WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706

June 11, 1975

FILE NO. S-912

LABOR:
Department of Labor
"Temporary Employment Agencies"

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Donald A. Johnson, Director
Department of Labor
State of Illinois
704 State Office Building
Springfield, Illinois 62706

Dear Director Johnson:

I have your letter wherein you state in part:

"Because of inquiries propounded to the Division of Private Employment Agencies of this Department in relation to so-called 'temporary employment agencies', a question exists as to the jurisdiction of this Division over these agencies under Chapter 48, Section 197. An interpretation in this matter would be constructive and appreciated by the Division.

The first question for consideration is: Does the Private Employment Agencies Act enable the Division of Private Employment Agencies to exercise its licensing and regulatory jurisdiction over these agencies?

> A factor involved is that presently, and in the past, these agencies advance the claim of an employer-employee relationship with applicants retained by them for temporary placements; therefore, the State regulatory agency has no jurisdiction over them.
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> When on analyzses [sic] the definition in the Act of 'employment agency' it readily becomes apparent that the gain or profit aspect included therein may very well apply to <u>any</u> agency unless it is specifically exempt (as is true of the management recruiting ones). As a matter of business fact, these temporary agencies have the object of turning a gain or profit.
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> Ultimately, the question for interpretation is whether the Division of Private Employment Agencies may assert jurisdiction over these agencies under the terms of the Act as it stands today regardless of the assertions advanced by these agencies which would have the effect of removing them from such jurisdiction. An agency would have gain or profit as an objective per se, and it seems extremely improbably that one would encounter a situation in which an agency would assert any other objective as a reason for its being organized as a business."

You have used the term "temporary employment agencies". Definition of such an agency is best given by example. A businessman's secretary may be on a week's vacation. Rather than hire a replacement on his own, the businessman may call a temporary employment agency. That agency will then send him a secretary who works for the week, and at the end of that time the agency will bill the businessman at a preagreed rate for

the services of the secretary. The secretary, in turn, is paid by the agency. The agency withholds whatever taxes need to be withheld and provides whatever insurance coverage is necessary. The secretary has, therefore, been employed by the agency but rendered services to the businessman who is a client of the agency. The services thus provided by such an agency may range from office work to manual labor.

The fact that the employment provided by such agencies is temporary offers no basis for exclusion from the terms of the Act. Temporary employment is specifically included. See the 8th grammatical paragraph of section 5. Ill. Rev. Stat. 1973, ch. 48, par. 197e.

At issue here is not whether a so-called "temporary employment agency" is within the commonly accepted concept of an employment agency. At issue is whether such a business falls within the definition of employment agency afforded by section 11 of "AN ACT to revise the law in relation to private employment agencies and to repeal an act therein named" (Ill. Rev. Stat. 1973, ch. 48, par. 197k) hereinafter the "Act", which provides in part:

> "The term 'employment agency' means any person engaged for gain or profit in the business of securing or attempting to secure employment for persons seeking employment or employees for employers. However, the term 'employment agency'

> shall not include any person engaged in the business of management consulting or management executive recruiting, * * *" (emphasis added.)

The apparent objective of this section is regulation of enterprises which are in the business of securing employment for persons, or employees for employers, for gain or profit. This statutory provision is, on its face, sufficiently broad to encompass a so-called "temporary employment agency" unless such an agency is specifically exempted [management consultants or management recruiters].

Gain or profit may be derived through the charging of a fee to clients. Section 11 of the Act (Ill. Rev. Stat. 1973, ch. 48, par. 197k) defines the term "fee" as follows:

> "The term 'fee' means money or a promise to pay money. The term 'fee' also means and includes the excess of money received by any such licensee over what he has paid for transportation, transfer of baggage, or lodging, for any applicant for employment. The term 'fee' also means and includes the difference between the amount of money received by any person, who furnishes employees or performers for any entertainment, exhibition or performance, and the amount paid by the person receiving the amount of money to the employees or performers whom he hires to give such entertainment, exhibition or performance."

Application of this section, however, is not limited to situations where a direct "fee" is charged clients. All

that is required for application of its provisions is that the business operate for gain or profit.

In Nitta v. Yamamoto, 107 A. 2d 515 N.J., (1954), the Supreme Court of New Jersey held that a person operating a business providing expert services to hatcheries in separating baby chicks by sex was carrying on an employment agency. In that case:

> "The method by which the hatcheries paid for having its chicks sexed was to give the sexor [employee] a check payable to plaintiff's American Chick Sexing Association. The checks and the sexor's weekly report were delivered to plaintiff who deposited the proceeds of the checks in a trust account, entered the amount in an account book. The proceeds, less the plaintiff's compensation as fixed in the sexor's contract, were paid to the sexor. Plaintiff deducted nothing for withholding taxes or social security taxes. (107 A. 2d 517.)

There have been, to date, no cases in Illinois involving application of the Act to "temporary employment agencies". In State ex rel. Weasmer v. Manpower of Omaha, (Neb. 1955), 73 N.W. 2d 692, 20 A.L.R. 3d 599, the Supreme Court of Nebraska interpreted an act which provided in relevant part:

> "The term employment agency means and includes the business of conducting * * * any agency * * * for the purposes of procuring * * * help or employments or engagements or for the registration of persons seeking such help * * * where a fee

> or other valuable consideration is exacted, or attempted to be collected, directly or indirectly, for such services * * *. Such term [fee] also includes the difference between the amount of money received by any such person who furnishes employees and the amount paid by him to such employees."

While the court placed some emphasis upon the last quoted sentence of the Nebraska statute, it pointedly implied that the preceding language, which parallels the Illinois provision, was sufficient to include "temporary employment agencies" The court stated:

> "Obviously this language covers the activities described in the petition. Even if there could be any doubt about this in the language preceding the last sentence, none could remain after reading this sentence. It points to the kind of acts described." (73 N.W. 2d at 697.)

The Illinois Act, on the other hand, specifically includes "contract labor agencies". (Ill. Rev. Stat. 1973, ch. 48, par. 197c; for a discussion of some such agencies and their various methods of operation see Epstein and Monat, Labor Contracting and Its Regulation, 1973 International Labor Review, 451 - 477, 513 - 529.) The inclusion of that term alone, may well provide sufficient grounds for inclusion of "temporary employment agencies" within the purview of the Illinois Act.

In the State v. Manpower of Omaha case, supra, the court dealt with a business which was:

> "* * * [O]pen to the public and the public is invited to avail themselves of the services offered by the respondent; that respondent interviews and lists in its files, without charge for registration, persons who come to it seeking part-time or temporary work; that other business organizations or persons interested in procuring such help notify respondent of their needs and respondent selects from its files a person deemed qualified to fulfill the request and dispatches him or her to the requesting organization or other person; that the requesting organization reports the actual hours that the worker dispatched has labored and respondent then bills the requesting organization at an hourly rate which is determined in advance according to the type of work requested or performed; that the hourly amount billed the requesting organization is greater than the hourly amount which is then paid to the person dispatched; that respondent keeps all records on the persons it dispatches, withholds social security and withholding taxes, maintains workmen's compensation insurance, liability insurance and fidelity bonds." (73 N.W. 2d 696.)

It is my opinion that the decision in State v. Manpower of Omaha, supra, is correct and a "temporary employment agency" is subject to regulation under the Illinois statute. This interpretation is consistent with the overall objectives of the Act.

It has also long been recognized that public regulation of private employment agencies is undertaken for the primary purpose of protecting applicants for employment against exploitation, dishonesty, unwholesome influence and the like, and it is firmly established that the State may, in exercise of its police power, regulate and license those carrying on the business

of a private employment agency. (27 Am. Jur. 2d at 466.) While statutes governing the licensing of, or otherwise regulating private employment agencies generally require strict construction as being regulatory and penal in nature, in interpreting such statutory regulations reference must be made to the evils sought to be overcome, so as to effectuate the statute rather than to destroy it. (Faingnaert v. Moss, 64 N.E. 2d 537; Janof v. Newsom, 53 F. 2d 149) Section 1 of the Act (Ill. Rev. Stat. 1973, ch. 48, par. 197a) provides in part:

> "It shall be the duty of the Department of Labor and it shall have power, jurisdiction and authority to issue licenses to employment agencies or agents, and to refuse to issue licenses whenever, after due investigation, the Department of Labor finds that the character of the applicant makes him unfit to be an employment agent, or when the premises proposed to be used for conducting the business of an employment agency, is found, upon investigation, to be unfit for such use. Any such license granted by the Department of Labor may also be revoked or suspended by it upon due notice to the holder of said license and upon due cause shown and hearing thereon. Failure to comply with the duties, terms, rules, conditions or provisions required by any law of this State governing employment agencies, or with any lawful order of the Department of Labor, shall be deemed cause to revoke or suspend such license. The Department of Labor shall have power, jurisdiction and authority to fix and order such reasonable rules and regulations for the conduct of the business of employment agencies, as may be necessary to carry out the laws relating to employment agencies.

> The Department shall not issue a license to operate an employment agency unless the applicant is a citizen of the United States. The applicant must furnish satisfactory proof to the Department that he has never been a party to any fraud, has no jail or prison record, belongs to no subversive societies, and is of good moral character. The applicant must furnish satisfactory proof to the Department that he is of business integrity and is financially responsible.
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> In determining moral character and qualification for licensing, the Department may take into consideration any criminal conviction of the applicant, but such a conviction shall not operate as a bar to licensing. * * * " (emphasis added.)

Section 1 is designed to insure honesty and fair dealing between the agency and the worker. There is nothing about the relationship between the agency and the worker in a temporary employment agency situation that would make the objectives of section 1 specifically, and the entire Act generally, less applicable to such agencies. In fact, the requirement of financial responsibility found in section 1 is perhaps more important to the worker employed by a temporary employment agency than to the worker who seeks out the service of an employment agency which only refers the worker to a prospective employer. In the temporary employment agency situation the worker must look to the agency for his entire wage for the work performed, whereas, in the other situation, the financial

responsibility of the agency is pertinent primarily to the extent of recovery of fees paid.

I have examined the case of Florida Industrial Com'n. v. Manpower of Miami, 91 So. 2d 197 (Fla., 1956), and I find the reasoning therein unpersuasive.

In conclusion, the division of private employment agencies of the Department of Labor has jurisdiction over so-called "temporary employment agencies" for purposes of regulation under the Act. Ill. Rev. Stat. 1973, ch. 48, par. 197a et seq.

Very truly yours,

ATTORNEY GENERAL