UNDERSTANDING THE BASICS OF

# PUBLIC SERVICE ETHICS LAWS

Principles and California Law

INSTITUTE FOR LOCAL GOVERNMENT

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UNDERSTANDING THE BASICS OF

# Public Service Ethics Laws

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# CHAPTER 1:
# About This Guide

## What Is an "Ethics" Law?

*Defining the subgroup of laws that constitute "ethics" laws is an imprecise undertaking.*

*For those involved in public service, "ethics laws" tend to be those laws whose central purpose is to preserve the public's trust in its public institutions and those who serve in them. Trustworthiness is a key ethical value.*[1]

**For more information on these principles, see www.ca-ilg.org/EthicsLaws.**

# Understanding California Ethics Laws

California has a complex set of ethics laws to guide local officials in their service to their communities. How does the well-intentioned local official keep track of them all?

Keeping four core principles in mind helps:

- Public officials may not use their offices for **personal financial gain**.
- Holding public office does not entitle one to **personal advantages and perks**.
- **Transparency** promotes public trust and confidence.
- Merit-based decision-making based on **fair processes** produces the best results for the public.

Each chapter of this guide is organized around one of these four principles and will discuss a variety of specific topics and penalties associated with violation of the laws.

- **Chapter 1/Personal Financial Gain.** This chapter covers the prohibitions against receiving special favors or money for official actions, stepping aside from the decision-making process when there is an economic interest in the outcome, and restrictions on employment in certain capacities after leaving public office.
- **Chapter 2/Gifts and Other Perks.** This chapter focuses on laws and regulations related to compensation, reimbursement of expenses, restrictions on the use of public resources, gifts to public officials, and the use of campaign funds.

## Types of Ethics Laws

### PROHIBITIONS

Many of these ethics laws are *prohibitions*: they forbid certain actions that would undermine the public's trust that decisions are being made to benefit the public's interests (as opposed to the personal or political interests of the decision-maker). Making decisions in the public's interest is also a key *responsibility* of public service (responsibility is another key ethical value) .[2] Prohibitions deter betrayals of the public's trust by creating penalties for such betrayal.

Laws against misusing public resources are a form of prohibitory law, as are laws that prevent a decision-maker from being involved in a decision if the decision-maker has a real or perceived conflict of interest. Laws against bribery or other forms of "pay to play" are another important ethics law prohibition.

### TRANSPARENCY REQUIREMENTS

Other ethics laws simply require *transparency*: they provide the public and the media with information on how the public's business is being conducted, who is receiving campaign contributions and gifts from whom, and what kinds of financial interests a public official has. With transparency laws, the public judges whether a public official or group of public officials is acting in a trustworthy fashion—typically as part of the elections process. Transparency laws also encourage trustworthy behavior by reminding public officials that their actions will likely be scrutinized and judged.

### FAIRNESS

Other ethics laws require that public agency decision-making processes meet minimum standards of *fairness*. Fairness is another key ethical value.[3]

- **Chapter 3/Transparency.** This chapter focuses on various disclosure requirements, including campaign contributions, economic interests, and charitable fundraising. Other topics include conducting public business in a public manner, the public's right to participate in meetings, and the right to access public records.
- **Chapter 4/Fair Processes and Merit-Based Decision-Making.** This chapter focuses on prohibitions against vote-trading, restrictions on personal loans, and disqualifications based on the receipt of campaign contributions and benefits to the official's family. It also covers the competitive bidding process for public contracts, bias, separating agency staff from politics, and prohibitions on holding multiple offices. The chapter concludes with a discussion of the whistleblower protections available to protect public employees from retaliation for reporting unlawful behavior.

A key goal of this guide is to alert local officials to when to ask for legal advice on how ethics laws apply in a particular situation.

## Laws as Minimum Standards

Because public trust and confidence is vital to the strength of a democratic system, ethics laws sometimes set very high standards for public official conduct.

Even so, it is important to keep in mind that these standards are only *minimum* standards: it is simply not possible or practical to write laws that prevent all actions that might diminish the public's trust.

For this reason, the laws should be viewed as a floor for conduct, not a ceiling. Just because a given course of conduct is legal does not mean that it is ethical (or the public will perceive it as such).

This means that public officials facing ethical issues are well-advised to engage in a two-step analysis:

- **Step One:** Is a given course of action consistent with one's own values and analysis of what would constitute the "ethical" course of conduct.
- **Step Two:** What will the public's perception be of course of conduct, given the information the public is likely to have available?

A helpful tool for analyzing the second question is whether one would like to see the course of conduct reported on the front page of the local newspaper.

### The Limits of This Information

Although the Institute endeavors to help local officials understand technical and legal concepts that apply to their public service, this publication is not technical or legal advice. Officials are encouraged to consult technical experts, attorneys and/or relevant regulatory authorities for up-to-date information and advice on specific situations.

**FOR MORE INFORMATION**

On thinking above and beyond the minimum requirements of the law, see www.ca-ilg.org/ppoe.

# Endnotes and Additional Information

**Note:** *Sections in the California Code are accessible at* http://leginfo.legislature.ca.gov/. *Fair Political Practices Commission regulations are accessible at* www.fppc.ca.gov/index.php?id=52. *A source for case law information is* www.findlaw.com/cacases/ *(requires registration).*

1 Rushworth M. Kidder, *How Good People Make Tough Choices* (Simon and Schuster, 1995).

2 *Id*.

3 *Id*.

4 *See* Cal. Gov't Code § 995.8. *See also Los Angeles Police Protective League v. City of Los Angeles*, 27 Cal. App. 4th 168, 32 Cal. Rptr. 2d 574 (1994) (finding city was not required to provide the defense of police officers accused of vandalism and conspiracy to commit vandalism).

5 *See* Cal. Gov't Code § 995.2 (public agency may refuse defense of civil action if, among other reasons, the agency finds the official acted because of "actual fraud, corruption or actual malice.") *See also* Cal. Gov't Code § 822.2 (immunity from liability for misrepresentation does not apply in instances of corruption).

6 *See* Cal. Gov't Code § 818.

7 California Rules of Professional Conduct for Lawyers, Rule 3-600(A); *Ward v. Superior Court*, 70 Cal. App. 3d 23, 138 Cal. Rptr. 532 (1977) (county counsel's client is county, not assessor in his individual capacity).

# CHAPTER 2:
# Personal Financial Gain Laws

### Available from Institute for Local Government website at:

- *This chapter:* www.ca-ilg.org/FinancialGain
- *Whole publication (Understanding the Basics of Public Service Ethics Laws):* www.ca-ilg.org/EthicsLaws

# Chapter 2: Personal Financial Gain Laws

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# Receiving Special Favors or Money for Official Actions

## Basic Rules

Perhaps the most extreme form of using one's public position for financial gain is graft. Graft involves using one's public position to get money or anything else of value. Examples of graft include bribery and extortion.

A bribe involves conferring a benefit on a public official to influence a person's vote, opinion, action or in-action.[1] Asking for that bribe is illegal, of course, but so is receiving one or agreeing to receive one.[2] Under California's criminal laws, a "bribe" includes anything of value; it also includes receiving "advantages." The advantage can be a future one and need not involve the payment of money.[3] The federal law definition of bribery is even broader.[4]

Extortion involves, among other things, getting something from someone by wrongfully using one's public position.[5] For example, a public official may not demand money in return for the performance of his or her official duties.[6] This includes demanding campaign contributions in return for action in one's official capacity.

Public officials are also forbidden from receiving a reward for appointing someone to public office or permitting someone to perform the duties of their offices.[7]

## Penalties

### California Law Penalties

#### *Bribery*

Receiving or agreeing to receive a bribe is a criminal act, punishable by a combination of prison time, fines and losing one's office and being forever disqualified from holding public office.[8]

The fines vary according to whether the bribe was actually received. If it was, the fine is a minimum of $2,000 up to either $10,000 or double the amount of the bribe, whichever is greater. If a bribe was not actually received, there still is a fine between $2,000 and $10,000. The specified prison sentence is two to four years in state prison.

Those who offer bribes also face penalties. Those who bribe a member of a legislative body of a city, county, school district or other special district face two to four years in state prison.[9]

#### *Extortion*

Extortion by public officials is a misdemeanor.[10] Misdemeanors are punishable by up to six months in county jail, a fine of up to $1,000 or both.[11] Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.[12]

#### *Appointing Someone to Office*

An official who receives payment or favors for making an appointment faces the following punishments: forfeiture of office, disqualification from ever holding public office again and a fine of up to $10,000.[13]

**DON'T COUNT ON A CODE OF SILENCE**

Faced with the temptation of receiving a bribe, it can be easy to underestimate the chances of being caught, let alone successfully prosecuted. Fortunately, bribery is fairly rare, which may lead one to mistakenly assume prosecutors never find out about bribery.

In some instances, prosecutors learn about illicit activities from informants from within an agency. In other instances, those who believe they have been asked for a bribe will turn the asking officials in. Sometimes, observers will notice that a public official seems to have more resources than before and start asking questions.

The media views itself as a key watchdog on such issues, of course. Unfortunately, some officials discount the likelihood of getting caught and prosecuted. They figure that everyone involved in illicit activities will have a strong incentive to keep quiet. What they don't realize is that prosecutors can offer powerful incentives to those involved to testify against others in exchange for a reduced penalty.

### IF I GET INTO TROUBLE, CAN THE AGENCY PAY MY DEFENSE?

Don't count on it. To provide a defense in a criminal action, for example, the agency must find that:

1. The criminal action or proceeding is brought on account of an act or omission in the official's service to the public entity;
2. Such defense would be in the best interests of the public entity; and
3. The individual's actions were in good faith, without actual malice and in the apparent interests of the public entity.[4]

If the issue is claims a public official misused his or her office for personal gain, it may be particularly difficult for the agency to make the second finding, which is that the actions were in the apparent interests of the public entity. Moreover, even if the agency could make these findings, it is not required to. Indeed, there may be strong political pressures not to.

Similarly, an agency may refuse to provide a defense in a civil action if it finds the actions in question related to corruption or fraud.[5] Also, public agencies are not responsible for damage awards designed to punish or make an example of someone.[6]

Note that, in these situations, the agency's attorney is not an individual public official's attorney, with attendant protections for attorney-client confidences. The agency attorney's obligations are to the entity as a whole – not to any one official in that agency.[7]

## Federal Penalties

If an agency receives more than $10,000 in federal monies an official could find him or herself subject to federal prosecution if the amount at stake (for example, a bribe) exceeds $5,000.[14] The penalty for bribery under federal law is a fine of up to twice the amount of the bribe or $250,000 (whichever is greater), up to 10 years imprisonment, or both.[15] Bribery, extortion, or embezzlement can also be basis of a federal income tax evasion charge. Federal prosecutors may treat money that an official receives through illicit means as income to the official. If the official fails to report this income at tax time (which of course, most don't), the official becomes subject to an action for income tax evasion.

Income tax evasion carries with it a possible five-year prison term and a fine of up to $100,000.[16] In addition, prosecutors can require the defendant to pay for the costs of prosecution (in addition to one's own costs associated with defending against the prosecution).[17] The sometimes-related crime of filing a false tax return is punishable by a maximum three-year prison term and a fine of up to $100,000 (along with the costs of prosecution).[18]

A court can also order a convicted official to pay restitution to the agency in the amount of the money or advantage received (or loss to the agency) as the result of criminal misuse of the official's position.[19]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

**MAKING A FEDERAL CASE OUT OF CORRUPTION:**

## Honest Services Fraud

Under federal wire and mail fraud laws, the public has the right to the "honest services" of public officials.[20] The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.[21] That duty is violated when a public official makes a decision that is not motivated by his or her constituents' interests but instead by his or her personal interests.[22]

A clear example is when an official receives a personal financial gain as the result of his or her public service. Examples include bribes and kickbacks (for example, receiving money back from proceeds paid to a company that does business with a public entity, but could also be as simple as receiving lavish gifts, loans or other gratuities).[23] The potential penalties for federal fraud are steep. The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a $250,000 fine.[24]

**For more information,** see "Making a Federal Case Out of Corruption," available at www.ca-ilg.org/fedcase.

# Disqualification Based on Financial Interests Under the Political Reform Act

## Basic Rules

The voters have created an across-the-board, bright line rule: public officials may not participate in governmental decisions affecting their financial interests.

The rule is designed to have public officials avoid putting themselves in the position of choosing between advancing the public's interests and their own financial interests. That would be a potential conflict of interest.

This does not mean there is anything corrupt or dishonest about having a disqualifying conflict of interest. It typically means that a public official has a personal life, with all the financial entanglements that life can involve. The key is to be aware when one's financial interests are implicated by a public agency decision, so one can step aside from the decision-making process. This way, there is no question about whether one's personal interests affected the decision-making process in any way.

The rule is that a public official may not make, participate in, or influence a governmental decision that will have a reasonably foreseeable and material financial effect on the official, the official's immediate family, or any of the official's financial interests.[25] Financial interests include real property, sources of income, business entities in which a public official has an investment or holds a management position, and donors of gifts. See pages 15-16 for more information.

*Note the breadth of the disqualification requirement: one must not only step aside from voting, but the entire process leading up to voting.*

Note the breadth of the disqualification requirement: one must not only step aside from voting, but the entire process leading up to voting. This means conversations with fellow officials and staff are also against the law if one has a conflict of interest. Also, there may be even more restrictive local requirements.

The process for determining whether an official must disqualify oneself is described on pages 12-13.

Note that disqualified officials do not count toward the quorum.[26]

### UPDATES TO THE POLITICAL REFORM ACT CONFLICT OF INTEREST REGULATIONS

At press time, the Fair Political Practices Commission is updating the conflict of interest regulations under the Political Reform Act. These first of these updates include redefining "reasonably foreseeable" and streamlining the 8-step conflict of interest analysis. The Commission has adopted some of these updates, but has not made them effective until the Commission considers other pending regulatory changes.

Since the changes are not yet effective, this guide reflects regulations in effect at the time of publication. For more information on the status of updates to the conflict of interest regulations, see the Fair Political Practices Commission webpage for newly adopted, amended or repealed regulations at: http://www.fppc.ca.gov/index.php?id=247#1.

## Imprecise Terminology: Abstentions, Disqualifications and Recusals

The terms "abstention," "disqualification" and "recusal" are sometimes used interchangeably when describing an official's decision to step aside from the decision-making process. The important thing is to be clear on *why* a decision-maker is stepping aside.

### Voluntary Abstention

There are instances in which a public official *voluntarily* chooses not to participate in a decision. The official may know it will be difficult to put personal interests aside and make a decision based solely on the public's interest. Or, the official may worry the public will perceive the official cannot put personal interests aside even if the official knows the he or she can.

The decision to voluntarily step aside from the decision-making process can involve two conflicting values:

1. One's responsibility to participate in decision-making; and
2. One's responsibility to preserve the public's trust in the decision-making process.

Both responsibilities are important, of course. Because of this, deciding not to participate should not be viewed as a way of avoiding difficult decisions.

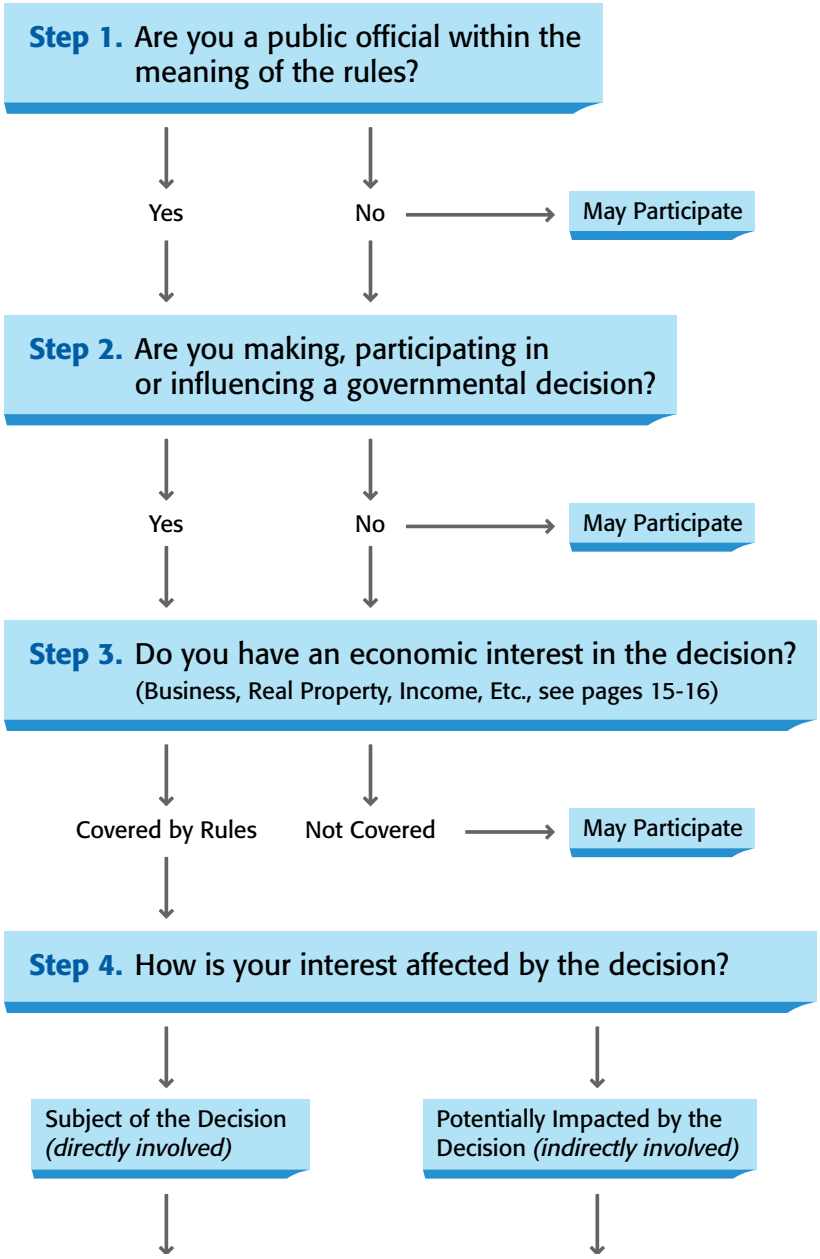
### Mandatory Disqualification

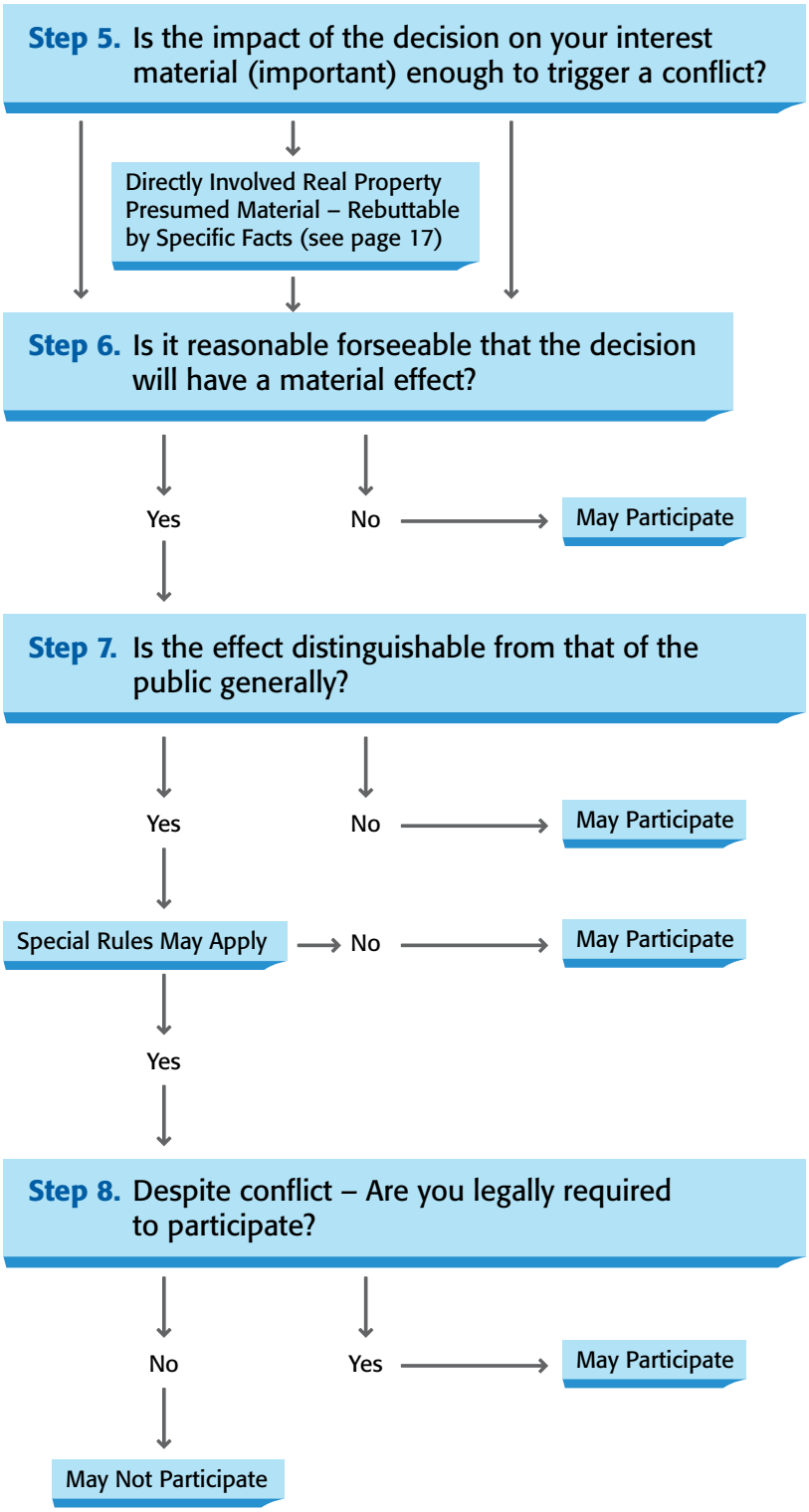
By contrast, when someone has a disqualifying conflict of interest, one does not have a choice. The law prohibits that individual from participating in a decision—even if the official believes he or she can be fair. There is no choice; the law presumes the public will doubt a person's ability to be fair. This is an example of avoiding the appearance of impropriety as well as the potential for actual impropriety.

# Political Reform Act – The Eight Step Conflict of Interest Test

The process of determining when an official is disqualified from participating in a decision is a very complex one. There are statutes, regulations and interpretive opinions that flesh out each aspect of the basic prohibition.

To organize the analysis of determining when an official is disqualified from participating in a decision, the Fair Political Practices Commission has adopted an eight-step procedure for identifying when one must disqualify oneself from participating in a matter.[28] Below is the general outline of the process. Since the rules are not necessarily logical or intuitive, it is best to consult with agency counsel or the Fair Political Practices Commission staff if there is a possibility one might have a conflict of interest.






*Credit: Greg Diaz, City Attorney, Merced, CA.*

## FOR MORE INFORMATION

See the following resources:

- "Deciding When *Not* to Participate in an Agency Decision: Abstentions and Disqualifications," available at www.ca-ilg.org/abstentions
- "Property Ownership in Your Jurisdiction," available at www.ca-ilg.org/owningproperty

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

### GETTING ADVICE AND STAYING OUT OF TROUBLE ON POLITICAL REFORM ACT ISSUES

Public officials should get advice on how these laws apply as early in the process as possible — as soon as a disqualifying conflict of interest is even a possibility.

Early consultation allows an attorney to analyze all of the facts involved and the relevant law. Even though the analysis is laid out in specific steps, each step has various rules and Fair Political Practices Commission guidelines associated with it. As one seasoned local agency attorney has observed, the later in the process the consultation occurs, the more likely the advice will be that disqualification must occur to make sure the official stays out of trouble.

Does advice from agency counsel protect an official against a Fair Political Practices Commission enforcement action? No. Only a formal opinion or formal advice letter from the Fair Political Practices Commission will protect a public official if someone argues that a violation of the Political Reform Act has occurred. Receiving such advice from the Commission takes time — another good reason to raise the conflict issue as early as possible.

### ETHICS CODES VERSUS LOCAL CONFLICT OF INTEREST CODES

California's Political Reform Act requires local agencies to adopt local conflict of interest codes.[27] These codes supplement state law, by specifying which positions in the agency are subject to disclosure under the Act.

**For more information,** see "About Local Conflict of Interest Codes" (available at www.ca-ilg.org/local-conflict-of-interest-codes) and the Fair Political Practices Commissions materials on adopting local conflict of interest codes (see www.fppc.ca.gov/index.php?id=228).

## Special Issues

### What Kinds of Economic Interests Are a Concern?

A public official is in the best position to focus the on the question: Does an official have a financial interest in a particular decision? There are a number of different ways to have a financial interest in a decision:

- **Sources of Income.** Receiving $500 or more in income from one source (including any income received from a business, nonprofit organization, government agency, or individual) within twelve months prior to the decision creates an economic interest. "Sources of income" includes a community property interest in a spouse or domestic partner's[29] income, but not separate property income.[30] Additionally, if someone promises an official $500 or more twelve months prior to the decision, that person or entity promising the money is a source of income.[31]
- **Personal Finances.** An official has an economic interest in the official's expenses, income, assets or liabilities and those of the official's immediate family (spouse or domestic partner[32] and dependent children).[33]
- **Real Property.** An interest in real property when the interest is worth $2,000 or more creates an economic interest. The interest may be held by the official, the official's spouse or domestic partner[34] (even as separate property) and children (or anyone acting on their behalf). Real property interests can also be created through leases, loans, mortgage or security interests in property.[35]
- **Investments.** An economic interest is created if the official, the official's spouse or domestic partner[36] (even as separate property) or dependent children (or anyone acting on their behalf) has an investment worth $2,000 or more in a business entity (even if the official does not receive income from the business).[37] Investments include stocks and bonds.
- **Business Employment or Management.** If the official serves as a director, officer, partner, trustee, employee or otherwise serves in a management position in a company, an economic interest is created.[38] Note this does not apply to a member of the board of a nonprofit entity.
- **Related Businesses.** The official has an economic interest in a business that is the parent, subsidiary or is otherwise related to a business where the official:
  - Has a direct or indirect investment worth $2000 or more; or
  - Is a director, officer, partner, trustee, employee, or manager.[39]
- **Business-Owned Property.** A direct or indirect ownership interest in a business entity or trust that owns real property is another form of economic interest.[40]
- **Loans.** A loan from someone (or guarantee on a loan) can create an economic interest unless the loan is from a commercial institution, made in the regular course of business and is on the same terms as are available to members of the public.[41]

» **Gifts.** Receiving gifts totaling $440 (2013-14) or more in a twelve-month period prior to the decision from any one person or organization may create an economic interest depending on the type of public official involved and whether the gift-giver is in the agency's jurisdiction.[42] Being promised a gift of $440 (2013-14) or more within a twelve-month period prior to the decision can also create a disqualifying financial interest.[43] The limit is adjusted every few years to reflect changes in the cost of living.[44] For more discussion of the gift issue, please see Chapter 3, pages 38-40, and www.ca-ilg.org/GiftCenter.

The timeline for determining whether an official has an economic interest is **twelve months before the decision** in question—not the calendar year.[45]

If a public official thinks he or she has one of the economic interests described above, the next step is to consult with the agency attorney about the situation and how the Fair Political Practices Commission's conflict of interest analysis applies.

### DISCLOSURE OF CONFIDENTIAL INFORMATION

California law also makes disclosure of certain kinds of confidential information for personal financial gain (as defined) a misdemeanor.[46] This restriction applies to public officers and employees.[47] Confidential information is: 1) information that is not subject to disclosure under the Public Records Act and 2) information for which disclosure is prohibited by statute, regulation or rule.[48]

## Real Property Interests

Say an official has determined a decision may affect real property interests. The next step is whether that interest is directly (or indirectly) involved in the decision. This relates to step 4 of the eight-step disqualification process.

The Fair Political Practices Commission has endeavored to simplify the analysis by providing bright line rules. A real property interest is presumed directly involved in a decision if one of the following conditions is met:

1. The official's property is within 500 feet of the boundaries or proposed boundaries of the property that is the subject of the decision;[49] or
2. The decision involves any of the following with respect to the official's property:
   - Zoning, rezoning, annexation, de-annexation, sale, purchase, lease, or inclusion in or exclusion from any local governmental subdivision of the property;[50]
   - Issuance, denial or revocation of a license, permit or other land use entitlement;[51]
   - Imposition, repeal or modification of any taxes or fees imposed on the official's property;[52]
   - Construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities and the real property will receive new or improved services (excluding repairs, replacement or maintenance of existing services).[53]

If a real property interest is directly involved in the decision, the effect is considered material (step 5 of the eight-step analysis) unless an official can prove the decision will not have any effect on the value of that property[54] or the "public generally" exception applies (step 7).[55]

**For more information** on analyzing property-related financial interests, see "Property Ownership in Your Jurisdiction," available at www.ca-ilg.org/owningproperty.

## What Happens if an Official is Disqualified?

### *General Rule*

If an official is disqualified from participating on a specific agenda item under the conflict of interest rules established by the Political Reform Act, the official must:

- At the meeting, publicly identify the financial interest or potential conflict of interest in sufficient detail to be understood by the public;
- Not attempt to influence the decision in any way, which includes talking with colleagues or staff about the matter; and
- Refrain from discussing or voting on the matter[56] (ask for the item to be considered separately if it is on the consent calendar).

At the meeting, city council members, county supervisors, planning commissioners and top staff members who have conflicts of interest will typically need to leave the room when that matter is up for decision (unless the matter is on consent, in which case the official must declare the conflict and have the clerk record an abstention on that particular item).[57] This may be a good practice for comparable officials at other local agencies as well.

Officials subject to the leave-the-room requirement will also need to explain why they are disqualified from participating, based on the nature of the financial interest.[58] For example:

- **Investment.** If the interest relates to an investment, provide the name of the business in which the investment is held.

- **Business Position.** If the interest relates to a business position, give a general description of the activity in which the business is engaged as well as the name of the business.
- **Real Property.** If the interest relates to real property, supply the address or another indication of the location of the property (unless the property is the public official's principal or personal residence, in which case explain the property is a residence).
- **Income or Gifts.** If the interest relates to the receipt of income or gifts, then describe the source.
- **Personal Finances.** If the interest relates to a personal financial interest in the decision, then describe the expense, liability, asset or income affected.

### *Exceptions to the Leave-the-Room Requirement*

There are limited exceptions that allow a disqualified official to remain in the room and participate in the discussion *as a member of the public* to represent himself or herself on matters related solely to the official's "personal interests."[59] These include when the subject of the discussion is:

- Interests in real property wholly owned by the official or his or her immediate family;[60]
- A business entity wholly owned by the official or his or her immediate family;[61] and
- A business entity over which the official (or the official and his or her spouse or domestic partner[62]) exercise sole direction and control.[63]

Even though the law allows the public official to remain in the room when these interests are at stake, the public official may still wish to balance that option with the potential that the public may nonetheless perceive the official is improperly trying to influence his or her colleagues. Many officials balance their rights as individuals with their responsibility to maintain the public's trust in both their leadership and the agency that they serve by not remaining in the room.

### *Note on Closed Sessions*

If a decision will be made in a closed session, an official with a conflict may not be present in the closed session during the discussion and decision. That official also may not obtain non-public information about the closed session.[64]

## Effect of Disqualification

The general rule is a majority of the membership of a body must be present in order for the decision-making body to conduct business—a concept known as a quorum.[65]

For some kinds of agencies, a majority of the quorum is necessary for an item to pass, although there are special rules that apply to certain kinds of actions. Note, however, the rule is different for county boards of supervisors, community college boards and school boards, which generally require a majority vote of the entire membership of the board to act.[66]

Those who are disqualified from participating in the decision are not counted toward the quorum.[67] However, those who abstain because of a pending question concerning a conflict of interest (for example, an elected official is waiting to receive an advice letter from the Fair Political Practices Commission) may be counted toward the quorum. This is because they have not yet been disqualified (typically their agency attorneys will recommend they abstain pending resolution of the conflict issue).[68]

### FOR MORE INFORMATION

See the following resources:

- The Fair Political Practices Commission has produced "Can I Vote? An Overview of the Conflicts Laws," available at www.fppc.ca.gov
- "Using Public Office to Promote One's Business Interests," available at www.ca-ilg.org/publicoffice
- *Conflicts of Interest* (2010). Explains California's conflict-of-interest laws available at http://ag.ca.gov/publications/coi.pdf

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

### Political Reform Act Penalties

A refusal to disqualify oneself is a violation of the Political Reform Act. Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[69]

These penalties can include any or all of the following:

- Immediate loss of office;[70]
- Prohibition from seeking elected office in the future;[71]
- Fines of up to $10,000 or more depending on the circumstances;[72] and
- Jail time of up to six months.[73]

### Effect on Agency and Those Affected by Agency's Decision

When a disqualified official participates in a decision, it can also void the decision.[74] This can have serious consequences for those affected by the decision as well as the public agency. If someone is encouraging an official to participate in spite of a disqualifying interest, consider pointing out the costs that would occur if the agency's decision has to be undone—not to mention the legal consequences for the official.

Typically it is wise to err on the side of caution when there is a question regarding the appropriateness of an official's participation in a matter. When in doubt, sit a decision out.

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Interests in Agency Contracts Barred

## Basic Rules

California law strictly forbids public officials from having an economic interest in their agencies' contracts. In essence, this is a prohibition against self-dealing. This particular law has been traced back to the earliest days of California's statehood—to 1851.[75] This prohibition applies to elected and appointed officials as well as public agency employees and consultants.[76]

This means that, *if an official has an interest in a contract being contemplated by their agency, the agency may not enter into the contract.* If a staff member has an interest in the contract, the staff member may not participate in any way in the contract negotiations. Contracts are broadly defined and include employment and a variety of other relationships.

Key things to keep in mind include the following.

» **Making a Contract.** The prohibition applies to preliminary discussions, negotiations, planning and solicitation of bids, as well as voting on the contract itself. This means the affected official can't be involved in those as well.

» **Disqualification Doesn't Fix the Problem.** When the prohibition applies, the agency may not enter into the contract in question. Members of the governing board of a local agency (including a board of supervisors, board of directors, city council or school board members) are *deemed* to have made any contract executed by the board, or any person or agency under its jurisdiction, *even if* officials disqualify themselves from participating in the contract.

» **Financial Interest.** A "financial interest" in a contract includes a direct or indirect financial interest. A direct financial interest is present when the official is the party contracting with the agency. An indirect financial interest involves an official who has a financial relationship with the contracting party or will receive some benefit from the making of the contract with the contracting party. It does not matter if the official's financial interest is positively or negatively affected. This provision covers financial relationships that go beyond the official's immediate family.

Officials will sometimes hear their agency counsel refer to this issue as a "section 1090 problem," in reference to the Government Code section containing this prohibition. These restrictions on contracts are *in addition to* the restrictions of the Political Reform Act.

A key question to ask oneself in evaluating an agency's contracts is: "will this contract affect my economic interests in any way?" If the answer is "yes," speak with agency counsel immediately.

*A key question to ask in evaluating an agency's contracts is: "will this contract affect my economic interests in any way?" If the answer is "yes," speak with agency counsel immediately.*

**WHAT IS THE THEORY OF NOT ALLOWING DISQUALIFICATION?**

When the prohibition against interests in contracts applies, the agency may not enter into the contract, even if the official with the interest disqualifies him- or herself. Why? The theory seems to be decision-makers may be favorably influenced to award a contract to a colleague—perhaps with the expectation the favor may be returned in the future. The absolute prohibition guards against such a tendency toward what might be described as "you-scratch-my-back-I'll-scratch-yours" dynamics within the agency.

## Exceptions to Rules

There are limited exceptions to the general prohibition against interests in contracts.

### Non-Interest Exception

Some potential interests in a contract are so small California law classifies them as "non-interests" in a contract. One is when an official receives public services provided by the official's agency on the same terms that the services are provided to the general public. For example, a member of a water district board may receive water service. In such cases, the official and the official's agency may participate in the contract. California law provides a full list of exceptions.[77]

### Remote Interest Exception

A local agency may enter into a contract when an official has a "remote" interest so long as the official does not attempt to influence another member of the board or council.[78] Examples of remote interests include:

- Being an employee of the contracting party, if the contracting party has ten or more employees, the employee began his or her employment at least three years prior to initially assuming office, and certain other requirements are met; or
- Being a supplier of goods or services to the party contracting with the agency, when those goods or services have been supplied to the contracting party by the public official for at least five years prior to assuming office.[79]

If the decision-maker qualifies as having a remote interest, the agency must then take these steps to stay on the right side of the law:

- The board or council member must disclose the financial interest to the board or council, and disqualify himself or herself from participating in all aspects of the decision;
- The disclosure must be noted in the official records of the board or council; and
- The board or council, after such disclosure, must approve, ratify or authorize the contract by a good faith vote of the remaining qualified members of the board or council.[80]

It is important to note that this exception applies *only* to members of multi-member bodies (not to individual decision makers and employees).[81]

## Limited Rule of Necessity

Even if there is not an exception from the prohibition, the agency may still enter into a contract if the rule of necessity applies.[82] In general, this rule will allow an agency to acquire an essential supply or service. The rule also allows a public official to carry out essential duties of his or her office where he or she is the only one who may legally act. Consult with agency counsel whether the intricacies of this rule may apply in any given situation.

## Special Rule for School District Boards

California's Education Code specifically allows school board members to vote on collective bargaining agreements and personnel matters that affect a class of employees to which a relative belongs.[83] Whether this rule also applies to domestic partners is not clear under the statute.

### FOR MORE INFORMATION

See the following resources:

"How Your Agency Counsel Should Advise You When Agency Contracts Represent a Conflict of Interest," available at www.ca-ilg.org/coi

» "Securing Goods and Services: Contracting Issues," available at www.ca-ilg.org/procurement

For specific questions, please contact agency counsel.

### GETTING ADVICE AND STAYING OUT OF TROUBLE ON CONTRACT ISSUES

As with issues under the Political Reform Act, advice of counsel does *not* provide a defense in a criminal prosecution relating to unlawful interests in contracts.[84]

Moreover, the Fair Political Practices Commission does not interpret and provide advice on Section 1090/ contract issues.[85]

The Attorney General will provide such advice, but only certain kinds of officials are entitled to ask the Attorney General for an opinion.[86] In addition, the process can take months, if not years.

## Penalties

The penalties for violating the prohibition against interests in contracts are severe.

### *Criminal Penalties*

Willful violations are a felony and may be punished by fines of up to $1,000, imprisonment, and being disqualified from ever holding public office again.[87]

### *Effect on Contract*

The contract also is "void," which means the local agency does not have to pay for goods or services received under the contract.[88] The agency may also seek repayment of amounts already paid.[89]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Employment-Related Restrictions

## Basic Rules

Another kind of "personal financial gain" law prohibits elected officials and top-level managers from, in essence, trading on the relationships developed in public service.

For example, elected officials and chief executives who leave government service must not represent people for pay before their former agencies for one year after leaving their agency.[90] This is known as a "revolving door" restriction.

In addition, under California's conflict of interest/disqualification rules, a public official may not influence agency decisions when the interests of a prospective employer are at stake.[91] The situation arises when an official is negotiating or has "any arrangement" concerning prospective employment with someone with business before the agency.

### WHEN AN EMPLOYEE RUNS FOR A SEAT ON THE GOVERNING BOARD

California law says that, with a few exceptions, local agency employees must resign their employment before taking a seat on the governing board of their local agency.[92]

This restriction applies to cities, counties, special districts and other public agencies and corporations.[93] There are parallel restrictions for employees who run for school boards[94] and community college district governing boards.[95] All of the sections note that, if an employee refuses to resign, his or her position will automatically terminate upon being sworn into office on the governing board.[96]

These restrictions prevent the dual role conflicts associated with being both in the role of employee and employer.[97]

### FOR MORE INFORMATION

On employment restrictions, see "Revolving Door Restrictions for Local Officials" available at www.ca-ilg.org/revolvingdoor.

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

These employment-related restrictions are part of the Political Reform Act. Violations of the Act are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[98]

These penalties can include any or all of the following:

- Immediate loss of office;[99]
- Prohibition from seeking elected office in the future;[100]
- Fines of up to $10,000 or more depending on the circumstances;[101] and
- Jail time of up to six months.[102]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Endnotes and Additional Information

**Note:** *Sections in the California Code are accessible at* http://leginfo.legislature.ca.gov/. *Fair Political Practices Commission regulations are accessible at* www.fppc.ca.gov/index.php?id=52. *A source for case law information is* www.findlaw.com/cacases/ *(requires registration).*

1 Cal. Penal Code §§ 7 (definition number 6), 68(a).

2 *See* Cal. Penal Code §§ 68(a), 86.

3 *Id.; See also People v. Anderson,* 75 Cal. App. 365, 242 P.2d 906 (1925).

4 *See* 18 U.S.C. § 201.

5 *See* Cal. Penal Code § 518.

6 *In re Shepard,* 161 Cal. 171 (1911) (in the context of removal-from-office proceedings for misconduct).

7 Cal. Penal Code § 74.

8 *See generally* Cal. Penal Code § 68(a). *See also* Cal. Elect. Code § 20 (making those convicted of making or receiving a bribe ineligible for public office).

9 *See* Cal. Penal Code § 85.

10 *See* 18 U.S.C. § 201.

11 Cal. Penal Code § 19.

12 Cal. Gov't Code §§ 3060-3074.

13 Cal. Penal Code § 74.

14 18 U.S.C. § 666 (at the time of publication, there is pending legislation to lower this amount).

15 *See* 18 U.S.C. §§ 666 (specifying maximum 10-year prison term and fine "under this title"), 3571 (general fine for violating federal criminal laws) (At the time of publication there is pending legislation to increase the maximum prison sentence for bribery).

16 26 U.S.C. § 7201.

17 *Id*.

18 26 U.S.C. § 7206(1).

19 *U.S. v. Gaytan,* 342 F.3d 1010 (9th Cir. 2003).

20 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).

21 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).

22 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350, 362-63 (1987) (Justice Stevens, dissenting).

23 *See Skilling v. U.S.*, 130 S.Ct. 2896, 2931(2010) (holding that in order to avoid unconstitutional vagueness, 18 USC § 1346 only criminalizes bribes and kick-back schemes).

24 18 U.S.C. §§ 1341 (". . . shall be fined under this title or imprisoned not more than 20 years, or both."), 1343 ("shall be fined under this title or imprisoned not more than 20 years, or both.").

25 *See* Cal. Gov't Code §§ 87100-87105.

26 2 Cal. Code Regs. § 18702.5(b)(3).

27 Cal. Gov't Code § 87300.

28 2 Cal. Code Regs. §18700(b). In 2012 the Fair Political Practices Commission revised the standard used to determine whether a financial effect is "reasonably foreseeable" in 2 Cal. Code Regs § 18706 (step 6) from being "substantially likely" to being a "realistic probability." Although this change was adopted in September 2012, at the time of publication the effective date for this change was delayed.

29 2 Cal. Code Regs. § 18229.

30 Cal. Gov't Code §§ 82030, 87103(c); 2 Cal. Code Regs. § 18703.3.

31 Cal. Gov't Code § 87103(c). *See Larsen Advice Letter*, No. A-82-192 (1982).

32 2 Cal. Code Regs. § 18229 (referring to Cal. Gov't Code § 82029 defining "immediate family").

33 2 Cal. Code Regs. § 18703.5.

34 2 Cal. Code Regs. § 18229.

35 *See* Cal. Gov't Code §§ 82033, 87103(b).

36 2 Cal. Code Regs. § 18229.

37 Cal. Gov't Code §§ 82034, 87103(a); 2 Cal. Code Regs. § 18703.1.

38 Cal. Gov't Code § 87103(d); 2 Cal. Code Regs. § 18703.1(b).

37 2 Cal. Code Regs. § 18703.1(c).

40 Cal. Gov't Code § 82033 (pro rata interest, if own 10 percent interest or greater).

41 Cal. Gov't Code § 82030(b)(8), (10).

42 Cal. Gov't Code§ § 82028, 87103(e); 2 Cal. Code Regs. § 18703.4.

43 Cal. Gov't Code § 87103(e); 2 Cal. Code Regs. § 18703.4.

44 Cal. Gov't Code § 89503(f).

45 Cal. Gov't Code § 87103(e); 2 Cal. Code Regs. § 18703.4.

46 *See* Cal. Gov't Code § 1098(a).

47 *Id.*

48 *See* Cal. Gov't Code § 1098(b)

49 2 Cal.Code Regs. § 18704.2(a)(1).

50 2 Cal. Code Regs. § 18704.2(a)(2).

51 2 Cal. Code Regs. § 18704.2(a)(3).

52 2 Cal. Code Regs. § 18704.2(a)(4).

53 2 Cal. Code Regs. § 18704.2(a)(6).

54 2 Cal. Code Regs. § 18705.2.

55 2 Cal. Code Regs. § 18707.1.

56 *See* Cal. Gov't Code § 87105; 2 Cal. Code Regs. § 18702.5.

57 *See* 2 Cal. Code Regs. § 18702.5.

58 2 Cal. Code Regs. § 18702.5(b)(1)(B).

59 2 Cal. Code Regs. §§ 18702.5(d)(3), 18702.4(b)(1).

60 2 Cal. Code Regs. § 18702.4(b)(1)(A).

61 2 Cal. Code Regs. § 18702.4(b)(1)(B).

62 2 Cal. Code Regs. § 18229.

63 2 Cal. Code Regs. § 18702.4(b)(1)(C).

64 *See* 2 Cal. Code Regs. § 18702.1(c). *See also Hamilton v. Town of Los Gatos,* 213 Cal. App. 3d 1050, 261 Cal. Rptr. 888 (1989).

65 *See* Cal. Gov't Code § 36810 (for general law cities). *See also* Cal. Civ. Code § 12; Cal. Civ. Proc. Code § 15.

66 *See* Cal. Gov't Code § 25005; Cal. Educ. Code §§ 35164 (K-12 districts), 72000(d)(3) (community college districts).

67 2 Cal. Code Regs. § 18702.5(b)(3); *Farwell v. Town of Los Gatos*, 222 Cal. App. 3d 711, 271 Cal. Rptr. 825 (1990) (subsequently ordered not published). *See also* 62 Cal. Op. Att'y Gen. 698, 700 (1979).

68 *Id.*

69 *See generally* Cal. Gov't Code §§ 91000-14.

70 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

71 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

72 Cal. Gov't Code § 91000(b).

73 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

74 *See* Cal. Gov't Code § 91003(b).

75 California Attorney General, *Conflict of Interest, 55 (*2010), available at http://ag.ca.gov/publications/coi.pdf.

76 *Id.*

77 *See* Cal. Gov't Code § 1091.5.

78 *See* Cal. Gov't Code § 1091(a), (c).

79 *See* Cal. Gov't Code § 1091(b).

80 *See* Cal. Gov't. Code § 1091.

81 California Attorney General, *Conflict of Interest*, 67(2010), available at http://ag.ca.gov/publications/coi.pdf.

82 *See* 70 Cal. Op. Att'y Gen. 45 (1987).

83 *See* Cal. Educ. Code § 35107(e).

84 *People v. Chacon*, 40 Cal. 4th 558, 53 Cal. Rptr. 3d 876 (2007).

85 At the time of publication there is pending state legislation that would allow the Fair Political Practices Commission to enforce and provide guidance on Government Code section 1090 contract issues. *See* A.B. 1090, 2013-2014 Leg., Reg. Sess. (Cal. 2013).

86 *See* Cal. Gov't Code § 12519.

87 *See* Cal. Gov't Code § 1097.

88 *Thomson v. Call,* 38 Cal. 3d 633, 214 Cal. Rptr. 139 (1985).

89 *See* Cal. Gov't Code § 1092.

90 Cal. Gov't Code § 87406.3; 2 Cal. Code Regs. § 18746.3.

91 Cal. Gov't Code § 87407.

92 Cal. Gov't Code § 53227(a).

93 Cal. Gov't Code § 53227.2(a).

94 Cal. Educ. Code § 35107(b)(1).

95 Cal. Educ. Code § 72103(b)(1).

96 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).

97 *Bd. of Retirement of Kern County Employees' Retirement Ass'n v. Bellino*, 126 Cal. App. 4th 781, 24 Cal. Rptr. 3d 384 (2005).

98 *See generally* Cal. Gov't Code §§ 91000-14.

99 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

100 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

101 Cal. Gov't Code § 91000(b).

102 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

# CHAPTER 3:
# Perk Issues, Including Compensation, Use of Public Resources and Gift Laws

### Available from Institute for Local Government website at:

- *This chapter:* www.ca-ilg.org/perks
- *Whole publication (Understanding the Basics of Public Service Ethics Laws):* www.ca-ilg.org/EthicsLaws

# Chapter 3: Perk Issues, Including Compensation, Use of Public Resources and Gift Laws

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# Compensation Issues

## Basic Rules

Typically there is a legal limit on public official compensation levels, either in state or local statutes. Public officials, particularly elected ones, may only receive such compensation that the law allows.[1] Any extra compensation must be refunded.[2] Moreover, as protectors of the public purse, courts generally take a strict approach to public official compensation limits.[3]

**WITH MONEY COMES EDUCATION**

If a local agency provides any type of compensation or payment of expenses to members of a legislative body, then all of the members must have two hours of ethics training within one year of entering public service. Subsequent trainings must occur every two years after that.[4]

For more information on these requirements, see www.ca-ilg.org/AB1234compliance.

### Counties

County boards of supervisors set their salaries; supervisors' salaries are subject to referendum.[5]

### Special Districts

California law sets the salaries for members of special district governing boards—typically in the law that creates the particular kind of special district.[6] Salaries usually are tied to the days a public official spends participating in meetings or other district-related work, with a maximum number of compensated days per month. The chart below contains examples.

| Special Districts | | |
|---|---|---|
| **Type of District** | **Per Day Maximum** | **Maximums** |
| Park and recreation districts | $100 | $500 per month[7] |
| Sanitation districts | $100 per day for board meetings or service provided at the request of the board | Not to exceed six days per month[8] |
| Harbor districts | No per day salary | $600 per month[9] |
| Utility districts | $100 per day | $600 per month[10] |
| **Irrigation Districts** | | |
| Irrigation districts of less than 500,000 acres | $100 per day | Not to exceed six days of compensated service[11] |
| Irrigation districts of less than 500,000 acres that produce or deliver electricity | $100 per day OR $600 per month | An annual cap of $15,000[12] |
| Irrigation districts of 500,000 acres or more | No per day salary | Salary to be fixed by ordinance and subject to referendum but cannot exceed the salary of a member of the Imperial County Board of Supervisors[13] |

| Water Districts | | |
|---|---|---|
| **Type of District** | **Per Day Maximum** | **Maximums** |
| Water district directors (as defined) | $100 per day | Not to exceed 10 days of compensated service per month[14] |
| California water district officials (as defined) | $100 per day | No maximum[15] |
| County water district directors (as defined) | $100 per day | Not to exceed 6 days of compensated service per month[16] |
| Contra Costa County Water District directors (as defined) | $100 per day | Not to exceed 10 days of compensated service per month[17] |
| Municipal water district directors (as defined) | $100 per day | Not to exceed 6 days of compensated service per month[18] |

What kinds of meetings and days of work may a district official be compensated for? Typically:

- A meeting of any "legislative body" as defined by California's open meeting laws;
- A meeting of an advisory body; and
- Conference attendance or educational activities, including ethics training.[19]

Agencies may compensate officials for attendance at other events as specified in a written policy adopted in a public meeting.[20] Note that these parameters don't apply when the district does not pay compensation based on number of days doing district business, but instead pays a more salary-like form of compensation.[21]

## Cities

### *Charter Cities*

For charter cities, elected official compensation is a matter of local concern which may be addressed in the city's charter.[22]

### *General Law Cities*

Broadly speaking in general law cities, city council members' baseline compensation is set by ordinance; such compensation is tied to parameters established in California law in the 1980s.[23] The starting points are:[24]

| General Law Cities | |
|---|---|
| **City Size by Population** | **Baseline Per Month Salary** |
| Up to and Including 35,000 | $300 |
| Over 35,000 Up to and Including 50,000 | $400 |
| Over 50,000 Up to and Including 75,000 | $500 |
| Over 75,000 Up to and Including 150,000 | $600 |
| Over 150,000 Up to and Including 250,000 | $800 |
| Over 250,000 Population | $1,000 |

General law cities may increase these amounts by up to five percent per year from the date of any prior adjustments.[25] When a city council votes to increase compensation, the increase takes effect in the future—not during the deciding council members' current terms.[26]

Elected mayors may receive additional compensation.[27]

These amounts compensate city council members for their service on the council, including any commission, committee, board, authority, or similar body on which the city council member serves, unless California law authorizes additional compensation.[28] If California law provides for additional council member compensation for serving on a commission—but that statute does not specify an amount of compensation—the compensation is $150 per month.[29]

**DISCLOSURE REQUIREMENTS WHEN MAKING COMPENSATED APPOINTMENTS**

From time to time, a decision-making body will be asked to appoint one or more of its members to certain positions. If that appointment involves additional compensation, the agency must make a special disclosure.[30]

The disclosure is on a form provided by the Fair Political Practices Commission and must be posted on the agency's website.[31]

## Local Agency Chief Executives and Staff

Governing bodies must approve all contracts with local agency chief executives (as defined) in open session, which must be reflected in the minutes.[32] In addition, salaries, salary schedules and fringe benefits must be approved at a regular (as opposed to a special) meeting of the body.[33]

Copies of contracts are public documents must be made available on request[34] (although some agencies elect to post these documents on their websites in the spirit of transparency).

Beginning in 2012, California law prohibits local agencies[35] from approving contracts for chief executives or department heads (as defined[36]) that contain automatic renewal clauses that provide for automatic compensation adjustments that exceed the cost of living.[37]

Contracts must also comply with California law restrictions on the amount of severance an agency pays if it becomes necessary to terminate a contract with a local agency employee.[38] Copies of severance agreements are public documents.[39]

If an employee is subsequently convicted of abuse of position (as defined[40]), the employee must reimburse 1) any severance payments paid,[41] and 2) any paid leave provided pending charges.[42]

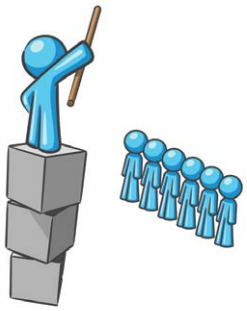
**FOR MORE INFORMATION**

On executive compensation issues, see www.ca-ilg.org/post/executive-compensation-issues.

For specific questions, please contact agency counsel.

## Special Issue: Speaking and Other Fees

### Basic No-Honoraria Rule



California law also regulates the degree to which public officials may receive payments for giving a speech, writing an article or attending a public or private conference, convention, meeting, social event, meal or similar gathering.[43] No local elected office holder, candidate for local elected office, or designated employee may accept such payments—which are known as honoraria.[44] The notion is such communications are part of a public official's service.

If one receives an honorarium from someone who is unaware of the rules, there is a 30-day time limit for returning it.[45]

### Exceptions to No-Honoraria Rules

Some gestures in connection with speaking or writing engagements are allowed. These include:

» **Payments Voluntarily Made to Charitable and Similar Organizations.** An organization may recognize a public official's speech, article or meeting attendance by making a direct contribution to a bona fide charitable, educational, civic, religious, or similar tax-exempt nonprofit organization.[46] A public official may not make such donations a condition for the speech, article or meeting attendance.[47] In addition, the official may not claim the donation as a deduction for income tax purposes.[48] Nor may the donation have a reasonably foreseeable financial effect on the public official or on any member of the official's immediate family.[49] The official may not be identified to the nonprofit organization in connection with the donation.[50]

» **Payments Deposited in Local Agency General Fund.** An honorarium given to an official that is unused may be deposited into the local agency's general fund within 30 days of receipt, so long as it is not claimed by an official as a deduction from income for income tax purposes.[51]

» **Income from Bona Fide Occupation.** An official may be paid income for personal services if the services are provided in connection with a bona fide business, trade, or profession (such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting) and the services are routinely provided in connection with the trade, business or profession.[52] This exception does not apply, however, when the main activity of the business or profession is making speeches.[53]

» **Some Gestures in Connection with a Speech or Panel Discussion.** An official may accept certain gestures when the official gives a speech, participates in a panel or seminar, or provides a similar service. These are exempt from the honoraria ban and are not considered "gifts" by the Political Reform Act. These include free admission to the event, refreshments and similar non-cash nominal benefits received at the event, necessary lodging and subsistence provided directly in connection with the speech, panel, seminar, or service, and transportation (within California) to the event.[54]

## Penalties

The restrictions against accepting fees are part of the Political Reform Act. Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[55]

These penalties can include any or all of the following:

- Immediate loss of office;[56]
- Prohibition from seeking elected office in the future;[57]
- Fines of up to $10,000 or more depending on the circumstances;[58] and
- Jail time of up to six months.[59]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Reimbursement of Expenses

## Basic Rules

California law contains certain requirements and restrictions on local agency practices relating to reimbursing local elected and appointed officials' expenses.

### When May Expenses Be Reimbursed?

The core test on whether an expense is reimbursable is whether the expense was "actual and necessary" in the official's performance of official duties.[60] Local agencies must adopt expense reimbursement policies that specify which kinds of activities are reimbursable for decision-making body members.[61] Many also have policies that govern employee reimbursements. Such policies are an opportunity for a local agency to make findings on why reimbursable activities are necessary to the individual's performance of their duties.[62]

Of course, if one has already received a cash advance or other form of payment for an expense, one may not request reimbursement. Double-charging a public agency for expenses misappropriates public resources and is a crime.[63]

### Process Requirements

For decision-making body member reimbursements, local agencies must:

- Use expense report forms;[64]
- Identify a "reasonable time" within which these forms must be submitted;[65] and
- Require that all expenses be documented with receipts.[66]

Those requesting reimbursement must show their request falls within the agency's parameters for use of public resources.[67] Many local agencies have also adopted similar policies for employee reimbursements.

All expense reimbursement requests and supporting documentation are public records.[68]

### Amounts

Local reimbursement policies may specify what constitutes reasonable rates for travel, meals, lodging and other expenses. For decision-making body reimbursements, if a local policy does not specify reimbursement rates, then the reimbursable rates default to Internal Revenue Service guidelines.[69]

If a public official wants to seek reimbursement for levels of expenses not otherwise authorized under the agency's reimbursement policy, then the official may seek prior approval for such reimbursement from the governing body (before incurring the expense).[70] Officials who spend more than allowed under their agencies' reimbursement policies have the option of simply paying the extra costs themselves.[71]

California law requirements relating to expense reimbursement policies and restrictions on reimbursement rates only apply to "reimbursements of members of a legislative body."[72] Although charter cities may not be subject to this requirement given their home rule authority, many charter cities have such policies as a matter of good practice.[73]

Again, many local agencies have adopted policies that govern reimbursements for staff as well as elected and appointed officials. Another option is to have the policies address expenses other than those are, strictly speaking, "reimbursed" (for example, those expenses that are paid by the agency in the first instance).

### FOR MORE INFORMATION

See the following resources:

- "Buying Meals for Others on the Public's Dime," available at www.ca-ilg.org/dime
- "Expense Reimbursement Frequently Asked Questions," available at www.ca-ilg.org/ExpenseReimbursementFAQs
- Sample reimbursement policies available at www.ca-ilg.org/SampleReimbursementPolicies

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

### California Law Penalties

Penalties for misuse of public resources or falsifying expense reports in violation of expense reporting policies include:

- Loss of reimbursement privileges;[74]
- Restitution to the local agency;[75]
- Civil penalties of up to $1,000 per day and three times the value of the resource used;[76] and
- Criminal prosecution and a lifetime bar from public office.[77]

At some point, personal use of public resources becomes embezzlement—a form of theft.[78] Embezzlement may constitute "willful misconduct" which warrants the removal from office of a public officer, or it may be prosecuted as a felony violation. A public officer convicted of embezzlement is guilty of a felony punishable by imprisonment; in addition, that person is ineligible thereafter to hold public office within California.[79]

### Federal Law Penalties

Federal prosecutors have been known to treat the receipt of illegitimate expense reimbursements or advances as income to the official. Because the official has not typically reported these payments as such on the official's tax returns, the official then becomes subject to an action for income tax evasion.

The Internal Revenue Code is notoriously complex and its penalty sections are no exception. The general penalty for willful income tax evasion is a fine of up to $100,000 and up to five years in prison, or both. Those convicted are also responsible for paying the costs of prosecution.[80] Failure to report information to the tax authorities is punishable by fines of up to $25,000 and/or a year in federal prison, plus the costs of prosecution.[81]

If the postal service was used in any way, such use can also become the basis for a charge of mail fraud.[82] Mail fraud is punishable by up to five years in federal prison per violation and/or a fine of the greater of 1) twice the gain to the violator or 2) $250,000 per violation.[83]

If the program has any degree of federal funding, the federal criminal laws against corruption and embezzlement will also apply.[84]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Restrictions on Use of Public Resources

## Basic Rules

### No Personal or Political Use of Public Resources

Under California law, using public resources for either personal or political purposes is illegal.[85] "Public resources" include such things as:

- Money (for example, charges made on an agency credit card or account);[86]
- Staff time;
- Equipment (for example, machinery, vehicles, technology, tools, telephones, furniture and computers); and
- Supplies (for example, items one would otherwise purchase at office supply or hardware stores).

"Use" means the use of public resources that is substantial enough to result in a gain in advantage for the user and a loss to the local agency that can be estimated as a monetary value.[87] Using a public agency vehicle for personal errands is an example, as is using office equipment and supplies for one's political campaign, business or family purposes (for example, the office photocopier).

There are very narrow exceptions for "incidental and minimal" use of resources. The purpose of these exceptions appears to be more to prevent traps for the unwary; they do not constitute an affirmative authorization for personal use of public resources. An "occasional telephone call" is an example of an incidental and minimal use of public resources.[88]

In addition, subsequent reimbursement or payment for resources misused is not a defense.[89]

### No Use of Public Resources on Ballot Measure Related Activities

Local agencies may take positions on ballot measures, as long as they do so in an open meeting where all points of view can be heard.[90] They generally may not, however, use public resources to engage in campaign-type advocacy with respect to the agency's position. Materials that urge voters to either "vote yes" or "vote no" on a measure constitute campaign advocacy,[91] so are materials whose style, tone and timing indicate that their purpose is advocacy as opposed to informational.[92]

**FOR MORE INFORMATION**

On ballot measure activities, see www.ca-ilg.org/ballot-measure-activities.

### Prohibition Against Mass Mailings at Public Expense

The law reflects the notion it is unfair for public officials to use public resources to enhance their visibility and name identification with potential voters. For this reason, California law forbids sending mass mailings at public expense.[93] The Fair Political Practices Commission has defined "mass mailings" as sending more than 200 substantially similar pieces that contain the name, office or pictures of elected officials except as part of a standard letterhead using the official's name and office.[94]

The rules on what constitute a mass mailing are quite complex. Make sure to consult with agency counsel whenever sending out materials that contain elected officials' names, offices or pictures (for example, newsletters). Also, there are some exceptions to the prohibition (for example, legal notices and directories).

### FOR MORE INFORMATION

On mass mailings, see the following resources:

- "Career-Saving Tips on Mass Mailings," available at www.ca-ilg.org/massmailing
- The Fair Political Practices Commission fact sheet on prohibited mass mailings available at www.fppc.ca.gov/index.php?id=54#fact

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

Public officials face both criminal and civil penalties for using public resources for personal or political benefit.[95]

Criminal penalties include:

- Two- to four-years in state prison;[96] and
- Permanent disqualification from public office.[97]

Civil penalties include fines of up to:

- $1,000 for each day the violation occurs;
- Three times the value of the resource used;[98] and
- Possible reimbursement for the costs of any litigation initiated by private individuals, including reasonable attorney's fees.[99]

Additionally, the Fair Political Practices Commission may impose an administrative fine of up to $5,000 per violation.[100]

Misuse of public resources is also punishable under laws prohibiting misappropriation of public resources and embezzlement.[101]

Both intentional and negligent violations of the law are punishable.[102]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

### ETHICS CODES VERSUS LOCAL CONFLICT OF INTEREST CODES

California's Political Reform Act requires local agencies to adopt local conflict of interest codes.[110] These codes supplement California law, by specifying which positions in the agency are subject to which ethics laws.

**For more information,** see "About Local Conflict of Interest Codes" (see http://www.ca-ilg.org/local-conflict-of-interest-codes) and the Fair Political Practices Commissions materials on adopting local conflict of interest codes (see www.fppc.ca.gov/index.php?id=228).

# Gifts to Public Officials

## Basic Rules

Receiving gifts can present a host of issues for public officials. Of course, making demands for gifts in exchange for official action violates California and federal laws prohibiting bribery and extortion.[103] Such demands also deprive the public of its right to honest services from public officials.[104]

Gifts that are not requested present other issues. California law puts an annual limit on the aggregate value of gifts a public official can receive from a single source; gifts over a certain amount also must be reported on a public official's Statement of Economic Interests.

Generally speaking, California public officials must:

- Report gifts worth $50 or more on their Statement of Economic Interests.[105] Gifts from a single source must be added up over the course of a calendar year. An official's reporting obligation is triggered when the combined value of a series of gestures from a single gift-giver reaches $50 or more.
- Not receive gifts that exceed $440 (2013-14) from a single source per calendar year.[106] This limit can be exceeded by accepting a single large gesture or a series of gestures over the course of a calendar year from the same gift-giver that total more than $440 (2013-14).[107]
- Having accepted gifts may keep a public official from participating in the decision-making process. If a public official accepts gestures with a value of more than $440 (2013-14) from a single gift-giver in the twelve months preceding the official's involvement in a decision affecting that gift giver, the official may have to disqualify himself from participating in that decision-making process.[108]

More detail on these rules is available at www.ca-ilg.org/GiftCenter. These rules apply to elected officials, top level managers and others who are covered in the agency's local conflict of interest code or make governmental decisions.[109]

Putting aside what the rules allow, public officials are well-advised to look beyond what the law allows in any situation involving a nice gesture. This includes considering how residents will view a public official's actions.

**COMPLIANCE STRATEGY:**
### Questions for Public Officials to Ask About Nice Gestures

One way to analyze one's likely obligations under California's gift rules is to ask:

1. Did I or my family receive something of value?
2. What's its value?
3. Who gave it to me?
4. Did I do something in exchange for what I received?
5. What kind of gift is it and do special rules apply as a result?
6. Which of the permitted courses of action do I want to take with respect to the gift?

Explanations of each of questions are available at www.ca-ilg.org/GiftCenter.

Unless one of the exceptions applies[111] (see chart on page 39), a public official receives a gift for purposes of California's gift rules any time the official receives anything that:

- Has a monetary value
- Provides the official with a personal benefit
- For which the official doesn't pay full value.[112]

## Exceptions/Gifts Subject to Special Rules

Certain kinds of gestures either are exempt from California's gift rules or are subject to special treatment. More information on each of these is available at www.ca-ilg.org/GiftCenter.

### Special Rules Relating to Who Receives the Gift (Question 1 at www.ca-ilg.org/GiftCenter)

- ✓ Gifts to family members[115]

### Gifts Subject to Special Valuation Rules (Question 2 at www.ca-ilg.org/GiftCenter)

- ✓ Air transportation[116]
- ✓ Nonprofit or political fundraiser tickets [117]
- ✓ Other tickets and passes[118]
- ✓ Invitation only events[119]

### Special Rules for Certain Sources of Gifts (Question 3 at www.ca-ilg.org/GiftCenter)

- ✓ Someone who is an intermediary for another[120]
- ✓ Group gifts[121]
- ✓ Family gifts[122]
- ✓ Gestures received in the context of certain relationships:
  - » Bona fide dating relationships[123]
  - » Existing personal or business relationship[124]
  - » Long term relationships[125]
- ✓ Acts of neighborliness[126]
- ✓ Agency gifts[127]
  - » Gifts from public agencies to agency officials[128]
  - » Agency provided tickets or passes[129]
  - » Agency raffles or gift exchanges[130]

### Gestures that Are Part of An Exchange (Question 4 at www.ca-ilg.org/GiftCenter)

- ✓ Gifts paid for (reimbursed) in full[131] or in part[132]
- ✓ Gifts exchanged on occasions like birthdays or holidays[133]
- ✓ Trading off who pays for meals or activities ("reciprocal exchanges")[134]
- ✓ Employee gift exchanges[135]
- ✓ Barter transactions[136]
- ✓ Presentations, event attendance and articles written[137]
- ✓ Ceremonial functions[138]
- ✓ Employment-related gestures[139]
- ✓ Business gestures[140]
- ✓ Gestures in connection with volunteer nonprofit service[141]
- ✓ Prizes in bona fide competitions[142]

### Additional Special Rules Based on Type of Gift (Question 5 at www.ca-ilg.org/GiftCenter)

- ✓ Home hospitality[143]
- ✓ Informational material[144]
- ✓ Inheritances[145]
- ✓ Leave credits[146]
- ✓ Disaster relief payments[147]
- ✓ Personalized plaques or trophies[148]
- ✓ Wedding gifts[149]
- ✓ Travel[150] and free transportation from transportation companies[151]
- ✓ Tickets /free admissions[152]
- ✓ Payments to worthy causes made at an official's request (behested payments)[153]
- ✓ Wedding guest benefits[154]
- ✓ Bereavement offerings[155]
- ✓ Acts of compassion[156]

Gifts can be:

- Tangible or intangible
- Real property or personal property
- Goods or services[113]

Under some circumstances, gifts that an official's family receives are considered gifts to the official for purposes of California's gift rules.[114]

### TRAVEL PASSES FROM TRANSPORTATION COMPANIES

When an official is offered free or discounted transportation, the official is well-advised to ask, "Who is offering the travel?" Different rules may apply to gifts of travel depending on who is the source of the gift.

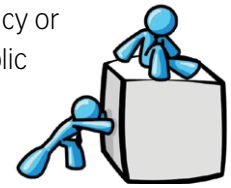
If the gift of travel is from a transportation carrier, a public official should be especially careful. California law forbids elected and appointed public officials from accepting free passes or discounted travel from transportation companies.[157]

This prohibition applies to any kind of travel — personal, business or on behalf of one's public agency — to any location, near or far. The rule applies both to elected and appointed public officers but not to employees.[158]

However, sometimes the rule doesn't apply. The chief exception is when the free or discounted travel is available to the general public and is given for reasons unrelated to the person's status as a public official.[159] For example, the prohibition against accepting free travel from transportation companies did not apply when:

- ✓ The elected official received a first-class airline upgrade because he was going on his honeymoon and the upgrade was given to all honeymooners.[160]
- ✓ An elected official received free airline travel because he was the spouse of a flight attendant.[161]
- ✓ An elected official exchanged frequent flier miles for an airline ticket because the earning of frequent-flier miles is done without regard to the person's status as an officeholder.[162]

## What to Do About Unwanted Gifts?



Some officials have a no-gifts policy or may be concerned about the public perceptions associated with receiving gifts from certain sources (or certain kinds of gifts). They may also just not want the gift.

Under such circumstances, an official has the following options:

- Decline the gift in the first place or return the gift unused to the gift giver within 30 days of receiving it.[163] Documenting one's actions (for example, with a thanks-but-no-thanks note), can be helpful.
- If the item is a pass or ticket, simply not use the pass or ticket and not let anyone else do so.[164]
- Donate the gift, unused, within thirty days of receipt to a 501(c)(3) tax-exempt nonprofit organization or to a government agency, without claiming a tax deduction for the donation. (Note the donation must be made within 30 days of the gift's receipt and the gift must be unused. Note too that for gifts to nonprofits, the nonprofit must be one which neither the official nor a family member holds a position.)[165]
- Reimburse the donor for the fair market value of the gift within 30 days of receiving it.[166] Keeping documentation (for example, a cancelled check) of the reimbursement is a good practice.

For gifts that are over the annual limit or would put the official over the annual limit for that gift giver, some officials also "buy down" the value of a gift (or the most recent gift in a series) to keep the value of the gift(s) from that gift giver below the annual limit.

The official then reports the fact that they received gift(s), what the gift(s) was/were, and the source of the gift(s) on their Statement of Economic Interests. Again, when paying down the gift, it is best to do so by check and then make sure the donor cashes the check.

### FOR MORE INFORMATION

On gift laws, see the following resources:

- The Institute Gift Resource Center, see www.ca-ilg.org/GiftCenter
- The Fair Political Practices Commission fact sheet for local officials on gifts, honoraria, travel and loans, available at www.fppc.ca.gov/factsheets/LocalGiftFactSheet2013.pdf

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

### California Law Penalties

These gift limit and reporting requirements are part of the Political Reform Act. Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[167]

These penalties can include any or all of the following:

- Immediate loss of office;[168]
- Prohibition from seeking elected office in the future;[169]
- Fines of up to $10,000 or more depending on the circumstances;[170] and
- Jail time of up to six months.[171]

### Federal Law Penalties

*Honest Services Fraud*

Under federal wire and mail fraud laws, the public has the right to the "honest services" of public officials.[172] The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.[173] That duty is violated when a public official makes a decision that is not motivated by his or her constituents' interests but instead by his or her personal interests.[174] Specifically, honest services fraud refers to actions that constitute bribery and kickback schemes.[175] In one instance, federal authorities prosecuted a city treasurer whose decisions to award contracts were motivated in part by gifts.[176]

The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a $250,000 fine.[177]

*Extortion*

A demand for gifts or other benefits in exchange for official action could also constitute extortion. Extortion occurs when someone obtains money through threat of harm or under color of official right.[178] To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a $250,000 fine.[179] A person convicted of a felony involving extortion is forever disqualified from seeking elected office in California.[180]

### Income Tax Violations

Income tax problems arise when officials receive money and other kinds of valuable items and don't report them on their income tax forms. Prosecutors don't need to show that the money or gifts were received in exchange for improper purposes—only that they were not reported on the official's income tax form.

Income tax evasion carries with it a possible five-year prison term and a fine of up to $100,000.[181] In addition, prosecutors can require the defendant to pay for the costs of prosecution (in addition to one's own costs associated with defending against the prosecution).[182] The sometimes-related crime of filing a false tax return is punishable by a maximum three-year prison term and a fine of up to $100,000 (along with the costs of prosecution).[183]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Use of Campaign Funds

## Basic Rule

In general, money raised to support a person's election to office may only be used for political, legislative, or governmental purposes. It's not okay to spend these monies is a way that confers a personal benefit on the candidate.[184] Any expenditure that confers a substantial personal benefit on an individual must be directly related to a political, legislative, or governmental purpose.[185] For example, using campaign funds to repair your car so you can travel to and from campaign events confers a personal benefit and is not a proper expenditure of those funds.

### FOR MORE INFORMATION

On the permissible use of campaign funds, see *Campaign Disclosure Manual 2: Information for Local Candidates, Superior Court Judges, Their Controlled Committees and Primarily Formed Committees for Local Candidates, 2007*, available online at www.fppc.ca.gov.

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

These restrictions are part of the Political Reform Act. Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[186]

These penalties can include any or all of the following:

- Immediate loss of office;[187]
- Prohibition from seeking elected office in the future;[188]
- Fines of up to $10,000 or more depending on the circumstances;[189] and
- Jail time of up to six months.[190]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Endnotes and Additional Information

**Note:** *Sections in the California Code are accessible at* http://leginfo.legislature.ca.gov/. *Fair Political Practices Commission regulations are accessible at* www.fppc.ca.gov/index.php?id=52. *A source for case law information is* www.findlaw.com/cacases/ *(requires registration)*

1 For example, the salary of council members of general law cities is controlled by Government Code section 36516(a), which *permits* a city council to establish by ordinance a salary up to a ceiling determined by the city's population. The electorate may approve a higher salary. Cal. Gov't Code § 36516(b). A council member appointed or elected to fill a vacancy is compensated in the same amount as his or her predecessor. A directly-elected mayor may receive additional compensation with the consent of the electorate or by ordinance of the city council. Cal. Gov't Code § 36516.1.

2 *County of San Diego v. Milotz*, 46 Cal. 2d 761, 767, 300 P. 2d 1, 4 (1956) (action to recover fees from court reporter for faulty work).

3 *Id.*

4 Cal. Gov't Code §§ 53234-35. *See* www.ca-ilg.org/ab1234compliance.

5 Cal. Const. art. XI, § 1(b).

6 *See, e.g.,* Cal. Pub. Res. Code § 5784.15(a), (b) (park and recreation district board members may be compensated a maximum of $100 per day for board meetings and $500 per month); Cal. Health & Safety Code § 6489 (sanitation district board members may receive $100 per day for board meetings or service rendered at request of board, not to exceed six days per month); Cal. Water Code §§ 20201, 20202 (water district officials—as defined—may, by ordinance, provide for compensation of $100 per day for each day's attendance at board meetings or each day's service rendered at the board's request; not to exceed 10 days service/meetings per month); Cal. Water Code §§ 34740-41 (California water districts must adopt bylaws fixing compensation paid to officers, but may not exceed $100 per day for attendance at board meetings and for each day's service at the request of the board); Cal. Water Code § 30507 (county water district directors receive compensation not to exceed $100 per day for each day's attendance at board meetings or each day's service rendered at the board's request but not to exceed six days service/meetings per month); Cal. Water Code § 30507.1 (Contra Costa County Water District directors receive compensation not to exceed $100 per day for each day's attendance at board meetings or each day's service rendered at the board's request but not to exceed 10 days service/meetings per month); Cal. Water Code § 21166 (irrigation district directors in districts of less than 500,000 acres receive 1) compensation of up to $100 per day, not to exceed six days, 2) irrigation district directors in districts that produce or deliver electricity receive one of the following: up to $100 per day or $600 per month, with an annual cap of $15,000); Cal. Water Code § 22840 (irrigation districts of 500,000 acres or more receive a salary to be fixed by ordinance and subject to referendum but cannot exceed the salary of a member of the Imperial County Board of Supervisors); Cal. Water Code § 71255 (municipal water district directors receive compensation not to exceed $100 per day for each day's attendance at board meetings or each day's service rendered at the board's request but not to exceed six days service/meetings per month).

7 Cal. Pub. Res. Code §§ 5784.15(a), (d).

8 Cal. Health & Safety Code § 6489.

9 Cal. Harb. & Nav. Code § 6060.

10 Cal. Pub. Util. Code § 11908.1.

11 Cal. Water Code § 21166.

12 Id.

13 Cal. Water Code § 22840.

14 Cal. Water Code §§ 20201, 20202.

15 Cal. Water Code §§ 34740-41.

16 Cal. Water Code § 30507.

17 Cal. Water Code § 30507.1.

18 Cal. Water Code § 71255.

19 Cal. Gov't Code § 53232.1(a).

20 Cal. Gov't Code § 53232.1(b).

21 Cal. Gov't Code § 53232.1(c).

22 Cal. Const. art. XI, § 5(b)(4).

23 *See* Cal. Gov't Code § 36516.

24 *See* Cal. Gov't Code § 36516(a).

25 *Id.*

26 *See* Cal. Gov't Code § 36516.5 (providing a change of compensation does not apply during the same term but allowing adjustment when one or more members serving staggered terms begin new terms).

27 *See* Cal. Gov't Code § 36516.1.

28 *See* Cal. Gov't Code § 36516(d).

29 Cal. Gov't Code § 36516(c).

30 2 Cal. Code Regs. § 18705.5(c).

31 2 Cal. Code Regs. § 18705.5(c)(3). The form is called "Form 806." More information is available from the Fair Political Practices Commission website: http://www.fppc.ca.gov/index.php?id=635.

32 Cal. Gov't Code § 53262 (a) ("All contracts of employment with a superintendent, deputy superintendent, assistant superintendent, associate superintendent, community college president, community college vice president, community college deputy vice president, general manager, city manager, county administrator, or other similar chief administrative officer or chief executive officer of a local agency shall be ratified in an open session of the governing body which shall be reflected in the governing body's minutes.").

33 Cal. Gov't Code §54956(b) ("Notwithstanding any other law, a legislative body shall not call a special meeting regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Section 3511.1. However, this subdivision does not apply to a local agency calling a special meeting to discuss the local agency's budget.").

34 Cal. Gov't Code § 53262(b) ("Copies of any contracts of employment, as well as copies of the settlement agreements, shall be available to the public upon request.").

35 Cal. Gov't Code § 3511.1(c) (defining local agency as "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission, or agency thereof, or other local public agency").

36 Cal. Gov't Code § 3511.1(d) (defining "local agency executive" as "any person employed by a local agency who is not subject to the Meyers-Milias-Brown Act (Chapter 10 (commencing with Section 3500)), Chapter 5 (commencing with Section 45100) of Part 25 of Division 3 of Title 2 of the Education Code, or Chapter 4 (commencing with Section 88000) of Part 51 of Division 7 of Title 3 of the Education Code, and who meets either of the following requirements:

(1) The person is the chief executive officer of the local agency.

(2) The person is the head of a department of a local agency.

37 Cal. Gov't Code § 3511.2 ("On or after January 1, 2012, any contract executed or renewed between a local agency and a local agency executive shall not provide for the following: (a) An automatic renewal of a contract that provides for an automatic increase in the level of compensation that exceeds a cost-of-living adjustment.").

38 Cal. Gov't Code § 3511.2 ("On or after January 1, 2012, any contract executed or renewed between a local agency and a local agency executive shall not provide for the following:… (b) A maximum cash settlement that exceeds the amounts determined pursuant to Article 3.5 (commencing with Section 53260) of Chapter 2 of Part 1 of Division 2 of Title 5.") *See also* Cal. Gov't Code § 53260(a) ("All contracts of employment between an employee and a local agency employer shall include a provision which provides that regardless of the term of the contract, if the contract is terminated, the maximum cash settlement that an employee may receive shall be an amount equal to the monthly salary of the employee multiplied by the number of months left on the unexpired term of the contract. However, if the unexpired term of the contract is greater than 18 months, the maximum cash settlement shall be an amount equal to the monthly salary of the employee multiplied by 18.")

39 Cal. Gov't Code § 53262(b) ("Copies of any contracts of employment, as well as copies of the settlement agreements, shall be available to the public upon request.").

40 Cal. Gov't Code § 53243.4 ("For purposes of this article, 'abuse of office or position' means either of the following:

(a) An abuse of public authority, including, but not limited to, waste, fraud, and violation of the law under color of authority.

(b) A crime against public justice, including, but not limited to, a crime described in Title 7 (commencing with Section 92) of Part 1 of the Penal Code.").

41 Cal. Gov't Code §§ 53243.2 ("On or after January 1, 2012, any contract of employment between an employee and a local agency employer shall include a provision which provides that, regardless of the term of the contract, if the contract is terminated, any cash settlement related to the termination that an employee may receive from the local agency shall be fully reimbursed to the local agency if the employee is convicted of a crime involving an abuse of his or her office or position."), 53243.3 ("On or after January 1, 2012, if a local agency provides, in the absence of a contractual obligation, for any of the payments described in this article, then the employee or officer receiving any payments provided for those purposes shall fully reimburse the local agency that provided those payments in the event that the employee or officer is convicted of a crime involving the abuse of his or her office or position.").

42 Cal. Gov't Code §§ 53243 ("On or after January 1, 2012, any contract executed or renewed between a local agency and an officer or employee of a local agency that provides paid leave salary offered by the local agency to the officer or employee pending an investigation shall require that any salary provided for that purpose be fully reimbursed if the officer or employee is convicted of a crime involving an abuse of his or her office or position."), 53243.3 ("On or after January 1, 2012, if a local agency provides, in the absence of a contractual obligation, for any of the payments described in this article, then the employee or officer receiving any payments provided for those purposes shall fully reimburse the local agency that provided those payments in the event that the employee or officer is convicted of a crime involving the abuse of his or her office or position.").

43 *See* Cal. Gov't Code § 89501 (definition of honorarium).

44 *See* Cal. Gov't Code § 89502 (general prohibition).

45 *See* Cal. Gov't Code § 89501(b)(2).

46 *See* 2 Cal. Code Regs. §18932.5(a)(1) (direct charitable contributions excluded from honorarium definition).

47 *See* 2 Cal. Code Regs. §18932.5(a)(2).

48 *See* 2 Cal. Code Regs. §18932.5(a)(3).

49 *See* 2 Cal. Code Regs. §18932.5(a)(4).

50 *See* 2 Cal. Code Regs. §18932.5(a)(5).

51 *See* Cal. Gov't Code § 89501(b)(2).

52 *See* Cal. Gov't Code § 89501(b)(1).

53 *Id.*

54 2 Cal. Code Regs. §§ 18932.4(e), 18950.3 (under review by FPPC).

55 *See generally* Cal. Gov't Code §§ 91000-14.

56 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

57 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

58 Cal. Gov't Code § 91000(b).

59 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

60 Cal. Gov't Code § 53232.2.

61 Cal. Gov't Code § 53232.2(b).

62 65 Cal. Op. Att'y Gen. 516, 522 (1982) (citing *Collins v. Riley*, 24 Cal. 2d 912, 918, 152 P.2d 169 (1944) and determining that the expenses of a handicapped council member met this standard); 61 Cal. Op. Att'y Gen. 303 (1978) (citing *Gibson v. Sacramento County*, 37 Cal. App. 523, 174 P. 935 (1918)); *Madden v. Riley*, 53 Cal. App. 2d 814, 823, 128 P.2d 602, 607 (1942) (propriety of conference expenses for networking purposes).

63 *See People v. Bradley, 208 Cal. App. 4th 64 (2012),* reh'g denied (2012), rev. denied (2012) (upholding the conviction of city manager and council member of misappropriating public funds –Penal Code section 424--when they made charges on city credit card for expenses that they had also received cash advances for).

64 Cal. Gov't Code § 53232.3(a).

65 Cal. Gov't Code § 53232.3(c).

66 *Id.*

67 Cal. Gov't Code § 53232.3(b).

68 Cal. Gov't Code § 53232.3(e).

69 Cal. Gov't Code § 53232.2(c).

70 Cal. Gov't Code § 53232.2(f).

71 Cal. Gov't Code § 53232.2(g).

72 Cal. Gov't Code § 53232.2(b).

73 Cal. Const. art. XI, § 5. *County of Sonoma v. Comm'n on State Mandates*, 84 Cal. App. 4th 1264, 101 Cal. Rptr. 784 (2000).

74 *See* Cal. Gov't Code § 53232.4.

75 *Id.*

76 *See* Cal. Gov't Code § 8314.

77 *See* Cal. Penal Code § 424. See also Cal. Elect. Code § 20 (making those convicted of embezzlement or theft of public money ineligible for public office).

78 Cal. Penal Code § 504.

79 Cal. Penal Code § 514. See also Cal. Elect. Code § 20 (making those convicted of embezzlement or theft of public money ineligible for public office).

80 *See* 26 U.S.C. § 7201.

81 *See* 26 U.S.C. § 7203.

82 *See generally* 18 U.S.C. §§ 1341-46.

83 *See generally* 18 U.S.C. § 3571(b), (d).

84 *See, for example*, 18 U.S.C. §§ 641 (crime of embezzlement against the United States), 648 (misuse of public funds).

85 *See* Cal. Penal Code § 424; Cal. Gov't Code § 8314.

86 *See People v. Bradley,* 208 Cal. App. 4th 64 (2012) (upholding the conviction of city manager and council member of misappropriating public funds – Penal Code section 424 – when they made personal charges on city credit card).

87 Cal. Gov't Code § 8314(b)(4).

88 Cal. Gov't Code § 8314(b)(1).

89 *See People v. Bradley,* 208 Cal. App. 4th at 81-82 (holding restitution was not a defense because misappropriation occurs as soon as credit card was use for personal purpose or unused cash advances were not promptly returned; this is particularly the case when restitution is prompted by a criminal investigation).

90 *Vargas v. City of Salinas,* 46 Cal. 4th 1, 35-37, 92 Cal. Rptr. 3d 286, (2009), *see also Choice-in-Education League v. Los Angeles Unified School Dist.*, 17 Cal. App. 4th 415, 429-431, 21 Cal. Rptr. 3d 303 (1993) (school district did not illegally expend public funds by holding and broadcasting school board meeting at which the board took position opposing a statewide ballot initiative). *League of Women Voters of California v. Countywide Criminal Justice Coordination Committee*, 203 Cal. App. 3d 529, 560, 250 Cal. Rptr. 3d 161 (1988). *See also* Cal. Elect. Code § 9282.

91 Cal. Gov't Code § 54964(b)(3).

92 *Vargas*, 46 Cal. 4th at 40, citing *Stanson v. Mott*, 17 Cal. 3d 206, 130 Cal. Rptr. 697 (1976).

93 *See* Cal. Gov't Code § 89001.

94 *See* 2 Cal. Code Regs. § 18901.

95 *See* Cal. Penal Code § 424; Cal. Gov't Code § 8314.

96 Cal. Penal Code § 424

97 See Cal. Penal Code § 424. See also Cal. Elect. Code § 20 (making those convicted of embezzlement or theft of public money ineligible for public office).

98 Cal. Gov't Code § 8314(c)(1).

99 Cal. Gov't Code § 91012.

100 Cal. Gov't Code § 83116.

101 Cal. Penal Code § 424 ("(a) Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:

1. Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another; or,
2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law . . .").

102 Cal. Gov't Code § 8314(c)(1).

103 Cal. Penal Code §§ 68(a), 518; 18 U.S.C. §§ 201, 872-880.

104 Under federal wire and mail fraud laws, the public has the right to the "honest services" of public officials. 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services). The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary. *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law). That duty is violated when a public official makes a decision that is not motivated by his or her constituents' interests but instead by his or her personal interests. *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).

105 Cal.Gov't Code § 87207(a)(1). For more information, see http://www.ca-ilg.org/StatementofEconomicInterests.

106 Cal. Gov't Code § 89503; 2 Cal. Code Regs. § 18940.2 (the FPPC adjusts the limit biennially).

107 If the limit is exceeded one has several options, any of which must be exercised within 30 days of receiving the gift. One may return the gift unused to the donor, reimburse the donor for all or a portion of the value of the gift or donate the gift, without claiming a tax deduction, to a 501(c)(3) charitable organization or government agency. 2 Cal. Code Regs. §18941(c).

108 Cal. Gov't Code § 87103(e); 2 Cal. Code Regs. § 18703.4. This is because public officials may not make, participate in making, or influence governmental decisions which affect their personal financial interests. Cal. Gov't Code § 87100. The law makes a judgment that one is financially self-interested in a decision when one accepts gifts exceeding the $440 (2013-14) gift limit from someone affected by that decision. Cal. Gov't Code § 89503; 2 Cal. Code Regs. § 18940.2(a).

109 2 Cal. Code Regs. §§ 18940(d), 18730(b)(8.1)(A) (application of the gift disclosure rules). *See also* 2 Cal. Code Regs. §§ 18701(a), 18730(b)(9)(A) (application of the disqualification/conflict of interest rules). *See also* 2 Cal. Code Regs. § 18940.1(b) (definition of "official").

110 Cal. Gov't Code § 87300.

111 *See generally* 2 Cal. Code Regs. § 18942 (list of exceptions in the regulations).

112 *See generally* 2 Cal. Code Regs. § 18940(a).

113 2 Cal. Code Regs. § 18940(a).

114 *See generally* 2 Cal. Code Regs. § 18943.

115 2 Cal. Code Regs. § 18943.

116 2 Cal. Code Regs. § 18946.5.

117 2 Cal. Code Regs. § 18946.4.

118 2 Cal. Code Regs. § 18946.1.

119 2 Cal. Code Regs. § 18946.2.

120 Cal. Gov't Code §§ 87210, 87313; 2 Cal. Code Regs. § 18945(b) (the source of the payment is the source of the gift).

121 2 Cal. Code Regs. § 18945.2.

122 2 Cal. Code Regs. § 18942(a)(3).

123 2 Cal. Code Regs. § 18942(a)(17)(A).

124 2 Cal. Code Regs. § 18942(a)(18).

125 2 Cal. Code Regs. § 18942(a)(17)(C).

126 2 Cal. Code Regs. § 18942(a)(16).

127 2 Cal. Code Regs. § 18944.

128 2 Cal. Code Regs. § 18944.3.

129 2 Cal. Code Regs. § 18944.1.

130 2 Cal. Code Regs. § 18944.2.

131 *See* Cal. Gov't Code § 82028(a).

132 2 Cal. Code Regs. § 18941(c)(3).

133 2 Cal. Code Regs. § 18942(a)(8)(A).

134 2 Cal. Code Regs. § 18942(a)(8)(B).

135 2 Cal. Code Regs. § 18944.2(d) (does not apply to tickets or passes that come from someone outside the agency).

136 *See* Cal. Gov't Code § 82028(a).

137 Cal. Gov't Code §§ 89501, 89502.

138 2 Cal. Code Regs. §§ 18942(a)(12), 18942.3.

139 *See* Cal. Gov't Code §§ 82030, 82030.5, 87207.

140 *See* Cal. Gov't Code §§ 82005, 87207, 87209.

141 *See* Cal. Gov't Code § 82028(a); Institute for Local Government, Commitment to Nonprofit Causes and Public Service: Some Issues to Ponder, at 7 (2008). Available at www.ca-ilg.org/document/commitment-nonprofit-causes-and-public-service-some-issues-ponder.

142 2 Cal. Code Regs. § 18942(a)(13).

143 2 Cal. Code Regs. § 18942(a)(7).

144 2 Cal. Code Regs. §§ 18942(a)(1), 18942.1.

145 2 Cal. Code Regs. § 18942(a)(5).

146 2 Cal. Code Regs. § 18942(a)(9).

147 2 Cal. Code Regs. § 18942(a)(10).

148 2 Cal. Code Regs. § 18942(a)(6).

149 2 Cal. Code Regs. §§ 18946.3, 18942(b)(2).

150 2 Cal. Code Regs. §§ 18950-18950.4 (under review by FPPC).

151 *See* Cal. Const. art. XII, § 7 ("A transportation company may not grant free passes or discounts to anyone holding an office in this state . . .").

152 2 Cal. Code Regs. §§ 18946.4, 18946.1, 18946.2, 18942(a)(12), 18942.1.

153 *See* Cal. Gov't Code § 82015 (note the behested payment reporting requirement also applies to candidates). For more information, see www.ca-ilg.org/BehestedPayments.

154 2 Cal. Code Regs. § 18942(a)(14).

155 2 Cal. Code Regs. § 18942(a)(15).

156 2 Cal. Code Regs. § 18942(a)(17)(B).

157 *See* Cal. Const. art. XII, § 7 ("A transportation company may not grant free passes or discounts to anyone holding an office in this state . . .").

158 *See* 3 Cal. Op. Att'y Gen. 318 (1944).

159 74 Cal. Op. Att'y Gen. 26 (1991).

160 74 Cal. Op. Att'y Gen. 26 (1991).

161 67 Cal. Op. Att'y Gen. 81 (1984).

162 80 Cal. Op. Att'y Gen. 146 (1997).

163 2 Cal. Code Regs. § 18941(c)(2).

164 2 Cal. Code Regs. § 18946.1 (b)(3) ("A pass or ticket has no reportable value unless it is ultimately used or transferred to another person.").

165 2 Cal. Code Regs. § 18941(c)(2).

166 2 Cal. Code Regs. § 18941(c)(3).

167 *See generally* Cal. Gov't Code §§ 91000-14.

168 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

169 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

170 Cal. Gov't Code § 91000(b).

171 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

172 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).

173 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).

174 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).

175 *See Skilling v. U.S.,* 130 S.Ct. 2896, 2931(2010) (holding that in order to avoid unconstitutional vagueness, 18 USC §1346, defining "scheme or artifice to defraud," only criminalizes bribes and kick-back schemes).

176 *U.S. v. Kemp*, 379 F.Supp. 2d 690, 697-98 (E.D. Penn. 2005).

177 18 U.S.C. §§ 1341 ("…shall be fined under this title or imprisoned not more than 20 years, or both."). 1343 ("shall be fined under this title or imprisoned not more than 20 years, or both."). *See generally* 18 U.S.C. § 3571(b), (d).

178 18 U.S.C. § 1951.

179 18 U.S.C. § 1951(a). *See generally* 18 U.S.C. § 3571(b).

180 *See* Cal. Elect. Code § 20 (making those convicted of a felony involving bribery, embezzlement, extortion or theft of public money ineligible for public office).

181 26 U.S.C. § 7201.

182 *Id.*

183 26 U.S.C. § 7206(1).

184 *See* Cal. Gov't Code §§ 89510-22. Campaign funds include "any contributions, cash, cash equivalents, and other assets received or possessed" by a campaign committee. Cal. Gov't Code § 89511(b)(1).

185 Cal. Gov't Code § 89512 (an expenditure of campaign funds must be reasonably related to a legislative or governmental purpose, unless the expenditure confers a substantial personal benefit, in which case such expenditures must be directly related to a political, legislative or governmental purpose). "Substantial personal benefit" means a campaign expenditure which results in a direct personal benefit with a value of more than $200. Cal. Gov't Code § 89511(b)(3).

186 *See generally* Cal. Gov't Code §§ 91000-14.

187 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

188 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

189 Cal. Gov't Code § 91000(b).

190 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

# CHAPTER 4:
# Transparency Laws

## Available from Institute for Local Government website at:

- *This chapter:* www.ca-ilg.org/TransparencyLaws
- *Whole publication (Understanding the Basics of Public Service Ethics Laws):* www.ca-ilg.org/EthicsLaws

# Chapter 4: Transparency Laws

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# Economic Interest Disclosure

## Basic Rules

There is an adage about one's life being an open book. Nowhere is this truer than for public officials and their finances. The bottom line is when people join the ranks of public servants, the public gets to learn a great deal about their financial lives. The voters created these disclosure requirements when they approved the Political Reform Act in 1974.[1] As a result, those entering public service sacrifice a degree of privacy.

The disclosure requirements apply to nearly every local elected official and department head. Members of commissions, boards, committees and other local agency bodies with significant decision-making authority are also subject to the disclosure requirements. An agency may also require persons in staff positions to disclose their economic interests under the agency's local conflict of interest code. Such employees are known as "designated employees."[2]

This disclosure is made on a form called a "Statement of Economic Interests." It may also be referred to by the acronym "SEI" or its number "Form 700." A web-based version of the form is available from the Fair Political Practices Commission website: www.fppc.ca.gov. Local agencies may adopt electronic filing procedures with oversight from the Fair Political Practices Commission.[3] One's local agency usually provides paper copies of the form as well.

This form is filed upon assuming office, on an annual basis while in office, and upon leaving office.[4] Local rules may impose more stringent requirements.

The following kinds of economic interests must be disclosed if they meet certain minimum thresholds:

- Sources of income;
- Interests in real property;
- Investments;
- Business positions; and
- Sources of gifts.

See table on page 52.

### ETHICS CODES VERSUS LOCAL CONFLICT OF INTEREST CODES

California's Political Reform Act requires local agencies to adopt local conflict of interest codes.[5] These codes supplement California law, by specifying which positions in the agency are subject to which ethics laws.

**For more information,** see "About Local Conflict of Interest Codes" (available at www.ca-ilg.org/local-conflict-of-interest-codes) and the Fair Political Practices Commissions materials on adopting local conflict of interest codes (see www.fppc.ca.gov/index.php?id=228).

## Types of Economic Interests that Must Be Disclosed

- **Sources of Income.** $500 or more in income from one source (including any income received from a business, nonprofit organization, government agency, or individual) must be disclosed. "Sources of income" include a community property interest in a spouse or domestic partner's[6] income, but not separate property income.[7] Additionally, if someone promises an official $500 or more twelve months prior to the decision, that person or entity promising the money is a source of income.[8]
- **Personal Finances.** An official has an economic interest in the official's expenses, income, assets or liabilities and those of the official's immediate family (spouse or domestic partner[9] and dependent children).[10]
- **Real Property.** An interest in real property where the interest is worth $2,000 or more in real property must be disclosed. The interest may be held by the official, the official's spouse or domestic partner[11] (even as separate property) and children or anyone acting on their behalf. Real property interests can also be created through leaseholds, options and security or mortgage interests in property.[12]
- **Investments.** Another disclosable interest is created when the official, the official's spouse or domestic partner[13] (even as separate property), or dependent children or anyone acting on their behalf has created an investment worth $2,000 or more in a business entity, even if the official does not receive income from the business.[14]
- **Business Employment or Management.** If the official serves as a director, officer or partner, trustee, employee or otherwise serves in a management position in a company, an economic interest is created.[15] Note this does not apply to a member of the board of a nonprofit entity.
- **Related Businesses.** The official must disclose an interest in a business that is the parent, subsidiary or is otherwise related to a business in which the official:
  - Has a direct or indirect investment worth $2000 or more; or
  - Is a director, officer, partner, trustee, employee, or manager.[16]
- **Business-Owned Property.** A direct or indirect ownership interest in a business entity or trust that owns real property is another disclosable interest.[17]
- **Loans.** Another kind of potentially disclosable interest is receiving a loan from someone (including someone who guarantees a loan), unless the loan is from a commercial institution issued on the same terms as available to anyone in the public.[18]
- **Gifts.** Gifts from a single source must be added up over the course of a calendar year. An official's reporting obligation is triggered when the combined value of a series of gestures from a single gift-giver reaches $50 or more.[19] For more discussion of the gift issue, please see chapter 3, pages 38-41, and www.ca-ilg.org/GiftCenter.

## Penalties

Economic interest disclosure requirements are part of California's Political Reform Act. Failure to report or incomplete reporting are punishable by a variety of civil, criminal and administrative penalties depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[20]

These penalties can include any or all of the following:

- Immediate loss of office;[21]
- Prohibition from seeking elected office in the future;[22]
- Fines of up to $10,000 or more depending on the circumstances;[23] and
- Jail time of up to six months.[24]

In addition to the above penalties, failure to file a Statement of Economic Interests on time will result in late fees of $10 per day, up to a maximum of $100.[25]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Campaign Contribution Disclosure

## Basic Rules

California has an extensive framework for transparency with respect to campaign contributions.[26] The basic theory is that the public has a right to know who gives money and other forms of support to candidates for public office; another is that the prospect of public disclosure will discourage improper influences.[27]

These transparency requirements apply not only to candidates, but also to groups which organize to participate in the election process (known as "committees" under the Political Reform Act).[28] Transparency requirements also apply to those who make large contributions to influence elections.[29] Those who participate in campaigns to pass or defeat ballot measures are also subject to these requirements.[30]

Cities and counties may have additional campaign finance disclosure laws for candidates for offices within their jurisdiction or committees focused on local jurisdiction ballot measures.[31] The Fair Political Practices Commission requires that these local ordinances be filed with the commission.[32]

In addition, certain kinds of local officials face California law restrictions on campaign contributions from people with business pending before the agency. Chapter 5 (pages 77-79) explains these restrictions.

Chapter 3 explains the restrictions on how campaign funds may be spent (only for political, governmental and charitable purposes) (page 42).

### FOR MORE INFORMATION

On campaign contribution disclosure, see the following resources:

- The Fair Political Practices Commission has extensive information to guide candidates and ballot measure committees on these requirements. Visit the FPPC website at www.fppc.ca.gov or call the FPPC's toll-free number: 1-866-ASK-FPPC (1-866-275-3772).
- The Political Reform Division of California Secretary of State issues identification numbers to campaigns and committees and provides technical assistance to filers, and maintains disclosure reports for public access. Visit the Secretary of State's website at www.sos.ca.gov/prd or call 916-653-6224.
- For federal elections (Presidential, U.S. Senate, House of Representatives), consult the Federal Election Commission at 1-800-424-9530 or on the web at www.fec.gov.

For specific questions, please contact the Fair Political Practices Commission.

## Penalties

Campaign contribution disclosure requirements are part of the Political Reform Act. Violations of the Act are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[33]

These penalties can include any or all of the following:

- Immediate loss of office;[34]
- Prohibition from seeking elected office in the future;[35]
- Fines of up to $10,000 or more depending on the circumstances;[36] and
- Jail time of up to six months.[37]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

### OTHER DISCLOSURE REQUIREMENTS

The Public Records Act is the over-arching disclosure requirement in California. In addition, there are specific disclosure requirements that are useful to note and are discussed in more detail online and in other chapters of this guide:

- General gifts to public agencies must be disclosed on a special form and posted on the agency website. More information about this disclosure is available at www.ca-ilg.org/GiftsQuestion3, and at http://www.fppc.ca.gov/index.php?id=512.
- Gifts of tickets to public agencies must be disclosed a special form and submitted to the FPPC for posting on its website. More information about this disclosure is available at www.ca-ilg.org/GiftsQuestion3, and at http://www.fppc.ca.gov/index.php?id=524.
- Campaign contributions over $250 during the previous 12 months from any party or participant in a pending permit or license application as discussed on pages 77-78 of chapter 5.

There are of course other specific disclosure/notice requirements; these are just ones that tend to relate directly to public confidence/ethics issues.

# Charitable Fundraising Disclosure

## Basic Rules

A sometimes overlooked disclosure obligation relates to an official or candidate's charitable or other fundraising activities. This obligation is referred to as the "behested payments" requirement. The theory is that the public has a right to know who is contributing to an elected official's favorite charities and other causes.

The disclosure requirement is triggered when:

- A person or business donates $5,000 or more (in a calendar year);
- The donation is for a legislative, governmental or charitable purpose; and
- The donation is made at the behest of the a public official. This means the official or candidate (or their employee or agent):
  - Requests or suggests the donation;
  - Controls or directs the donation; or
  - Plays a cooperating, consulting, or coordinating role with respect to the donation.[38]

The report contains the following information:

- The contributor's name and address;
- The amount or fair market value of the contribution;
- The date or dates on which the payments were made;
- The name and address of the contribution recipient;
- If goods or services were contributed, a description of those goods and services; and
- A description of the purpose or event for which the contribution was used.[39]

The official must make this report once a single donor (whether an individual or an organization) has given more than the $5,000 aggregate threshold for a calendar year. Once the $5,000 threshold has been met, all payments the donor has made for the calendar year must be disclosed within 30 days after: 1) the date the $5,000 threshold was reached, or 2) the date the payment was made, whichever occurs later.[40]

Within 30 days of the donor reaching the $5,000 threshold, the elected official must file a report with the official's agency (typically the filing officer). The Fair Political Practices Commission's "Form 803 - Behested Payments Report" should be used to make this disclosure.[41]

What is a "legislative, governmental or charitable" purpose? The law does not say, but charitable causes typically involve 501(c)(3) organizations. A "governmental" cause might include such things as fund-raising for a new county library. The reference to a "legislative" cause apparently has its roots in a 1996 Fair Political Practices Commission opinion addressing a situation in which a state senator asked a private party to pay for the airfare and expenses for a witness to come testify at a legislative hearing.[42]

Of course, when a public servant conditions one's action on a matter on a contribution to a worthy cause it is criminal extortion under state and federal law.[43] See discussion in next section.

### FOR MORE INFORMATION

On charitable fundraising, see the following resources:

- "Raising Funds for Favorite Causes," available at www.ca-ilg.org/fundraising
- "Using Public Resources for Charitable Purposes," available at www.ca-ilg.org/charity
- "Commitment to Nonprofit Causes and Public Service: Some Issues to Ponder," available at www.ca-ilg.org/nonprofits
- "Understanding the 'Behested Payments' Issue," available at www.ca-ilg.org/BehestedPayments

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

These disclosure requirements are part of the Political Reform Act. Violations of the Act are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[44]

### Penalties for Extortion under State and Federal Law

**California Law.** If an official demands that a contribution to a charitable organization be made as a condition of making a favorable decision, the demand could be prosecuted as extortion. Extortion under color of official right is a misdemeanor under California law.[45] Misdemeanors are punishable by up to six months in county jail, a fine of up to $1,000 or both.[46] Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.[47]

**Federal Law.** To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a $250,000 fine.[48]

### Honest Services Fraud

Under federal wire and mail fraud laws, the public has the right to the "honest services" of public officials.[49] The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.[50] That duty is violated when a public official makes a decision that is not motivated by his or her constituents' interests but instead by his or her personal interests.[51]

In one instance, federal authorities prosecuted a city treasurer whose decisions to award contracts were motivated in part by whether the firm contributed to political and charitable causes favored by the treasurer.[52]

The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a $250,000 fine.[53]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# The Public's Right to Access Records

## Basic Rules

There are two sets of laws and regulations that govern public records in California. One set governs the public's right to access public records[54] and another set governs which records an agency must retain and for how long.[55]

The public has the right to see materials that are created as part of the conduct of the people's business.[56] These materials include any writing that was prepared, owned, used, or retained by a public agency.[57] They include documents, computer data, e-mails, facsimiles, and photographs.[58]

A document is presumed to be a disclosable record unless a specific exception applies.[59] A few of the exceptions worth noting are:

- The "pending litigation" exception, which exempts documents that are prepared in support of ongoing litigation (otherwise opposing counsel could obtain all documents containing the agency's legal strategy just by asking for them).[60]
- The "deliberative process" exception, which exempts preliminary drafts, notes, or other information relating to deliberative processes not ordinarily retained in the agency's course of business. The public agency also must be able to demonstrate the public's interest in nondisclosure outweighs the public's interest in disclosure.[61]
- The "personal privacy" exception, which exempts personnel files, medical records or other such files the disclosure of which would constitute an invasion of personal privacy.[62]

Despite these exceptions, the safe assumption is virtually all materials involved in one's public service—including e-mails—are records subject to disclosure.

*A safe assumption is virtually all materials involved in one's public service are public records subject to public disclosure.*

**RECORDS RETENTION**

Local agencies generally must retain public records for a minimum of two years.[63] Most local agencies adopt record retention schedules as part of their records management system. These define which records must be retained. The Secretary of State provides local agencies with record management guidelines.[64]

### FOR MORE INFORMATION

On Public Records, see the following resources:

- *The People's Business: A Guide to the California Public Records Act*, 2008. Available at the League of California Cities website at www.cacities.org/PRAGuide or in hardcopy form from http://www.cacities.org/publications or by calling (916) 658-8257
- *The People's Business* August 2011 Supplement, 2011. Available at the League of California Cities website at www.cacities.org or in hardcopy form from www.cacities.org/publications or by calling (916) 658-8257
- *The People's Business: A Chart of Frequently Requested Information and Records*, 2011. Available at the League of California Cities website at www.cacities.org or in hardcopy form from www.cacities.org/publications or by calling (916) 658-8257
- *Summary of the California Public Records Act*, 2004. Available on the California Attorney General's website at or go to http://ag.ca.gov/publications/summary_public_records_act.pdf

For specific questions, please contact agency counsel.

## Penalties

Anyone can sue the agency to enforce his or her right to access public records subject to disclosure.[65] If the agency loses, it must pay costs and attorney's fees.[66]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Conducting the Public's Business in Public

## Basic Rules

The underlying philosophy of California's open government laws is that public agency processes should be as transparent as possible. Such transparency Is vital in promoting public trust in government.

California's open meeting laws[67] provide legal minimums for local agency transparency in decision-making.[68] Although community college boards are subject to less detailed requirements than are other local agencies, the following are some general guidelines. Check the endnotes for specific references to community college district law.[69]

Elected and most appointed local agency decision-making bodies—which include many advisory committees—must conduct their business in an open and public meeting to assure the local decision-making process is observable by the public.[70] Note that the issue of what kinds of bodies are subject to open meeting requirements can involve careful legal analysis. For purposes of clarity, this guide uses the term "decision-making body" and "decision-makers," but the reader should be aware that this term is imprecise.

A "meeting" is any situation involving a majority of a decision-making body discussing, hearing, deliberating or making a decision on any item that is within the agency's jurisdiction. In other words, a majority of a decision-making body cannot hear a presentation or talk privately about an issue that is before the body, no matter how the conversation occurs, whether by telephone or e-mail, on a local blog, or at a local coffee shop.[71]

The following are some key things to keep in mind:

» **Meetings.** A "meeting" is any situation involving a majority of a decision-making body in which agency business is transacted or discussed.[72]

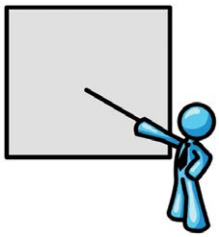
» **Committees and Advisory Bodies.** Advisory groups or committees formally created by a governing body are subject to the open meeting laws. Standing committees are subject to the open meeting laws if they have a continuing subject-matter jurisdiction or have a meeting schedule fixed by formal action of the governing body.[73]

» **Serial Meetings.** Avoid unintentionally creating a "serial" meeting—a series of communications that result in a majority of decision-makers conferring on an issue. For example, if two members of a five-member decision-making body consult outside of a public meeting (which is not in and of itself a violation) about a matter of agency business and then one of those individuals consults with a third member on the same issue, a majority of the body has consulted on the same issue. Note the communication does not need to be in person and can occur through a third party. For example, sending or forwarding e-mail can be sufficient to create a serial meeting, as can a staff member polling decision-makers members in a way that reveals the members' positions to one another.[74]

However, separate communications with decision-makers to answer questions or provide information are generally okay, as long as those communications do not communicate information about other decision-makers' comments or position.[75] The key thing to avoid is all communications that would result in a collective concurrence among decision-makers outside a public meeting.[76]

## GOOD ETHICS IS GOOD POLITICS

*The media is highly vigilant in monitoring compliance with open government requirements—and quick to report on perceived violations.*



» **Posting and Following the Agenda.** In general, public officials may only discuss and act on items included on the posted agenda for a meeting.[77] However, decision-makers or staff may briefly respond to questions or statements during public comments that are unrelated to the agenda items. Officials can also request staff to look into a matter or place a matter on the agenda for a subsequent meeting.[78] Only in unexpected emergency circumstances or situations when the decision-making body has determined by vote there is a need for immediate action can matters that are not on the agenda be discussed or acted upon.[79]

» **Permissible Gatherings.** Not every gathering of members of a decision-making body outside a noticed meeting violates the law. For example, an open meeting violation would not occur if a majority of a decision-making body attend the same educational conference or attend a meeting not organized by the local agency as long as certain requirements are met.[80] Nor is attendance at a social or ceremonial event in and of itself a violation.[81] The basic rule to keep in mind is a majority of members of a decision-making body cannot discuss agency business (including at conferences or social events) except at an open and properly noticed meeting.

» **Closed Sessions.** The open meeting laws include provisions for closed discussions under very limited circumstances.[82] For example, a governing body may generally meet in a closed session to receive advice from its legal counsel regarding pending or reasonably anticipated litigation.[83] However, the reasons for holding the closed session must be noted on the agenda and different disclosure requirements apply to different types of closed sessions.[84] See table on next page for a list of kinds of permissible closed sessions.

Because of the complexity of the open meeting laws, close consultation with an agency's legal advisor is necessary to ensure that requirements are observed.

### FOR MORE INFORMATION

On open meeting laws, see the following resources:

» Open and *Public IV: A Guide to the Ralph M. Brown Act*, 2010. Available on the League of California Cities website at www.cacities.org/openandpublic or in hardcopy form by visiting www.cacities.org/publications or by calling (916) 658-8257.

» *The Brown Act: Open Meetings for Local Legislative Bodies*, 2003. Available on the California Attorney General's website at http://oag.ca.gov/open-meetings

» "Closed Session Leaks: Discretion is the Better Part of Valor – and Ethics," available at www.ca-ilg.org/closed-session-leaks

» The use of technology and public meetings is discussed in *Meetings and Technology: Finding the Right Balance*, 2012. Available at www.ca-ilg.org/technology-and-meetings

For specific questions, please contact agency counsel.

## Typical Closed Session Issues

Local agency open meetings laws vary in terms of what kinds of closed sessions are allowed. The following list is illustrative. Consult with agency counsel concerning 1) whether a particular type of closed session is available and 2) under what circumstances.

- ✓ **Personnel.** To consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee, or to hear complaints against an employee.[85]
- ✓ **Pending Litigation.** To confer with or receive advice from an agency's legal counsel with respect to existing, threatened or potential litigation.[86]
- ✓ **Real Estate Negotiations.** To provide direction to the agency's negotiator on the price and terms under which the agency will purchase, sell, exchange or lease real property.[87]
- ✓ **Labor Negotiations.** To meet with the agency's labor negotiator regarding salaries and benefits and other matters within the scope of labor negotiations.[88]
- ✓ **Student Disciplinary Issues (for School Districts and Community College Districts).** To consider discipline of a student if a public hearing would result in disclosure of prohibited information, after notifying the student (or parents in the case of minor students) and they do not request a public hearing.[89]
- ✓ **Grand Jury Proceedings.** To allow testimony in private before a grand jury (either individually or collectively).[90]
- ✓ **License Applicants with Criminal Records.** To allow an agency to determine whether a would-be licensee with a criminal record is sufficiently rehabilitated to obtain the license.[91]
- ✓ **Public Security.** To confer with designated law enforcement officials regarding threats to public facilities and services or the public's right to access those services and facilities.[92]
- ✓ **Multi-jurisdictional Law Enforcement Agency.** To discuss ongoing criminal investigations.[93]
- ✓ **Hospital Peer Review and Trade Secrets.** To discuss issues related to medical quality assurance or trade secrets.[94]

Just because a topic *may* be discussed in closed session does not mean that it always *must* be discussed in closed session. Sometimes there are additional legal reasons (for example privacy interests of employees) for discussing a matter during a permissible closed session. Other times such discussions are in the best interests of the public (for example, in determining negotiating positions for the agency). But other times, a majority of the decision-making body may decide that the public's interests are best served by *not* discussing a matter in closed session. A key thing to keep in mind is the decision on whether to discuss and disclose such information is a collective one, not an individual one.

## Penalties

### Nullification of Decision

Many decisions that are not made according to the open meeting laws are voidable.[95] After asking the agency to cure the violation, either the district attorney or any interested person may sue to have the action declared invalid.[96]

### Criminal Sanctions

Additionally, members of the governing body who intentionally violate the open meeting laws may be guilty of a misdemeanor.[97] The penalty for a misdemeanor conviction is imprisonment in county jail for up to six months or a fine of up to $1,000 or both.[98]

### Other Consequences

Either the district attorney or any interested person may sue to remedy past, and prevent future, violations of the open meeting laws.[99] Another remedy, under certain circumstances, is for a court to order all closed sessions be tape-recorded.[100] Costs and attorney's fees may be awarded to those who successfully challenge open meeting law violations.[101]

**FOR MORE INFORMATION**

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

**A NOTE ABOUT BLOGGING AND SOCIAL NETWORKING SITES**

Decision-makers who are covered by open meeting laws must avoid situations in which the majority of a decision-making body uses the Internet to communicate with each other about a matter of agency business. For this reason, decision-makers must take care when responding to each other's blogs, posts on social networking sites (such as Facebook) or e-mails.

The so-called "Web 2.0" creates opportunities for people to present information on websites in the form of a journal. These sites also allow visitors to make comments or ask questions (called "posts" or "postings") in response to the others' comments.

For many decision-makers, blogging offers an effective way to share information with and communicate with constituents. For example, rather than having to field 10 e-mails asking the same question, an official can post a response on his or her blog and refer folks to the answer. Blogging can also a good way to keep the public informed, especially as fewer people turn to traditional media for information.

The open meeting laws do not stop one-way communications from members of legislative bodies to others. An example would be a "frequently asked questions" piece on an official's website that does not involve two-way communications among legislative body members.

However, a majority of decision-makers participating in a blog or other web-based conversation could constitute a "meeting" within the meaning of the open meeting laws. This means that the meeting must be held in accordance with all open meeting requirements, in an appropriate (disability accessible) location, with prior notice and an agenda.

What is the theory underlying these restrictions? One is that the general public has a right to know that discussions and decision-making on a particular issue may occur. There is also an underlying concept of decision-makers facing their constituents as they deliberate on issues, as well as the obligation to hear the thoughts of the full range of constituents (not just those on the Internet) should constituents choose to offer them.

**For more information,** see "Legal Issues Associated with Social Media" (available at www.ca-ilg.org/SocialMediaLegalIssues) and "Taking the Bite Out of Blogs: Ethics in Cyberspace" (available at www.ca-ilg.org/blogs).

# The Public's Right to Participate in Meetings

## Basic Rules

Another element of open meeting laws is the public's right to address the governing body at any open meeting. An elected official's role is to both hear and evaluate these communications. There are a number of basic rules that govern this right. Again, check the endnotes for specific references to requirements for community college boards.[102]

### Posting and Following the Agenda

The open meeting laws require the public be informed of the time of and the issues to be addressed at each meeting.[103] The agenda must be posted at least 72 hours in advance of a meeting and written in a way that informs people of what business will be discussed.[104]

Members of the public may request a copy of the agenda packet be mailed to them at the time the agenda is posted or upon distribution to the governing body.[105] Most local agencies must post these materials on their website, if the agency has one.[106]

There are a few exceptions to the 72-hour requirement that relate to unexpected circumstances.[107] These exceptions may allow an agency to take action or discuss items not on the agenda.[108] The agency may also hold special meetings on 24-hour notice[109] or on less than 24-hours notice if a true emergency exists.[110]

### The Public's Right to Material Not Included in the Agenda Packet

Any documents or other materials relating to an agenda item for an open session of a regular meeting of a governing body distributed less than 72 hours before the meeting must be made available to the public. This must occur when the materials are distributed to the members of the governing body at a public office or location that the agency designates for this purpose. Local agencies must list the address of this office or location on the agendas for all meetings of their governing body. Materials distributed after the agenda packet is prepared may be posted on an agency website.[111]

Any documents distributed during a public meeting must also be made available to the public. This must occur at the meeting if the document is prepared by the agency, or after the meeting of the document is prepared by others, like members of the public.[112]

## Special Issues

### Taping or Recording of Meetings Is Allowed

Anyone attending a meeting may photograph or record it with an audio or video recorder unless the governing body makes a finding the noise, illumination, or obstruction of view will disrupt the meeting.[113] Any meeting tape or film made by the local agency becomes a public record that must be made available to the public for at least 30 days.[114]

### Sign-In Must Be Voluntary

Members of the public cannot be required to register their name or fulfill any other condition for attendance at a meeting. If an attendance list is used, it must clearly state signing the list is voluntary.[115]

## The Public's Right to be Heard

Generally, every agenda must provide an opportunity for the public to address the governing body on any item of interest to the public within the body's jurisdiction.[116] If the issue of concern is one pending before the governing body, the opportunity must be provided before or during the body's consideration of that issue.[117]

### *Reasonable Time Limits May Be Imposed*

Local agencies may adopt reasonable regulations to ensure everyone has an opportunity to be heard in an orderly manner.[118] When many people wish to comment on an issue, for example, an agency may give each speaker a time limit to ensure that everyone has a chance to speak and the agency can complete its business. However, every effort should be made to avoid artificially short time limits; this gives the public a reasonable chance to share their views and demonstrates the agency's commitment to considering the public's perspectives.

### *Handling Disruptions*

If an individual or group willfully interrupts a meeting and order cannot be restored, the room may be cleared.[119] Members of the media must be allowed to remain and only matters on the agenda can be discussed.[120]

The chair can encourage everyone to be civil and mutually respectful during the meeting and remove individuals that are disruptive.[121] However, the chair cannot stop or remove speakers for expressing their opinions or their criticism of the governing body.[122]

Finally, note that other California laws may provide additional, subject-specific notice requirements.

### FOR MORE INFORMATION

On public participation in meetings, see the following resources:

- *The Brown Act: Open Meetings for Local Legislative Bodies, 2003*. Available on the California Attorney General's website at http://oag.ca.gov/open-meetings
- Institute resources on civility, see www.ca-ilg.org/civility
- Resources on open meetings listed at page 60

For specific questions, please contact agency counsel.

**GOOD ETHICS IS GOOD POLITICS**

Community relations—and the public's views of an official's responsiveness—are seriously undermined when it appears an official is not listening to the input being provided by the public. Even more damage occurs to the public's perception if an official expresses disagreement with a position being advocated in a hostile or disrespectful way.

Even if one disagrees with the views being offered, the statesperson-like approach is to treat all speakers with the same respect one would like to be treated with if the roles were reversed. This is an application of the value of respect.

## Penalties

### Nullification of Decision

As a general matter, decisions that are not made according to the open meeting laws are voidable.[123] After asking the agency to cure the violation, either the district attorney or any interested person may sue to have the action declared invalid.[124]

### Criminal Sanctions

Additionally, members of the governing body who intentionally violate the open meeting laws may be guilty of a misdemeanor.[125] The penalty for a misdemeanor conviction is imprisonment in county jail for up to six months or a fine of up to $1,000 or both.[126]

### Other Measures

Either the district attorney or any interested person may sue to remedy past and prevent future violations of the open meeting laws.[127] Another remedy, under certain circumstances, is for a court to order that all closed sessions be tape-recorded.[128] Costs and attorney's fees may be awarded to those who successfully challenge open meeting law violations.[129]

### Potential Civil Rights Violations

Regulations of public participation beyond those allowed by applicable statutory and constitutional law can give rise to liability under the civil rights laws,[130] including liability for attorney's fees.[131]

**FOR MORE INFORMATION**

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

**VOTERS SUPPORT OPEN GOVERNMENT**

In 2004, California voters made the concept of public agency transparency a state constitutional requirement as well as a statutory one. In so doing, the voters observed that "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."[132]

# Endnotes and Additional Information

**Note:** *Sections in the California Code are accessible at* http://leginfo.legislature.ca.gov/. *Fair Political Practices Commission regulations are accessible at* www.fppc.ca.gov/index.php?id=52. *A source for case law information is* www.findlaw.com/cacases/ *(requires registration).*

1 This is a requirement of the Political Reform Act. *See generally* Cal. Gov't Code §§ 87200-10.

2 Cal. Gov't Code § 82019.

3 *See* Cal. Gov't Code § 87500.2.

4 Cal. Gov't Code §§ 87202-04, 87302. *See* 2 Cal. Code Regs. § 18722.

5 Cal. Gov't Code § 87300.

6 2 Cal. Code Regs. § 18229.

7 Cal. Gov't Code §§ 82030, 87103(c); 2 Cal. Code Regs. § 18703.3.

8 Cal. Gov't Code § 87103(c). *See Larsen Advice Letter,* No. A-82-192 (1982).

9 2 Cal. Code Regs. § 18229.

10 2 Cal. Code Regs. § 18703.5 (referring to Cal. Gov't. Code § 82029, defining "immediate family").

11 2 Cal. Code Regs. § 18229.

12 *See* Cal. Gov't Code §§ 82033, 87103(b).

13 2 Cal. Code Regs. § 18229.

14 Cal. Gov't Code §§ 82034, 87103(a); 2 Cal. Code Regs. § 18703.1.

15 Cal. Gov't Code § 87103(d); 2 Cal. Code Regs. § 18703.1(b).

16 2 Cal. Code Regs. § 18703.1(c).

17 Cal. Gov't Code § 82033 (pro rata interest, if own 10 percent interest or greater).

18 Cal. Gov't Code § 82030(b)(8), (10).

19 Cal. Gov't Code § 87207(a)(1).

20 *See generally* Cal. Gov't Code §§ 91000-14.

21 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

22 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

23 Cal. Gov't Code § 91000(b).

24 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

25 Cal. Gov't Code §91013.

26 *See generally* Cal. Gov't Code §§ 84100-511.

27 *See* Cal. Gov't Code § 81002(a).

28 *See, e.g.*, Cal. Gov't Code §§ 82013, 84101.

29 *See* Cal. Gov't Code § 82013(c).

30 *See* Cal. Gov't Code § 84202.3.

31 *See* Cal. Gov't Code §§ 81013, 81009.5.

32 Cal. Gov't Code § 81009.5(a). Local disclosure requirements can be found on the Fair Political Practices Commission's website, available at http://fppc.ca.gov/index.php?id=9.

33 *See generally* Cal. Gov't Code §§ 91000-14.

34 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

35 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

36 Cal. Gov't Code § 91000(b).

37 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

38 *See* Cal. Gov't Code § 82015(b)(2)(B)(iii); 2 Cal. Code Regs. § 18215.3(a). *See also* Cal. Fair Political Practices Commission, *Limitations and Restrictions on Gifts, Honoraria, Travel and Loans,* at 6 (2012), available at http://www.fppc.ca.gov/factsheets/LocalGiftFactSheet2013.pdf.

39 *See* Cal. Gov't Code § 82015(b)(2)(B)(iii). *See also* Fair Political Practices Commission, California Form 803 – Behested Payments Report Instructions, available at http://fppc.ca.gov/forms/803/Form803.pdf.

40 *Id.*

41 Fair Political Practices Commission, California Form 803 - Behested Payments Report, available at http://www.fppc.ca.gov/forms/803/Form803.pdf

42 *See Schmidt Advice Letter,* No. A-96-098 (March 26, 1996); S. Rules. Comm., S.B. 124 S. Floor Analysis, 1997-1998 Sess., (Cal. Sept. 2, 1997).

43 Cal. Penal Code § 518; *In re Shepard*, 161 Cal. 171 (1911). *See also* 18 U.S.C. § 666(a)(1) (B) (referring to "corruptly solicits or demands for the benefit of any person, intending to be influenced . . .").

44 *See generally* Cal. Gov't Code §§ 91000-14.

45 Cal. Penal Code § 521.

46 Cal. Penal Code § 19.

47 Cal. Gov't Code §§ 3060-3074.

48 18 U.S.C. § 1951(a). *See generally* 18 U.S.C. § 3571(b).

49 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).

50 *U.S. v. Sawyer,* 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).

51 *U.S. v. Lopez-Lukis,* 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.,* 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).

52 *U.S. v. Kemp,* 379 F.Supp. 2d 690, 697-98 (E.D. Penn. 2005). In *Skilling v. U.S.,* 130 S.Ct. 2896, 2931 (2010), the U.S. Supreme Court held that in order to avoid unconstitutional vagueness 18 USC §1346 (honest services fraud) only criminalizes bribes and kick-back schemes.

53 18 U.S.C. §1341 (". . . shall be fined under this title or imprisoned not more than 20 years, or both.").

54 *See* Cal. Gov't Code §§ 6250-70.

55 *See* Cal. Gov't Code §§ 34090-34090.8.

56 *See generally* Cal. Gov't Code §§ 6250-70. *See also* Cal. Const. art. I, § 3(b)(1).

57 *See* Cal. Gov't Code §§ 6252-53.

58 Cal. Gov't Code § 6252(g) "'Writing' means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."

59 *State ex rel. Division of Industrial Safety v. Superior Court,* 43 Cal. App. 3d 778, 117 Cal. Rptr. 726 (1974); Cook v. Craig, 55 Cal. App. 3d 773, 127 Cal. Rptr. 712 (1976).

60 Cal. Gov't Code § 6254(b).

61 *See* Cal. Gov't Code § 6254(a). *See also California First Amendment Coalition v. Superior Court,* 67 Cal. App. 4th 159, 78 Cal. Rptr. 2d 847 (1998).

62 Cal. Gov't Code § 6254(c).

63 Cal. Gov't Code § 34090(d). Note that in California, the Public Records Act is not a records retention statute. *See Los Angeles Police Dept. v. Superior Court,* 65 Cal. App. 3d 661 (1977).

64 The Secretary of State's Local Government Records Management Guidelines may be viewed at http://www.sos.ca.gov/archives/local-gov-program/pdf/records-management-8.pdf

65 Cal. Gov't Code § 6258.

66 Cal. Gov't Code § 6259(d).

67 *See generally* Cal. Gov't Code §§ 54950-63 (for cities, counties, special districts and school districts).

68 *See* Cal. Gov't Code § 54953.7.

69 Cal. Educ. Code §§ 72121-29 (for community college district governing boards).

70 *See* Cal. Gov't Code § 54952.2(a).

71 Cal. Gov't Code § 54952.2(b); Cal. Educ. Code § 72121.

72 Cal. Gov't Code § 54952.2(a).

73 Cal. Gov't Code § 54952(b).

74 Cal. Gov't Code § 54952.2.

75 Cal. Gov't Code § 54952.2(b)(2).

76 *Wolfe v. City of Fremont,* 144 Cal. App. 4th 533, 50 Cal. Rptr. 3d 524 (2006); *see also* S.B. 1732, 2007-2008 Leg., Reg. Sess. (Cal. 2008) (clarifying Cal. Gov't Code § 54952.2 to include both communications that result in a collective concurrence and those that are part of the process of developing collective concurrence).

77 Cal. Gov't Code § 54954.2; Cal. Educ. Code § 72121.5.

78 Cal. Gov't Code § 54954.2(a)(2), *See* Cal. Educ. Code § 72121.5.

79 Cal. Gov't Code § 54954.2(b).

80 Cal. Gov't Code § 54952.2(c)(2).

81 Cal. Gov't Code § 54952.2(c)(5).

82 *See, e.g.,* Cal. Gov't. Code §§ 54956.5-54957, 54957.6, 54957.10, 54962; Cal. Educ. Code § 72122.

83 Cal. Gov't Code § 54956.9.

84 Cal. Gov't Code § 54954.5.

85 Cal. Gov't Code § 54957(b).

86 Cal. Gov't Code § 54956.9.

87 Cal. Gov't Code § 54956.8.

88 Cal. Gov't Code §§ 3549.1 (school and community college districts), 54957.6 (other local agencies).

89 Cal. Educ. Code §§ 35146, 72122.

90 Cal. Gov't Code § 54953.1.

91 Cal. Gov't Code § 54956.7.

92 Cal. Gov't Code § 54957(a).

93 Cal. Gov't Code § 54957.8.

94 Cal. Gov't Code §§ 37606, 37624.3; Cal. Health & Safety Code §§ 1461, 1462, 32106, 32155.

95 Cal. Gov't Code § 54960.1; Cal. Educ. Code § 72121(b).

96 *Id.*

97 Cal. Gov't Code § 54959.

98 *See* Cal. Penal Code § 19.

99 Cal. Gov't Code §§ 54960-.2.

100 *Id.*

101 Cal. Gov't Code § 54960.5.

102 Cal. Educ. Code §§ 72121-29 (for community college district governing boards).

103 Cal. Gov't Code § 54954.2(a); Cal. Educ. Code § 72121.

104 *Id.*

105 Cal. Gov't Code § 54954.1.

106 *See* Cal. Gov't Code § 54954.2. This requirement only applies to:

- The governing body of a local agency or any other local body created by state or federal statute; or
- A commission, committee, board, or other body of a local agency, created by charter, ordinance, resolution, or formal action of a legislative body, if the members are compensated for their appearance, and at least one member is also the member of a governing body created by state or federal statute.

107 Cal. Gov't Code § 54954.2(b).

108 Cal. Gov't Code § 54954.2(b)(2).

109 Cal. Gov't Code § 54956.

110 Cal. Gov't Code § 54956.5.

111 Cal. Gov't Code § 54957.5.

112 Cal. Gov't Code § 54957.5(c).

113 Cal. Gov't Code § 54953.5(a).

114 Cal. Gov't Code § 54953.5(b).

115 Cal. Gov't Code § 54953.3.

116 Cal. Gov't Code § 54954.3(a); Cal. Educ. Code § 72121.5.

117 Cal. Gov't Code § 54954.3(a).

118 Cal. Gov't Code § 54954.3(b); *White v. City of Norwalk,* 900 F.2d 1421, 1425 (9th Cir. 1990).

119 Cal. Gov't Code § 54957.9.

120 *Id.*

121 *Norse v. City of Santa Cruz,* 629 F.3d 966, 976 (9th Cir. 2010).

122 Cal. Gov't Code §§ 54954.3(c), 54957.9; *Perry Educational Association v. Perry Local Educators' Association,* 460 U.S. 37, 46 (1983); *Acosta v. City of Costa Mesa,* --- F.3d ----, 2013 WL 1847026 (9th Cir. 2013).

123 Cal. Gov't Code § 54960.1; Cal. Educ. Code § 72121(b).

124 *Id.*

125 Cal. Gov't Code § 54959.

126 *See* Cal. Penal Code § 19.

127 Cal. Gov't Code § 54960.

128 *Id.*

129 Cal. Gov't Code § 54960.5.

130 *See* 42 U.S.C. § 1983.

131 *See* 42 U.S.C. § 1988.

132 Cal. Const. art. I, § 3(b)(1).

# CHAPTER 5:
# Fair Process Laws and Merit-Based Decision-Making

### Available from Institute for Local Government website at:

- *This chapter:* www.ca-ilg.org/FairProcess
- *Whole publication (Understanding the Basics of Public Service Ethics Laws):* www.ca-ilg.org/EthicsLaws

# Chapter 5: Fair Process Laws and Merit-Based Decision-Making

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# The Right to Fair and Unbiased Decision-Makers

## Basic Rules

Although California statutes largely determine when public officials must disqualify themselves from participating in decisions, common law (judge-made law) and some constitutional principles still require a public official to exercise his or her powers free from personal bias—including biases that have nothing to do with financial gain or losses.

Under the common law doctrine, an elected official has a fiduciary duty to exercise the powers of office for the benefit of the public and is not permitted to use those powers for the benefit of private interests.[1]

*Local officials are much less constrained when the body is acting in a legislative, as opposed to quasi-judicial capacity.*

In addition, constitutional due process principles require a decision-maker to be fair and impartial when the decision-making body is sitting in what is known as a "quasi-judicial" capacity. Quasi-judicial matters include variances, use permits, annexation protests, personnel disciplinary actions and licenses. Quasi-judicial proceedings tend to involve the application of generally adopted standards to specific situations, much as a judge applies the law to a particular set of facts.

The kinds of impermissible bias[2] include:

- **Personal Interest in the Decision's Outcome.** For example, one court found an elected official was biased and should not participate in a decision on a proposed addition to a home in his neighborhood when the addition would block the elected official's view of the ocean from the official's apartment.[3] Personal interest bias can also arise when hearing officers are selected and paid on an ad hoc basis, making their future work dependent on the public agency's goodwill.[4]
- **Personal Bias.**
  - **People.** Strong animosity about a permit applicant based on conduct that occurred outside the hearing is one example. Conversely, a strong personal loyalty toward a party could bias an official as well.[5]
  - **Belief/Ideology.** Examples include strong ideological reactions to a proposed Planned Parenthood clinic or community center for a particular ethnic or religious group.
- **Factual Bias.** For example, information an official might receive outside the public hearing that causes the official to have a closed mind to any factual information that may be presented in a hearing. This is a variation of the "*ex parte* communications" doctrine, which suggests that, in quasi-judicial matters, all communications to decision-makers about the merits (or demerits) of an issue should occur in the context of the noticed hearing (as opposed to private meetings with either side of an issue, for example).[6]

» **Dual Role Influence.** Another example is when someone plays multiple roles in a decision making process. A court concluded that a business owner's fair hearing rights were violated when a public agency attorney made the initial decision to deny the renewal of the business's regulatory permit then acted as a legal adviser to a hearing officer reviewing that denial.[7]

When an official sits in a quasi-judicial capacity, that official's personal interest or involvement, either in a decision's outcome or with any participants, can create a risk that the agency's decision will be set aside by a court if the decision is challenged. Typically, having the official disqualify himself or herself removes the risk.[8]

Decision-makers are also well advised to step aside on participation in a quasi-judicial matter when the decision-maker has pre-judged the matter. Attributes of having "pre-judged the matter" include having a closed mind or a preconceived and unalterable view of the proper outcome without regard to the evidence.[9]

This rule does not preclude holding opinions, philosophies or strong feelings about issues or specific projects; it also does not proscribe expression of views about matters of importance in the community, particularly during an election campaign.[10] Also, local officials are much less constrained when the body is acting in a legislative, as opposed to quasi-judicial capacity.

### FOR MORE INFORMATION

On fair decision-making and bias, see the following resources:

» When an Elected Official Feels Passionately About an Issue: Fair Process Requirements in Adjudicative Decision Making," available at www.ca-ilg.org/bias

» "When Your Decision Will Affect a Friend or Supporter," available at www.ca-ilg.org/fairness

» *Understanding the Basics of Local Agency Decision-Making, 2009,* available at www.ca-ilg.org/decisionmaking

» *An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions, 2006*, available at www.ca-ilg.org/ounce

For specific questions, please contact agency counsel.

## Effect of Violations

### Effect on Decision

An administrative decision tainted by bias will be set aside. The agency will have to conduct new proceedings free of the influence of the biased decision-maker.[11]

### Due Process Violations

If the violation rises to the level of a denial of due process under constitutional law, the affected individual(s) may seek damages, costs and attorney's fees.[12]

### FOR MORE INFORMATION

On the effect of ethics law violations, see www.ca-ilg.org/consequences.

# Vote-Trading

## Basic Rules

The California law that prohibits public officials from asking for, receiving, or agreeing to receive bribes in exchange for their votes or other official actions also forbids them from giving, or offering or promising to give, "any official vote" in exchange for another public official's vote on the "same or another question."[13]

Like bribery, vote-trading is a form of "you-do-this-for-me,-I-will-do-this-for-you" practice. In Latin, this is known as a *quid pro quo* ("this for that"). *Quid pro quos* are legally risky. Any time a public official stops making decisions based on what's best for the public, the policy-making process is compromised.

Note that the Attorney General has concluded that the prohibition against vote-trading applies to exchanges of votes between *public officials* and not to commitments made by *jurisdictions* in an inter-agency agreement.[14]

### FOR MORE INFORMATION

On vote trading, see www.ca-ilg.org/votetrading.

For specific questions, please contact agency counsel.

## Penalties

Penalties for vote trading include "imprisonment in the state prison for two, three, or four years and . . . by a restitution fine of not less than two thousand dollars ($2,000) or not more than ten thousand dollars ($10,000) . . ."[15] A conviction for vote-trading will also lead to an immediate loss of office and permanent disqualification from holding any office in the state.[16]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Personal Loans

## Basic Rules

Elected officials and others may not receive a personal loan from any officer, employee, member or consultant of the official's respective agency while in office.[17] There also are limits on elected officials' and others' ability to receive loans from those with contracts with the agency (except for bank or credit card loans made in the regular course of the company's business).[18] Personal loans over $500 from others must meet certain requirements (for example, be in writing, clearly state the date, amounts and interest payable).[19] For further discussion of ethics laws related to personal loans and other economic interests, see chapter 2, pages 10-16.

## Penalties

These restrictions are part of the Political Reform Act. Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[20]

These penalties can include any or all of the following:

- Immediate loss of office;[21]
- Prohibition from seeking elected office in the future;[22]
- Fines of up to $10,000 or more depending on the circumstances;[23] and
- Jail time of up to six months.[24]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Decisions May Not Benefit Family

## Basic Rules

An important part of a fair process is that everyone, irrespective of their personal relationship to decision-makers, will have the same access to public agency benefits and approvals.

An outgrowth of this principle is the rule that public officials must disclose their interests and disqualify themselves under the Political Reform Act and other laws (for example Government Code section 1090's prescription against interests in contracts) from participating in decisions that will have the result of their immediate family's expenses, income, assets or liabilities increasing or decreasing.[25] "Immediate family" includes one's spouse or domestic partner and dependent children.[26] For further discussion of conflict of interest disclosure and disqualification, see chapter 2, beginning on page 10.

Some jurisdictions have also adopted additional policies to prevent nepotism in hiring, promotions and appointments. For more information about hiring family members, see "Hiring: When a Relative Wants a Job," available at www.ca-ilg.org/fairness.

## Penalties

The disqualification requirements relating to family members are part of the Political Reform Act. A refusal to disqualify oneself is punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[27]

These penalties can include any or all of the following:

- Immediate loss of office;[28]
- Prohibition from seeking elected office in the future;[29]
- Fines of up to $10,000 or more depending on the circumstances;[30] and
- Jail time of up to six months.[31]

If the family members' interest relates to an interest in a contract, penalties for violating Government Code section 1090 apply (for example, felony prosecution or refunds of amounts paid under the contract).[32] For more information about Government Code section 1090, see chapter 2, pages 20-22.

**EFFECT ON AGENCY AND THOSE AFFECTED BY AGENCY'S DECISION**

When a disqualified official participates in a decision, it can also void the decision.[33] This can have serious consequences for those affected by the decision as well as the public agency.

**FOR MORE INFORMATION**

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Restrictions and Disqualification Requirements Relating to Campaign Contributions

## Basic Rules

Generally, the ethics laws with respect to campaign contributions emphasize disclosure rather than disqualification.[34] Disclosure enables voters to assess the degree an official could be influenced by campaign contributors who appear before the agency. Both financial and in-kind (goods and services) support must be disclosed.[35] These requirements are discussed on chapter 4, page 53.

Moreover, the courts have held the receipt of campaign contributions does not generally give rise to a duty to disqualify for bias. For example, a court determined an elected official who received a campaign contribution from a developer is not automatically barred from acting on the developer's land use permit application.[36] The court left open the possibility this scenario could, under certain circumstances, create a problem.

However, under limited (and sometimes counterintuitive) circumstances, *certain* local agency officials must disqualify themselves from participating in proceedings regarding licenses, permits and other entitlements for use if the official has received campaign contributions of more than $250 during the previous twelve months from any party or participant.[37] Note campaign contributions may be both monetary (dollars) and "in-kind" (goods or services) contributions.[38]

In addition, these officials are prohibited from receiving, soliciting or directing a campaign contribution of more than $250 from any party or participant in a license, permit or entitlement proceeding while the proceeding is pending and for three months after the proceeding.[39]

### Affected Officials

Generally speaking, this requirement does not apply to officials directly elected to the board of local agencies while acting in the scope of the office for which they were elected. *However, elected officials are covered by this prohibition when they sit as members of other boards to which they were not elected (such as joint powers agencies, regional government entities or local agency formation commissions).*[40]

Other covered officials include appointed board or commission members who become or have been candidates for elective office.[41]

These prohibitions apply only with respect to campaign contributions from persons who are financially interested in the outcome of the specified proceedings. Those interested persons include:

» Parties to the proceeding (such as applicants for the permit, license or entitlement); and

» Participants.[42]

A participant is a person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit or other entitlement for use and who has a financial interest in the outcome of the decision.[43] A person qualifies as a "participant" if he or she attempts to influence the officers or employees of the agency with respect to the decision or testifies in person before the agency with respect to the decision.[44]

### Extortion under California and Federal Law

A demand for campaign contributions can also constitute extortion. Extortion occurs when someone obtains money through threat of harm or under color of official right.[45]

**California Law.** Extortion under is a misdemeanor under California law.[46] Misdemeanors are punishable by up to six months in county jail, a fine of up to $1,000 or both.[47] Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.[48]

**Federal Law.** To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a $250,000 fine.[49]

## Kinds of Proceedings Affected

The general rule applies to all proceedings involving licenses and permits, including use permits. This includes:

- Business, professional, trade and land use licenses and permits;
- Land use permits;
- Franchises; and
- Contracts, other than competitively bid, labor or personal employment contracts.[50]

Examples of land use permits include conditional use permits,[51] zoning variances,[52] and tentative subdivision and parcel maps.[53] Examples of covered contracts include consulting contracts, whether engineering, architectural or legal.[54]

## Actions That Must Be Taken

### *Disclosure*

When someone files a permit or license application, that individual must publicly report all covered officials to whom the individual made contributions of more than $250 during the previous twelve months.[55] Likewise, a covered official must publicly disclose on the record of the proceeding any party or participant who has contributed more than $250 during the previous twelve months to that official.[56] The disclosure must be made prior to the agency making any decision in the proceeding (without the covered official's participation).[57]

### *Disqualification*

If prior to making a decision in the proceeding, a covered official knowingly receives more than $250 in campaign contributions from a party during the previous twelve months, that official must disqualify himself or herself from participating in the proceeding.[58] Likewise, with respect to contributions received from a participant, the covered official must disqualify himself or herself if he or she has reason to know, prior to making a decision in the proceeding, that the participant is financially interested in the outcome of the proceeding.[59]

*(Note the disqualification requirement is triggered by actual receipt of campaign contributions, not simply asking for a contribution if the request is unsuccessful. Of course, there are significant ethical issues associated with soliciting campaign contributions from either parties or participants while a decision is pending).*

Disqualification means the official may not participate in making any decision in the proceeding, and may not in any way attempt to use his or her official position to influence the decision.[60]

### *Avoiding Disqualification*

A covered official may avoid disqualification if he or she returns the contribution, or that portion which is over $250, within 30 days from the time the official knows or has reason to know of the contribution and the proceeding.[61]

### *No Contributions During the Proceeding*

While the permit or license proceeding is pending and for three months after the decision, covered officials must not solicit or receive campaign contributions from either parties or participants (persons who actively support or oppose a particular decision and are financially interested in the outcome).[62] This prohibition includes a prohibition against soliciting, receiving or directing contributions on behalf of another person or on behalf of a campaign committee.[63]

Likewise, all parties and participants are prohibited during this period of time from making contributions of more than $250 to any officials involved in the proceedings.[64]

**MORE ON FUNDRAISING**

Even when the law does not constrain an official's political fund-raising activities (other than requiring disclosure of donors), it is important to be extraordinarily judicious in choosing those one will ask for campaign contributions.

If an individual or company has matters pending with one's agency, they (and others, including the media and one's fellow candidates) are going to perceive a relationship between the decision and whether they contribute to one's campaign. The unkind characterization for this dynamic is "shake-down."

Two important points to remember:

- ✓ Public officials who indicate their actions on a matter will be influenced by whether they receive a campaign contribution put themselves at risk of being accused of soliciting a bribe or extortion.
- ✓ The legal restrictions on campaign fund-raising are *minimum* standards.

**FOR MORE INFORMATION**

See the following resources:

- » "Raising Funds for Favorite Causes," available at www.ca-ilg.org/fundraising
- » Institute resources on ethics on the campaign trail, see www.ca-ilg.org/campaigning-office
- » "Campaign Contributions May Cause Conflicts for Appointees and Commissioners," available at www.fppc.ca.gov
- » *Campaign Disclosure Manual 2: Information for Local Candidates, Superior Court Judges, Their Controlled Committees and Primarily Formed Committees for Local Candidates*, 2007. Available at www.fppc.ca.gov

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

The disqualification requirements are part of the Political Reform Act. A refusal to disqualify oneself is punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[65]

These penalties can include any or all of the following:

- » Immediate loss of office;[66]
- » Prohibition from seeking elected office in the future;[67]
- » Fines of up to $10,000 or more depending on the circumstances;[68] and
- » Jail time of up to six months.[69]

**FOR MORE INFORMATION**

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Agency Staff and Political Activities

## Basic Rules

There are a number of laws designed to insulate public employees from having to participate in the campaign activities of candidates for their agency's governing board.

### Employment Decisions, Soliciting Support and Campaign Contributions

California law forbids candidates and officials from conditioning employment decisions on support of a person's candidacy.[70]

Soliciting campaign funds from agency officers or employees is also unlawful.[71] There is an exception if the solicitation is made to a significant segment of the public that happens to include agency officers or employees.[72] Candidates also may not offer or arrange for an increase in salary for an agency employee in exchange for a political contribution.[73]

Note that members of the International City/County Management Association and the City Attorneys Department of the League of California Cities place a high value on these positions' independence from the political process. As a result, both organizations encourage their members not to make campaign contributions to local officials.[74]

### Engaging in Political Activities During Work Hours or While in Uniform

Engaging in political activities during work hours violates prohibitions against the political use of public resources.[75] Local agencies and school districts may impose additional restrictions on the political activities of employees during working hours or while on agency property.[76] Such restrictions can include wearing political buttons during work hours and displaying political signs at one's workstation.[77]

Additionally, California law prohibits employees or officers of local agencies from engaging in political activities of any kind while in uniform.[78]

For more information about the use of public resources for political purposes, see chapter 3, pages 36-37.

## Penalties

Violation of the prohibition against soliciting campaign funds from agency staff is punishable as a misdemeanor.[79] Offering or arranging a raise for an agency employee in exchange for a contribution is punishable by up to a year in county jail, a fine of up to $5,000 or both.[80]

No penalties are specified in the code sections creating the prohibitions against conditioning employment decisions on political support or against engaging in political activities while in uniform.[81] Presumably violations would fall into the catchall penalty for misconduct in office, which is loss of office.[82]

Public officials face both criminal and civil penalties for using public resources for political benefit.[83] See chapter 3, page 35 for more details.

**FOR MORE INFORMATION**

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Holding Multiple Public Offices

There is such a thing as too much public service; the law limits the degree to which public officials can simultaneously hold multiple offices. The reason is, when an official assumes a public office, he or she takes on responsibility to the constituents of that agency to put their interests first. When an official occupies multiple offices in multiple agencies, fulfilling that responsibility becomes more complicated, both legally and ethically.

Potential legal issues include:

- Political Reform Act issues when the official is in the position of making decisions that affect the official's economic interests. This issue is covered in *chapter 2;*
- Section 1090 issues when the official's position is such that the official has an interest in a contract in which the agency is involved. This issue is also covered in *chapter 2*; and
- Incompatibility of office issues (for example, membership on the city council and serving on the board of another local agency) when the official's offices are such that the official may be subjected to conflicting loyalties.[84]

The incompatible office holding problem differs from a conflict of interest that involves a potential clash between one's private interest and one's public duties, incompatibility of offices normally refers to the "public-public" situation where no personal conflict of interest is involved. Instead there is a potential clash between one's responsibility to two sets of constituents.

## Basic Rules

California law prohibits public officers from simultaneously holding multiple offices that are "incompatible" with one another.[85] Offices are incompatible when:

- Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body;
- Based on the powers and jurisdiction of the offices, there is a possibility of significant clashes of duties or loyalties between the offices; or
- Public policy considerations make it improper for one person to hold both offices.[86]

The notion underlying the prohibition is that it can be unfair and unwise to have decision-makers who are supposed to have just one agency's (and one agency's constituents') interests at heart assume multiple decision-making roles. As the Attorney General observed, the public is entitled to utmost loyalty from those who occupy offices.[87]

This restriction on holding multiple public offices only applies to positions that are considered to be *offices*—including appointed or elected members of a governmental board, commission, committee, or other body.[88] The restriction does not apply to positions of employment in an agency,[89] although employees may be prohibited from serving on the governing bodies of agencies in which they are employed.[90]

Note there can be specific legislative exceptions to this rule.[91] Under some circumstances, local agencies may allow simultaneous occupancy of what would otherwise be incompatible offices.[92]

*When one assumes a public office, one takes on responsibility to the constituents of that agency to put their interests first. When one occupies multiple offices in multiple agencies, that job becomes more complicated…*

## Special Issues

### Employees Who Run for the Governing Board of Their Public Agency Employers

Generally, an individual may not serve as an elected or appointed member of a local agency's governing board if he or she is an employee of the local agency.[93] If the employee does not resign, the individual's employment automatically terminates upon being sworn into office.[94] Volunteer firefighters are exempt from these provisions if the firefighter receives no salary.[95]

### Individual Agency Guidelines

Local agencies must adopt rules regarding incompatible activities.[96]

**FOR MORE INFORMATION**

On holding multiple offices see "Holding Two Positions" available online at www.fppc.ca.gov.

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

If an official accepts a second office that is incompatible with an office he or she currently holds, employment in the prior office automatically terminates upon being sworn into the second office.[97]

**FOR MORE INFORMATION**

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Competitive Bidding Processes for Public Contracts

## Basic Rules

Public contracting laws — including those adopted at the local level — are designed to give all interested parties the opportunity to do business with the government on an equal basis.[98]

This keeps contracts from being steered to businesses or individuals because of political connections, friendship, favoritism, corruption or other factors. It also assures that the public receives the best value for its money by promoting competition among businesses so the public can receive the best deal.[99]

Many competitive bidding requirements are locally imposed, for example by charter cities as part of their municipal affairs authority.[100] California law also authorizes local agencies to adopt procedures for acquisition of supplies and equipment.[101] Most of these purchasing ordinances require competitive bids for contracts in excess of designated dollar amounts.

For public works projects, California law defines when general law cities and counties must use competitive bidding. For general law cities, public works projects over $5,000 are subject to the state's competitive bidding requirements.[102] For county projects, the threshold is based on population: $6,500 (counties with populations of 500,000 or over),[103] $50,000 (counties with populations of 2 million or over)[104] and $4,000 (all other counties).[105] Note that it is a misdemeanor to split projects to avoid competitive bidding requirements.[106]

The contract for a competitively bid public project must be awarded to the lowest responsible bidder.[107] A responsible bidder is one who is able to perform the contract if awarded.[108]

## Exceptions

### Emergency

Contracts may be awarded without competitive bidding if the legislative body makes a finding by a four-fifths vote that an emergency exists.[109]

### Professional Services

Contracts for professional services such as private architectural, landscape architectural, engineering, environmental, land surveying, or construction management firms need not be competitively bid, but must be awarded on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.[110] However, if the professional services are too closely akin to the work typically performed by public works construction contractors (for example, some services performed by construction managers), then competitive bidding may be required.[111]

### Special Services

The legislative body of any public agency may contract with and employ persons for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.[112] The test as to whether services are special services depends on the nature of the services, the necessary qualifications required of a person furnishing the services, and the availability of the service from public sources.[113]

## Design-Build

Design-build is a method of project delivery in which the design and construction functions are combined and contracted to a single entity (called the "design builder"). Cities, with approval of the city council, may use design-build contracting for building construction projects over one million dollars.[114] Counties, with approval of the board of supervisors, may use design-build contracting for building construction projects over $2.5 million.[115] Cities and counties may award design-build projects using either the lowest responsible bidder or best value.[116]

### FOR MORE INFORMATION

On public agency procurement processes, see the Institute resources available at www.ca-ilg.org/post/fair-procurement.

## Penalties

An agency that improperly awards a bid to any bidder other than the lowest responsible bidder may be liable for reimbursing the low bidder's actual cost in submitting the bid, but will not be liable for the low bidder's lost profits.[117]

### HONEST SERVICES, FRAUD AND EXTORTION

Under federal wire and mail fraud laws, the public has the right to the "honest services" of public officials.[118] The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.[119] That duty is violated when a public official makes a decision that is not motivated by his or her constituents' interests but instead by his or her personal interests.[120] Specifically, honest services fraud refers to actions that constitute bribery and kickback schemes.[121]

"Kickbacks" (for example, receiving money back from proceeds paid to a company that does business with a public entity) in exchange for favorable contracting decisions is one area in which prosecutors have been particularly active.

The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a $250,000 fine.[122]

An official's refusal to award a contract unless the individual receives benefits can also be prosecuted as extortion.[123] To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a $250,000 fine.[124]

**For more information** about honest services, fraud and extortion, see "Making a Federal Case Out of Corruption," available at www.ca-ilg.org/fedcase.

# Whistle-Blowing Protections

## Basic Rules

California whistle-blowing laws make it unlawful for employers to retaliate against employees who refuse to participate in unlawful activities.[125] Furthermore, if an employee can demonstrate by a preponderance of evidence that his or her whistle-blowing activities were a contributing factor in an adverse employment action, the burden of proof then shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the action for "legitimate, independent reasons" even if the employee had not been a whistle-blower.[126] These protections apply specifically to local agency employees.[127]

California law requires employers to post the state attorney general's whistle-blower hotline number at the workplace.[128] Any employee or member of the public can call the hotline at (800) 952-5225 to register their concerns about potentially unlawful practices.[129]

### FOR MORE INFORMATION

On whistle-blower protections, see the following resources:

- "For Whom the Whistle Blows," available at www.ca-ilg.org/whistle
- *Walking the Line: What to do When You Suspect an Ethics Problem*, 2005. Available at www.ca-ilg.org/WhatToDo

## Penalties

Violation of whistle-blower protection laws is a misdemeanor.[130] The maximum criminal penalty for an individual is a year of jail time, a fine of $1,000 or both.[131] In the case of corporations the criminal penalty is a fine of up to $5,000.[132]

In addition, retaliation against an employee for whistle-blowing activities could result in a suit for violation of the employee's civil rights.[133] Such actions carry the prospect of damages[134] and attorney's fee awards.[135]

### FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

# Endnotes and Additional Information

**Note:** *Sections in the California Code are accessible at* http://leginfo.legislature.ca.gov/. *Fair Political Practices Commission regulations are accessible at* www.fppc.ca.gov/index.php?id=52. *A source for case law information is* www.findlaw.com/cacases/ *(requires registration).*

1 *See Nussbaum v. Weeks,* 214 Cal. App. 3d 1589, 1597-98, 263 Cal. Rptr. 360, 365-66 (4th Dist. 1989).

2 *See Breakzone Billiards v. City of Torrance,* 81 Cal. App. 4th 1205, 1234 n.23, 97 Cal. Rptr. 2d 467 (2d Dist. 2000) (finding no common law bias).

3 *See Clark v. City of Hermosa Beach,* 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (finding common law bias).

4 *Haas v. County of San Bernadino*, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d. 341 (2002).

5 *See Breakzone*, 81 Cal. App. 4th at 1234 n.23, 97 Cal. Rptr. 2d at 490.

6 *See, e.g., Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 89, 133 Cal. Rptr. 2d 234, 241 (2d Dist. 2003).

7 *Nightlife Partners*, 108 Cal.App.4th at 97-98, 133 Cal. Rptr. 2d at 248.

8 *See Fairfield v. Superior Court,* 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975); *Mennig v. City Council,* 86 Cal. App. 3d 341, 150 Cal. Rptr. 207 (2d Dist. 1978).

9 *See Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 35 Cal. Rptr. 2d 782 (2d Dist. 1994) (where local ordinance called for "person" appealing planning commission decision to city council to show cause why the commission's action should be overturned, city council's decision to appeal the action to itself was an appearance of conflict of interest and was part of overall violation of developer's substantive and procedural due process rights).

10 *Fairfield v. Superior Court,* 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975).

11 *See generally* Cal. Civ. Proc. Code § 1094.5. *See Clark v. City of Hermosa Beach,* 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (requiring the council to rehear an appeal from the planning commission's decision and provide a fair hearing).

12 *See* 42 U.S.C. §§ 1983, 1988.

13 Cal. Penal Code § 86.

14 91 Cal. Op. Att'y Gen. 46 (2008).

15 Cal. Penal Code § 86.

16 *See Cal. Pen. Code § 88. See also* Cal. Elect. Code § 20 (making those convicted of a felony involving bribery, embezzlement, extortion or theft of public money ineligible for public office); Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

17 Cal. Gov't Code § 87460(a), (b).

18 *See* Cal. Gov't Code § 87460(c), (d).

19 *See* Cal. Gov't Code § 87461.

20 *See generally* Cal. Gov't Code §§ 91000-14.

21 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

22 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

23 Cal. Gov't Code § 91000(b).

24 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

25 2 Cal. Code Regs. § 18703.5.

26 *See* Cal. Gov't Code § 82029.

27 *See generally* Cal. Gov't Code §§ 91000-14.

28 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

29 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

30 Cal. Gov't Code § 91000(b).

31 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

32 *See, e.g., People v. Honig*, 48 Cal. App. 4th 289, 55 Cal. Rptr. 2d 555 (1996).

33 *See* Cal. Gov't Code § 91003(b).

34 This is a requirement of the Political Reform Act. *See generally* Cal. Gov't Code §§ 84100-511.

35 Cal. Gov't Code § 82015; 2 Cal. Code Regs. 18421.1.

36 *Woodland Hills Residents Association v. City Council,* 26 Cal. 3d 938, 164 Cal. Rptr. 255 (1980). *But see* Cal. Gov't Code § 84308; 2 Cal. Code Regs. §§ 18438.1-.8 (defining who is disqualified from acting on a land use entitlement application after receipt of a campaign contribution).

37 Cal. Gov't Code § 84308(c).

38 *See* Cal. Gov't Code § 82015; 2 Cal. Code Regs. § 18215.

39 *See* Cal. Gov't Code § 84308(b).

40 *See* Cal. Gov't Code § 84308(a)(3); 2 Cal. Code Regs. § 18438.1.

41 *See* Cal. Gov't Code § 84308(a)(4); 2 Cal. Code Regs. § 18438.1.

42 *See* Cal. Gov't Code § 84308(b), (c); 2 Cal. Code Regs. § 18438.4.

43 *See* Cal. Gov't Code § 84308(a)(2).

44 *Id.*

45 Cal.Pen. Code §518; 18 U.S.C. § 1951.

46 Cal. Penal Code § 521.

47 Cal. Penal Code § 19.

48 Cal. Gov't Code §§ 3060-3074.

49 18 U.S.C. § 1951(a). *See generally* 18 U.S.C. § 3571(b).

50 *See* Cal. Gov't Code § 84308(a)(5); 2 Cal. Code Regs. § 18438.2.

51 Cal. Gov't Code § 65901.

52 Cal. Gov't Code § 65906.

53 Cal. Gov't Code §§ 66411-413.5.

54 Cal. Gov't Code §§ 4526, 37103, 53060.

55 Cal. Gov't Code § 84308(d); 2 Cal. Code Regs. § 18438.8.

56 Cal. Gov't Code § 84308(c).

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 Cal. Gov't Code § 84308(b).

63 *Id.*

64 Cal. Gov't Code § 84308(d).

65 *See generally* Cal. Gov't Code §§ 91000-14.

66 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

67 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

68 Cal. Gov't Code § 91000(b).

69 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

70 *See* Cal. Gov't Code § 3204, which reads as follows:

No one who holds, or who is seeking election or appointment to, any office or employment in a state or local agency shall, directly or indirectly, use, promise, threaten or attempt to use, any office, authority, or influence, whether then possessed or merely anticipated, to confer upon or secure for any individual person, or to aid or obstruct any individual person in securing, or to prevent any individual person from securing, any position, nomination, confirmation, promotion, or change in compensation or position, within the state or local agency, upon consideration or condition that the vote or political influence or action of such person or another shall be given or used in behalf of, or withheld from, any candidate, officer, or party, or upon any other corrupt condition or consideration. This prohibition shall apply to urging or discouraging the individual employee's action.

71 *See* Cal. Gov't Code § 3205.

72 *See* Cal. Gov't Code § 3205(c).

73 *See* Cal. Gov't Code § 3205.5, which reads as follows:

No one who holds, or who is seeking election or appointment to, any office shall, directly or indirectly, offer or arrange for any increase in compensation or salary for an employee of a state or local agency in exchange for, or a promise of, a contribution or loan to any committee controlled directly or indirectly by the person who holds, or who is seeking election or appointment to, an office. A violation of this section is punishable by imprisonment in a county jail for a period not exceeding one year, a fine not exceeding five thousand dollars ($5,000), or by both that imprisonment and fine.

74 The ICMA Code is available on the ICMA website at: http://icma.org/codeofethics.

75 *See* Cal. Gov't Code § 8314.

76 *See* Cal. Gov't Code § 3207 (providing that any city, county or local agency may prohibit or restrict officers and employees engaging in political activity during working hours and political activities on agency premises); Cal. Educ. Code § 7055; 5 U.S.C. §§ 7321-26 (prohibiting employees of state and local executive agencies who work in connection with programs financed in whole or in part by federal loans or grants from engaging in political activities while on duty).

77 *See. Cal. Teachers Ass'n v. Governing Bd.*, 45 Cal.App.4th 1383, 53 Cal.Rptr.2d 474 (1996); 5 C.F.R. § 734.306 example 16 (with limited exception, those employees working in connection with federally funded programs "may not wear partisan political buttons or display partisan political pictures, signs, stickers, or badges while he or she is on duty or at his or her place of work.").

78 Cal. Gov't Code § 3206. *See also* Cal. Gov't Code § 3302.

79 *See* Cal. Gov't Code § 3205

80 *See* Cal. Gov't Code § 3205.5, which reads as follows:

No one who holds, or who is seeking election or appointment to, any office shall, directly or indirectly, offer or arrange for any increase in compensation or salary for an employee of a state or local agency in exchange for, or a promise of, a contribution or loan to any committee controlled directly or indirectly by the person who holds, or who is seeking election or appointment to, an office. A violation of this section is punishable by imprisonment in a county jail for a period not exceeding one year, a fine not exceeding five thousand dollars ($5,000), or by both that imprisonment and fine.

81 *See* Cal. Gov't Code §§ 3204, 3206.

82 *See* Gov't Code §§ 3060-75. *See also Steiner v. Superior Court,* 50 Cal.App.4th 1771, Cal. Rptr.2d 668 (1996) (discussing the types of misconduct warranting removal from office under section 3060).

83 *See* Cal. Penal Code § 424; Cal. Gov't Code § 8314.

84 *See* Cal. Gov't Code § 1126.

85 Cal. Gov't Code § 1099(a).

86 Cal. Gov't Code § 1099(a)(1)-(3).

87 91 Cal. Op. Att'y Gen. 25 (2008)

88 Cal. Gov't Code § 1099(a).

89 Cal. Gov't Code § 1099(c).

90 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).

91 *See, e.g.,* Cal. Health & Safety Code § 6480(b) (relating to city officials serving on sanitary districts) *See also* 85 Cal. Op. Att'y Gen. 239 (2002) (noting the Legislature can create exceptions to the incompatibility doctrine).

92 *See* 66 Cal. Op. Att'y Gen. 293 (1983) (offices of city and county planning commission are incompatible but county and charter city may adopt legislation specifying otherwise).

93 *See* Cal. Gov't Code § 53227 (for cities, counties and special districts); Cal. Educ. Code §§ 35107(b)(1) (school districts), 72103(b)(1) (community college districts). See *also* 84 Cal. Op. Att'y Gen. 126 (2001) (community college board member may not become part-time instructor for district).

94 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).

95 *See* 85 Cal. Op. Att'y Gen. 230 (2002) ("salary" does not include per-call and equipment stipends).

96 Cal. Gov't Code § 1126.

97 Cal. Gov't Code § 1099(b) (noting that this position is enforceable through Civil Procedure Code section 803). *People ex rel. Chapman v. Rapsey,* 16 Cal. 2d 636, 107 P.2d 388 (1940). *See also* Cal. Gov't Code § 1126.

98 *See* Cal. Pub. Cont. Code § 100.

99 *Id.*

100 *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 110 Cal. Rptr. 67 (4th Dist. 1973). *See also* Cal. Pub. Cont. Code § 1100.7.

101 Cal. Gov't Code §§ 54021-25.

102 Cal. Pub. Cont. Code § 20162.

103 Cal. Pub. Cont. Code § 20122.

104 Cal. Pub. Cont. Code § 20123.

105 Cal. Pub. Cont. Code § 20121.

106 Cal. Pub. Cont. Code § 20163.

107 Cal. Pub. Cont. Code § 20162.

108 *See* Cal. Pub. Cont. Code § 1103.

109 Cal. Pub. Cont. Code §§ 1102, 20168, 22050.

110 Cal. Gov't Code § 4526.

111 *City of Inglewood-Los Angeles County Civic Ctr. Auth. v. Superior Court*, 7 Cal. 3d 861, 103 Cal. Rptr. 689 (1972).

112 Cal. Gov't Code § 53060.

113 *Cal. School Employees Ass'n v. Sunnyvale Elementary Sch. Dist.*, 36 Cal. App. 3d 46, 60, 111 Cal. Rptr. 433, 442 (1st Dist. 1973).

114 Cal. Pub. Cont. Code § 20175.2.

115 Cal. Pub. Cont. Code § 20133.

116 Cal. Pub. Cont. Code §§ 20175.2, 20133.

117 *Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.*, 23 Cal. 4th 305, 315-16, 96 Cal. Rptr. 2d 747 (2000).

118 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).

119 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).

120 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).

121 *See Skilling v. U.S.*, 130 S.Ct. 2896, 2931(2010) (holding that in order to avoid unconstitutional vagueness, 18 USC §1346, defining "scheme or artifice to defraud," only criminalizes bribes and kick-back schemes).

122 18 U.S.C. §§ 1341 (". . . shall be fined under this title or imprisoned not more than 20 years, or both."), 1343 ("shall be fined under this title or imprisoned not more than 20 years, or both.").

123 18 U.S.C. § 1951.

124 18 U.S.C. § 1951(a).

125 *See* Cal. Lab. Code § 1102.5(c) ("An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.").

126 Cal. Lab. Code § 1102.6.

127 *See* Cal. Lab. Code § 1106.

128 *See* Cal. Lab. Code § 1102.8 (requiring employers to post employees' rights and responsibilities under the whistle-blower laws, including the telephone number for the Attorney General's hotline).

129 *See* Cal. Lab. Code § 1102.7 (requiring the Attorney General to set up the hotline).

130 Cal. Lab. Code § 1103.

131 *Id.*

132 *Id.*

133 *See, e.g.*, *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.,* 391 U.S. 563, 88 S.Ct. 1731 (1968); *Garcetti v. Ceballos,* 547 U.S. 410, 126 S. Ct. 1951(2006).

134 42 U.S.C. § 1983.

135 42 U.S.C. § 1988.

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