sharing employees with an optometric office staffed by optometrists employed by a physician where the physician leases space from the unlicensed retailer.” *Id.* You also ask whether the same subsection prevents the Board from taking disciplinary action against “licensed optometrists employed by a physician where the physician leases space from an unlicensed retailer of ophthalmic goods and the unlicensed retailer provides business services and shares employees with the office in which the optometrists practice.” *Id.*

The Texas Optometry Act (the “Act”), in Occupations Code chapter 351, governs the practice of optometry. *See generally* TEX. OCC. CODE §§ 351.001–.608. An optometrist³ is one licensed under chapter 351 and “authorized to practice optometry.” *Id.* § 351.002(4); *see also id.* § 351.002(6) (defining the practice of optometry). Chapter 351 contains specific provisions regarding an optometrist’s independence. *See, e.g., id.* §§ 351.458 (regarding the use of name or professional identification), .459 (regarding the optometrist’s leasing of space from a mercantile establishment), .460 (regarding the optometrist’s relationship with dispensing opticians). The Act prohibits the control of optometry by manufacturers, wholesalers, and retailers of ophthalmic goods. *Id.* § 351.408. The Act also authorizes the Board to discipline an optometrist for certain activities. *Id.* § 351.501 (listing seventeen actions for which the Board may discipline an optometrist).

It is well established in Texas that a licensed physician may practice optometry. *See Baker v. State*, 240 S.W. 924, 928–29 (Tex. Crim. App. 1921) (recognizing that the practice of medicine includes optometry). By its plain language, subsection 351.005(a)(2)(B) effectively shields a licensed physician and those under his or her direction or instruction from some application of the Act. *See* TEX. OCC. CODE § 351.005(a)(2)(B). Your specific questions implicate Board action against a retailer under section 351.408 and against an optometrist under section 351.501. *See* Request Letter at 2. Whether a particular set of facts will support Board action in either case such that a particular retailer is subject to an injunction or civil penalty, or a particular optometrist is subject to discipline involves fact questions that are outside the purview of an attorney general opinion. *See* Tex. Att’y Gen. Op. No. KP-0205 (2018) at 1. However, the fundamental legal issue underlying your questions is essentially whether subsection 351.005(a)(2)(B)’s shield removes the retailer and the licensed optometrist in the lease arrangement you describe from regulation by the Act in its entirety. On that question, we can provide general advice on the construction and scope of subsection 351.005(a)(2)(B). *See id.*

³To distinguish an optometrist from an ophthalmologist, the optometrist holds the “degree of Doctor of Optometry (O.D.) after completion of at least 3 years of college followed by 4 years in an approved college of optometry.” MOSBY’S DICTIONARY OF MEDICINE, NURSING & HEALTH PROFESSIONS 1276 (10th ed. 2017). An “ophthalmologist” is a “physician that specializes in the study and treatment of defects and diseases of the eye.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1582 (2002).

In construing a statute, the “primary objective is to ascertain and give effect to the Legislature’s intent.” *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011); *see Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004). “To discern that intent,” courts “begin with the statute’s words.” *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439. A court will also “consider statutes as a whole rather than their isolated provisions.” *Id.*

We begin with the language of subsection 351.005(a)(2). It does not purport to categorically exempt a licensed physician from all aspects of the Act. *See* TEX. OCC. CODE § 351.005(a)(2). Instead, it limits the Board from interfering with certain rights of a licensed physician in specific circumstances. *See id.* The first is the physician’s right to “treat or prescribe for a patient.” *Id.* § 351.005(a)(2)(A). The second is the right of the physician to direct or instruct one under his or her control “to aid or attend to the needs of a patient according to the physician’s specific direction, instruction, or prescription.” *Id.* § 351.005(a)(2)(B). With respect to the physician’s direction or instruction of another, the plain language of section 351.005(a)(2)(B) requires that the physician’s direction, instruction, or prescription be specific. *Id.* Texas courts define the word “specific” to mean “explicit” or “relating to a particular named thing.” *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (quotation marks omitted); *see also* WEBSTER’S THIRD NEW INT’L DICTIONARY 2187 (2002) (defining “specific” to mean “having a real and fixed relationship to and usu[ally] constituting a characteristic of: being peculiar to the thing or relation in question”). Further, that specific direction, instruction, or prescription must serve the purpose to “aid or attend to the needs of a patient.” TEX. OCC. CODE § 351.005(a)(2)(B); *see generally* Tex. Att’y Gen. Op. Nos. MW-275 (1980) at 2–4 (discussing physician’s delegation of a patient’s care in the context of a predecessor to subsection 351.005(a)(2)); H-395 (1974) at 4 (discussing physician’s responsibility over a delegatee under his control or supervision).

Briefing submitted to this office suggests that this section is an exemption for “physicians and their employees.”⁴ Subsection 351.005(a)(2)(B) uses the term “person,” not “employee.” *Id.* And though “person” is broadly defined for the Act’s purposes and can include a licensed optometrist as an employee, the applicability of subsection 351.005(a)(2)(B) requires more than an employment relationship. *See id.*; *see also id.* §§ 351.002(5) (defining “person” to mean “an individual, association of individuals, trustee, receiver, partnership, corporation, or organization or the manager, agent, servant, or employee of any of those entities”); 351.457(b)(3) (acknowledging that an optometrist can be employed by a licensed physician). Instead, it is the nature of the function performed under the physician’s direction or instruction that invokes the shield of subsection 351.005(a)(2)(B). *See id.* § 351.005(a)(2)(B) (providing that Act does not interfere with the right of a physician to “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”).

We next consider the context of subsection 351.005(a)(2)(B). Courts will not construe a provision in isolation but will look to give it meaning consistent with the statute as a whole. *See*

⁴*See* Brief from Jared Brandman, Senior Vice President, Gen. Counsel & Sec’y, Nat’l Vision, Inc., to Virginia K. Hoelscher, Chair, Op. Comm. at 4 (Oct. 30, 2019) (on file with the Op. Comm.).

Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318, 326 (Tex. 2017) (“[W]e consider the context and framework of the entire statute and meld its words into a cohesive reflection of legislative intent.”). As noted previously, chapter 351 prohibits an optometrist from giving up his or her independence in working with an ophthalmic retailer. *See supra* at 2; *see also* TEX. OCC. CODE § 351.408. The chapter also imposes educational and professional requirements on an optometrist. *See, e.g., id.* §§ 351.308 (requiring continuing education), .451–.460 (prohibiting practices by license holder). Construing section 351.005(a)(2)(B) to allow an optometrist under the direction or instruction of a physician to avoid all application of the Act simply by virtue of that employment relationship would essentially invalidate the regulatory framework for a subset of optometrists. Such a construction negates key provisions of the Act, and courts “do not lightly presume that the Legislature may have done a useless act.” *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010). It is unlikely that the Legislature intended for subsection 351.005(a)(2)(B) to be so construed.

For these reasons, a court would likely not construe subsection 351.005(a)(2)(B) as a blanket exception from the Act in its entirety for any and all acts taken by those under the direction or instruction of a licensed physician just because they are conducted at the physician’s direction. It 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. As we said before, the question whether any given set of circumstances will support Board action against a retailer or an optometrist involves fact questions that are outside the purview of an attorney general opinion. *See Tex. Att’y Gen. Op. No. KP-0205 (2018)* at 1.

S U M M A R Y

Occupations Code subsection 351.005(a)(2)(B) prohibits the Texas Optometry Board from preventing or interfering with the right of a physician licensed by the Texas Medical Board to “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.”

Given the language and context of subsection 351.005(a)(2)(B), a court would likely conclude that it is not an exception from the Act in its entirety for any and all acts taken by those under the direction or instruction of a licensed physician just because they are conducted at the physician’s direction. Subsection 351.005(a)(2)(B) operates as a shield when the physician’s direction and instruction of the optometrist is to aid and attend to the needs of a patient as specifically directed, instructed, or prescribed by the physician. The question whether any given set of circumstances will support Board action against a retailer or an optometrist, however, involves fact questions that are outside the purview of an attorney general opinion.

Very truly yours,



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