
CHAPTER 2: Personal Financial Gain Laws

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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.

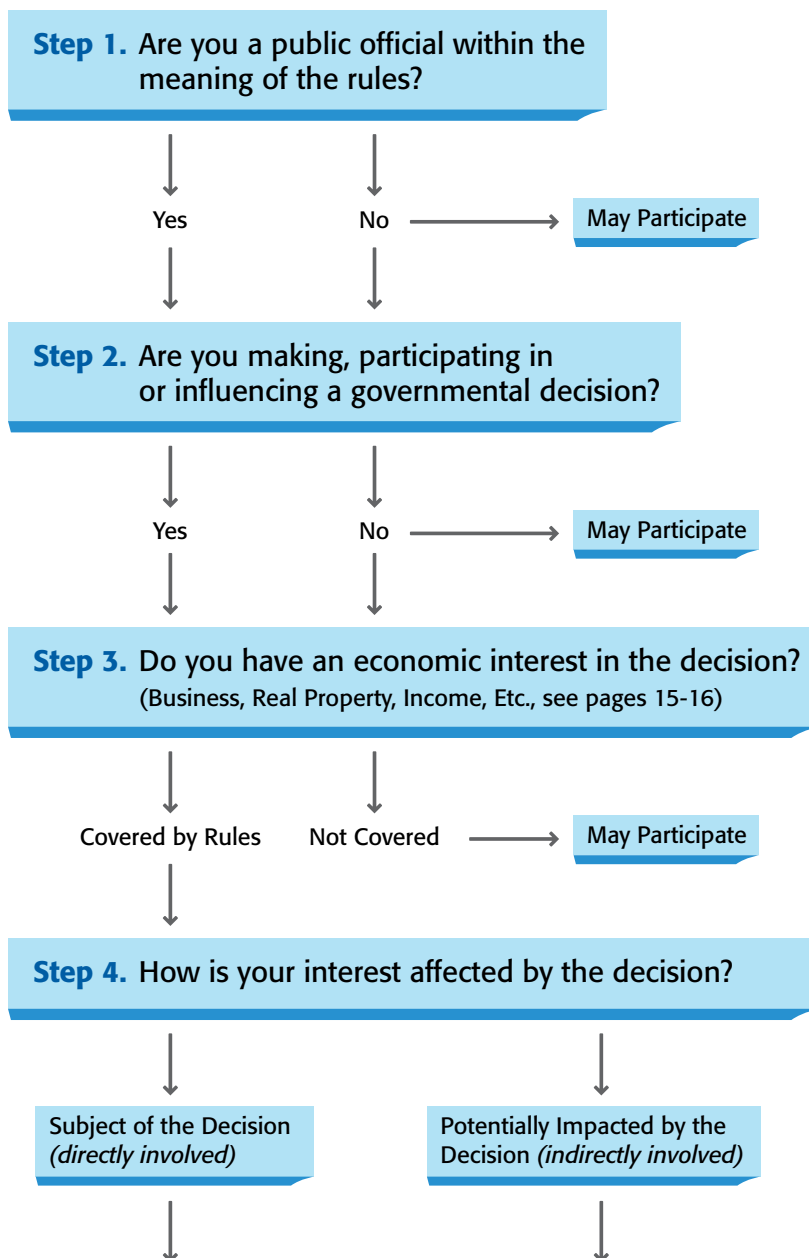
Mandatory Disqualification

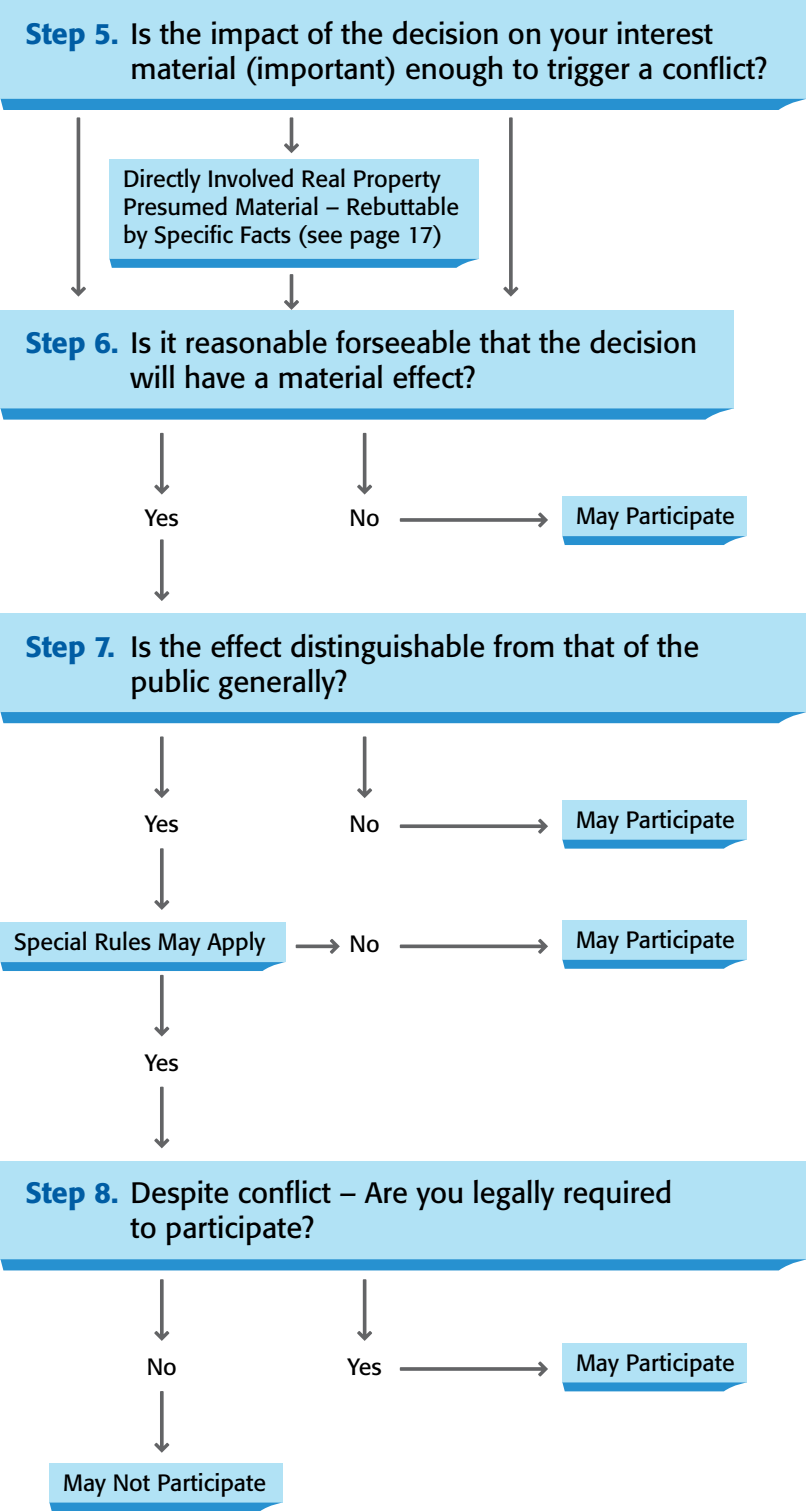
By contrast, when someone has a disqualifying conflict of interest, one does not have a choice. The law prohibits that individual from participating in a decision—even if the official believes he or she can be fair. There is no choice; the law presumes the public will doubt a person’s ability to be fair. 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 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’s²⁹ 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 partner³² 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 partner³⁴ (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 partner³⁶ (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 property⁵⁴ 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 matter⁵⁶ (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 partner⁶²) 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 boards⁹⁴ 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).

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