SUBJECT: Confidentiality of communications in an employer's ombudsman program

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 5 ayes — B. Cook, Strama, Madden, Miller, Raymond

1 nay — Talton

3 absent — P. King, Martinez Fischer, Woolley

WITNESSES: For —Sean Banks, Shell Oil Co. and International Ombudsman Program; John C. Fleming; Ralph Hasson; Charles L. Howard; Cyndi Taylor Crier, USAA; Amos Morale, Jr., Marathon Oil Co.; (*Registered, but did not testify*: Jeff Clark, American Electronics Assoc.; Brent Connett, Texas Conservative Coalition; Robert Howden, Texas Association of Manufacturers; Terry Roberts, Texas Employment Law Council; Ben Sebree, Texas Oil & Gas Assoc.)

Against — None

On— Nathanael Haddox, Texas Tech University; Ann Rav, Self and M.D. Anderson Cancer Center

BACKGROUND: Civil Practice and Remedies Code, sec. 154.073 provides protection for confidential communications made by a participant in an alternative dispute resolution procedure.

DIGEST: CSHB 3578 would allow an employer to establish an ombudsman program for alternative dispute resolution services to provide information, facilitation, mediation, and conciliation guidance and assistance to:

- help employees resolve workplace and organizational disputes; and
- permit employees to have confidential communications on issues of concern or conflict, including allegations of organizational misconduct.

An ombudsman program established by an employer:

- would have to be neutral and functionally independent;
- would not be authorized to make managerial decisions with regard to any issue brought to the program;
- would not be responsible for any essential business function of the employer, including operations, compliance, human resources, or equal employment opportunity;
- could not be staffed by employees who held other positions such as operations, compliance, human resources, or equal employment opportunity;
- could not be staffed by an officer or director of the employer; and
- would be required to have direct access to the employer's senior management.

An employer ombudsman program would not have the authority to:

- receive notice of claims against employer;
- collect, assemble, or maintain permanent information or records relating to confidential communications for the employer; or
- conduct a formal investigation for the employer.

The program and the employer would have to adequately publicize the existence, purpose, and limitations of the program and inform employees and others that communications with the programs were confidential. The employer would build procedures and facilities into the program adequate to permit private access to the program's office and to preserve confidential communications. The program would have to adhere to generally accepted standards for ombudsman programs on confidentiality of communications.

The ombudsman program's oral and written communications would be privileged, confidential, and not subject to discovery or for use as evidence in any judicial or administrative hearing, including:

- communications between a staff member of the program and an employee or other person regarding informal and expeditious resolution of a concern or complaint; and
- communications between staff members of the program for the resolution of a concern or complaint.

Notwithstanding these confidentiality rules, a staff member of the ombudsman program could voluntarily disclose confidential information if

the staff member determined disclosure was necessary to prevent an imminent threat of serious harm. Information discovered or disclosed in violation of these confidentially rules would not admissible as evidence in any proceeding or for any other purpose.

The ombudsman confidentiality provisions would be in addition to statutory or common law privileges, including attorney-client, and attorney work product privilege.

The bill would specify that the confidentiality provisions for the ombudsman program would not prevent:

- the discovery or admissibility of information that was otherwise discoverable;
- the disclosure of information for ombudsman research or educational purposes, provided the identity of the parties and specific issues were not identifiable; or
- the preparation and disclosure of statistical summary reports based on a sufficiently large number of issues so that the identify of parties and specific issues were not identifiable.

The bill would take effect September 1, 2007.

SUPPORTERS SAY:

CSHB 3578 would enable an ombudsman program to maintain the confidentiality of communications with employees who came forward as whistleblowers so that they would not fear retaliation, forced retirement, or firing due to their communications.

Similar to formal Alternative Dispute Resolution (ADR), ombudsman programs within companies provide a non-adversarial forum for confidential communications between employees and ombudsman staff to enable those employees to report fraud and abuse without implicating themselves. However, unlike ADR, ombudsman programs currently do not have protection under the law to keep their program's communications confidential and have had limited success in protecting the identity of parties when subpoenaed to testify in a formal proceeding. Companies that realize the pervasiveness of corporate fraud and take affirmative action by paying for ombudsman programs to ensure the disclosure of internal fraud by employees should have legal protection from revealing confidential communications.

The author plans to offer a floor amendment to clarify that the confidentiality protection provided in the bill would be available to employers if they chose to adopt the program's guidelines expressly in writing. If an employer had an existing ombudsman program that did not correlate with the bill's regulations, then the employer could opt-out.

OPPONENTS SAY:

Courts should be able to obtain access to the ombudsman's confidential information for good cause. Confidentiality cannot be absolute when it comes to deposition, subpoena, and discovery in a case involving confidential conversations.

The court system is a neutral, independent dispute resolution forum, and therefore the ombudsman program is unnecessary. Although the program would be voluntary, creating the ombudsman program specifically in law would open the door for future legislatures to mandate that all employers resolve claims through an ombudsman rather than using ADR or litigation.

NOTES:

Rep. Rose plans to offer a floor amendment to provide that the bill would not apply to an ombudsman program or other alternative dispute resolution service established by an employer unless the program or service provided expressly in writing that the regulations applied to the program. The amendment also would specify that CSHB 3578 would not prevent an employer from establishing an ombudsman program or other alternative resolution service that was not subject to the bill's regulations.