

## Holding Two Positions (updated 6/20/2009)

Nothing in the Political Reform Act<sup>1</sup> or its conflict-of-interest rules prevents a public official from seeking or holding a particular position, whether public or private. A conflict of interest may arise only after a person takes office and is dependent on that person's conduct subsequent to taking office. (*Eldridge v. Sierra View Hospital District*, 224 Cal. App. 3d 311 (1990).)

A conflict of interest does not prohibit a person from seeking or holding office. Rather, the conflict-of-interest provisions of the Act prohibit a public official from participating in a decision that will have a financial effect on his or her economic interests. This prohibition is applied on a decision-by-decision basis.

### Public Officials May Not Make Decisions That Affect Them Financially

Under the Act, a public official may not participate in a decision if it is reasonably foreseeable that the decision will have a material financial effect on one of the official's economic interests or on the official him or herself. (Sections 87100 and 87103.)

**Economic Interests.** The official's economic interests include:

- **Business Entities.** Any business entity in which the public official has a direct or indirect investment worth \$2,000 or more. Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- **Real Property.** Any real property in which the public official has a direct or indirect interest worth \$2,000 or more.
- **Sources of Income.** Any individual, business, or other entity that has been a source of income aggregating \$500 or more to the public official within 12 months prior to the time when the decision is made. This excludes gifts and certain bank loans.
- **Gifts.** Any donor of gift(s) aggregating \$420 (**changed from \$390 on December 31, 2008**) or more to the public official within 12 months prior to the time when the decision is made.

**Direct Effect on Official.** The Act also provides that a conflict of interest may exist where a decision will result in a public official's personal expenses, income, assets, or liabilities, or those of his or her immediate family (spouse and dependent children), increasing or decreasing by \$250 or more in a 12-month period. (Regulations 18703.5 and 18705.5.)

For a conflict to exist, the effect of the decision on the official's economic interests must be considered material under Commission regulations. (Regulations 18705-18705.5.) And the effect of the decision on the official must be distinguishable from its effect on the public generally. (Regulations 18707-18707.9.)

For more information about conflicts of interest and governmental decisions, refer to the Commission's fact sheet *Can I Vote? Conflicts of Interest Overview*.

### May I Hold Two Public Positions?

The Political Reform Act does not prohibit you from holding multiple public positions, either within a single agency or different agencies.<sup>2</sup> In addition, there are no provisions of the Act which preclude you

from seeking more than one elective office in a single election, or from serving in more than one elective office at any one time. (See Incompatible Offices, below.) For example, a firefighter may be elected to a fire protection district, or a parks and recreation board member may also be elected to a water district.

**Governmental Salary Does Not Create a Conflict.** If you are employed by a federal, state, or local government agency, the salary you receive from that agency is excluded from the definition of income under the Act. (Section 82030(b)(2).) Therefore, the governmental income which you receive will not give rise to a conflict of interest under the Act. This exclusion applies to salary, reimbursement for expenses, or per diem that you receive from a government agency. However, the exclusion for governmental salary generally does not apply to individuals who work under contract for a government agency. (*Moore* Advice Letter, No. I-93-343.)

*Will a teacher's salaried position with the Morongo Unified School District create a conflict of interest with respect to her decisions as a Twentynine Palms city council member?* Her governmental salary from the district is excluded from the definition of income under the Act. Neither her salary from nor employment with the school district will create an economic interest in the district that could result in a conflict of interest. (*Meyer* Advice Letter, No. A-93-051.)

*Is an individual who wants to run for the county board of supervisors prevented by the Act from seeking election because he is employed by the county office of education as director of a career center?* It does not. His salary from the county office of education is excluded from the definition of income under the Act, and will not create a conflict of interest for him should he be elected. (*Simmons* Advice Letter, No. I-95-245.)

**Be Careful About Votes Affecting Your Own Position.** The Political Reform Act does not require you to disqualify yourself on decisions that affect the salary, per diem or reimbursement for expenses you and other employees in the same job classification or position receive from your agency. (Regulation 18705.5(b).) You cannot, however, vote to create a new position for yourself or to increase your position from part to full time. (Regulation 18703.5; *Koski* Advice Letter, No. I-96-289.)

In addition, Gov. Code Section 1090 provides that a public official may not make a contract in which he or she is financially interested. A board member may violate Section 1090 if he or she contracts with the board to provide services. For questions about Section 1090, contact your city attorney, county counsel or the Attorney General's office.

**Incompatible Offices.** Gov. Code Section 1099 codifies the common law prohibition against the holding of "incompatible offices." This doctrine restricts the ability of public officials to hold two different public offices simultaneously if the offices have overlapping and conflicting public duties. For this section to apply, each position must be a "public office." (Gov. Code Section 1099 (c).) <sup>3</sup>

Pursuant to Section 1099, a person may not simultaneously hold two public offices if:

1. either of the offices exercises a supervisory, auditing, or removal power over the other office or body,
2. there is a significant clash of duties or loyalties between the offices, or
3. there are public policy considerations that make it improper.

The consequence of holding an incompatible office is that the person is "deemed to have forfeited the first office upon acceding to the second." (Gov. Code Section 1099(b).)

Additionally, The California Constitution has provisions addressing the holding of two government positions.<sup>4</sup>

The doctrine of incompatible offices is outside the jurisdiction of the Fair Political Practices Commission, but the Attorney General's office has issued numerous opinions on the subject which are available on the Attorney General's web site: <http://caag.state.ca.us>. If you have a question about whether two public offices which you hold or seek to hold would be considered incompatible offices, contact your city attorney, county counsel, or the Attorney General's office.

*Can the elected trustee of the South Bay high school district run for a seat on the Redondo Beach City Council, or does the Political Reform Act prohibit it?* The Act does not prohibit him from holding two elected offices. However, he may want to check with the Attorney General's office to make sure that district trustee and council member are not "incompatible offices." (*Downs Advice Letter, No. I-90-278.*)

### **May I Hold a Public Position and Private Employment?**

The Act does not prohibit you from holding a public position, and also being employed by a private business or firm. But you may not make a governmental decision that would affect your economic interests, such as the business or firm you work for, or in some cases, your clients, as discussed above.

*Does the Act prohibit a council member from accepting employment with a brokerage firm, Merrill-Lynch, that does business in the jurisdiction and has contracted with the city in the past to issue bonds?* The Act does not prohibit the council member from accepting employment with Merrill-Lynch. However, the conflict-of-interest provisions of the Act prohibit the council member from making, participating in making, or otherwise using his official position to influence a governmental decision that will materially affect any economic interest, including sources of income such as Merrill-Lynch and clients who will have paid the council member commission income. (*Rede Advice Letter, No. I-93-023.*)

**Outside Employment and Activities -- Your Agency's Own Guidelines.** State and local agencies are authorized to adopt "statements of incompatible activities" that govern their employees' conduct. State and local agencies can prohibit their employees from engaging in any outside employment, activities, or enterprises, which are inconsistent or in conflict with their duties as agency employees. (Gov. Code Sections 19990 and 1126 et seq.) This area of law is outside the jurisdiction of the Fair Political Practices Commission. You should check with your supervisor or agency counsel to see whether your agency has adopted a statement of incompatible activities. Make sure that nothing in these guidelines would prohibit you from performing the outside work or holding the additional position that you are interested in.

*May a Fair Political Practices Commission employee open a campaign consulting business?* No. The Commission's statement of incompatible activities prohibits Commission employees from being compensated to perform any political campaign activities. In addition, the statement of incompatible activities prohibits an employee from engaging in outside employment if that employment prevents the employee from devoting his or her full time, attention, and efforts to performing regularly assigned Commission duties.

**Professional Ethics.** Many professions have their own codes of ethics. While particular outside employment or positions may not present a conflict of interest under the Political Reform Act, you may wish to review your profession's code of ethics to make sure that your activities do not create a professional ethics problem.

### **Your Spouse's Employment**

The Act does not prohibit you from seeking a public position just because your spouse holds another public position or private employment. Under the Act, however, an official's income includes a community property interest in the income of his or her spouse. (Section 82030(a).) If your spouse has received income from a business or firm, you may have to disqualify yourself if a decision would have a material financial effect on that business. Check with your agency counsel or the FPPC to determine whether you have a conflict of interest with respect to the governmental decision. (Refer to the FPPC's fact sheet *Can I Vote? Conflicts of Interest Overview*.)

*Can a city council member, whose spouse has been employed by a bank for several years, vote on the bank's petition for a variance?* No, the council member must disqualify himself because the bank has been a source of community property income to him of \$500 or more in the preceding 12 months.

*Would an individual who is interested in running for an elected position on the Castaic Lake Water Agency Board have a conflict of interest if she is elected to a position on the Castaic board since her husband is an elected director on the Newhall County Water District Board?* No. The salary her husband receives from the Newhall board is excluded from the definition of income under the Act and will not create a conflict of interest for her if she is elected to the Castaic board. (Dunn Advice Letter, No. A-96-211.)

As a public official, you must disqualify yourself from a decision that will result in the hiring, firing, promotion, demotion, or disciplining of your spouse, or setting a salary for your spouse that is different from salaries paid to other employees in the same job classification. (Regulation 18705.5(b).) However, you do not have to disqualify yourself from a decision that only affects the salary, per diem, or reimbursement for expenses you or your spouse receives from a state or local government agency, where these are the same as what other employees in the same job classification or position receive (Regulation 18705.5(b).)

*Can a school board member vote on the district's budget if his spouse is a teacher in the district and the budget decisions might affect teacher salaries?* In general, yes if his spouse's salary is exempt from the definition of income under the Act and the decision affects the salary of all teachers in the district, not just his spouse's. (Regulation 18705.5(b); see also Sylvia Advice Letter, No. I-02-176.)

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1. Citations contained in this fact sheet refer to the Political Reform Act, Cal. Gov. Code Sections 81000-91015, to Fair Political Practices Commission regulations, contained in Title 2, Division 6 of the California Code of Regulations, and to FPPC advice letters, available on Westlaw and Lexis. You should not rely solely on this fact sheet to ensure compliance with the Political Reform Act, but should also consult the Act and Commission regulations.

2. A state or local agency is generally prohibited from restricting the political activities of its officers or employees, subject to certain exceptions. (Gov. Code Section 3203.)

3. The legislature has indicated that this act is not "intended to expand or contract the common law rule prohibiting an individual from holding incompatible

offices.... but it is intended that courts interpreting this act shall be guided by judicial and administrative precedent concerning incompatible public offices developed under common law. (Stats. 2005, ch. 254, §2)

4. See, Cal. Const. Art. VII §7. See also: *McCoy v. Board of Sup'rs of Los Angeles County*, 18 Cal. 2d 193 (1941) (Construing former Cal. Const., Art. IV §20); *People ex rel. Atty. Gen. v. Turner*, 20 Cal. 142 (1862); *Crawford v. Dunbar*, 52 Cal. 63 (1877); and *Lungreen v. Deukmejian*, 45 Cal. 3d 727 (1988).

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