MISSISSIPPI LEGISLATURE REGULAR SESSION 2011

By: Senator(s) Hewes To: Judiciary, Division A

SENATE BILL NO. 2021

AN ACT TO AMEND SECTION 7-5-1, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT NOTICE OF CERTAIN LITIGATION SHALL BE GIVEN TO AN AGENCY HEAD AND THAT AGENCIES MAY RETAIN SEPARATE COUNSEL IN CERTAIN SITUATIONS; TO AMEND SECTION 7-5-5, MISSISSIPPI CODE OF 1972, TO REVISE THE AUTHORITY OF THE ATTORNEY GENERAL TO ENTER INTO CONTRACTS FOR OUTSIDE LEGAL SERVICES; TO AMEND SECTION 7-5-21, MISSISSIPPI CODE OF 1972, TO REVISE THE CASE DOCKET MAINTAINED BY THE ATTORNEY GENERAL; TO AUTHORIZE STATE AGENCIES AND OTHER STATE ENTITIES TO DIRECTLY EMPLOY LEGAL COUNSEL, WHETHER SALARIED OR ON A CASE-BY-CASE BASIS, WHEN CERTAIN CONFLICTS OF INTEREST EXIST; TO PROVIDE THAT COMPENSATION OF SUCH LEGAL COUNSEL MAY BE PAID FROM ANY FUNDS APPROPRIATED OR OTHERWISE AVAILABLE TO THE APPOINTING OR EMPLOYING ENTITY; TO AMEND SECTION 25-9-120, MISSISSIPPI CODE OF 1972, TO REVISE THE DUTIES OF THE PERSONAL SERVICE CONTRACT REVIEW BOARD TO REVIEW CERTAIN FEE CONTRACTS FOR OUTSIDE LEGAL COUNSEL WHEN ENTERED INTO BY THE ATTORNEY GENERAL OR STATE AGENCIES; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 7-5-1, Mississippi Code of 1972, is amended as follows:

7-5-1. (1) The Attorney General provided for by Section 173 of the Mississippi Constitution shall be elected at the same time and in the same manner as the Governor is elected. His term of office shall be four (4) years and his compensation shall be fixed by the Legislature. He shall be the chief legal officer and advisor for the state, both civil and criminal, and is charged with managing all litigation on behalf of the state. No arm or agency of the state government shall bring or defend a suit against another such arm or agency without prior written approval of the Attorney General. He shall have the powers of the Attorney General at common law and, subject to the notice requirements of subsection (2) of this section, is given the sole power to bring or defend a lawsuit on behalf of a state agency, the subject

matter of which is of statewide interest, and he shall intervene and argue the constitutionality of any statute when notified of a challenge thereto, pursuant to the Mississippi Rules of Civil Procedure. His qualifications for office shall be as provided for chancery and circuit judges in Section 154 of the Mississippi Constitution.

(2) No legal action on behalf of any state agency, including a suit to recoup funds expended by an agency, may be taken until seven (7) working days' written notice of the proposed legal action is given to the executive director of the agency unless irreparable inquiry to the state would result by waiting for the expiration of the seven-day period. Upon the expiration of the notice period, the Attorney General may institute suit with or without the consent of the executive director of the agency. In such instances where the executive director does not consent, the agency may retain separate counsel pursuant to Section 4 of Senate Bill No. 2021, 2011 Regular Session.

SECTION 2. Section 7-5-5, Mississippi Code of 1972, is amended as follows:

7-5-5. (1) The Attorney General shall appoint nine (9) competent attorneys, each of whom shall be designated as an assistant attorney general. The assistants shall each possess all of the qualifications required by law of the Attorney General and shall have power and authority under the direction and supervision of the Attorney General to perform all of the duties required by law of that officer; and each shall be liable to the pains and penalties to which the Attorney General is liable. The assistants shall serve at the will and pleasure of the Attorney General, and they shall devote their entire time and attention to the duties pertaining to the Department of Justice as required by the general laws. The compensation of the within enumerated assistant attorneys general and all other regular assistants authorized by

law, shall be fixed by the Attorney General not to exceed the compensation fixed by law for such assistants.

(2) (a) The Attorney General is hereby authorized, empowered, and directed to designate three (3) of the * * * assistant attorneys general to devote their time and attention primarily to defending and aiding in the defense in all courts of any suit, filed or threatened, against the State of Mississippi, against any subdivision thereof, or against any agency or instrumentality of the state or subdivision, including all elected officials and any other officer or employee thereof. When the circumstances permit, the assistants may perform any of the Attorney General's powers and duties, including, but not limited to, engaging in lawsuits outside the state when in his opinion same would help bring about the equal application of federal laws and court decisions in every state and guaranteeing equal protection of the laws as guaranteed every citizen by the United States Constitution.

(b) To further prosecute and insure such purposes, subject to the limitations in this paragraph, the Attorney General is hereby further expressly authorized, empowered, and directed to employ such additional counsel as special assistant attorneys general as may be necessary or advisable, on a fee or contract basis; and the Attorney General shall be the sole judge of the compensation in such cases.

(i) Any contract for services of additional counsel providing for a contingent fee, or where the anticipated fee is in excess of One Million Dollars ($1,000,000.00), shall require that the contracting attorney or law firm keep current and complete written time and expense records that describe in detail the time and money spent each day in performance of the contract.

(ii) Any contract for legal services where the legal fee is reasonably expected to exceed One Million Dollars

($1,000,000.00) shall be reviewed by the Personal Service Contract Review Board pursuant to Section 25-9-120.

(iii) In those cases where the anticipated fee is in excess of One Million Dollars ($1,000,000.00), no contract for services of additional counsel shall be entered into by the Attorney General until requests for proposals have been issued to at least three (3) separate law firms or solo practitioners, and the Attorney General shall submit copies of all proposals to the Personal Service Contract Review Board.

(iv) On conclusion of the matter for which the outside legal services were obtained, the contracting attorney or law firm shall provide the Personal Service Contract Review Board with a complete written statement showing the contracting attorney's or law firm's computation of the amount of all fees and expenses, and the final complete time and expense records required under subparagraph (i) of this paragraph.

(3) The Attorney General may discharge any assistant attorney general or special assistant attorney general at his pleasure and appoint another in his stead. The assistant attorneys general shall devote their entire time and attention to the duties pertaining to the Department of Justice under the control and supervision of the Attorney General.

SECTION 3. Section 7-5-21, Mississippi Code of 1972, is amended as follows:

7-5-21. The Attorney General shall keep a docket of all causes in which he is required to appear or is appearing, either through his office or through retained counsel, which must * * * be open to the inspection of the public and must show the county, district, and court in which the causes have been instituted and tried, and whether they be civil or criminal. If civil, the docket must show the nature of the demand, the stage of the proceedings, the name and address of any retained or contract counsel, a memorandum of the judgment when prosecuted to judgment,

any process issued thereon, whether satisfied or not, and if not satisfied, the return of the sheriff. If criminal, the docket must show the nature of the crime, the mode of prosecution, the stage of the proceedings, a memorandum of the sentence when prosecuted to a sentence, the execution thereof, if executed, and, if not executed, the reasons of delay or prevention.

SECTION 4. The governing director or governing entity of any state agency, board, institution or commission is entitled to retain special counsel on a fee or salary basis if a conflict of interest exists between the positions of the agency, board, institution or commission and the Office of the Attorney General as to a legal or policy position with regard to which the agency, board, institution or commission has standing. The compensation of any special counsel under this section shall not exceed recognized bar rates for similar services; the attorney's compensation shall be paid out of any funds appropriated or otherwise available to the appointing or employing entity. If the contract provides for a fee anticipated to exceed One Million Dollars ($1,000,000.00), the agency, board, institution or commission shall not enter into a contract for legal services until requests for proposals have been issued to at least three (3) separate law firms or solo practitioners; copies of all proposals shall be submitted to the Personal Service Contract Review Board.

SECTION 5. Section 25-9-120, Mississippi Code of 1972, is amended as follows:

25-9-120. (1) Contract personnel, whether classified as contract workers or independent contractors shall not be deemed state service or nonstate service employees of the State of Mississippi, and shall not be eligible to participate in the Public Employees' Retirement System, or the state employee health plan, nor be allowed credit for personal and sick leave and other leave benefits as employees of the State of Mississippi,

notwithstanding Sections 25-3-91 through 25-3-101; 25-9-101 through 25-9-151; 25-11-1 through 25-11-126; 25-11-128 through 25-11-131; 25-15-1 through 25-15-23 and for the purpose set forth herein. Contract workers, i.e., contract personnel who do not meet the criteria of independent contractors, shall be subject to the provisions of Section 25-11-127.

(2) There is hereby created the Personal Service Contract Review Board, which shall be composed of the State Personnel Director, the Executive Director of the Department of Finance and Administration, or his designee, the Commissioner of Corrections, or his designee, the Executive Director of the Mississippi Department of Wildlife and Fisheries, or his designee, and the Executive Director of the Department of Environmental Quality, or his designee. The State Personnel Director shall be chairman and shall preside over the meetings of the board. The board shall annually elect a vice chairman, who shall serve in the absence of the chairman. No business shall be transacted, including adoption of rules of procedure, without the presence of a quorum of the board. Three (3) members shall be a quorum. No action shall be valid unless approved by the chairman and two (2) other of those members present and voting, entered upon the minutes of the board and signed by the chairman. Necessary clerical and administrative support for the board shall be provided by the State Personnel Board. Minutes shall be kept of the proceedings of each meeting, copies of which shall be filed on a monthly basis with the Legislative Budget Office.

(3) The Personal Service Contract Review Board shall have the following powers and responsibilities:

(a) Promulgate rules and regulations governing the solicitation and selection of contractual services personnel including personal and professional services contracts for any form of consulting, policy analysis, public relations, marketing, public affairs, legislative advocacy services or any other

contract that the board deems appropriate for oversight, with the exception of any personal service contracts entered into for computer or information technology-related services governed by the Mississippi Department of Information Technology Services, any personal service contracts entered into by the Mississippi Department of Transportation, and any contract for attorney not subject to paragraph (b)(ii) of this subsection, accountant, auditor, physician, dentist, architect, engineer, veterinarian and utility rate expert services. Any such rules and regulations shall provide for maintaining continuous internal audit covering the activities of such agency affecting its revenue and expenditures as required under Section 7-7-3(6)(d), Mississippi Code of 1972;

(b) (i) Approve all personal and professional services contracts involving the expenditures of funds in excess of One Hundred Thousand Dollars ($100,000.00);

(ii) Review all contracts for legal services, whether on a set fee, contingent fee or hourly fee basis, in which the anticipated fee is in excess of One Million Dollars ($1,000,000.00), and provide a recommendation to the Attorney General or the retaining agency which the Attorney General or the retaining agency may consider;

(c) Develop standards with respect to contractual services personnel which require invitations for public bid, requests for proposals, record keeping and financial responsibility of contractors. The Personal Service Contract Review Board may, in its discretion, require the agency involved to advertise such contract for public bid, and may reserve the right to reject any or all bids;

(d) Prescribe certain circumstances whereby agency heads may enter into contracts for personal and professional services without receiving prior approval from the Personal Service Contract Review Board. The Personal Service Contract

Review Board may establish a preapproved list of providers of various personal and professional services for set prices with which state agencies may contract without bidding or prior approval from the board;

(e) To provide standards for the issuance of requests for proposals, the evaluation of proposals received, consideration of costs and quality of services proposed, contract negotiations, the administrative monitoring of contract performance by the agency and successful steps in terminating a contract;

(f) To present recommendations for governmental privatization and to evaluate privatization proposals submitted by any state agency;

(g) To authorize personal and professional service contracts to be effective for more than one (1) year provided a funding condition is included in any such multiple year contract, except the State Board of Education, which shall have the authority to enter into contractual agreements for student assessment for a period up to ten (10) years. The State Board of Education shall procure these services in accordance with the Personal Service Contract Review Board procurement regulations;

(h) To request the State Auditor to conduct a performance audit on any personal or professional service contract;

(i) Prepare an annual report to the Legislature concerning the issuance of personal service contracts during the previous year, collecting any necessary information from state agencies in making such report.

(4) No member of the Personal Service Contract Review Board shall use his official authority or influence to coerce, by threat of discharge from employment, or otherwise, the purchase of commodities or the contracting for personal or professional services under this section.

(5) The Personal Service Contract Review Board may retain outside counsel for the purpose of advising it in its review pursuant to subsection (3)(b)(ii) of contracts entered into by the Attorney General or an agency for outside legal counsel.

SECTION 6. This act shall take effect and be in force from and after July 1, 2011.

ST: Sunshine attorney act; require review of certain contracts for outside counsel.