



MEMORANDUM

TO: Texas CEC Members

FROM: Steve Stagner
Executive Director

DATE: June 9, 2003

SUBJ: TBPE Sunset/Use of Title

As you are probably aware, one of the most significant issues we faced as an industry during the recently concluded legislative session was the Sunset review of the Board of Professional Engineers. One of the biggest controversies within this issue was the matter of who can legally use the title “engineer” in business activities and on what terms they can do so. Since this was such an emotional issue, and because you might hear differing judgments from the various engineering organizations about the outcome, I would like to provide you a final detailed update on how this controversy was resolved and why the CEC leadership believes that the resolution was appropriate.

Historically under Texas law, only licensed professional engineers have been entitled to use the term “engineer.” Unfortunately, however, this law has been sporadically enforced and has been honored in the breach as much as in the observance, particularly in the computer, electronics and high-tech industries. Consequently, when this issue began to be debated last fall, we were confronted with a situation where “the horse was out of the barn.”

CEC members would almost unanimously have preferred to maintain the existing law if possible. The State Legislative Committee, however, was convinced that some change was likely. The SLC was also concerned that a head-on fight with the computer industry could have resulted in an outcome in which this industry managed to get itself exempted from the Engineering Practice Act, even as to its consulting activities. This outcome has occurred in other states, such as California. The SLC opted to explore a compromise on the issue, which is what was ultimately enacted.

What Does SB 277 Do?

First, it is important to note that SB 277 addresses the engineer title issue in two ways – it both

- (1) revises the industry exemption and
- (2) addresses the use of title under the exemption.

The so-called “industry exemption” has been in the Texas Engineering Practice Act for decades. It provides that engineers working within industry performing services only for a company are not required to be licensed. (In many ways, this is dubious public policy. Would anyone argue that a doctor working for Exxon only on Exxon’s employees should not be licensed? Nevertheless, it is long-standing law.)

The existing industrial exemption in Texas is extremely vague. It applies to

Any regular full-time employee of a private corporation . . . who is engaged solely and exclusively in performing services for such corporation . . . ; provided, such employee’s services are on, or in connection with, property owned or leased by such private corporation . . . or whose services affect exclusively the property, products or interest of such private corporation . . . ; and, provided further, that such employee does not have the final authority for the approval of, and the ultimate responsibility for, engineering designs, plans, or specifications pertaining such property or products which are to be incorporated into fixed works, systems, or facilities on the property of others or which are to be made available to the general public. . . .

SB 277 revises this to state:

This chapter shall not be construed to apply to the activities of a private corporation . . . or the activities of the full-time employees or other personnel under the direct supervision and control of the business entity, on or in connection with

- (1) reasonable modifications to existing buildings, facilities, or other fixtures to real property not accessible to the general public, or
- (2) activities related only to the research, development, design, fabrication, production, assembly, integration or service of products manufactured by the entity.

SB 277 adds clarification that the exemption is not intended to prevent a licensed engineer who is incorporating a manufactured product into a fixed work or facility from requiring a manufacturer to have plans and specifications sealed by a P.E. Furthermore, the bill gives the Board of P.E.s the ability to require by rule that certain manufactured products delivered to or used by the public must be designed and sealed by a P.E. Thus, not only can a P.E. require a pipe or truss manufacturer to provide sealed specifications, but the TBPE can require all pipes, trusses, manufactured buildings or other manufactured products be provided with sealed plans and specifications.

Finally, SB 277 ties the use of the title to these exemptions. The bill provides that a regular employee of a business entity who is engaged in engineering activities but is exempt under the industry exemption or the utility exemption is not prohibited from using the title on a business card or cover letter as long as the person does not:

- (1) offer to the public to perform engineering services; or
- (2) use the title in any context outside the scope of the exemption in a manner that represents an ability or willingness to perform engineering services or make an engineering judgment requiring a licensed professional engineer.

What Does All This Mean?

- **The “industrial exemption” is clarified but is essentially the same is scope.** Under the old language, almost all work on a company’s own property arguably could be exempt from engineering requirements, including significant new construction, civil site work, or other major projects. Under the new language, the exemption is limited to minor modifications to buildings and facilities; it is also limited to property not accessible to the general public. The exemption does not, as some have argued, extend to contractors or consultants. The phrase “full-time employees or other personnel under the entity’s direct supervision and control” was added to cover contract labor that is working in a company 40 hours a week under the direct supervision of the company, but this does not extend to a contractor as that term is usually meant and certainly does not extend to consultants.
- **Work that employees do on a company’s own products is exempted, but only as to their own products.** The exemption covers, for example, a Dell employee working on a Dell product installed off-site, but it does not cover a person calling himself a “computer engineer” or “software engineer” who is consulting with a company helping them choose between competing systems. That person may not use the title without being licensed, and if he is offering to the public a service that the Board defines as engineering he would be required to be licensed.
- **The new language does not allow companies to call any employee an engineer.** The new law requires that a person must be performing engineering activities in order to use the title. Since only the Board of P.Es. can define what is and is not engineering, this provides some element of control. In all likelihood, it also means that the Board will be forced to confront and define what is and is not engineering in the computer and technology industry.
- **A person who has the engineer title by virtue of the exemption may not make representations about his or her ability to make engineering judgments outside the scope of employment.** The prohibition is very broad. It encompasses use of the title outside the scope of employment in any context that represents an ability to make an engineering judgment that requires a licensee. We have used the example of an unlicensed chemical company engineer who testifies before a city council that as an engineer he knows that the drainage plan for a subdivision is inadequate. This is a violation of the Act. To some extent this makes the enforcement of the provision more difficult, since it puts the focus of enforcement on the context in which a representation is made rather than on the mere use of title. On the other hand, it puts the focus where it should be in terms of protecting the public.

- ***The consequences of a violation of the use of title are serious.*** A person who has the title by virtue of an exemption and who violates the prohibition on misusing the title is subject to a variety of sanctions – administrative penalties, criminal penalties, and (perhaps most significant) loss of the exemption for ten years. In other words, if a person works in industry performing engineering but is not licensed, and that person is found by the Board to have misused the title, he or she may not perform engineering work for an industry without being licensed for ten years. We encourage you to bring to our attention persons who violate the provision. We negotiated the compromise with industry in good faith, but with the understanding that the broader language would not be abused. We will not hesitate to pursue enforcement against an unlicensed individual who uses the title inappropriately outside of his or her job activities.
- ***Engineers-in-Training.*** As this issue went forward during the session, CEC members argued that it was unfair to allow expanded use of the title by industry engineers yet still require EITs in your firms to use that title. Therefore, SB 277 allows graduate engineers in registered firms working under the supervision of a licensed P.E. to be called an “engineer” (but not a P.E.) on business cards.

I hope this is helpful in explaining where we ended up on this important issue. While most of our members would have preferred no change, this was not a viable or politically realistic option. Nevertheless, we believe the outcome protects the business and professional interests of CEC members to the greatest extent practicable.