
 THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. **1236** Session of
2013

INTRODUCED BY KRIEGER, METCALFE, SWANGER, TURZAI, KAUFFMAN, DAY,
DeLUCA, EVERETT, JAMES, CUTLER, SAYLOR, R. MILLER, GINGRICH,
MOUL, GROVE, SACCONI, ENGLISH, LAWRENCE, COX, TALLMAN, RAPP,
SIMMONS, PYLE, MUSTIO, ROAE, ROCK, DUNBAR, GABLER, BLOOM,
REESE, BROOKS, DENLINGER AND CALTAGIRONE, APRIL 22, 2013

SENATOR SMUCKER, STATE GOVERNMENT, IN SENATE, AS AMENDED,
JUNE 27, 2014

AN ACT

1 Amending Title 62 (Procurement) of the Pennsylvania Consolidated
2 Statutes, providing for ~~contingency fee~~ LEGAL SERVICES <--
3 contracts.

4 The General Assembly of the Commonwealth of Pennsylvania
5 hereby enacts as follows:

6 Section 1. Title 62 of the Pennsylvania Consolidated
7 Statutes is amended by adding a section to read:

8 ~~§ 544. Contingency fee contracts.~~ <--

9 ~~(a) Scope. Nothing in this section shall be construed to~~
10 ~~expand the authority of the Commonwealth to enter into contracts~~
11 ~~if the authority never previously existed.~~

12 ~~(b) Procurement determination. When the head of the~~
13 ~~purchasing agency determines in writing that it is in the best~~
14 ~~interests of the Commonwealth for the agency to pay for legal~~
15 ~~services on a contingent fee basis, the determination shall be~~
16 ~~part of the contract file and a solicitation shall disclose that~~

1 ~~a contingent fee basis is the method of compensation for the~~
2 ~~procurement.~~

3 ~~(c) Prohibition.~~

4 ~~(1) The Commonwealth shall not enter into a contingency~~
5 ~~fee contract that provides for a legal entity to receive an~~
6 ~~aggregate contingency fee, exclusive of reasonable costs and~~
7 ~~expenses, in excess of \$50,000,000.~~

8 ~~(2) Except as provided for in paragraph (4), the~~
9 ~~Commonwealth shall not enter into a contingency fee contract~~
10 ~~that provides for a legal entity to receive an aggregate~~
11 ~~contingency fee, exclusive of reasonable costs and expenses,~~
12 ~~in excess of any of the following:~~

13 ~~(i) twenty five percent of any recovery up to~~
14 ~~\$10,000,000; plus~~

15 ~~(ii) twenty percent of any portion of such recovery~~
16 ~~between \$10,000,000 and \$15,000,000; plus~~

17 ~~(iii) fifteen percent of any portion of such~~
18 ~~recovery between \$15,000,000 and \$20,000,000; plus~~

19 ~~(iv) ten percent of any portion of such recovery~~
20 ~~between \$20,000,000 and \$25,000,000; plus~~

21 ~~(v) five percent of any portion of such recovery~~
22 ~~exceeding \$25,000,000.~~

23 ~~(3) A contingency fee shall not be based on a penalty or~~
24 ~~civil fine awarded or an amount attributable to a penalty or~~
25 ~~civil fine.~~

26 ~~(4) The Commonwealth shall not enter a contingency fee~~
27 ~~contract covering a securities class action that provides for~~
28 ~~a legal entity to receive an aggregate contingency fee,~~
29 ~~exclusive of reasonable costs and expenses, in excess of 20%~~
30 ~~of a portion of the recovery if any of the following:~~

1 ~~(i) The Commonwealth is appointed as lead plaintiff~~
2 ~~pursuant to section 21D(a)(3)(B)(i) of the Securities Act~~
3 ~~of 1933 (48 Stat. 74, 15 U.S.C. § 78u-4(a)(3)(B)(i)) or~~
4 ~~section 27 of the Securities Exchange Act of 1934 (48~~
5 ~~Stat. 881, 15 U.S.C. § 78aa).~~

6 ~~(ii) The Commonwealth is a class representative.~~

7 ~~(5) This subsection shall apply only to the~~
8 ~~Commonwealth's share of any judgment, settlement amount or~~
9 ~~common fund and shall not apply to the amount of attorney~~
10 ~~fees that may be awarded to a legal entity for representing~~
11 ~~other members of a class certified pursuant to the Rules of~~
12 ~~Civil Procedure or state class action procedures.~~

13 ~~(d) Applicability. This section shall not apply to~~
14 ~~contingency fee contracts where the gross amount of the award or~~
15 ~~settlement is less than \$100,000.~~

16 ~~(e) Control.—~~

17 ~~(1) A contingency fee contract for legal services~~
18 ~~entered into shall include all of the following provisions:~~

19 ~~(i) A Commonwealth attorney shall retain control~~
20 ~~over the course and conduct of the case.~~

21 ~~(ii) A Commonwealth attorney shall retain veto power~~
22 ~~over a decision made by outside counsel.~~

23 ~~(iii) A Commonwealth attorney shall attend all~~
24 ~~settlement conferences.~~

25 ~~(iv) Decisions regarding settlement of the case~~
26 ~~shall be reserved exclusively to the discretion of a~~
27 ~~Commonwealth attorney and the Commonwealth.~~

28 ~~(v) A Commonwealth attorney shall be subject to the~~
29 ~~Rules of Professional Conduct.~~

30 ~~(2) The head of the purchasing agency shall develop a~~

~~standard addendum to the contingency fee contract that shall be used in all cases, which shall include all of the following:~~

~~(i) A detailed description of the expectations for both the contracted legal entity and the Commonwealth.~~

~~(ii) The provisions listed in paragraph (1).~~

~~(f) Oversight.~~

~~(1) A copy of an executed contingency fee contract for legal services and the head of the purchasing agency's written determination under subsection (b) to enter into the contract shall be posted on the purchasing agency's website for public inspection no less than five business days after the date the contract is executed and shall remain posted on the website for the duration of the contract, including an extension or amendment to the contract.~~

~~(2) The cost of a contingency fee shall be posted on the purchasing agency's website no less than 15 days after the payment of the contingency fee and shall remain posted on the website for no less than 365 days.~~

~~(3) A contingency fee contract for legal services executed under this section shall be in writing and posted in accordance with Chapter 17 of the act of February 14, 2008 (P.L.6, No.3), known as the Right to Know Law.~~

~~(4) A legal entity under contract to provide legal services on a contingency fee basis shall, from the inception of the contract until no less than four years after the contract expires or is terminated, maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices and other financial transactions concerning the~~

~~1 legal services. The legal entity shall make all the records~~
~~2 available to the head of the purchasing agency, where they~~
~~3 will be available for inspection and copying upon request in~~
~~4 accordance with the Right to Know Law. The Commonwealth may~~
~~5 take reasonable steps to protect the evidentiary privileges~~
~~6 of the Commonwealth when producing the records under the~~
~~7 Right to Know Law. The legal entity shall maintain detailed~~
~~8 contemporaneous time records for the legal services in~~
~~9 increments of no greater than one tenth of an hour and shall~~
~~10 promptly provide the records upon request to the head of the~~
~~11 purchasing agency.~~

~~12 (5) By February 1 of each year, the head of the~~
~~13 purchasing agency shall submit a report to the President of~~
~~14 the Senate and the Speaker of the House of Representatives~~
~~15 describing the use of contingency fee contracts with legal~~
~~16 entities in the preceding calendar year. The Commonwealth may~~
~~17 take reasonable steps to protect the evidentiary privileges~~
~~18 of the Commonwealth when producing the report. The report~~
~~19 shall include, but not be limited to, the following:~~

~~20 (i) The contingency fee contracts entered into~~
~~21 during the year and all previously executed contingency~~
~~22 fee contracts that remain current and for each contract~~
~~23 describe all of the following:~~

~~24 (A) The name of the legal entity with whom the~~
~~25 purchasing agency has contracted, including the name~~
~~26 of the attorney representing the Commonwealth.~~

~~27 (B) The nature and status of the legal matter.~~

~~28 (C) The name of the parties to the legal matter.~~

~~29 (D) The amount of the recovery.~~

~~30 (E) The amount of the contingency fee paid.~~

1 ~~(ii) The copies of written determinations made under~~
2 ~~subsection (b).~~

3 ~~(g) Definitions. As used in this section, the following~~
4 ~~words and phrases shall have the meanings given to them in this~~
5 ~~subsection unless the context clearly indicates otherwise:~~

6 ~~"Commonwealth attorney." An attorney at law employed by the~~
7 ~~purchasing agency who is eligible to participate in the~~
8 ~~retirement system established under 71 Pa.C.S. Pt. XXV (relating~~
9 ~~to retirement for State employees and officers).~~

10 ~~"Legal entity." A private attorney at law, law firm,~~
11 ~~partnership, association or professional corporation.~~

12 ~~"Securities class action" An action brought as a class~~
13 ~~action that includes a claim for a violation of the Securities~~
14 ~~Act of 1933 (48 Stat. 74, 15 U.S.C. § 77a et seq.) or the~~
15 ~~Securities Exchange Act of 1934 (48 Stat. 881, 15 U.S.C. § 78a~~
16 ~~et seq.).~~

17 § 544. LEGAL SERVICES CONTRACTS.

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18 (A) GENERAL RULE.--A PURCHASING AGENCY SHALL DETERMINE THE
19 PAYMENT METHOD TO BE USED PURSUANT TO A LEGAL SERVICES CONTRACT
20 ENTERED INTO UNDER SECTION 515 (RELATING TO SOLE SOURCE
21 PROCUREMENT) OR 518 (RELATING TO COMPETITIVE SELECTION
22 PROCEDURES FOR CERTAIN SERVICES).

23 (B) CONTRACT.--THE METHOD OF COMPENSATION DETERMINED UNDER
24 SUBSECTION (A) SHALL BE PART OF THE CONTRACT FOR LEGAL SERVICES.

25 (C) DETERMINATION.--THE FOLLOWING FACTORS SHALL BE
26 CONSIDERED BY THE PURCHASING AGENCY WHEN SELECTING A CONTRACTOR
27 FOR LEGAL SERVICES:

28 (1) WHETHER OUTSIDE COUNSEL:

29 (I) POSSESSES THE REQUISITE SKILLS, EXPERTISE AND
30 STAFF TO HANDLE THE NATURE, SCOPE AND COMPLEXITY OF THE

1 MATTER.

2 (II) INTENDS TO ENGAGE OTHER COUNSEL OR FIRMS TO
3 ASSIST IN THE MATTER, AND THE MANNER IN WHICH THESE
4 COUNSEL OR FIRMS WILL BE COMPENSATED.

5 (III) IS IN COMPLIANCE WITH ALL APPLICABLE FEDERAL
6 AND STATE LAWS.

7 (2) THE ESTIMATED COSTS AND EXPENSES TO BE INCURRED TO
8 FULFILL THE LEGAL SERVICES CONTRACT.

9 (3) ANY OTHER FACTORS DEEMED NECESSARY BY THE PURCHASING
10 AGENCY.

11 (D) CONDUCT.--COMMONWEALTH ATTORNEYS SHALL BE SUBJECT TO THE
12 RULES OF PROFESSIONAL CONDUCT ESTABLISHED BY THE PENNSYLVANIA
13 SUPREME COURT UNDER SECTION 10(C) OF ARTICLE V OF THE
14 CONSTITUTION OF PENNSYLVANIA.

15 (E) POSTING.--A CONTRACT UNDER THIS SECTION SHALL COMPLY
16 WITH CHAPTER 17 OF THE ACT OF FEBRUARY 14, 2008 (P.L.6, NO.3),
17 KNOWN AS THE RIGHT-TO-KNOW LAW, SUBJECT TO ALL APPLICABLE
18 PRIVILEGES OR EXCEPTIONS.

19 (F) CONTINGENT FEES.--THE FOLLOWING SHALL APPLY:

20 (1) IN ORDER TO ENTER INTO A LEGAL SERVICES CONTRACT
21 PAID ON A CONTINGENT FEE BASIS, THE PURCHASING AGENCY SHALL
22 MAKE A WRITTEN DETERMINATION THAT PAYMENT ON A CONTINGENT FEE
23 BASIS IS ALL OF THE FOLLOWING:

24 (I) FEASIBLE AND EFFICIENT.

25 (II) IN THE BEST INTEREST OF THE COMMONWEALTH.

26 (2) CONTINGENT FEE CONTRACTS UNDER THIS SUBSECTION SHALL
27 COMPLY WITH ALL OF THE FOLLOWING:

28 (I) COMPENSATION SHALL NOT EXCEED 25% OF AN AWARD OR
29 SETTLEMENT IN FAVOR OF THE COMMONWEALTH.

30 (II) THE FOLLOWING PROVISIONS SHALL BE INCLUDED IN

1 THE CONTRACT:

2 (A) COMMONWEALTH ATTORNEYS DESIGNATED BY THE
3 HEAD OF THE PURCHASING AGENCY SHALL RETAIN FINAL
4 AUTHORITY OVER THE COURSE AND CONDUCT OF THE LEGAL
5 ACTION, INCLUDING AUTHORITY TO:

6 (I) REVIEW AND APPROVE ALL COURT FILINGS,
7 INCLUDING BRIEFS, PLEADINGS, MOTIONS AND OTHER
8 MATERIALS.

9 (II) VETO ANY DECISION OF OUTSIDE COUNSEL.

10 (III) RETAIN THE ABILITY TO HAVE DIRECT
11 CONTACT WITH ANY PARTY TO THE ACTION.

12 (IV) PARTICIPATE IN ANY CONFERENCE CALL,
13 HEARING, TRIAL OR COMMONWEALTH SETTLEMENT.

14 (B) THE COMMONWEALTH SHALL MAINTAIN THE
15 EXCLUSIVE AUTHORITY TO ACCEPT A SETTLEMENT.

16 (C) A DETAILED DESCRIPTION OF THE EXPECTATIONS
17 FOR BOTH THE CONTRACTOR AND THE COMMONWEALTH.

18 (III) A CONTINGENT FEE SHALL NOT BE BASED ON A
19 PENALTY OR CIVIL FINE AWARDED OR AN AMOUNT ATTRIBUTABLE
20 TO A PENALTY OR CIVIL FINE.

21 (IV) A CONTRACTOR THAT PROVIDES LEGAL SERVICES
22 PURSUANT TO A CONTINGENT FEE AGREEMENT SHALL MAINTAIN
23 DETAILED CURRENT RECORDS AND DOCUMENTATION OF ALL
24 EXPENSES, CHARGES, CREDITS, RECEIPTS AND OTHER FINANCIAL
25 RECORDS RELATING TO THE LEGAL SERVICES PROVIDED FOR NO
26 LESS THAN FOUR YEARS FROM THE EXECUTION OF THE CONTRACT.

27 (3) BY FEBRUARY 1 OF EACH YEAR, THE HEAD OF THE
28 PURCHASING AGENCY SHALL SUBMIT A REPORT TO THE PRESIDENT PRO
29 TEMPORE, MAJORITY LEADER AND MINORITY LEADER OF THE SENATE,
30 AND THE SPEAKER, MAJORITY LEADER AND MINORITY LEADER OF THE

1 HOUSE OF REPRESENTATIVES RELATING TO THE USE OF CONTINGENCY
2 FEE CONTRACTS UNDER THIS SECTION IN THE PRECEDING CALENDAR
3 YEAR. SUBJECT TO ALL APPLICABLE PRIVILEGES, THE REPORT SHALL
4 INCLUDE ALL OF THE FOLLOWING INFORMATION:

5 (I) ALL CURRENT CONTINGENT FEE CONTRACTS OR
6 CONTRACTS THAT EXPIRED IN THE CALENDAR YEAR, WITH
7 DESCRIPTION OF ALL OF THE FOLLOWING:

8 (A) THE NAME OF THE OUTSIDE COUNSEL AND THE NAME
9 OF THE ATTORNEY REPRESENTING THE COMMONWEALTH.

10 (B) THE NATURE AND STATUS OF THE MATTER.

11 (C) THE NAME OF THE PARTIES TO THE MATTER.

12 (D) THE AMOUNT OF ANY RECOVERY BY THE
13 COMMONWEALTH.

14 (E) THE AMOUNT OF ANY CONTINGENT FEE PAID AT THE
15 CONCLUSION OF THE LITIGATION.

16 (II) THE WRITTEN DETERMINATIONS MADE UNDER PARAGRAPH
17 (1).

18 (4) THIS SUBSECTION SHALL NOT APPLY TO CONTRACTS WHERE
19 THE GROSS AMOUNT OF THE AWARD OR SETTLEMENT IS LESS THAN
20 \$100,000.

21 (5) THE REPORT SHALL NOT INCLUDE MATTERS THAT ARE
22 RELATED TO AN ONGOING INVESTIGATION.

23 (G) APPLICABILITY.--THIS SECTION SHALL NOT APPLY TO LEGAL
24 SERVICES CONTRACTS ENTERED INTO BY THE PUBLIC SCHOOL EMPLOYEES'
25 RETIREMENT SYSTEM OR THE STATE EMPLOYEES' RETIREMENT SYSTEM.

26 (H) DEFINITIONS.--AS USED IN THIS SECTION, THE FOLLOWING
27 WORDS AND PHRASES SHALL HAVE THE MEANINGS GIVEN TO THEM IN THIS
28 SUBSECTION UNLESS THE CONTEXT CLEARLY INDICATES OTHERWISE:

29 "COMMONWEALTH ATTORNEY." AN ATTORNEY AT LAW EMPLOYED BY THE
30 PURCHASING AGENCY WHO IS ELIGIBLE TO PARTICIPATE IN THE

1 RETIREMENT SYSTEM UNDER 71 PA.C.S. PT. XXV (RELATING TO
2 RETIREMENT FOR STATE EMPLOYEES AND OFFICERS).
3 "OUTSIDE COUNSEL." A PRIVATE ATTORNEY AT LAW, LAW FIRM,
4 PARTNERSHIP, ASSOCIATION OR PROFESSIONAL CORPORATION.

5 Section 2. This act shall take effect in 60 days.