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Opinion No. 05-142

Qualifications for Employment of Surgical Technologists, Tenn. Code Ann. §§ 68-57-101, *et seq.*

QUESTIONS

1. When Tenn. Code Ann. §§ 68-57-101, *et seq.* takes effect on July 1, 2006, will certification be mandatory for all individuals seeking new employment as surgical technologists, with the exception of those individuals who fall within the provisions of Tenn. Code Ann. § 68-57-102(b)?
2. Does Tenn. Code Ann. § 68-57-102(a), which contains a grandfather clause, provide a time limit on eligibility for those who qualify for employment under the provisions of this section?

OPINIONS

1. No. When Tenn. Code Ann. §§ 68-57-101, *et seq.* takes effect on July 1, 2006, holding current national certification established by the Liaison Council on Certification for the Surgical Technologist (“LCC-ST”) is only one of several qualifications that an individual may satisfy under Tenn. Code Ann. §§ 68-57-101, *et seq.*, in order to be employed as a surgical technologist.
2. Yes. There are two time limits on eligibility described in Tenn. Code Ann. § 68-57-102(a).¹ First, a person may be employed as a surgical technologist upon providing sufficient evidence that the person began training to be a surgical technologist before July 1, 2006. Second, a person may be employed as a surgical technologist if the individual at any time was employed as a surgical technologist for not less than eighteen (18) months in a hospital, medical office, surgery center, or school. Such persons also must demonstrate continued competence under that section.

ANALYSIS

Tenn. Code Ann. §§ 68-57-101, *et seq.*, which takes effect July 1, 2006, establishes qualifications for employment as surgical technologists. Further, the Act provides alternative

¹We do not read the question as inquiring whether the eligibility of those grandfathered under this section subsequently would expire. In any event, Tenn. Code Ann. § 68-57-102(a) does not provide that such eligibility expires.

qualifications for employment, and exempts certain federal employees. Tenn. Code Ann. § 68-57-102. The license of a hospital, ambulatory surgical treatment center, or other such entity that violates any provision of the Act may be subject to penalties imposed by the Board for Licensing Healthcare Facilities under Tenn. Code Ann. § 68-11-207. Tenn. Code Ann. § 68-57-103. Further, a hospital, ambulatory surgical treatment center, or other such entity may petition the director of health care facilities of the Department of Health for a waiver from the provisions of the Act in accordance with the provisions of Tenn. Code Ann. § 68-57-104. Such waiver shall exempt a facility from the provisions of the Act for not more than six (6) months, and additional waivers may be granted, but all exemptions greater than twelve (12) consecutive months must be approved by the Board. *Id.*

1. Tenn. Code Ann. § 68-57-101(a) sets out requirements for individuals employed as surgical technologists.² Such individuals must:

(a)(1) Hold current national certification established by the Liaison Council on Certification for the Surgical Technologist (LCC-ST);

(2) Have completed a program for surgical technology accredited by the Commission on Accreditation of Allied Health Education Programs (CAAHEPP);

(3) Have completed an appropriate training program for surgical technologists in the armed forces or at a CAAHEP accredited hospital or CAAHEP accredited ambulatory surgical treatment center program. For the purposes of this chapter, “armed forces” means the army, navy, air force, marine corps, coast guard, or public health service of the United States; or

(4) Successfully complete the surgical technologists LCC-ST certifying exam.

Tenn. Code Ann. § 68-57-101(a)(1).

Further, that section provides in Tenn. Code Ann. § 68-57-101(b) that:

Any student who completes a surgical technology program that is in the process of becoming CAAHEP accredited on July 1, 2006, shall be considered a graduate of a CAAHEP accredited program.

Moreover, as is described below, the Act also provides additional qualifications for employment. Therefore, holding current national certification established by LCC-ST is only one of several qualifications that an individual may satisfy under Tenn. Code Ann. §§ 68-57-101, *et seq.*, in order to be qualified to be employed as a surgical technologist.

²Tenn. Code Ann. § 68-57-102(b) provides that “[n]otwithstanding any provision of law to the contrary, a surgical technologist in the service of the federal government is exempt from the provisions of this chapter while performing duties related to such employment.”

2. Tenn. Code Ann. § 68-57-102(a) also describes alternative qualifications for employment. That section provides that “[i]n addition to individuals identified in § 68-57-101, a person may be employed upon providing sufficient evidence that, prior to July 1, 2006, the person has begun training to be a surgical technologist, or was at any time employed as a surgical technologist for not less than eighteen (18) months in a hospital, medical office, surgery center, or school.” Subsequent to the Act’s enactment, the Legislature amended Tenn. Code Ann. § 68-57-102(a). 2005 Pub. Chap. 159 added the following language:

All individuals who are employed under this provision shall demonstrate continued competence in order to perform their professional duties in surgical technology. The employer will maintain evidence of the continued competence of such individuals. Continued competence activities may include but are not limited to continuing education, in-service training, or certification renewal.³

Id.

Tenn. Code Ann. § 68-57-102(a) contains what is known as a “grandfather clause.” A grandfather clause is “an exception to a restriction that allows all those already doing something to continue to do it, even if they would be stopped by the new restriction.” *Teague v. Campbell County*, 920 S.W.2d 219, 221 (Tenn. Ct. App. 1995), quoting Black’s Law Dictionary, 5th Ed. West. A grandfather clause exception in a statute must be construed strictly against the party who seeks to come within the exception. *Id.*, citing 73 Am.Jur 2d Statutes, § 313, p. 464. See also *Fleet Transport Co., Inc. v. Tennessee Public Service Commission*, 545 S.W.2d 4 (Tenn. 1976).

The grandfather clause in Tenn. Code Ann. § 68-57-102(a) provides two time limits on eligibility. First, a person may be employed as a surgical technologist upon providing sufficient evidence that the person began training to be a surgical technologist before July 1, 2006. Presumably, eventually the person will complete such training and qualify for employment as a surgical technologist under the provisions of Tenn. Code Ann. § 68-57-101. Yet, the grandfather clause in Tenn. Code Ann. §68-57-102(a) does not require completion of such training to be a surgical technologist. Under the time frame described in that section, a person grandfathered into employment as a surgical technologist because the person began training as a surgical technologist before July 1, 2006, may remain employed as a surgical technologist, provided that the person complies with the continued competency requirement mandated by 2005 Pub. Chap. 159.

Second, a person may be employed as a surgical technologist if the person was at any time employed as a surgical technologist for not less than eighteen (18) months in a hospital, medical office, surgery center, or school. Tenn. Code Ann. § 68-57-102(a) does not limit the eighteen-month time frame, and hence that section would permit a person to be employed as a surgical technologist

³We note, in passing, that the amendment to Tenn. Code Ann. § 68-57-102(a) that was enacted by 2005 Pub. Chap. 159 contains what appears to be a non sequitur in that it includes certification renewal among its continued competence activities. Persons who hold certification as described in Tenn. Code Ann. § 68-57-101(a) would not need to seek employment under the alternative qualifications provisions of Tenn. Code Ann. § 68-57-102(a).

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if the person had been so employed for not less than eighteen months at any time, regardless of the length of time that may have elapsed since such employment, provided that the person complies with the continued competency requirement mandated by 2005 Pub. Chap. 159.

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