

In the  
**Supreme Court of Ohio**

STATE OF OHIO, ex rel.  
MARGARITA R. GLENN,

Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,  
and  
COLUMBUS PUBLIC SCHOOLS,

Appellees.

: Case No. 2007-2420

:  
: On Appeal from the Franklin County  
: Court of Appeals, Tenth Appellate  
: District Case No. 07AP-089

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**MERIT BRIEF OF APPELLEE,  
INDUSTRIAL COMMISSION OF OHIO**

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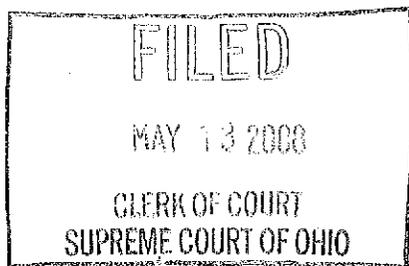


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## INTRODUCTION

The question before this Court is whether, under Ohio workers' compensation law, a teacher who ordinarily works only during the nine-month school year can receive temporary total disability ("TTD") during the summer months when she was not expected to work. Appellant/Relator Margarita Glenn ("Glenn") appeals the Tenth District Court of Appeals' decision that denied her request for a writ of mandamus. *State ex rel. Glenn v. Indus. Comm.*, Franklin App. No. 07AP-89, 2007-Ohio-6535, ¶10 ("*Glenn*"). The Tenth District found that Glenn must prove not only a physical or psychological inability to perform her job, but also that the inability to return to work was proximately caused by the industrial injury, and not some other factor, such as summer recess. *Id.* at ¶39. Contrary to Glenn's argument, the Tenth District did not find that she voluntarily abandoned her employment on the last day of the school year until the first day of the next school year. Rather, the lower court correctly found that, absent proof of intent to secure employment during the summer recess, Glenn failed to show that her inability to work at that time was proximately caused by the industrial injury. *Id.* at ¶¶6-7.

Glenn's argument invites this Court to abandon the requirement of proximate cause for workers' compensation awards, reverse a holding that the Tenth District did not reach and discard a principle—voluntary abandonment—not at issue here. The court below correctly found the commission within its discretion to deny Glenn TTD during summer recess. Accordingly, the commission urges this Court to affirm the Tenth District and deny Glenn's request for writ of mandamus.

## STATEMENT OF THE CASE AND FACTS

Glenn suffered an industrial injury to her right hip and thigh on October 8, 2004 and also had an allowed psychological condition stemming from the injury. Second Supplement to the Merit Brief of Appellee at p. 1 (“SS. \_\_\_\_”). She received a closed period of TTD ending in January 2005. *Id.* Glenn sought another period of TTD due to her psychological condition from June 29, 2005 and continuing. SS. 3.

The commission granted the second period of TTD but denied any award for the summer recess in 2005. SS. 5-6. The commission found that Glenn was not entitled to TTD during the summer because she “is a school teacher who customarily did not work during the summer months.” SS. 5. The commission relied on a letter from Columbus Public Schools confirming that their records from 2002 through 2005 “found no indication that Ms. Glenn worked during the normal summer breaks.” SS.7. Glenn submitted no evidence that she had worked during prior summer recesses or that she intended to work in the summer of 2005; relying on this lack of evidence, the commission, denied TTD. SS. 5-6. The commission revisited the issue a year later and denied Glenn TTD for the 2006 summer recess, again because Glenn submitted no “proof of any intent to work during this summer break.” SS. 7-8.

Glenn filed a complaint in mandamus in the Tenth District, seeking a writ of mandamus vacating both orders that deny TTD during summer breaks. The Tenth District found that the commission did not abuse its discretion in denying Glenn TTD during the summer recesses of 2005 and 2006. *Glenn* at ¶ 27-28. Glenn now appeals the Tenth District’s decision.

## ARGUMENT

### **Industrial Commission's Proposition of Law:**

*A claimant schoolteacher is not entitled to temporary total disability during summer recess absent a showing that she intended to engage in some other work during the summer, but could not because of the industrial injury.*

- A. A claimant schoolteacher is not entitled to TTD during the summer months if she had no intent to work during that time, as the receipt of TTD benefits where there is no intent to work creates a windfall.**

Glenn is not entitled to TTD for the summer recess, because it is the seasonal nature of her work as a schoolteacher, rather than her industrial injury, that prevents her return to work at those times. The same legal issue—but with a significant factual difference—was analyzed and discussed in *State ex rel. Crim v. Ohio Bureau of Workers' Comp.*, 92 Ohio St.3d 481, 2001-Ohio-1268.. In *Crim*, this Court held that a schoolteacher who was injured during the course of the school year was entitled to TTD during the summer, because she demonstrated the intent to obtain summer employment but was prevented from doing so due to her injury. The *Crim* Court made clear that the teacher's intent to work over the summer controlled whether she could get TTD for the summer months:

[T]he claimant would not be entitled to [TTD] if she had no intent to work during the summer, since the receipt of benefits where there is no intent to work would create a windfall. But the payment of [TTD] would not create a windfall if the claimant planned to work during the summer recess and an injury prevented that occurrence.

92 Ohio St.3d at 485, citing *Outland v. Monmouth-Ocean Edn. Serv. Comm.* (1998), 154 N.J. 531, 713 A.2d 460. Thus, if a teacher can show an intent to work during the summer, she can receive TTD, but if there was no intent to work during the summer, “the receipt of benefits . . . would create a windfall.”

The outcome in this case is different from that in *Crim*, not because the legal principle is different, but because the facts are different. In *Crim*, the teacher showed that she had, in

previous summers, worked for the YMCA until school started again in the fall. She also showed that she intended to work there again during the next summer, but was prevented from doing so because of her injury. 92 Ohio St.3d at 484.

Here, in contrast to *Crim*, the teacher had apparently never worked during the summers, and produced no evidence of either previous summer employment or an intent to find employment for the summers at issue. Glenn would receive a windfall if she received TTD for the 2005 and 2006 summer recesses because she never intended to work during those periods. Intent “may be inferred from words spoken, acts done, and other objective facts [and] being a factual question is a determination for the commission.” *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 297. Evidence here shows no words spoken, acts done or other objective facts supporting Glenn’s intent to work during the summers of 2005 or 2006. SS. 5 and 8. Indeed, the evidence shows that between 2002 and her injury Glenn never worked during summer recesses. SS. 7. Thus, the commission was within its discretion to find that Glenn did not intend to earn wages during the summer recesses of 2005 and 2006, and thus that she was not entitled to TTD.

Moreover, denying Glenn TTD based on *Crim* fits the general rationale for the award of TTD. The *Crim* Court looked at whether the injury, and not some other factor, caused the inability to work. The receipt of TTD “rests on a claimant’s inability to return to his or her former job as a direct result of an industrial injury.” *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 6 (emphasis added). That is, the industrial injury, and not some other factor, must prevent the return to work. The Court has recognized several “other factors” that prevent an award of TTD. See, e.g. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44 (voluntary retirement unrelated to the industrial injury), *State ex rel. Ashcraft v.*

*Indus. Comm.* (1987), 34 Ohio St.3d 42 (incarceration), *State ex rel. McGraw v. Indus. Comm.* (1990), 56 Ohio St.3d 137 (voluntary resignation unrelated to the injury), *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401 (involuntary termination deemed voluntary due to violation of a written work rule) and *State ex rel. Cobb v. Indus. Comm.* (2000), 88 Ohio St.3d 54 (involuntarily termination for violation of company drug policy).

Here, the “other factor” preventing Glenn’s return to work is the seasonal nature of the work: a schoolteacher’s employment contract contemplates employment only for the school year. In the case of a schoolteacher or other seasonal worker, it is the lack of work during the off-season—not the injury—that prevents the return to the job. While her injuries may render Glenn unable to perform the job duties of teaching, her injuries do *not* prevent Glenn from returning to her teaching position during the summer. During the summer recess, there is no teaching position to which Glenn may return. Thus, Glenn is not entitled to TTD during the summer recesses, but TTD should resume, as it did here, on the first day that teachers were to report for the next school term.

In short, under the rationale of *Crim*, awarding TTD to Glenn “would create a windfall.” The commission was well within its discretion to deny her the benefits.

**B. Voluntary abandonment does not apply here, and was never asserted by any party.**

Finally, this is the wrong case to entertain a break with the Court’s precedent regarding “voluntary abandonment.” Glenn invites this Court to overrule its prior decisions and discard the “voluntary abandonment” defense as one of the “other factors” noted above. But this case does not present a question of voluntary abandonment. Neither the employer nor the commission has ever asserted voluntary abandonment as a defense in this case, nor could they. The *Crim* Court has already held that teachers do not “voluntarily abandon” their positions during the summer. 92 Ohio St.3d at 484. As explained above, it is the seasonal nature of the work—not voluntary

abandonment—that prevents a teacher from receiving TTD during the summer. Only if the teacher presents proof that she intended to find off-season work, as the teacher did in *Crim*, can she receive TTD for the summer months.

The Court should ignore the call to abandon a doctrine not at issue here.

### CONCLUSION

For the above reasons, the commission urges the Court to affirm the Court of Appeals and deny issue of the writ of mandamus.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee-Respondent Industrial Commission of Ohio was served by U.S. mail this 13th day of May, 2008, upon the following counsel:

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## **APPENDIX**

\*\*\* ARCHIVE MATERIAL \*\*\*

\* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY \*  
 \* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 18, 2005 \*  
 \* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2005 \*

CHAPTER 4123. WORKERS' COMPENSATION, COMPENSATION; BENEFITS  
*ORC Ann. 4123.54 (2005)*

§ 4123.54. Compensation in case of injury or death; chemical tests; agreement if work performed in another state

(A) Every employee, who is injured or who contracts an occupational disease, and the dependents of each employee who is killed, or dies as the result of an occupational disease contracted in the course of employment, wherever such injury has occurred or occupational disease has been contracted, provided the same were not:

(1) Purposely self-inflicted; or

(2) Caused by the employee being intoxicated or under the influence of a controlled substance not prescribed by a physician where the intoxication or being under the influence of the controlled substance not prescribed by a physician was the proximate cause of the injury, is entitled to receive, either directly from the employee's self-insuring employer as provided in *section 4123.35 of the Revised Code*, or from the state insurance fund, the compensation for loss sustained on account of the injury, occupational disease, or death, and the medical, nurse, and hospital services and medicines, and the amount of funeral expenses in case of death, as are provided by this chapter.

(B) For the purpose of this section, provided that an employer has posted written notice to employees that the results of, or the employee's refusal to submit to, any chemical test described under this division may affect the employee's eligibility for compensation and benefits pursuant to this chapter and Chapter 4121. of the Revised Code, there is a rebuttable presumption that an employee is intoxicated or under the influence of a controlled substance not prescribed by the employee's physician and that being intoxicated or under the influence of a controlled substance not prescribed by the employee's physician is the proximate cause of an injury under either of the following conditions:

(1) When any one or more of the following is true:

(a) The employee, through a qualifying chemical test administered within eight hours of an injury, is determined to have an alcohol concentration level equal to or in excess of the levels established in divisions (A)(2) to (7) of *section 4511.19 of the Revised Code*;

(b) The employee, through a qualifying chemical test administered within thirty-two hours of an injury, is determined to have one of the following controlled substances not prescribed by the employee's physician in the employee's system that tests above the following levels in an enzyme multiplied immunoassay technique screening test and above the levels established in division (B)(3) of this section in a gas chromatography mass spectrometry test:

- (i) For amphetamines, one thousand nanograms per milliliter of urine;
- (ii) For cannabinoids, fifty nanograms per milliliter of urine;
- (iii) For cocaine, including crack cocaine, three hundred nanograms per milliliter of urine;
- (iv) For opiates, two thousand nanograms per milliliter of urine;
- (v) For phencyclidine, twenty-five nanograms per milliliter of urine.

(c) The employee, through a qualifying chemical test administered within thirty-two hours of an injury, is determined to have one of the following controlled substances not prescribed by the employee's physician in the employee's system that tests above the following levels by a gas chromatography mass spectrometry test:

- (i) For amphetamines, five hundred nanograms per milliliter of urine;
- (ii) For cannabinoids, fifteen nanograms per milliliter of urine;
- (iii) For cocaine, including crack cocaine, one hundred fifty nanograms per milliliter of urine;
- (iv) For opiates, two thousand nanograms per milliliter of urine;
- (v) For phencyclidine, twenty-five nanograms per milliliter of urine.

(d) The employee, through a qualifying chemical test administered within thirty-two hours of an injury, is determined to have barbiturates, benzodiazepines, methadone, or propoxyphene in the employee's system that tests above levels established by laboratories certified by the United States department of health and human services.

(2) When the employee refuses to submit to a requested chemical test, on the condition that that employee is or was given notice that the refusal to submit to any chemical test described in division (B)(1) may affect the employee's eligibility for compensation and benefits under this chapter and Chapter 4121. of the Revised Code.

(C) (1) For purposes of division (B) of this section, a chemical test is a qualifying chemical test if it is administered to an employee after an injury under at least one of the following conditions:

(a) When the employee's employer had reasonable cause to suspect that the employee may be intoxicated or under the influence of a controlled substance not prescribed by the employee's physician;

(b) At the request of a police officer pursuant to *section 4511.191 [4511.19.1] of the Revised Code*, and not at the request of the employee's employer;

(c) At the request of a licensed physician who is not employed by the employee's employer, and not at the request of the employee's employer.

(2) As used in division (C)(1)(a) of this section, "reasonable cause" means, but is not limited to, evidence that an employee is or was using alcohol or a controlled substance drawn from specific, objective facts and reasonable inferences drawn from these facts in light of experience and training. These facts and inferences may be based on, but are not limited to, any of the following:

(a) Observable phenomena, such as direct observation of use, possession, or distribution of alcohol or a controlled substance, or of the physical symptoms of being under the influence of alcohol or a controlled substance, such as but not limited to slurred speech, dilated pupils, odor of alcohol or a controlled substance, changes in affect, or dynamic mood swings;

(b) A pattern of abnormal conduct, erratic or aberrant behavior, or deteriorating work performance such as frequent absenteeism, excessive tardiness, or recurrent accidents, that appears to be related to the use of alcohol or a controlled substance, and does not appear to be attributable to other factors;

(c) The identification of an employee as the focus of a criminal investigation into unauthorized possession, use, or trafficking of a controlled substance;

(d) A report of use of alcohol or a controlled substance provided by a reliable and credible source;

(e) Repeated or flagrant violations of the safety or work rules of the employee's employer, that are determined by the employee's supervisor to pose a substantial risk of physical injury or property damage and that appear to be related to the use of alcohol or a controlled substance and that do not appear attributable to other factors.

(D) Nothing in this section shall be construed to affect the rights of an employer to test employees for alcohol or controlled substance abuse.

(E) For the purpose of this section, laboratories certified by the United States department of health and human services or laboratories that meet or exceed the standards of that department for laboratory certification shall be used for processing the test results of a qualifying chemical test.

(F) The written notice required by division (B) of this section shall be the same size or larger then the certificate of premium payment notice furnished by the bureau of workers' compensation and shall be posted by the employer in the same location as the certificate of premium payment notice or the certificate of self-insurance.

(G) Whenever, with respect to an employee of an employer who is subject to and has complied with this chapter, there is possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is or is to be performed in a state or states other than Ohio, the employer and the employee may agree to be bound by the laws of this state or by the laws of some other state in which all or some portion of the work of the employee is to be performed. The agreement shall be in writing and shall be filed with the bureau of workers' compensation within ten days after it is executed and shall remain in force until terminated or modified by agreement of the parties similarly filed. If the agreement is to be bound by the laws of this state and the employer has complied with this chapter, then the employee is entitled to compensation and benefits regardless of where the injury occurs or the disease is contracted and the rights of the employee and the employee's dependents under the laws of this state are the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the employee's employment. If the agreement is to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and the employee's dependents under the laws of that state are the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the employee's employment without regard to the place where the injury was sustained or the disease contracted.

If any employee or the employee's dependents are awarded workers' compensation benefits or recover damages from the employer under the laws of another state, the amount awarded or recovered, whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee or the employee's dependents by the bureau.

If an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and the employee's dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state, and the rights of the employee and the employee's dependents under the laws of the other state are the exclusive remedy against the employer on account of the injury, disease, or death.

(H) Compensation or benefits are not payable to a claimant during the period of confinement of the claimant in any state or federal correctional institution whether in this or any other state for conviction of violation of any state or federal criminal law.

**HISTORY:** GC § 1465-68; 103 v 72, § 21; 111 v 220; 117 v 109; 119 v 565; Bureau of Code Revision, 10-1-53; 128 v 743(755) (Eff 11-2-59); 136 v S 545 (Eff 1-17-77); 137 v H 1282 (Eff 1-1-79); 141 v S 307 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); 145 v H 107 (Eff 10-20-93); 145 v H 571 (Eff 10-6-94); 147 v S 45; 148 v H 122. Eff 4-10-2001; 150 v H 163, § 1, eff. 9-23-04; 150 v H 223, § 1, eff. 10-13-04.

**NOTES:**

**EFFECT OF AMENDMENTS**

150 v H 223, effective October 13, 2004, rewrote (B); and inserted (C) through (F) and redesignated the remaining subsections accordingly.

150 v H 163, effective September 23, 2004, corrected internal references.

\*\*\* ARCHIVE MATERIAL \*\*\*

\* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY \*  
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TITLE 41. LABOR AND INDUSTRY  
 CHAPTER 4123. WORKERS' COMPENSATION  
 COMPENSATION; BENEFITS

*ORC Ann. 4123.56 (2005)*

§ 4123.56. Temporary disability compensation

(A) Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of *section 4123.62 of the Revised Code*, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of *section 4123.62 of the Revised Code* unless the employee's wage is less than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event the employee shall receive compensation equal to the employee's full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the lesser of the statewide average weekly wage as defined in division (C) of *section 4123.62 of the Revised Code* or one hundred per cent of the employee's net take-home weekly wage. In the case of a self-insuring employer, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of *section 4123.511 [4123.51.1] of the Revised Code*. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

After two hundred weeks of temporary total disability benefits, the medical section of the bureau of workers' compensation shall schedule the claimant for an examination for an evaluation to determine whether or not the temporary disability has become permanent. A self-insuring employer shall notify the bureau immediately after payment of two hundred weeks of temporary total disability and request that the bureau schedule the claimant for such an examination.

When the employee is awarded compensation for temporary total disability for a period for which the employee has received benefits under Chapter 4141. of the Revised Code, the bureau shall pay an amount equal to the amount received from the award to the director of job and family services and the director shall

credit the amount to the accounts of the employers to whose accounts the payment of benefits was charged or is chargeable to the extent it was charged or is chargeable.

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or program paid or payable. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

As used in this division, "net take-home weekly wage" means the amount obtained by dividing an employee's total remuneration, as defined in *section 4141.01 of the Revised Code*, paid to or earned by the employee during the first four of the last five completed calendar quarters which immediately precede the first day of the employee's entitlement to benefits under this division, by the number of weeks during which the employee was paid or earned remuneration during those four quarters, less the amount of local, state, and federal income taxes deducted for each such week.

(B) Where an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment or as a result of being unable to find employment consistent with the claimant's physical capabilities, the employee shall receive compensation at sixty-six and two-thirds per cent of the employee's weekly wage loss not to exceed the statewide average weekly wage for a period not to exceed two hundred weeks.

(C) In the event an employee of a professional sports franchise domiciled in this state is disabled as the result of an injury or occupational disease, the total amount of payments made under a contract of hire or collective bargaining agreement to the employee during a period of disability is deemed an advanced payment of compensation payable under *sections 4123.56 to 4123.58 of the Revised Code*. The employer shall be reimbursed the total amount of the advanced payments out of any award of compensation made pursuant to *sections 4123.56 to 4123.58 of the Revised Code*.

(D) If an employee receives temporary total disability benefits pursuant to division (A) of this section and social security retirement benefits pursuant to the "Social Security Act," the weekly benefit amount under division (A) of this section shall not exceed sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of *section 4123.62 of the Revised Code*.

**HISTORY:** GC § 1465-79; 103 v 72(85), § 32; 108 v PtI, 313; 110 v 224; 117 v 252; 119 v 565; 121 v 660; 122 v 268(280); 123 v 250; 124 v 806; Bureau of Code Revision, 10-1-53; 126 v 1015(1028) (Eff 10-5-55); 128 v 743(757) (Eff 11-2-59); 130 v 926 (Eff 10-1-63); 132 v H 268 (Eff 12-11-67); 133 v H 1 (Eff 3-18-69); 134 v H 280 (Eff 9-20-71); 135 v H 417 (Eff 11-16-73); 136 v H 714 (Eff 1-1-76); 136 v S 545 (Eff 1-17-77); 137 v H 1282 (Eff 1-1-79); 138 v S 30 (Eff 5-14-79); 138 v H 184 (Eff 6-27-79); 141 v S 307 (Eff 8-22-86); 141 v S 390 (Eff 7-17-86); 141 v S 411, § 3 (Eff 7-17-86); 141 v S 411, § 5 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); 145 v H 107 (Eff 10-20-93); 147 v S 45;\* 148 v H 471. Eff 7-1-2000.

#### NOTES:

#### FOOTNOTE

\* The amendments made by SB 45 (147 v --) were rejected by the 11-4-97 referendum vote on Issue 2. The effective date is set by section 12(A) of HB 471.