



**How to Build and Maintain the Public's  
Trust: Practical Ethics and the Law  
(AB 1234)**



# Ethics Law Principles for Public Servants:

## KEY THINGS TO KNOW

*Note that the following are not statements of law, but rather principles the law is designed to achieve. The goal in providing this list is to identify the kinds of issues addressed by public service ethics laws. If an issue arises for you under these principles, public officials should consult agency counsel.*

### Personal Financial Gain

Generally speaking, public officials:

- Cannot request, receive or agree to receive anything of value or other advantages in exchange for a decision.
- Must disclose their financial interests to the public.
- Must disqualify themselves from participating in decisions that may affect (positively or negatively) their financial interests.
- Cannot have a financial interest in a contract made by their agency.
- Cannot be involved in agency decisions affecting a potential future employer once the official and employer each have expressed an interest in a professional relationship.
- Cannot lobby their agency for pay for a year following their departure from the agency.

### Perk Issues: Including Compensation, Use of Public Resources and Gifts

Generally speaking, public officials:

- Receive limited compensation for their service to the public.
- Cannot receive compensation for speaking, writing an article or attending a conference.
- May be reimbursed for only those active and necessary expenses allowed in agency expense reimbursement policies.
- Cannot use public agency resources (money, travel expenses, staff time and agency equipment) for personal or political supplies or purposes.
- Cannot send or be featured in mass mailings at public expense.
- Cannot make gifts of public resources or funds.
- Must disclose gifts they receive from each single source that has given gifts worth \$50 or more in a single calendar year.
- May not receive gifts worth a total of \$500 (2019-20 amount) from a single source in a single calendar year. Note: this amount changes every two years.



- May only accept free trips and travel expenses under limited circumstances.
- May not accept free or discounted transportation from transportation companies.
- May not use campaign funds for personal benefits not directly related to a political, legislative, or governmental purpose.

## Transparency

Generally speaking, public officials must:

- Disclose their economic interests when they take office, annually while they are in office and when they leave office. These economic interests can include: sources of income, property ownership, investments, certain family members' interests, business interests, loans, contracts and gifts received.
- Disclose information about who has agreed to donate significant resources (\$5,000 or more) to legislative, governmental or charitable purposes at an elected official's request.
- Disclose campaign contributions and abide by applicable limits.
- Conduct the public's business in open and publicized meetings, except for the limited circumstances when the law allows closed sessions.
- Allow the public to participate in meetings, and listen to the public's views before making decisions.
- Allow public inspection of documents and records generated, owned, used, or retained by public agencies, except when non-disclosure is specifically authorized by law.
- Disclose gifts given to the public agency and how they are ultimately used.

## Fair Process and Merit-Based Decision-Making

Generally speaking, public officials:

- Cannot receive loans from other staff, officials or contractors, and must disclose and comply with certain requirements for loans from others.
- Cannot engage in vote-trading.
- Have a responsibility to ensure fair and competitive agency contracting processes.
- Cannot participate in quasi-judicial proceedings in which they have a strong bias with respect to the parties or facts.
- Must conduct public hearings in accordance with fair process principles.
- Cannot participate in decisions that will benefit their immediate family (spouse/domestic partner and dependent children).
- Cannot simultaneously hold certain other public offices or engage in other outside activities that would subject them to conflicting loyalties.
- Cannot participate in entitlement proceedings—such as proceedings regarding land use permits— involving campaign contributors (does not apply to elected bodies).
- Cannot solicit campaign contributions of more than \$250 from permit applicants while an application is pending and for three months after a decision (if sitting on an appointed body).
- Cannot directly solicit agency employees for political support or donations for their political causes.
- Cannot retaliate against whistle-blowers who report improper government activities.



# A Public Official's Conflict of Interest Checklist

## KEY CONCEPTS

- A public agency's decision should be based solely on what best serves the public's interests.
- The law is aimed at the perception, as well as the reality, that a public official's personal interests may influence a decision. Even the temptation to act in one's own interest could lead to disqualification, or worse.
- Having a conflict of interest does not imply that a public official has done anything wrong; it just means that the official has financial or other disqualifying interests.
- Violating the conflict of interest laws could lead to monetary fines and criminal penalties for public officials, and may lead to proceedings to remove the official from office. Don't take that risk.

## BASIC RULE

A public official may not participate in a decision — including trying to influence a decision — if the official has financial or, in some cases, other strong personal interests in that decision. When an official has an interest in a contract, the official's agency may be prevented from even making the contract.

## WHEN TO SEEK ADVICE FROM AGENCY COUNSEL

The rules are very complex. A public official should talk with agency counsel early and often and when an action by the public agency may affect (positively or negatively) any of the following:

- Income.** Any source of income of \$500 or more (including promised income) during the prior 12 months to the official or official's spouse/domestic partner.
- Immediate Family.** The official's spouse/domestic partner and dependent children.
- Business Management or Employment.** An entity for which the official serves as a director, officer, partner, trustee, employee or manager.
- Real Property.** A direct or indirect interest in real property of \$2,000 or more that the official or official's immediate family has, including such interests as ownership, leaseholds (but not month-to-month tenancies) and options to purchase.
- Gift Giver.** A giver of one or more gifts worth a total of \$500 (2019-20 amount) or more to the official in the prior 12 months, including promised gifts.

- Lender/Guarantor.** A source or guarantor of a loan to the official.
- Personal Finances.** The official or official's immediate family's personal expenses, income, assets or liabilities.
- Contract.** A contract that the agency is considering entering into, in which the official or a member of the official's immediate family may have an interest (direct or indirect).
- Business Investment.** An interest in a business that the official or the official's immediate family have a direct or indirect investment worth \$2,000 or more.
- Related Business Entity.** 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 \$2,000 or more; or
  - Is a director, officer, partner, trustee, employee or manager.
- Business Entity Owning Property.** Real property owned by a business entity or trust of the official.
- Campaign Contributor.** A campaign contributor of the official (applies to appointed decision-making bodies only).
- Other Personal Interests and Biases.** The official has important, but non-financial, personal interests or biases (positive or negative) about the facts or the parties that could cast doubt on the official's ability to make a fair decision.

## WHAT WILL HAPPEN NEXT?

Agency counsel will advise the official whether 1) the official may participate in the decision and, 2) if a contract is involved, whether the agency can enter into the contract at all. Counsel may suggest asking either the Fair Political Practices Commission or the California Attorney General's Office regarding their opinion about the political conflict.

## EVEN IF IT'S LEGAL, IS IT ETHICAL?

The law sets only minimum standards. Officials should ask themselves whether members of the public will question whether the officials are acting solely in the public's interest. If even a perceived conflict exists, officials should consider excusing themselves voluntarily from that particular decision-making process.



## Beyond the Law: Ethics and Values

- Ethics is what one ought to do in a given situation. It's the kind of conduct that would make the world a better place if everyone engaged in it.
- The law provides only minimum standards for ethical conduct. Just because a course of action is legal doesn't mean it is right.
- What one ought to do is typically tied to a series of values:
  - » Trustworthiness
  - » Respect
  - » Responsibility
  - » Compassion
  - » Loyalty
  - » Fairness

ILG developed a Good Governance Checklist to help local officials identify ways they can go above and beyond legal requirements to promote public trust and confidence. To access the checklist visit: [www.ca-ilg.org/goodgovernance](http://www.ca-ilg.org/goodgovernance).

## AB 1234 Trainings

California law requires local officials to periodically receive training on public service ethics laws and principles (AB 1234). ILG offers trainings and self-test options to help local officials comply with this law. ILG offers two, one-hour self-study exercises as an option for local officials to satisfy AB 1234 requirements. The self-study materials can also be used to make up for time missed at in-person sessions if the official either arrived late or left early. Find out more at:

[www.ca-ilg.org/ab1234selfstudy](http://www.ca-ilg.org/ab1234selfstudy).

ILG can also come to your community to train your local officials and staff. Contact ILG at [ethicsmailbox@ca-ilg.org](mailto:ethicsmailbox@ca-ilg.org) for more information on how to schedule an ethics workshop.

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The Institute for Local Government is the nonprofit training and education affiliate of the League of California Cities, the California State Association of Counties and the California Special Districts Association.

Its mission is to promote good government at the local level.

The Institute's current program areas include:

- Leadership and Governance
- Public Engagement
- Sustainable Communities
- Workforce and Civics Education

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Understanding the Basics of

# PUBLIC SERVICE *ETHICS*

# LAWS



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- » Sustainable Communities
- » Public Engagement
- » Ethics and Transparency
- » Local Government Basics
- » Collaboration and Partnerships

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Understanding the Basics of  
**Public Service Ethics Laws**

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# CHAPTER 1: Introduction



## What Is an Ethics Law?

The notion that one should enter into public service to benefit the public and not one's own personal financial interests is almost axiomatic in American politics. News coverage of elected and appointed officials who break either the written or unwritten rules (or both) against self-interested actions in their official capacities dominate at every level of public discourse, from cable and national network news to the neighborhood newsletter and local internet blog.

Ethics laws are designed to preserve the public's trust in its public institutions and those who serve in them by setting a framework to guide conduct and behavior.<sup>1</sup>

This guide discusses several types of ethics laws and principles and their important role in public service.

For more information on these principles, see [www.ca-ilg.org/ethics](http://www.ca-ilg.org/ethics).

# 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 or 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 2: Personal Financial Gain Laws.

This chapter covers the prohibitions against receiving 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 3: 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.<sup>2</sup> Prohibitions deter betrayals of the public's trust by creating penalties for such betrayals.

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.<sup>3</sup>

» **Chapter 4: Transparency Laws.** 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 5: 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 on when to ask for legal advice on how ethics laws apply in a particular situation.

## The Key Laws to Know

While there are innumerable statutes, regulations, policies and court decisions that shape California ethics and transparency laws, there are a handful of specific, fundamental laws that embody many of the issues commonly encountered by local officials and employees, and that often directly govern their actions. These key laws include:

- » **Brown Act:** Requires the governing bodies of local agencies to conduct open and public meetings, subject to limited exceptions, and to post meeting agendas beforehand. See Chapter 4 for more information.
- » **Government Code section 1090:** Prohibits public officials and employees from being financially interested in any contract made by them in their official capacity or by any body or board of which they are members. See Chapter 2 for more information.
- » **Political Reform Act:** Governs campaign financing and prohibits local agency officials and employees from participating in governmental decisions affecting their financial interests. See Chapter 2 for more information.

» **California Public Records Act:** Subject to specified exemptions, requires public agencies to make writings created, used or possessed by the agency available to the public, upon request. See Chapter 4 for more information.

It is not necessary for local agency officials and employees to have a thorough understanding of all the nuances and intricacies of each of these laws but they should be aware of the purpose and general requirements of each. Along with numerous other bodies of law, each of these key laws will be comprehensively discussed in this guide.

## 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 though public officials may feel at times that some of these high standards of conduct are unduly burdensome or intrusive of their private lives, they must accept that adhering to these standards, including broad financial disclosure rules for gifts and income, is simply part of the process of public service.

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 that the public will perceive it as such).

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

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

A helpful tool for analyzing the third 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 nor is it intended to provide 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 ethics laws and principles, see:

» [www.ca-ilg.org/ppoe](http://www.ca-ilg.org/ppoe).

» [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/ethics-training.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/ethics-training.html).

## Endnotes

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

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 blatant and 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.<sup>1</sup> Asking for that bribe is illegal, of course, but so is receiving one or agreeing to receive one.<sup>2</sup> 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.<sup>3</sup> The federal law definition of bribery is even broader.<sup>4</sup>

Extortion involves, among other things, getting something from someone by wrongfully using one's public position.<sup>5</sup> For example, a public official may not demand money in return for the performance of his or her official duties.<sup>6</sup> 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.<sup>7</sup>

## PENALTIES

### California Law Penalties

#### *Bribery*

Receiving or agreeing to receive a bribe is a crime, punishable by a combination of prison time, fines and forfeiting and being forever disqualified from holding public office.<sup>8</sup>

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.<sup>9</sup>

#### *Extortion*

Extortion by public officials is a misdemeanor.<sup>10</sup> Misdemeanors are punishable by up to six months in county jail, a fine of up to \$1,000 or both.<sup>11</sup> Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings (also known as "quo warranto") for official misconduct.<sup>12</sup>

#### *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.<sup>13</sup>

### 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 reduced penalties, and that the prospect of successfully prosecuting an elected official provides prosecutors a high-visibility opportunity to make an example of an offender, perhaps reasoning that such an example will serve as a deterrent to others.



## 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.<sup>14</sup>

If the issue is whether a public official misused his or her office for personal gain, it may be particularly difficult for the agency to make the third 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.<sup>15</sup> Also, public agencies are not responsible for damage awards designed to punish or make an example of someone (known as "punitive" or "exemplary" damages).<sup>16</sup>

Note that, in these situations, the agency's attorney is not the public official's personal attorney, with attendant protections for attorney-client confidences. The agency attorney's legal and ethical obligations are to the agency itself- not to any one official in that agency.<sup>17</sup>

## FEDERAL PENALTIES

If an agency receives more than \$10,000 in federal funding, an official of that agency could find him or herself subject to federal prosecution if the amount involved in an ethical violation (for example, a bribe) exceeds \$5,000.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> In addition, prosecutors can require the defendant to pay for the costs of prosecution (in addition to one's own defense costs).<sup>21</sup>

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).<sup>22</sup>

A court can also order a convicted official to pay restitution to the agency in the amount of the money or advantage received (or lost to the agency) as the result of criminal misuse of the official's position.<sup>23</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://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.<sup>24</sup>

The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.<sup>25</sup> That duty is violated when a public official makes a decision that is not motivated by the public’s interests but instead by his or her personal interests.<sup>26</sup>

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).<sup>27</sup>

Sometimes violation of a state law is the basis of an “honest services” fraud claim (in addition to other charges, like income tax evasion). However, the courts have also held that such claims can also be based on common or judge-made law concepts relating to a public official’s fiduciary duties to his or her constituents.

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.<sup>28</sup>

**For more information,** see “Making a Federal Case Out of Corruption,” available at [www.ca-ilg.org/fedcase](http://www.ca-ilg.org/fedcase).

# Disqualification Based on Financial Interests Under the Political Reform Act

## BASIC RULES

In the statewide general election of 1974, voters passed the Political Reform Act, creating an independent authority, the Fair Political Practices Commission (FPPC), to, among other things, administer and enforce 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 interest or 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; nor is it against the law to have a disqualifying conflict of interest. It typically means that a public official has a personal life, with all the financial realities that life can involve. The key is to be aware when one's economic interests are implicated by a public agency decision, so one can stay clear of and avoid 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 economic interests.<sup>29</sup>

Economic 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.



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

Note the breadth of the disqualification requirement: one must not only step aside from voting, but the entire process leading up to a governmental decision, whether a vote of a legislative body or an action or decision by an employee vested with the authority to act on behalf of the agency. 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.

Note that disqualified officials do not count toward the establishment of a quorum.<sup>30</sup>

### Updates to the Political Reform Act Conflict of Interest Regulations

The FPPC has updated conflict of interest regulations under the Political Reform Act. These changes are significant and have changed several key parts of the conflict of interest analysis, including: material business interests, what is "reasonably foreseeable," the 500 foot real property rule, the public generally exception and overall streamlining of the 8-step conflict of interest analysis.

For more information on these updates to the conflict of interest regulations, see the FPPC webpage for newly adopted, amended or repealed regulations at: [www.fppc.ca.gov/the-law/fppc-regulations/newly-adopted-amended-or-repealed-regulations.html](http://www.fppc.ca.gov/the-law/fppc-regulations/newly-adopted-amended-or-repealed-regulations.html). Also seek professional guidance when facing a potential conflict of interest issue as the rules and regulations can be complicated.

## Imprecise Terminology: Abstentions, and Disqualifications

The terms “abstention,” and “disqualification” are sometimes used interchangeably when describing an official's decision to step aside from the decision-making process, and the applicable laws do not necessarily mandate the use of any particular term. 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 by “abstaining” from the vote. 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 refrain from participating in the decision-making process can involve two conflicting values:

1. One's responsibility to perform the duties of his or her office; and
2. One's responsibility to honor one's own ethical standards or 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, there is no choice. The law prohibits that individual from participating in or seeking to influence a decision—even if the official believes he or she can be fair. 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 Four Step Conflict of Interest Test

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

To organize the analysis, the FPPC has adopted a new four-step procedure (trimmed down from an eight-step analysis that had been used for many years) for identifying when one must disqualify oneself from participating in a matter. Although it is useful to be aware of the general outlines of the process, the analysis is probably best undertaken with the assistance of agency attorneys and/or the FPPC staff—particularly since the rules are not necessarily logical or intuitive.

1. Is it reasonably foreseeable that a governmental decision will have a financial effect on any of the public official's financial interests?
2. Will the reasonably foreseeable financial effect be material?
3. Can the public official demonstrate that the material financial effect on the public official's financial interest is indistinguishable from its effect on the public generally?
4. If, after applying the three steps above the public official determines they have a conflict of interest, he or she may not make, participate in making, or in any way attempt to use his or her official position to influence the governmental decision, unless some exception applies.

Evaluating each of these four steps involves fact-specific inquiries that must be guided by the standards and definitions laid out in the regulations.<sup>31</sup>

## ETHICS CODE VERSUS LOCAL CONFLICT OF INTEREST CODES

California's Political Reform Act requires local agencies to adopt local conflict of interest codes.<sup>32</sup> 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](http://www.ca-ilg.org/local-conflict-of-interest-codes)) and the FPPC's materials on adopting local conflict of interest codes (see <http://www.fppc.ca.gov/learn/rules-on-conflict-of-interest-codes/local-government-agencies-adopting-amending-coi.html>).

## 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](http://www.ca-ilg.org/abstentions).
- » "Property Ownership in Your Jurisdiction," available at [www.ca-ilg.org/owningproperty](http://www.ca-ilg.org/owningproperty).

For specific questions, please contact agency counsel or the FPPC at 1-866-ASK-FPPC (866-275-3772 \*2) or [Advice@fppc.ca.gov](mailto:Advice@fppc.ca.gov).

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

Public officials should seek 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. This means taking an active and attentive role by asking questions when items are placed on an agency agenda or mentioned or discussed as part of an agency's business. For example, when a city manager or other executive previews items or programs during a report, or when staff responds to a question from a constituent, if it becomes evident that a governmental decision within the meaning of the law is contemplated, the public official should immediately ask themselves whether any of their financial interests might be affected, and, if so, seek advice about whether they have an actual conflict.

Early consultation allows an attorney to analyze all of the facts involved and the relevant law. Even though the analysis is laid out in four specific steps, each step has various rules and FPPC regulations associated with it, which can be complex. 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 FPPC enforcement action? No. Only a formal opinion or formal advice letter from the FPPC 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.

# Identifying Economic Issues

## WHAT KINDS OF ECONOMIC INTERESTS ARE A CONCERN?

There are a number of 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<sup>33</sup> income, but not separate property income.<sup>34</sup> Additionally, if someone promises an official \$500 or more twelve months prior to the decision, the person or entity promising the money is a source of income, even if the income has yet to be received by the official, as long as the official has a legally-enforceable right to the promised income.<sup>35</sup>
- » **Investments.** An economic interest is created if the official, the official’s spouse or domestic partner<sup>41</sup> (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).<sup>42</sup> Investments include stocks and corporate (though not government) 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.<sup>43</sup> 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.<sup>44</sup>
- » **Personal Finances.** An official has an economic interest in their own expenses, income, assets, or liabilities and those of the official’s immediate family (spouse or domestic partner<sup>36</sup> and dependent children).<sup>37</sup>
- » **Real Property.** An interest in real property worth \$2,000 or more creates an economic interest.<sup>38</sup> The interest may be held by the official, the official’s spouse or domestic partner<sup>39</sup> (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.<sup>40</sup>
- » **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.<sup>45</sup>
- » **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.<sup>46</sup>
- » **Gifts.** Receiving gifts totaling \$460 (2015-16) 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.<sup>47</sup> Being promised a gift of \$460 (2015-16) or more within a twelve-month period prior to the decision can also create a disqualifying financial interest.<sup>48</sup> The limit is adjusted every two years to reflect changes in the cost of living.<sup>49</sup> For more discussion of the gift issue, please see Chapter 3, and [www.ca-ilg.org/ GiftCenter](http://www.ca-ilg.org/GiftCenter).

The timeline for determining whether an official has a potentially disqualifying economic interest is **twelve months before the decision** in question—not the calendar year.<sup>50</sup>

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 FPPC’s four-step conflict of interest analysis applies. One of the key purposes of the disclosure requirements is to enable the public to assess whether an official’s financial interests may affect his or her decision-making. The disclosure requirements are discussed in further detail in Chapter 4.

## DISCLOSURE OF CONFIDENTIAL INFORMATION

California law also makes disclosure of certain kinds of confidential information for personal financial gain (as defined) a misdemeanor.<sup>51</sup> This restriction applies to public officers and employees.<sup>52</sup> Confidential information means information not subject to disclosure under the Public Records Act and information that may not be disclosed by statute, regulation, or rule.<sup>53</sup>

## REAL PROPERTY INTERESTS

The previous FPPC regulations analyzed real property conflicts in a two-step process. The first step was to determine if the official's property was "directly" or "indirectly" involved in the decision and then to determine if the decision would have a "material" effect on the official's property. The old regulations described a number of different types of decisions, and provided that if the official's property was the subject of one of those types of decisions, the property was deemed to be "directly" involved in the decision. In addition, there was a rule based upon the proximity of the official's property in relation to other property that was the subject of the decision. If the official's property was within 500 feet of the subject property, the official's property was deemed to be "directly" involved in the decision. If the official's property did not fall within any of the circumstances described in the old rule, the official's property was considered to be "indirectly" involved in the decision.

In 2014, the FPPC amended its regulations to simplify the property interests analysis by dispensing with the "directly" versus "indirectly involved" dichotomy. Now, a real property interest is examined in light of its "materiality" only.<sup>54</sup>

Before the change, if the official's property was located within 500 feet of property that was the subject of a governmental decision, the financial impacts of the decision on the official's property were **presumed** to be material. The presumption could be rebutted, however, by showing that the decision would not have **any** impact on the value of the official's property.

Now, the 500 foot rule is still a part of the new regulation but the presumption of materiality can only be rebutted by written advice from the FPPC finding that the decision will have no measureable impact on the value of the official's property.



## THE “PUBLIC GENERALLY” ANALYSIS

Additionally, the recent changes to the regulation ushered in a new “**Reasonably Prudent Person**” standard, which serves as a sort of “catch-all” exemption. Specifically, even if an official’s property is not the subject of the decision, or is located well beyond 500 feet from the subject property, the official must consider whether “...a reasonably prudent person, using due care and consideration under the circumstances, [would] believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official’s property.”

For interests in common areas, such as in a residential condominium complex or an industrial lease that includes areas in common with other tenants, the new regulations redefine “real property in which an official has an interest” to exclude an official’s undivided interest in common area, thus offering another simplification of the real property interest analysis.

For interests in business properties, under the updated regulations, the effects of the decision on the official’s real property interest do not have to be considered when the decision involves the issuance of a permit or entitlement, or when one is considering the impact of the decision on the income producing potential of the property. When applying those factors, only the impacts on the official’s business entity interest are to be considered.<sup>55</sup>

Under the FPPC’s Four-Step Test, if the effect of a decision on the public official’s interests is indistinguishable from the effect on the public generally, the public official may participate in the decision even if the decision would otherwise materially affect the official’s economic interests.

In 2015, the FPPC revised the analysis to simplify the previous general rule and various exceptions; the former nine separate regulations were consolidated into a single regulation,<sup>56</sup> which now provides that an official may participate in a decision “if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.” A “significant segment is defined as at least 25% of:

- » All businesses or nonprofit entities in the jurisdiction;
- » All real property (commercial or residential) in the jurisdiction; or
- » All individuals in the jurisdiction.

The effect of a decision on an official’s interest is considered unique if it results in a **disproportionate effect** on:

- » The development potential, use, or income-producing potential of real property or a business entity in which the public official has an interest;
- » The official’s business entity or real property because of how close business or the property is to the project that is the subject of the decision;
- » The official’s business entity or real property interests as a result of the cumulative effect of the official’s multiple interests in similar entities or properties that is substantially greater than the effect on a single interest;
- » The official’s business entity or real property interests as a result of the public official’s substantially greater business volume or larger real property the size when the decision will affect all interests by the same or similar rate or percentage;
- » A person’s income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official; or
- » The official’s personal finances or those of his or her immediate family.<sup>57</sup>

## 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:

- » If the decision is being voted on at a public meeting, verbally identify the financial interest or potential conflict of interest in sufficient detail to be understood by the public; and
- » Not attempt to influence the decision in any way, which includes talking with colleagues or staff about the matter at any time, including before, during, or after any meeting at which the item may be taken up.

At the meeting, elected and appointed officials, and top staff members who have conflicts of interest must 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).<sup>58</sup> 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.<sup>59</sup> 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 and do not give the address or location).
- » **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 provide input as a member of the public to represent himself or herself on matters related solely to the official's "personal interests."<sup>60</sup>

These include when the subject of the discussion is:

- » Interests in real property wholly owned by the official or his or her immediate family;<sup>61</sup>
- » Interests in a business entity wholly owned by the official or his or her immediate family;<sup>62</sup> and
- » Interests in a business entity over which the official (or the official and his or her spouse or domestic partner<sup>63</sup>) exercises sole direction and control.<sup>64</sup>

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 leaving the room after having provided their input related to their personal interest.

### Note on Closed Sessions

If a decision will be made or discussed in a closed session, an official with a conflict may not be present. Nor may the official obtain non-public information about the closed session.<sup>65</sup>

### 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.<sup>66</sup>

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.<sup>67</sup>

Those who are disqualified from participating in the decision are not counted toward the quorum.<sup>68</sup>

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 FPPC) 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).<sup>69</sup>

#### FOR MORE INFORMATION

See the following resources:

- » The FPPC has produced “Recognizing Conflicts of Interest: A Guide to the Conflict of Interest Rules of the Political Reform Act” (2015), available at [www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Conflicts%20of%20Interest/Conflicts-Guide-August-2015-Jan-2016-Edits.pdf](http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Conflicts%20of%20Interest/Conflicts-Guide-August-2015-Jan-2016-Edits.pdf).
- » “Using Public Office to Promote One’s Business Interests,” available at [www.ca-ilg.org/publicoffice](http://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.<sup>70</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>71</sup>
- » Prohibition from seeking elected office in the future;<sup>72</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>73</sup> and
- » Jail time of up to six months.<sup>74</sup>

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

When a disqualified official participates in a decision, a court can void the decision.<sup>75</sup> This can have serious consequences for those affected by the decision as well as the public agency itself. 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](http://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. Now codified in section 1090 of the Government Code, this particular law has been traced back to the earliest days of California's statehood—to 1851.<sup>76</sup>

This prohibition applies to elected and appointed officials as well as public agency employees and consultants.<sup>77</sup>

*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 or in any part of the development of the contract. Contracts are broadly defined and include employment and a variety of other relationships, including independent contractors.<sup>78</sup>*

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. For example, the Attorney General has concluded that a trustee of a community college district cannot become employed in any capacity by the district because the trustee would have a financial interest in the employment contract. 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.



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## FPPC JURISDICTION OVER SECTION 1090 QUESTIONS

The Legislature empowered the FPPC in 2013 to enforce the provisions of section 1090 through either administrative proceedings similar to those it uses for violations of the Political Reform Act or civil actions imposing fines. Prior to commencing such an action, however, the FPPC must obtain permission from the district attorney of the county in which the alleged violation occurred, and the FPPC may not issue opinions related to past conduct. Further, before providing advice, the FPPC must send a copy of the request for advice to the Attorney General and the local district attorney.<sup>79</sup>

The FPPC has developed a six-step analysis to determine whether a violation of section 1090 might occur based on the facts and circumstances presented to the FPPC prior to the action being taken. Those steps are as follows:

- Step 1:** Is the public official in question subject to the provisions of section 1090?
- Step 2:** Does the decision at issue involve a contract?
- Step 3:** Is the official making or participating in making a contract?
- Step 4:** Does the official have a financial interest in the contract?
- Step 5:** Does either a remote interest or a noninterest exception apply?
- Step 6:** Does the “Rule of Necessity” apply?

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

When the prohibition against interests in contracts under section 1090 applies, the agency may not enter into the contract, even if the official with the interest recuses or disqualifies him- or herself. Why? The theory seems to be decision-makers may be favorably influenced to award a contract that benefits a colleague—perhaps with the expectation the favor may be returned in the future. The courts have made clear that the law will assume that undue influence was exerted, and that the risk to the public from self-dealing by public officials is too great to allow anything other than a bright-line, absolute prohibition. 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.<sup>80</sup>

### 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.<sup>81</sup> Government Code section 1091 lists more than a dozen types of remote interests, including:

- » 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;<sup>82</sup> 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.<sup>83</sup>

Moreover, in 2015, the Legislature passed Senate Bill 704 which added a remote interest exception stating that an official is not financially interested in a contract if he or she is an owner or partner of a firm serving on an advisory board to the contracting agency and the owner or partner recuses himself or herself from reviewing a project that results from a contract between the firm and agency.<sup>84</sup>

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.<sup>85</sup>

It is important to note that this exception applies only to members of multi-member bodies (not to individual decision-makers and employees).<sup>86</sup>

## 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.<sup>87</sup> In general, this allows 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.

### Types of Ethics Laws

#### 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.<sup>88</sup> 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](http://www.ca-ilg.org/coi).
- » "Let's Make a Deal: Securing Goods and Services For Your Agency," available at [www.ca-ilg.org/procurement](http://www.ca-ilg.org/procurement).

For specific questions, please contact agency counsel.

## 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.<sup>91</sup>

#### 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.<sup>92</sup> The agency may also seek repayment of amounts already paid.<sup>93</sup>

#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

### Types of Ethics Laws

#### 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 or immunity in a criminal prosecution relating to unlawful interests in contracts.<sup>89</sup>

As discussed above, the FPPC now has authority to issue advice and opinions on questions involving contracts under section 1090.

The Attorney General will also provide such advice, but only certain kinds of officials are entitled to request an Attorney General opinion.<sup>90</sup> In addition, the process can take months.

# Employment-Related Restrictions

## BASIC RULES

Another kind of “personal financial gain” law prohibits elected officials and top-level managers from trading on the relationships developed in public service for their own benefit.

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.<sup>94</sup> This is known as a “revolving door” restriction.

In addition, under California’s conflict of interest disqualification rules, a public official may not make or influence agency decisions when the interests of a prospective employer are at stake.<sup>95</sup> The situation arises when an official is negotiating or has “any arrangement” concerning prospective employment with someone with business before the agency.

### FOR MORE INFORMATION

On employment restrictions, see “Revolving Door Restrictions for Local Officials,” available at [www.ca-ilg.org/revolvingdoor](http://www.ca-ilg.org/revolvingdoor).

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

## 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.<sup>96</sup> However, running for an office is not prohibited while employed by a local agency.

This restriction applies to cities, counties, special districts, and other public agencies and corporations.<sup>97</sup>

There are parallel restrictions for employees who run for school boards<sup>98</sup> and community college district governing boards.<sup>99</sup> 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.<sup>100</sup>

These restrictions prevent the dual role conflicts associated with being both in the role of employee and employer.<sup>101</sup>

## PENALTIES

These employment-related restrictions are part of the Political Reform Act. As discussed above, 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.<sup>102</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>103</sup>
- » Prohibition from seeking elected office in the future;<sup>104</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>105</sup> and
- » Jail time of up to six months.<sup>106</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).



# Endnotes and Additional Information

**Note:** The California Codes are accessible at <http://leginfo.ca.gov/>. Fair Political Practices Commission regulations are accessible at [www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html](http://www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html). A source for case law information is [www.findlaw.com/cacases/](http://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 Cal. Penal Code § 521.
- 11 Cal. Penal Code § 19.
- 12 Cal. Gov't Code §§ 3060-3074.
- 13 Cal. Penal Code § 74.
- 14 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).
- 15 See Cal. Gov't Code § 995.2(a)(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).
- 16 See Cal. Gov't Code § 818.
- 17 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).
- 18 18 U.S.C. § 666.
- 19 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).
- 20 26 U.S.C. § 7201.
- 21 *Id.*
- 22 26 U.S.C. § 7206(1).
- 23 *U.S. v. Gaytan*, 342 F.3d 1010 (9th Cir. 2003).
- 24 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 25 *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).
- 26 *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).
- 27 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).
- 28 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").
- 29 See Cal. Gov't Code §§ 87100-87105.
- 30 2 Cal. Code Regs. § 18707(a)(1)(C).
- 31 2 Cal. Code Regs. § 18700(d).
- 32 Cal. Gov't Code § 87300.
- 33 2 Cal. Code Regs. § 18229.
- 34 Cal. Gov't Code §§ 82030, 87103(c); 2 Cal. Code Regs. §§ 18700, 18700.1.
- 35 Cal. Gov't Code § 87103(c). See also *Larsen Advice Letter*, No. A-82-192 (1982).
- 36 2 Cal. Code Regs. § 18229 (referring to Cal. Gov't Code § 82029 defining "immediate family").
- 37 2 Cal. Code Regs. § 18700.
- 38 Cal. Gov't Code § 87103(b); 2 Cal. Code Regs. § 18700(c)(6)(B).
- 39 2 Cal. Code Regs. § 18229.
- 40 See Cal. Gov't Code §§ 82033, 87103(b).
- 41 2 Cal. Code Regs. § 18229.
- 42 Cal. Gov't Code §§ 82034, 87103(a); 2 Cal. Code Regs. § 18700(c)(6)(A).
- 43 Cal. Gov't Code § 87103(d); 2 Cal. Code Regs. § 18700(c)(6)(D).
- 44 2 Cal. Code Regs. §§ 18700(c)(6)(D), 18700.2(b).
- 45 Cal. Gov't Code § 82033 (pro rata interest, if own 10 percent interest or greater).
- 46 Cal. Gov't Code § 82030(b)(8), (10).
- 47 Cal. Gov't Code §§ 82028, 87103(e); 2 Cal. Code Regs. §§ 18940(c), 18940.2(a)..
- 48 Cal. Gov't Code § 87103(e); 2 Cal. Code Regs. §§ 18940(c), 18940.2(a).
- 49 Cal. Gov't Code § 89503(f).

- 50 See generally Cal. Gov't Code § 87103. See also 2 Cal. Code Regs. § 418700(c)(6)(C), (E).
- 51 See Cal. Gov't Code § 1098(a).
- 52 *Id.*
- 53 See Cal. Gov't Code § 1098(b)
- 54 See generally, 2 Cal. Code Regs. § 18702.2.
- 55 2 Cal. Code Regs. § 18702.2(a)(5).
- 56 2 Cal. Code Regs. § 18703.
- 57 2 Cal. Code Regs. § 18703(b),(c).
- 58 See 2 Cal. Code Regs. § 18707.
- 59 2 Cal. Code Regs. §18707(a)(1)(A).
- 60 2 Cal. Code Regs. §18707(a)(3)(C).
- 61 2 Cal. Code Regs. § 18704(d)(2)(A).
- 62 2 Cal. Code Regs. § 18704(d)(2)(B).
- 63 2 Cal. Code Regs. § 18229.
- 64 2 Cal. Code Regs. § 18704(d)(2)(C).
- 65 See 2 Cal. Code Regs. § 18707(a)(2). See also *Hamilton v. Town of Los Gatos*, 213 Cal. App. 3d 1050, 261 Cal. Rptr. 888 (1989).
- 66 See Cal. Gov't Code § 36810 (for general law cities). See also Cal. Civ. Code § 12; Cal. Civ. Proc. Code § 15.
- 67 See Cal. Gov't Code § 25005; Cal. Educ. Code §§ 35164 (K-12 districts), 72000(d)(3) (community college districts).
- 68 2 Cal. Code Regs. § 18707(a)(1)(C); *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).
- 69 *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).
- 70 See generally Cal. Gov't Code §§ 91000-14.
- 71 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).
- 72 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).
- 73 Cal. Gov't Code § 91000(b). See also Cal. Gov't Code § 83116(c) (providing that the FPPC may impose administrative penalties of up to \$5,000 per violation of the Political Reform Act).
- 74 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).
- 75 See Cal. Gov't Code § 91003(b).
- 76 California Attorney General, Conflicts of Interest, 55 (2010), available at <http://ag.ca.gov/publications/coi.pdf>.
- 77 *Id.*
- 78 See *California Housing Finance Agency v. Hanover/California Management and Accounting Center, Inc.* (2007) 148 Cal.App.4th 682.
- 79 Cal. Gov't Code § 1097.1.
- 80 See Cal. Gov't Code § 1091.5.
- 81 See Cal. Gov't Code § 1091(a), (c).
- 82 See Cal. Gov't Code § 1091(b)(2).
- 83 See Cal. Gov't Code § 1091(b)(8).
- 84 2015 Cal. Stat. ch. 495, § 1 (amending Cal. Gov't Code § 1091).
- 85 See Cal. Gov't. Code § 1091.
- 86 California Attorney General, Conflicts of Interest, 67(2010), available at <http://ag.ca.gov/publications/coi.pdf>.
- 87 See 70 Cal. Op. Att'y Gen. 45 (1987).
- 88 See Cal. Educ. Code § 35107(e).
- 89 *People v. Chacon*, 40 Cal. 4th 558, 53 Cal. Rptr. 3d 876 (2007).
- 90 See Cal. Gov't Code § 12519.
- 91 See Cal. Gov't Code § 1097.
- 92 *Thomson v. Call*, 38 Cal. 3d 633, 214 Cal. Rptr. 139 (1985).
- 93 See Cal. Gov't Code § 1092.
- 94 Cal. Gov't Code § 87406.3; 2 Cal. Code Regs. § 18746.3.
- 95 Cal. Gov't Code § 87407.
- 96 Cal. Gov't Code § 53227(a).
- 97 Cal. Gov't Code § 53227.2(a).
- 98 Cal. Educ. Code § 35107(b)(1).
- 99 Cal. Educ. Code § 72103(b)(1).
- 100 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).
- 101 *Bd. of Retirement of Kern County Employees' Retirement Ass'n v. Bellino*, 126 Cal. App. 4th 781, 24 Cal. Rptr. 3d 384 (2005).
- 102 See generally Cal. Gov't Code §§ 91000-14.
- 103 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).
- 104 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).
- 105 Cal. Gov't Code § 91000(b). See also Cal. Gov't Code § 83116(c) (providing that the FPPC may impose administrative penalties of up to \$5,000 per violation of the Political Reform Act).
- 106 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



# 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.<sup>1</sup> Any extra compensation must be refunded.<sup>2</sup> Moreover, as protectors of the public purse, courts generally take a strict approach to public official compensation limits.<sup>3</sup>

## COUNTIES

County boards of supervisors set their salaries; supervisors' salaries are subject to referendum.<sup>5</sup>

## 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.<sup>6</sup> 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 on the next page contains examples from some of the numerous types of special districts throughout the state.

### 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.<sup>4</sup>

For more information on these requirements, see [www.ca-ilg.org/AB1234compliance](http://www.ca-ilg.org/AB1234compliance).

## Special Districts

Type of District	Per Day/Meeting Maximum	Maximums
Airport districts	\$100 for attending each board meeting	Not to exceed four meetings in a calendar month <sup>7</sup>
Cemetery districts	\$100 for attending each board meeting	Not to exceed four meetings in a calendar month <sup>8</sup>
Community Services districts	\$100 per day	Not to exceed six days of compensated service per month <sup>9</sup>
Fire Protection districts	\$100 for attending each board meeting	Not to exceed four meetings in a calendar month <sup>10</sup>
Harbor districts	No per day salary	\$600 per month <sup>11</sup>
Hospital districts	\$100 for attending each board meeting	Not to exceed five meetings in a calendar month <sup>12</sup>
Park and Recreation districts	\$100 for attending each board meeting	\$500 per month <sup>13</sup>
Sanitation districts	\$100 per day for board meetings or service provided at the request of the board	Not to exceed six days per month <sup>14</sup>
Utility districts	\$100 per day	\$600 per month <sup>15</sup>
Vector Control districts	Trustees serve without compensation	Trustees serve without compensation <sup>16</sup>

## Irrigation Districts

Irrigation districts of less than 500,000 acres	\$100 per day	Not to exceed six days of compensated service <sup>17</sup>
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 <sup>18</sup>
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 <sup>19</sup>

## 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 <sup>20</sup>
California water district officials (as defined)	\$100 per day	No maximum <sup>21</sup>
County water district directors (as defined)	\$100 per day	Not to exceed 6 days of compensated service per month <sup>22</sup>
Contra Costa County Water District directors (as defined)	\$100 per day	Not to exceed 10 days of compensated service per month <sup>23</sup>
Municipal water district directors (as defined)	\$100 per day	Not to exceed 6 days of compensated service per month <sup>24</sup>

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.<sup>25</sup>

Agencies may compensate officials for attendance at other events as specified in a written policy adopted in a public meeting.<sup>26</sup> 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.<sup>27</sup>

## CITIES

### Charter Cities

For charter cities, elected official compensation is a matter of local concern which may be addressed in the city’s charter.<sup>28</sup>

### 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.<sup>29</sup> The starting points are:<sup>30</sup>

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	\$1000

General law cities may increase these amounts by up to five percent per year from the date of any prior adjustments.<sup>31</sup> When a city council votes to increase compensation, the increase takes effect in the future—not during the deciding council members’ current terms.<sup>32</sup>

Elected mayors may receive additional compensation.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup>

### 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.<sup>36</sup>

The disclosure is on a form provided by the Fair Political Practices Commission and must be posted on the agency's website.<sup>37</sup>

## 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.<sup>38</sup> In addition, salaries, salary schedules and fringe benefits must be approved at a regular (as opposed to a special) meeting of the body.<sup>39</sup> Senate Bill 1436, signed into law on August 22, 2016, also requires a governing body to orally report a summary of its recommendation for a final action regarding local agency executive compensation during the open meeting in which that final action is to be taken and prior to the body actually taking that final action.<sup>40</sup>

Copies of contracts are public documents that must be made available on request.<sup>41</sup> Moreover, local agencies must report the annual compensation of its elected officials, officers and employees to the State Controller and, if the agency maintains one, post such information on the agency's website.<sup>42</sup>

The California Constitution provides that “[a] local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been into and performed in whole or in part, or pay

a claim under an agreement made without authority of law.”<sup>43</sup> Thus, even if a public employee's compensation is later deemed to be inadequate, it is not legal for a local agency to compensate the employee over and above the amount fixed by contract or law.

Beginning in 2012, California law prohibits local agencies<sup>44</sup> from approving contracts for chief executives or department heads (as defined<sup>45</sup>) that contain automatic renewal clauses that provide for automatic compensation adjustments that exceed the cost of living.<sup>46</sup>

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.<sup>47</sup> Copies of severance agreements are public documents.<sup>48</sup>

If an employee is subsequently convicted of abuse of position (as defined<sup>49</sup>), the employee must reimburse:

- 1) any severance payments paid,<sup>50</sup> and
- 2) any paid leave provided pending charges.<sup>51</sup>

### FOR MORE INFORMATION

On executive compensation issues, see [www.ca-ilg.org/post/executive-compensation-issues](http://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.<sup>52</sup> No local elected office holder, candidate for local elected office, or designated employee may accept such payments—which are known as honoraria.<sup>53</sup> 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.<sup>54</sup>

### 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.<sup>55</sup> A public official may not make such donations a condition for the speech, article or meeting attendance.<sup>56</sup> In addition, the official may not claim the donation as a deduction for income tax purposes.<sup>57</sup> Nor may the donation have a reasonably foreseeable financial effect on the public official or on any member of the official's immediate family.<sup>58</sup> The official may not be identified to the nonprofit organization in connection with the donation.<sup>59</sup>
- » **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.<sup>60</sup>
- » **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.<sup>61</sup> This exception does not apply, however, when the main activity of the business or profession is making speeches.<sup>62</sup>

- » **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.<sup>63</sup>

## 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.<sup>64</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>65</sup>
- » Prohibition from seeking elected office in the future;<sup>66</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>67</sup> and
- » Jail time of up to six months.<sup>68</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://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.<sup>69</sup> Local agencies must adopt expense reimbursement policies that specify which kinds of activities are reimbursable for decision-making body members.<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup>

### Process Requirements

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

- » Use expense report forms;<sup>73</sup>
- » Identify a "reasonable time" within which these forms must be submitted;<sup>74</sup> and
- » Require that all expenses be documented with receipts.<sup>75</sup>

Those requesting reimbursement must show their request falls within the agency's parameters for use of public resources.<sup>76</sup> Many local agencies have also adopted similar policies for employee reimbursements.

All expense reimbursement requests and supporting documentation are public records.<sup>77</sup>

### 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.<sup>78</sup>

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).<sup>79</sup>

Officials who spend more than allowed under their agencies' reimbursement policies have the option of simply paying the extra costs themselves.<sup>80</sup>

California law requirements relating to expense reimbursement policies and restrictions on reimbursement rates only apply to reimbursements of members of a legislative body.<sup>81</sup> 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.<sup>82</sup>

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](http://www.ca-ilg.org/dime).
- » "Expense Reimbursement Frequently Asked Questions," available at [www.ca-ilg.org/ExpenseReimbursementFAQs](http://www.ca-ilg.org/ExpenseReimbursementFAQs).
- » Sample reimbursement policies available at [www.ca-ilg.org/SampleReimbursementPolicies](http://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;<sup>83</sup>
- » Restitution to the local agency;<sup>84</sup>
- » Civil penalties of up to \$1,000 per day and three times the value of the resource used;<sup>85</sup> and
- » Criminal prosecution and a lifetime bar from public office.<sup>86</sup>

At some point, personal use of public resources becomes embezzlement—a form of theft.<sup>87</sup>

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.<sup>88</sup>

### 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.<sup>89</sup> 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.<sup>90</sup>

If the postal service was used in any way, such use can also become the basis for a charge of mail fraud.<sup>91</sup> 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.<sup>92</sup>

If the program has any degree of federal funding, the federal criminal laws against corruption and embezzlement will also apply.<sup>93</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://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.<sup>94</sup> “Public resources” include such things as:

- » Money (for example, charges made on an agency credit card or account);<sup>95</sup>
- » 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.<sup>96</sup> 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.<sup>97</sup>

In addition, subsequent reimbursement or payment for resources misused is not a defense.<sup>98</sup>

### 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.<sup>99</sup> 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,<sup>100</sup> so are materials whose style, tone and timing indicate that their purpose is advocacy as opposed to informational.<sup>101</sup>

#### FOR MORE INFORMATION

On ballot measure activities, see [www.ca-ilg.org/ballot-measure-activities](http://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.<sup>102</sup> The FPPC 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.<sup>103</sup>

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](http://www.ca-ilg.org/massmailing).
- » The Fair Political Practices Commission fact sheet on prohibited mass mailings available at [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html).

## PENALTIES

Public officials face both criminal and civil penalties for using public resources for personal or political benefit.<sup>104</sup>

Criminal penalties include:

- » Two- to four-years in state prison;<sup>105</sup> and
- » Permanent disqualification from public office.<sup>106</sup>

Civil penalties include fines of up to:

- » \$1,000 for each day the violation occurs;
- » Three times the value of the resource used;<sup>107</sup> and
- » Possible reimbursement for the costs of any litigation initiated by private individuals, including reasonable attorney's fees.<sup>108</sup>

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

Additionally, the FPPC may impose an administrative fine of up to \$5,000 per violation.<sup>109</sup>

Misuse of public resources is also punishable under laws prohibiting misappropriation of public resources and embezzlement.<sup>110</sup>

Both intentional and negligent violations of the law are punishable.<sup>111</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

### ETHICS CODES VERSUS LOCAL CONFLICT OF INTEREST CODES

The Political Reform Act requires local agencies to adopt local conflict of interest codes.<sup>112</sup>

These codes supplement state 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 FPPC's materials on adopting local conflict of interest codes (see [www.fppc.ca.gov/index.php?id=228](http://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.<sup>113</sup> Such demands also deprive the public of its right to honest services from public officials.<sup>114</sup>

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.<sup>115</sup> 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 \$460 (2015-16) from a single source per calendar year.<sup>116</sup> 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 \$460 (2015-16).<sup>117</sup>
- » 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 \$460 (2015-16) 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.<sup>118</sup>

More detail on these rules is available at [www.ca-ilg.org/GiftCenter](http://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.<sup>119</sup>

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](http://www.ca-ilg.org/GiftCenter).

Unless one of the exceptions applies<sup>120</sup> (see the chart on the following page), 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, and
- » For which the official doesn't pay full value.<sup>121</sup>

## 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](http://www.ca-ilg.org/GiftCenter).

### Special Rules Relating to Who Receives the Gift

(Question 1 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Gifts to family members<sup>122</sup>

### Gifts Subject to Special Valuation Rules

(Question 2 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Air transportation<sup>123</sup>
- Nonprofit or political fundraiser tickets<sup>124</sup>
- Other tickets and passes<sup>125</sup>
- Invitation only events<sup>126</sup>

### Special Rules for Certain Sources of Gifts

(Question 3 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Someone who is an intermediary for another<sup>127</sup>
- Group gifts<sup>128</sup>
- Family gifts<sup>129</sup>
- Gestures received in the context of certain relationships:
  - Bona fide dating relationships<sup>130</sup>
  - Existing personal or business relationship<sup>131</sup>
  - Long term relationships<sup>132</sup>
- Acts of neighborliness<sup>133</sup>
- Agency gifts<sup>134</sup>
  - Gifts from public agencies to agency officials<sup>135</sup>
  - Agency provided tickets or passes<sup>136</sup>
  - Agency raffles or gift exchanges<sup>137</sup>

### Gestures that Are Part of An Exchange

(Question 4 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Gifts paid for (reimbursed) in full<sup>138</sup> or in part<sup>139</sup>
- Gifts exchanged on occasions like birthdays or holidays<sup>140</sup>
- Trading off who pays for meals or activities ("reciprocal exchanges")<sup>141</sup>
- Employee gift exchanges<sup>142</sup>
- Barter transactions<sup>143</sup>
- Presentations, event attendance and articles written<sup>144</sup>
- Ceremonial functions<sup>145</sup>
- Employment-related gestures<sup>146</sup>
- Business gestures<sup>147</sup>
- Gestures in connection with volunteer nonprofit service<sup>148</sup>
- Prizes in bona fide competitions<sup>149</sup>

### Additional Special Rules Based on Type of Gift

(Question 5 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Home hospitality<sup>150</sup>
- Informational material<sup>151</sup>
- Inheritances<sup>152</sup>
- Leave credits<sup>153</sup>
- Disaster relief payments<sup>154</sup>
- Personalized plaques or trophies<sup>155</sup>
- Wedding gifts<sup>156</sup>
- Travel<sup>157</sup> and free transportation from transportation companies<sup>158</sup>
- Tickets /free admissions<sup>159</sup>
- Payments to worthy causes made at an official's request (behested payments)<sup>160</sup>
- Wedding guest benefits<sup>161</sup>
- Bereavement offerings<sup>162</sup>
- Acts of compassion<sup>163</sup>
- Gift made because of existing personal or business relationship unrelated to the official's position where there is no evidence the official makes decisions that affect the gift giver.<sup>164</sup>

### Gifts can be:

- » Tangible or intangible
- » Real property or personal property
- » Goods or services<sup>165</sup>

Under some circumstances, gifts that an official's family receives are considered gifts to the official for purposes of California's gift rules.<sup>166</sup>

## 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.<sup>167</sup>

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.<sup>168</sup>

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.<sup>169</sup>

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.<sup>170</sup>
- An elected official received free airline travel because he was the spouse of a flight attendant.<sup>171</sup>
- 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.<sup>172</sup>

## FOR MORE INFORMATION

On gift laws, see the following resources:

- » The Institute Gift Resource Center, see [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter).
- » The Fair Political Practices Commission fact sheet titled “Limitations and Restrictions on Gifts, Honoraria, Travel and Loans,” available at [www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Public%20Officials%20and%20Employees/LocalGiftFactSheet.pdf](http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Public%20Officials%20and%20Employees/LocalGiftFactSheet.pdf).

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

## 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.<sup>173</sup> 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.<sup>174</sup>
- » 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.)<sup>175</sup>
- » Reimburse the donor for the fair market value of the gift within 30 days of receiving it.<sup>176</sup> 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.



## 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.<sup>177</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>178</sup>
- » Prohibition from seeking elected office in the future;<sup>179</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>180</sup> and
- » Jail time of up to six months.<sup>181</sup>

### 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.<sup>182</sup>

The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.<sup>183</sup> 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.<sup>184</sup> Specifically, honest services fraud refers to actions that constitute bribery and kickback schemes.<sup>185</sup> In one instance, federal authorities prosecuted a city treasurer whose decisions to award contracts were motivated in part by gifts.<sup>186</sup>

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.<sup>187</sup>

#### *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.<sup>188</sup> 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.<sup>189</sup> A person convicted of a felony involving extortion is forever disqualified from seeking elected office in California.<sup>190</sup>

## 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.<sup>191</sup> 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).<sup>192</sup>

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).<sup>193</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://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 in a way that confers a personal benefit on the candidate.<sup>194</sup> Any expenditure that confers a substantial personal benefit on an individual must be directly related to a political, legislative, or governmental purpose.<sup>195</sup> 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](http://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.<sup>196</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>197</sup>
- » Prohibition from seeking elected office in the future;<sup>198</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>199</sup> and
- » Jail time of up to six months.<sup>200</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Endnotes and Additional Information

**Note:** The California Codes are accessible at <http://leginfo.ca.gov/>. Fair Political Practices Commission regulations are accessible at [www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html](http://www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html). A source for case law information is [www.findlaw.com/cacases/](http://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](http://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. Util. Code § 22407.
- 8 Cal. Health & Safety Code § 9031(a).
- 9 Cal. Gov't Code § 61047(a).
- 10 Cal. Health & Safety Code § 13857(a).
- 11 Cal. Harb. & Nav. Code § 6060.
- 12 Cal. Health & Safety Code § 32103.
- 13 Cal. Pub. Res. Code §§ 5784.15(a), (b).
- 14 Cal. Health & Safety Code § 6489(a).
- 15 Cal. Pub. Util. Code § 11908.1(a).
- 16 Cal. Health & Safety Code § 2030(a).
- 17 Cal. Water Code § 21166.
- 18 *Id.*
- 19 Cal. Water Code § 22840.
- 20 Cal. Water Code §§ 20201, 20202.
- 21 Cal. Water Code §§ 34740-41.
- 22 Cal. Water Code § 30507.
- 23 Cal. Water Code § 30507.1.
- 24 Cal. Water Code § 71255.
- 25 Cal. Gov't Code § 53232.1(a).
- 26 Cal. Gov't Code § 53232.1(b).
- 27 Cal. Gov't Code § 53232.1(c).
- 28 Cal. Const. art. XI, § 5(b)(4).
- 29 See Cal. Gov't Code § 36516.
- 30 See Cal. Gov't Code § 36516(a).
- 31 Cal. Gov't Code § 36516(a)(4).
- 32 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).
- 33 See Cal. Gov't Code § 36516.1.
- 34 See Cal. Gov't Code § 36516(c).
- 35 *Id.*
- 36 2 Cal. Code Regs. § 18702.5(b)(3).

- 37 *Id.* The form is called "Form 806." More information regarding Form 806 is available from the Fair Political Practices Commission website at: <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/agency-report-of-public-official-appointments-form-806.html>.
- 38 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.").
- 39 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.").
- 40 2016 Cal. Stat. ch. 175, § 1 (amending Cal. Gov't Code § 54953).
- 41 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.").
- 42 Cal. Gov't Code §§ 53891, 53892, 53908.
- 43 Cal. Const. art. XI, § 10(a).
- 44 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").
- 45 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, or (2) the person is the head of a department of a local agency).
- 46 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....").
- 47 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 that 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...").
- 48 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.").
- 49 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 5 (commencing with Section 67), Title 6 (commencing with Section 85), or Title 7 (commencing with Section 92) of Part 1 of the Penal Code.").
- 50 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.").
- 51 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.").
- 52 See Cal. Gov't Code § 89501 (definition of honorarium).
- 53 See Cal. Gov't Code § 89502 (general prohibition).
- 54 See Cal. Gov't Code § 89501(b)(2).
- 55 See 2 Cal. Code Regs. §18932.5(a)(1) (direct charitable contributions excluded from honorarium definition).
- 56 See 2 Cal. Code Regs. §18932.5(a)(2).
- 57 See 2 Cal. Code Regs. §18932.5(a)(3).
- 58 See 2 Cal. Code Regs. §18932.5(a)(4).
- 59 See 2 Cal. Code Regs. §18932.5(a)(5).
- 60 See Cal. Gov't Code § 89501(b)(2).
- 61 See Cal. Gov't Code § 89501(b)(1).
- 62 *Id.*
- 63 2 Cal. Code Regs. § 18932.4(e).

- 64 See generally Cal. Gov't Code §§ 91000-14.
- 65 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).
- 66 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).
- 67 Cal. Gov't Code § 91000(b).
- 68 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).
- 69 Cal. Gov't Code § 53232.2(a).
- 70 Cal. Gov't Code § 53232.2(b).
- 71 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).
- 72 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).
- 73 Cal. Gov't Code § 53232.3(a).
- 74 Cal. Gov't Code § 53232.3(c).
- 75 *Id.*
- 76 Cal. Gov't Code § 53232.3(b).
- 77 Cal. Gov't Code § 53232.3(e).
- 78 Cal. Gov't Code § 53232.2(c).
- 79 Cal. Gov't Code § 53232.2(f).
- 80 Cal. Gov't Code § 53232.2(g).
- 81 See Cal. Gov't Code § 53232.2(b).
- 82 See Cal. Const. art. XI, § 5. *County of Sonoma v. Comm'n on State Mandates*, 84 Cal. App. 4th 1264, 101 Cal. Rptr. 784 (2000).
- 83 Cal. Gov't Code § 53232.4(a).
- 84 Cal. Gov't Code § 53232.4(b).
- 85 Cal. Gov't Code § 53232.4(c). See also Cal. Gov't Code § 8314.
- 86 Cal. Gov't Code § 53232.4(d). 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).
- 87 Cal. Penal Code § 504.
- 88 Cal. Penal Code § 514. See also Cal. Elect. Code § 20 (making those convicted of embezzlement or theft of public money ineligible for public office).
- 89 See 26 U.S.C. § 7201.
- 90 See 26 U.S.C. § 7203.
- 91 See generally 18 U.S.C. §§ 1341-46.
- 92 See generally 18 U.S.C. § 3571(b), (d).
- 93 See, e.g., 18 U.S.C. §§ 641 (crime of embezzlement against the United States), 648 (misuse of public funds).
- 94 See Cal. Penal Code § 424; Cal. Gov't Code § 8314.
- 95 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).
- 96 Cal. Gov't Code § 8314(b)(4).
- 97 Cal. Gov't Code § 8314(b)(1).
- 98 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 used for personal purpose or unused cash advances were not promptly returned; this is particularly the case when restitution is prompted by a criminal investigation).
- 99 *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.
- 100 Cal. Gov't Code § 54964(b)(3).
- 101 *Vargas*, 46 Cal. 4th at 40, citing *Stanson v. Mott*, 17 Cal. 3d 206, 130 Cal. Rptr. 697 (1976).
- 102 See Cal. Gov't Code § 89001.
- 103 See 2 Cal. Code Regs. § 18901.
- 104 See Cal. Penal Code § 424; Cal. Gov't Code § 8314.
- 105 Cal. Penal Code § 424
- 106 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).
- 107 Cal. Gov't Code § 8314(c)(1).
- 108 Cal. Gov't Code § 91012.
- 109 Cal. Gov't Code § 83116.

- 110 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 . . .”).
- 111 Cal. Gov’t Code § 8314(c)(1).
- 112 Cal. Gov’t Code § 87300.
- 113 Cal. Penal Code §§ 68(a), 518; 18 U.S.C. §§ 201, 872-880.
- 114 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).
- 115 Cal. Gov’t Code § 87207(a)(1). For more information, see <http://www.ca-ilg.org/StatementofEconomicInterests>.
- 116 Cal. Gov’t Code § 89503; 2 Cal. Code Regs. § 18940.2 (the FPPC adjusts the limit biennially).
- 117 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).
- 118 Cal. Gov’t Code § 87103(e); 2 Cal. Code Regs. § 18700(c)(6) (E). 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 \$460 (2015-16) gift limit from someone affected by that decision. Cal. Gov’t Code § 89503; 2 Cal. Code Regs. § 18940.2(a).
- 119 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) (application of the disqualification/conflict of interest rules). See also 2 Cal. Code Regs. § 18940.1(b) (definition of “official”).
- 120 See generally 2 Cal. Code Regs. § 18942 (list of exceptions in the regulations).
- 121 See generally 2 Cal. Code Regs. § 18940(a).
- 122 2 Cal. Code Regs. § 18943.
- 123 2 Cal. Code Regs. § 18946.5.
- 124 2 Cal. Code Regs. § 18946.4.
- 125 2 Cal. Code Regs. § 18946.1.
- 126 2 Cal. Code Regs. § 18946.2.
- 127 Cal. Gov’t Code §§ 87210, 87313; 2 Cal. Code Regs. § 18945(b) (the source of the payment is the source of the gift).
- 128 2 Cal. Code Regs. § 18945.2.
- 129 2 Cal. Code Regs. § 18942(a)(3).
- 130 2 Cal. Code Regs. § 18942(a)(18)(A).
- 131 2 Cal. Code Regs. § 18942(a)(19).
- 132 2 Cal. Code Regs. § 18942(a)(17)(C).
- 133 2 Cal. Code Regs. § 18942(a)(17).
- 134 2 Cal. Code Regs. § 18944.
- 135 2 Cal. Code Regs. § 18944.3.
- 136 2 Cal. Code Regs. § 18944.1.
- 137 2 Cal. Code Regs. § 18944.2.
- 138 See Cal. Gov’t Code § 82028(a).
- 139 2 Cal. Code Regs. § 18941(c)(3).
- 140 2 Cal. Code Regs. § 18942(a)(8)(A).
- 141 2 Cal. Code Regs. § 18942(a)(8)(B).
- 142 2 Cal. Code Regs. § 18944.2(d) (does not apply to tickets or passes that come from someone outside the agency).
- 143 See Cal. Gov’t Code § 82028(a).
- 144 Cal. Gov’t Code §§ 89501, 89502.
- 145 2 Cal. Code Regs. §§ 18942(a)(13), 18942.3.
- 146 See Cal. Gov’t Code §§ 82030, 82030.5, 87207.
- 147 See Cal. Gov’t Code §§ 82005, 87207, 87209.
- 148 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](http://www.ca-ilg.org/document/commitment-nonprofit-causes-and-public-service-some-issues-ponder).
- 149 2 Cal. Code Regs. § 18942(a)(14).
- 150 2 Cal. Code Regs. § 18942(a)(7).
- 151 2 Cal. Code Regs. §§ 18942(a)(1), 18942.1.
- 152 2 Cal. Code Regs. § 18942(a)(5).
- 153 2 Cal. Code Regs. § 18942(a)(9).
- 154 2 Cal. Code Regs. § 18942(a)(10).
- 155 2 Cal. Code Regs. § 18942(a)(6).
- 156 2 Cal. Code Regs. §§ 18946.3, 18942(b)(2).
- 157 2 Cal. Code Regs. §§ 18950-18950.3.

- 158 See Cal. Const. art. XII, § 7 (“A transportation company may not grant free passes or discounts to anyone holding an office in this state . . .”).
- 159 2 Cal. Code Regs. §§ 18492(a)(13), 18942.1(c), 18946.1, 18946.2, 18946.4.
- 160 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](http://www.ca-ilg.org/BehestedPayments).
- 161 2 Cal. Code Regs. § 18942(a)(15).
- 162 2 Cal. Code Regs. § 18942(a)(16).
- 163 2 Cal. Code Regs. § 18942(a)(18)(B).
- 164 2 Cal. Code Regs. § 18942(a)(19).
- 165 2 Cal. Code Regs. § 18940(a).
- 166 See generally 2 Cal. Code Regs. § 18943.
- 167 See Cal. Const. art. XII, § 7 (“A transportation company may not grant free passes or discounts to anyone holding an office in this state . . .”).
- 168 See 3 Cal. Op. Att’y Gen. 318 (1944).
- 169 74 Cal. Op. Att’y Gen. 26 (1991).
- 170 *Id.*
- 171 67 Cal. Op. Att’y Gen. 81 (1984).
- 172 80 Cal. Op. Att’y Gen. 146 (1997).
- 173 2 Cal. Code Regs. § 18941(c)(1).
- 174 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.”).
- 175 2 Cal. Code Regs. § 18941(c)(2).
- 176 2 Cal. Code Regs. § 18941(c)(3).
- 177 See generally Cal. Gov’t Code §§ 91000-14.
- 178 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).
- 179 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).
- 180 Cal. Gov’t Code § 91000(b).
- 181 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).
- 182 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 183 *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).
- 184 *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).
- 185 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).
- 186 *U.S. v. Kemp*, 379 F.Supp. 2d 690, 697-98 (E.D. Penn. 2005).
- 187 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).
- 188 18 U.S.C. § 1951.
- 189 18 U.S.C. § 1951(a). See generally 18 U.S.C. § 3571(b).
- 190 See Cal. Elect. Code § 20 (making those convicted of a felony involving bribery, embezzlement, extortion or theft of public money ineligible for public office).
- 191 26 U.S.C. § 7201.
- 192 *Id.*
- 193 26 U.S.C. § 7206(1).
- 194 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).
- 195 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).
- 196 See generally Cal. Gov’t Code §§ 91000-14.
- 197 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).
- 198 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).
- 199 Cal. Gov’t Code § 91000(b).
- 200 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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CHAPTER 4:  
**Transparency Laws**



# 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 financial situations. When people become public servants, the public gets to learn a great deal about their financial lives. California voters established some of these disclosure requirements when they approved the Political Reform Act (PRA) in 1974.<sup>1</sup> Those entering public service sacrifice a degree of their privacy.

The disclosure requirements of the PRA apply to all "designated employees" of an agency.<sup>2</sup> "Designated employees" is broadly defined to include local elected officials (e.g., members of city councils, county boards of supervisors, and district boards), executive level agency employees (e.g., General Managers and Superintendents), and consultants and appointed members of councils, commissions, boards, committees and other local agency bodies with significant decision-making authority that exceeds a solely advisory function. "Designated employees" also includes persons in staff positions required to disclose their economic interests under the agency's local conflict of interest code because the position entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest of the employee.

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 (FPPC) website: [www.fppc.ca.gov](http://www.fppc.ca.gov). Local agencies may adopt electronic filing procedures with FPPC oversight.<sup>3</sup> 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.<sup>4</sup> 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 the table on the following page.

### ETHICS CODES VERSUS LOCAL CONFLICT OF INTEREST CODES

The PRA requires local agencies to adopt local conflict of interest codes, which supplement California law by specifying which positions in the agency are subject to which ethics laws.<sup>5</sup>

**For more information**, see "About Local Conflict of Interest Codes" (available at [www.ca-ilg.org/sites/main/files/file-attachments/about\\_local\\_conflict\\_of\\_interest\\_codes.pdf](http://www.ca-ilg.org/sites/main/files/file-attachments/about_local_conflict_of_interest_codes.pdf)) and FPPC materials on adopting local conflict of interest codes (see [www.fppc.ca.gov/learn/rules-on-conflict-of-interest-codes/local-government-agencies-adopting-amending-coi.html](http://www.fppc.ca.gov/learn/rules-on-conflict-of-interest-codes/local-government-agencies-adopting-amending-coi.html)).

## TYPES OF ECONOMIC INTERESTS THAT MUST BE DISCLOSED

- » **Sources of Income.** Disclosure is required for income of \$500 or more provided or promised to an official from one source (including any income received from a business, nonprofit organization, government agency, or individual) for the previous calendar year (for annual disclosures) or the previous 12 months (for assuming office statements).<sup>6</sup> “Income” includes a community property interest in a spouse or domestic partner’s income.<sup>8</sup>
- » **Personal Finances.** An official has an economic interest in that official’s expenses, income, assets or liabilities and those of his or her immediate family (spouse or domestic partner<sup>9</sup> or dependent children).<sup>10</sup>
- » **Real Property.** An interest in real property must be disclosed where the interest is worth \$2,000 or more. The interest may be held by the official, the official’s spouse or domestic partner<sup>11</sup> (even as separate property) or children, or anyone acting on their behalf. Real property interests can also be created through leaseholds, options and security or mortgage interests in property.<sup>12</sup>
- » **Investments.** Another disclosable interest is created when the official, the official’s spouse or domestic partner<sup>13</sup> (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 that has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior, even if the official does not receive income from the business.<sup>14</sup>
- » **Business Employment or Management.** If the official serves in a director, officer, partner, trustee, employee, or other management position in a business entity, an economic interest is created.<sup>15</sup> Note that this does not apply to a member of the board of a nonprofit entity.<sup>16</sup>
- » **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.<sup>17</sup>
- » **Business-Owned Property.** A direct or indirect ownership interest in a business entity or trust that owns real property is another disclosable interest.<sup>18</sup>
- » **Loans.** Another type of potentially disclosable interest is created by the receipt of a loan, unless the loan is from a commercial lending Institution or indebtedness created as part of a retail installment or credit card transaction, issued on the same terms as available to anyone in the public.<sup>19</sup>
- » **Gifts.** Gifts from a single source must be totaled up over the course of a calendar year. An official’s reporting obligation is triggered when the combined value of gifts from one source totals \$50 or more.<sup>20</sup> For more information about gifts, please see Chapter 3, and [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter).<sup>23</sup>

## PENALTIES

Economic interest disclosure requirements are part of the PRA. 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.<sup>21</sup>

Penalties for violation of the PRA can include one or more of the following:

- » Immediate loss of office;<sup>22</sup>
- » Prohibition from seeking elected office in the future;<sup>23</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>24</sup> and
- » Jail time of up to six months.<sup>25</sup>

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.<sup>26</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Campaign Contribution Disclosure

## BASIC RULES

California has an extensive framework for transparency with respect to campaign contributions.<sup>27</sup> The basic reasoning behind these laws is that the public has a right to know who gives money and other forms of support to candidates for public office. Another stated justification is that the prospect of public disclosure will discourage improper influences.<sup>28</sup>

These transparency requirements apply not only to candidates, but also to groups which organize to participate in the election process (known as “committees”).<sup>29</sup> Transparency requirements also apply to those who make large contributions, ten thousand dollars (\$10,000) or more in a calendar year, to influence elections.<sup>30</sup> Those who participate in campaigns to pass or defeat ballot measures are also subject to these requirements.<sup>31</sup>

Cities and counties may have additional campaign finance disclosure laws for candidates for offices within their jurisdiction or committees focused on local ballot measures.<sup>32</sup> Copies of these local ordinances must be filed with the FPPC.<sup>33</sup>

In addition, certain categories of local officials are subject to restrictions on campaign contributions received from people with business pending before the agency. Chapter 5 (pages \_-\_) explains these restrictions.

Chapter 3 explains the restrictions on how campaign funds may be spent.

## FOR MORE INFORMATION

On campaign contribution disclosure, see the following resources:

- » The FPPC has extensive information to guide candidates and ballot measure committees on these requirements. Visit the FPPC website at [www.fppc.ca.gov](http://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 the California Secretary of State’s office issues identification numbers to campaigns and committees, 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](http://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](http://www.fec.gov).

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

## PENALTIES

The PRA includes campaign contribution disclosure requirements. Violations of the PRA 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.<sup>34</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>35</sup>
- » Prohibition from seeking elected office in the future;<sup>36</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>37</sup> and
- » Jail time of up to six months.<sup>38</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## OTHER DISCLOSURE REQUIREMENTS

The California Public Records Act is the main source of authority providing public access to documents in the possession of public agencies in California. There are specific disclosure requirements that are useful to note that 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. For more information, see [www.ca-ilg.org/GiftsQuestion3](http://www.ca-ilg.org/GiftsQuestion3) and [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/gifts-and-honoraria.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/gifts-and-honoraria.html).
- » Gifts of event tickets to public agencies must be disclosed on a special form and submitted to the FPPC for posting on its website. For more information, see [www.ca-ilg.org/GiftsQuestion3](http://www.ca-ilg.org/GiftsQuestion3) and [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/reporting-ceremonial-role-events-and-ticket-admission.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/reporting-ceremonial-role-events-and-ticket-admission.html).
- » Campaign contributions in excess of \$250 received during the preceding 12 months from any party or participant in a pending permit or license application are discussed on chapter 5.

There are of course other disclosure and notice requirements that are not listed here; these are just some that often raise issues concerning public confidence and ethics.

# Charitable Fundraising Disclosure

## BASIC RULES

A frequently 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 reasoning behind these laws 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 entity 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):
  - Has requested or suggested the donation;
  - Controls or directs the donation; or
  - Plays a cooperating, consulting, or coordinating role with respect to the donation.<sup>39</sup>

The report must contain the following information:

- » The contributor's name and address;
- » The dollar amount or fair market value of the contribution;
- » The date or dates on which the contributions were made;
- » The name and address of the recipient of the contribution;
- » 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.<sup>40</sup>

The official must make this report once contributions from a single donor (whether an individual or an organization) have reached the \$5,000 aggregate threshold for any calendar year. Once this occurs, all contributions the donor makes or 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.<sup>41</sup>

Within 30 days of the donor reaching the \$5,000 threshold, the elected official must file a report with his or her agency (typically through the agency's filing officer)<sup>42</sup>. The FPPC's "Form 803 - Behested Payments Report" should be used to make this disclosure.<sup>43</sup>

What is a "legislative, governmental or charitable" purpose? The law does not define these words, but charitable causes typically involve Internal Revenue Code section 501(c)(3) organizations. A "governmental" cause might include such things as fundraising for a new public library. The reference to a "legislative" cause apparently has its roots in a 1996 FPPC advice letter which addressed a situation in which a State Senator asked a private party to pay the airfare and expenses for a witness to come testify at a legislative hearing.<sup>44</sup>

Of course, when a public servant conditions his or her official actions on a contribution to a worthy cause it is criminal extortion under both state and federal law.<sup>45</sup>

See discussion in the next section.

### FOR MORE INFORMATION

On charitable fundraising, see the following resources:

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

For specific questions, contact the FPPC or agency counsel.



## PENALTIES

These disclosure requirements are part of the PRA. PRA violations 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.<sup>46</sup>

### Penalties for Extortion under State and Federal Law

#### *California Law*

If an official demands, solicits, or otherwise compels a contribution to a charitable organization in exchange for performing an official act favorable to the person making the contribution, the official's act of compelling the contribution could be prosecuted as extortion. Extortion under color of official right is a misdemeanor under California law.<sup>47</sup> Misdemeanors are punishable by up to six months in county jail, a fine of up to \$1,000, or both.<sup>48</sup> Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.<sup>49</sup>

#### *Federal Law*

If the official's extortion affects interstate commerce, it is chargeable as a federal offense, which, under federal law, has a maximum penalty of 20 years in prison and a \$250,000 fine.<sup>50</sup>

### Honest Services Fraud

Under federal wire and mail fraud laws, the public has the right to the "honest services" of public officials.<sup>51</sup>

The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to that owed by a trustee or fiduciary.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup>

The maximum penalty for wire and/or mail fraud includes a jail term of up to 20 years and a \$250,000 fine.<sup>55</sup>

## FOR MORE INFORMATION

On penalties for violations of ethics laws, see [www.ca-ilg.org/consequences](http://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.<sup>56</sup> The other set governs which records an agency must retain and for how long.<sup>57</sup>

Pursuant to the California Public Records Act ("CPRA"), the public has the right to access materials that are created in the course of conducting the people's business.<sup>58</sup> These materials include any writing prepared, owned, used or retained by a public agency, with some exceptions.<sup>59</sup> "Writings" include, among other things, documents, computer data, e-mails, facsimiles and photographs.<sup>60</sup>

Public agency records are generally subject to public disclosure unless a specific exemption applies.<sup>61</sup> A few of the exemptions worth noting are:

- » The "pending litigation" exemption, which exempts from disclosure documents prepared in support of ongoing litigation (but for this protection, lawyers suing an agency could obtain all documents containing the agency's legal strategy just by asking for them).<sup>62</sup>
- » The "drafts" exemption, which exempts from disclosure preliminary drafts, notes or other interagency or intra-agency memoranda not retained in the agency's ordinary course of business. The public agency also must be able to demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure.<sup>63</sup>
- » The "personal privacy" exemption, which exempts from disclosure personnel files, medical records or other such files, the disclosure of which would constitute an unwarranted invasion of personal privacy.<sup>64</sup>

Despite these exceptions, the safe assumption is that most materials used, prepared, or simply maintained by a public agency—including e-mails—are records subject to disclosure.

A person may make a request for records in any manner, whether orally in person or over the phone, or in a writing mailed, emailed, faxed or personally delivered to the agency.<sup>65</sup> There are two ways for a person to gain access to requested records, and the requester may choose either or both: 1) inspecting the records at the local agency's

office during regular business hours; and 2) receiving copies of the requested records.<sup>66</sup>

A request for records must be specific and clear enough for the local agency to be able to determine what records the requester seeks.<sup>67</sup> However, if the request is overly broad or unclear, the local agency must assist the requester with revising the request so that it seeks more easily identifiable records; for instance, the local agency can describe the kind of records it possesses that may be relevant given the purpose of the request and how those records are maintained.<sup>68</sup>

Within ten calendar days of receiving a CPRA request, a local agency must respond to the requester notifying them of whether there are records responsive to the request that the agency will disclose.<sup>69</sup> If the agency is withholding any records pursuant to one or more applicable exemptions, the response must be in writing and identify the exemption(s) invoked to justify the nondisclosure.<sup>70</sup> Sometimes records will contain both nonexempt and exempt information, and the agency must redact a writing to conceal the portions that are exempt before disclosing the writing.<sup>71</sup> Although the CPRA sets a specific deadline for *responding* to a records request, the CPRA simply states that the nonexempt records must be actually *disclosed* to the requester "promptly."<sup>72</sup>

## RECORDS RETENTION

Counties and cities generally must retain public records for a minimum of two years, but for special districts, the duration of time varies based on the type of records sought to be destroyed.<sup>73</sup> Most local agencies adopt record retention schedules as part of their records management system. These define which records must be retained and for how long. The California Secretary of State provides local agencies with record management guidelines.<sup>74</sup>



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

## 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](http://www.cacities.org/PRAGuide) or in hardcopy form from [www.cacities.org/publications](http://www.cacities.org/publications) or by calling (916) 658-8217.
- » *The People's Business December 2014 Guide Supplement*, 2014. Available at the League of California Cities website at [www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications](http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications).
- » *The People's Business: 2014 Chart of Frequently Requested Information and Records*, 2014. Available at the League of California Cities website at [www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications](http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications).
- » *Summary of the California Public Records Act*, 2004. Available on the California Attorney General's website at [http://ag.ca.gov/publications/summary\\_public\\_records\\_act.pdf](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 the right to access public records which are subject to disclosure.<sup>75</sup> If the agency loses, it must pay costs and attorney's fees.<sup>76</sup>

## FOR MORE INFORMATION

On penalties for violations of ethics laws, see [www.ca-ilg.org/consequences](http://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.

The Ralph M. Brown Act (Brown Act) is California's open meeting law for the governing bodies of nearly all local agencies.<sup>77</sup> The Brown Act provides minimum legal requirements for local agency transparency in decision-making.<sup>78</sup> (Please note that community college boards are subject to less stringent requirements than are other local agencies. Check the endnotes for specific references to open meeting laws pertaining to community college districts.)<sup>79</sup>

Under the Brown Act, elected and most appointed local agency decision-making bodies, including many advisory committees, must conduct their business in open and public meetings to assure that the local decision-making process is observable by the public.<sup>80</sup> The issue of what kinds of bodies are subject to open meeting laws may require 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 congregation of a majority of the members of a decision-making body to discuss, hear, deliberate, or make a decision on any item 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 within its subject matter jurisdiction, no matter how the conversation occurs, whether by telephone or e-mail, on a private blog, or at a local coffee shop.<sup>81</sup>

The following are some key things to keep in mind:

» **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 charter or formal action of the governing body.<sup>82</sup>

» **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 with each other outside of a public meeting (which is not in and of itself a violation) about a matter of agency business, and then one or both of those individuals consults with a third member on the same issue, a majority of the body has consulted on the same issue and a violation of the open meeting law has occurred. 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.<sup>83</sup>

However, separate communications of an employee or official of a local agency with individual decision-makers to answer questions or provide information are permissible, as long as those communications do not communicate information about other decision-makers' comments or positions.<sup>84</sup> For example, the General Manager of a special district may have an individual meeting with Board Member A to answer questions or provide information about a proposal, and then the General Manager may have a similar meeting with Board Member B, as long as the General Manager does not communicate Board Member A's comments or position on the proposal to Board Member B.

## GOOD ETHICS EQUALS 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.** The Brown Act requires that at least 72-hours before a regular meeting, and 24-hours before a special meeting, a local agency must post an agenda for the meeting, including on the agency's website, if the agency maintains one.<sup>85</sup> In general, public officials may only discuss and act on items included on the posted agenda for that meeting.<sup>86</sup> However, decision-makers or staff may briefly respond to questions or statements during the public comments section of the meeting even if the questions or statements are unrelated to any agenda items. Officials can also request staff to look into a matter or place a matter on the agenda of a subsequent meeting.<sup>87</sup> Action may be taken on a matter not on the agenda only when the decision-making body determines by a majority vote that an emergency situation exists or the decision-making body determines by a two-thirds vote of those officials present at the meeting that there is a need to take immediate action and the need for action came to the attention of the local agency subsequent to the agenda being posted.<sup>88</sup>
- » **Permissible Gatherings.** Not every gathering of members of a decision-making body outside of a noticed meeting violates the law. For example, an open meeting violation would not occur if a majority of a decision-making body attends the same educational conference or a meeting not organized by the local agency as long as certain requirements are met.<sup>89</sup> Neither is attendance at a social or ceremonial event in and of itself a violation.<sup>90</sup> 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 allow for closed discussions only under very limited circumstances.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> See the table on the next page for information on what kinds of closed sessions are permissible.

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

### FOR MORE INFORMATION

On open meeting laws, see the following resources:

- » Open and Public V: A Guide to the Ralph M. Brown Act, 2016. Available on the League of California Cities website at [www.cacities.org/OpenandPublicV](http://www.cacities.org/OpenandPublicV) or in hardcopy form by visiting [www.cacities.org/publications](http://www.cacities.org/publications) or by calling (916) 658-8217.
- » 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](http://www.ca-ilg.org/closed-session-leaks).
- » The use of technology and public meetings is discussed in Meetings and Technology: Finding the Right Balance, 2013. Available at [www.ca-ilg.org/technology-and-meetings](http://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. Below is a list of matters that generally may be addressed in closed session. The list is illustrative, but not comprehensive, and in many cases, there are statutory limitations and requirements that must be considered. Consult with agency counsel concerning 1) whether a particular type of closed session is permissible 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; however, where the body will be hearing complaints against an employee, at least 24-hours before the time for holding the session, the employee must receive a written notice of his or her right to require that the hearing be in open session.<sup>94</sup>
- **Pending Litigation.** To confer with or receive advice from the agency's legal counsel with respect to existing, threatened or potential litigation.<sup>95</sup>
- **Real Estate Negotiations.** To grant authority to the agency's negotiator regarding the price and terms for the purchase, sale, exchange, or lease of real property on the agency's behalf.<sup>96</sup>
- **Labor Negotiations.** To meet with the agency's labor negotiator regarding salaries, benefits, and other matters within the scope of labor negotiations.<sup>97</sup>
- **Student Disciplinary Issues (for School Districts and Community College Districts).** To consider discipline of a student if a public hearing would result in the prohibited disclosure of private information, after notifying the student (and his or her parents in the case of minor students) and not receiving in response a request for a public hearing.<sup>98</sup>
- **Grand Jury Proceedings.** To allow testimony in private before a grand jury (either individually or collectively).<sup>99</sup>
- **License Applicants with Criminal Records.** To allow an agency to determine whether an applicant for a license or license renewal with a criminal record is sufficiently rehabilitated to obtain the license.<sup>100</sup>
- **Public Security.** To confer with designated law enforcement officials regarding threats to public facilities or services, or the public's right of access to those facilities or services.<sup>101</sup>
- **Multi-jurisdictional Law Enforcement Agency.** To discuss ongoing multi-jurisdictional criminal investigations.<sup>102</sup>
- **Hospital Peer Review and Trade Secrets.** To discuss issues related to medical quality assurance or involving hospital trade secrets.<sup>103</sup>

Just because a topic may be discussed in closed session does not mean that it always must be discussed in closed session. However, sometimes there are reasons for discussing a matter during a permissible closed session. For example, the governing body should discuss an employee disciplinary matter in a closed session meeting to protect the privacy interests of the employee, unless the affected employee gives permission for the governing body to discuss the matter in open session. Other times, the governing body may decide that an open session is in the public's best interest, even if not required (for example, in determining negotiating positions for the agency). Keep in mind that the decision of whether a meeting should be open or closed (where the governing body has authority to decide) is a collective one, not an individual one. However, also keep in mind that a closed session is permissible only where a statute specifically allows it. Otherwise, the matter must be discussed in open session.

## PENALTIES

### Nullification of Decision

Many decisions that are not made according to the open meeting laws are voidable.<sup>104</sup> After asking the agency to cure the violation, either the District Attorney or any interested person may sue to have the action declared void.<sup>105</sup>

### Criminal Sanctions

Additionally, members of the governing body who intentionally violate the open meeting laws may be guilty of a misdemeanor.<sup>106</sup> 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.<sup>107</sup>

### Other Consequences

Either the District Attorney or any interested person may sue to remedy past, and prevent future, violations of the open meeting laws.<sup>108</sup> Another remedy, under certain circumstances, is for a court to order all closed sessions be electronically recorded.<sup>109</sup> Costs and attorney fees may be awarded to those who successfully challenge open meeting law violations.<sup>110</sup>

#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://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 special care when responding to each other's emails, blogs, or posts on social networking sites (such as Facebook or LinkedIn).

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 respond to 10 e-mails asking the same question, an official can simply post a response on his or her blog and refer folks to the answer. Blogging can also be a good way to keep the public informed, especially as fewer people turn to traditional media for information.

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 (accessible to those with disabilities) location, with prior notice and an agenda.

What is the reasoning underlying these restrictions? One is that the public has a right to know about discussions and decision-making on any issue that may affect them. There is also an underlying belief that decision-makers should deliberate on issues in front of, and facing, their constituents. Another proposed justification is that officials should hear the thoughts of the full range of constituents (not just those on the Internet), should constituents choose to offer them. Further, public discussions and decision-making prevents fears of secret backroom deals made without public knowledge.

For more information, see "Legal Issues Associated with Social Media" (available at [www.ca-ilg.org/SocialMediaLegalIssues](http://www.ca-ilg.org/SocialMediaLegalIssues)) and "Taking the Bite Out of Blogs: Ethics in Cyberspace" (available at [www.ca-ilg.org/blogs](http://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 duty 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.)<sup>111</sup>

### Posting and Following the Agenda

The open meeting laws provide requirements for informing the public of the date, time, and location of meetings, and the items of business to be addressed at the meetings.<sup>112</sup> The agenda must be posted at least 72-hours in advance of a regular meeting.<sup>113</sup>

Members of the public may request that a copy of the agenda packet be mailed to them at the time the agenda is posted or upon distribution to the governing body.<sup>114</sup> Local agencies must post these materials on their website, if the agency has a website.<sup>115</sup>

There are a few exceptions to the 72-hour requirement that relate to unexpected circumstances.<sup>116</sup> These exceptions, where applicable, also permit an agency to take action on or discuss items not on the agenda.<sup>117</sup> The agency may also hold special meetings on 24-hours' notice<sup>118</sup> or on less than 24-hours' notice if a true emergency exists.<sup>119</sup>

### The Public's Right to Materials 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.<sup>120</sup>

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 if the document is prepared by someone else, such as a member of the public.<sup>121</sup>

## SPECIAL ISSUES

### Electronic Recording of Meetings is Allowed

Anyone attending a meeting may photograph or record it with an audio or video recorder unless the governing body reasonably finds that the noise, illumination, or obstruction of view would disrupt the meeting.<sup>122</sup>

Any audio or video recording of a meeting made by the local agency becomes a public record that must be made available to the public for at least 30 days.<sup>123</sup>

### 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 that signing the list is voluntary.<sup>124</sup>

### The Public's Right to be Heard

Generally, every agenda must include an opportunity for the public to address the governing body on any item of interest to the public within the body's jurisdiction.<sup>125</sup> 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.<sup>126</sup>

### 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.<sup>127</sup>



When many people wish to comment on an issue, for example, an agency may assign a time limit to each speaker to ensure that everyone has a chance to be heard and the agency can complete its business (individuals using a translator must be allotted at least twice the amount of time of a English speaker). 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.<sup>128</sup> Members of the media must be allowed to remain (except those participating in the disturbance) and only matters on the agenda can be discussed.<sup>129</sup>

The chair may encourage everyone to be civil and mutually respectful during the meeting and have disruptive individuals removed from the room.<sup>130</sup> However, speakers may not be prevented from criticizing the governing body.<sup>131</sup>

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

## **GOOD ETHICS EQUALS GOOD POLITICS**

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

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.

## **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](http://www.ca-ilg.org/civility).

For specific questions, please contact agency counsel.

## PENALTIES

### Nullification of Decision

As a general matter, decisions that are not made according to the open meeting laws are voidable.<sup>132</sup> After asking the agency to cure the violation, either the District Attorney or any interested person may sue to have the action declared void.<sup>133</sup>

### Criminal Sanctions

Additionally, members of the governing body who intentionally violate the open meeting laws may be guilty of a misdemeanor.<sup>134</sup> The penalty for a misdemeanor conviction is imprisonment in county jail for up to six months, a fine of up to \$1,000, or both.<sup>135</sup>

### Other Measures

Either the District Attorney or any interested person may sue to remedy past and prevent future violations of the open meeting laws.<sup>136</sup> Another remedy, under certain circumstances, is for a court to order that all closed sessions be electronically recorded.<sup>137</sup> Costs and attorney's fees may be awarded to those who successfully challenge open meeting law violations.<sup>138</sup>

### Potential Civil Rights Violations

By implementing policies or taking actions to regulate or limit the public's right to participate in meetings, other than those regulations and limitations specifically allowed under California law and constitutional law principles, the governing board exposes the local agency to liability for violations of individuals' civil rights<sup>139</sup> including liability for attorney fees.<sup>140</sup>

## FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## VOTERS SUPPORT OPEN GOVERNMENT

In 2004, California voters made public agency transparency a state constitutional and statutory requirement. The California Constitution now provides that "[t]he 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."<sup>141</sup>

# Endnotes and Additional Information

**Note:** The California Codes are accessible at <http://leginfo.ca.gov/>. Fair Political Practices Commission regulations are accessible at [www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html](http://www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html). A source for case law information is [www.findlaw.com/cacases/](http://www.findlaw.com/cacases/) (requires registration).

- 1 Political Reform Act. 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 See Cal. Gov't Code § 87103(c).
- 7 2 Cal. Code Regs. § 18229.
- 8 Cal. Gov't Code §§ 82030, 87103(c).
- 9 2 Cal. Code Regs. § 18229.
- 10 Cal. Gov't. Code § 82029.
- 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) .
- 15 Cal. Gov't Code § 87103(d).
- 16 See Cal. Gov't Code § 82005.
- 17 Cal. Gov't Code §§ 82034, 87103(a), (d).
- 18 Cal. Gov't Code § 82033 (pro rata interest, if own 10 percent interest or greater).
- 19 Cal. Gov't Code § 82030(a),(b)(8), (10).
- 20 Cal. Gov't Code § 87207(a)(1).
- 21 See *generally* Cal. Gov't Code §§ 91000-14.
- 22 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).
- 23 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).
- 24 Cal. Gov't Code § 91000(b).
- 25 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).
- 26 Cal. Gov't Code § 91013.
- 27 See *generally* Cal. Gov't Code §§ 84100-511.
- 28 See Cal. Gov't Code § 81002(a).
- 29 See, e.g., Cal. Gov't Code §§ 82013, 84101.
- 30 See Cal. Gov't Code § 82013(c).
- 31 See Cal. Gov't Code § 84202.3.
- 32 See Cal. Gov't Code §§ 81013, 81009.5.
- 33 Cal. Gov't Code § 81009.5(a). Local disclosure requirements can be found on the Fair Political Practices Commission's website, available at <http://www.fppc.ca.gov/learn/campaign-rules/local-campaign-ordinances.html>.
- 34 See *generally* Cal. Gov't Code §§ 91000-14.
- 35 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).
- 36 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).
- 37 Cal. Gov't Code § 91000(b).
- 38 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).
- 39 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 8 (2015), available at <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Public%20Officials%20and%20Employees/StateGiftFactSheet.pdf>.
- 40 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://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Agency%20Reports/Form803.pdf>.
- 41 Cal. Gov't Code § 82015(b)(2)(B)(iii).
- 42 Cal. Gov't Code § 82015(b)(2)(B)(iii); Fair Political Practices Commission, California Form 803 - Behested Payments Report Instructions, available at <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Agency%20Reports/Form803.pdf>.
- 43 Fair Political Practices Commission, California Form 803 - Behested Payments Report, available at <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Agency%20Reports/Form803.pdf>.
- 44 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).
- 45 Cal. Penal Code § 518; *In re Shepard*, 161 Cal. 171 (1911). See also 18 U.S.C. § 666(a)(1)(B) .

- 46 See generally Cal. Gov't Code §§ 91000-14.
- 47 Cal. Penal Code § 521.
- 48 Cal. Penal Code § 19.
- 49 Cal. Gov't Code §§ 3060-3074.
- 50 18 U.S.C. §§ 1951(a), 3571(b).
- 51 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 52 *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).
- 53 *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).
- 54 *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.
- 55 18 U.S.C. §1341 (“... shall be fined under this title or imprisoned not more than 20 years, or both.”).
- 56 See Cal. Gov't Code §§ 6250-70.
- 57 See Cal. Gov't Code §§ 34090-34090.8.
- 58 See generally Cal. Gov't Code §§ 6250-70.5. See also Cal. Const. art. I, § 3(b)(1).
- 59 See Cal. Gov't Code §§ 6252-53.
- 60 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.”)
- 61 *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).
- 62 Cal. Gov't Code § 6254(b).
- 63 Cal. Gov't Code § 6254(a).
- 64 Cal. Gov't Code § 6254(c).
- 65 League of California Cities, *The People's Business: A Guide to the California Public Records Act*, 11 (2008), available at <http://www.cacities.org/PRAGuide> (citing *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381).
- 66 *Id.* at 10.
- 67 *Id.* at 11 (citing *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469; *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159).
- 68 *Id.* at 12 (citing Cal. Gov. Code § 6253.1; *State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177).
- 69 *Id.* at 11 (citing Cal. Gov't Code § 6253(c)).
- 70 *Id.* at 13 (citing Cal. Gov't Code § 6255).
- 71 *Id.* (citing Cal. Gov. Code § 6253(a); *ACLU Foundation v. Deukmejian* (1982) 32 Cal.3d. 440).
- 72 *Id.* (citing Cal. Gov. Code § 6253(b); 88 Ops.Cal.Atty.Gen. 153 (2005); 89 Ops.Cal.Atty.Gen. 39 (2006)).
- 73 Cal. Gov't Code §§ 26202 (counties), 34090(d) (cities), 60201 (special districts). 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).
- 74 The Secretary of State's Local Government Records Management Guidelines may be viewed at <http://www.sos.ca.gov/archives/admin-programs/local-gov-program>.
- 75 Cal. Gov't Code § 6258.
- 76 Cal. Gov't Code § 6259(d).
- 77 See generally Cal. Gov't Code §§ 54950-63 (for cities, counties, special districts and school districts).
- 78 See Cal. Gov't Code § 54953.7.
- 79 Cal. Educ. Code §§ 72121-29 (for community college district governing boards).
- 80 See Cal. Gov't Code § 54952.2(a).
- 81 Cal. Gov't Code § 54952.2(b); Cal. Educ. Code § 72121.
- 82 Cal. Gov't Code § 54952(b).
- 83 Cal. Gov't Code § 54952.2.
- 84 Cal. Gov't Code §§ 54954.2; 54956.
- 85 Cal. Gov't Code § 54952.2(b)(2).
- 86 *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).
- 87 Cal. Gov't Code § 54954.2; Cal. Educ. Code § 72121.5.
- 88 Cal. Gov't Code § 54954.2(a)(2), See Cal. Educ. Code § 72121.5.
- 89 Cal. Gov't Code § 54954.2(b).
- 90 Cal. Gov't Code § 54952.2(c)(2).
- 91 Cal. Gov't Code § 54952.2(c)(5).
- 92 See, e.g., Cal. Gov't. Code §§ 54956.5-54957, 54957.6, 54957.10, 54962; Cal. Educ. Code § 72122.
- 93 Cal. Gov't Code § 54956.9.
- 94 Cal. Gov't Code §§ 54957(b)(1), (2).
- 95 Cal. Gov't Code § 54956.9.
- 96 Cal. Gov't Code § 54956.8.
- 97 Cal. Gov't Code §§ 3549.1 (school and community college districts), 54957.6 (other local agencies).

- 98 Cal. Educ. Code §§ 35146, 72122.
- 99 Cal. Gov't Code § 54953.1.
- 100 Cal. Gov't Code § 54956.7.
- 101 Cal. Gov't Code § 54957(a).
- 102 Cal. Gov't Code § 54957.8.
- 103 Cal. Gov't Code §§ 37606, 37624.3; Cal. Health & Safety Code §§ 1461, 1462, 32106, 32155.
- 104 Cal. Gov't Code § 54960.1; Cal. Educ. Code § 72121(b).
- 105 *Id.*
- 106 Cal. Gov't Code § 54959.
- 107 See Cal. Penal Code § 19.
- 108 Cal. Gov't Code § 54960(a).
- 109 Cal. Gov't Code § 54960(b).
- 110 Cal. Gov't Code § 54960.5.
- 111 Cal. Educ. Code §§ 72121-29 (for community college district governing boards).
- 112 Cal. Gov't Code § 54954.2(a); Cal. Educ. Code § 72121.
- 113 *Id.*
- 114 Cal. Gov't Code § 54954.1.
- 115 See Cal. Gov't Code § 54954.2. This requirement currently 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.
- However, per 2016 Cal. Stat. ch. 265, § 1 (amending Cal. Gov't Code § 54954.2), beginning January 1, 2019, the agenda for a meeting of a legislative body of a city, county, city and county, special district, school district, or political subdivision established by the state must be posted on the local agency's "primary Internet Web site homepage" if the local agency has a webpage.
- 116 Cal. Gov't Code § 54954.2(b).
- 117 Cal. Gov't Code § 54954.2(b)(2).
- 118 Cal. Gov't Code § 54956.
- 119 Cal. Gov't Code § 54956.5.
- 120 Cal. Gov't Code § 54957.5.
- 121 Cal. Gov't Code § 54957.5(c).
- 122 Cal. Gov't Code § 54953.5(a).
- 123 Cal. Gov't Code § 54953.5(b).
- 124 Cal. Gov't Code § 54953.3.
- 125 Cal. Gov't Code § 54954.3(a); Cal. Educ. Code § 72121.5.
- 126 Cal. Gov't Code § 54954.3(a).
- 127 Cal. Gov't Code § 54954.3(b); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).
- 128 Cal. Gov't Code § 54957.9.
- 129 *Id.*
- 130 Cal. Gov't Code § 54957.9; *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010).
- 131 Cal. Gov't Code § 54954.3(c); *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983); *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013).
- 132 Cal. Gov't Code § 54960.1; Cal. Educ. Code § 72121(b).
- 133 *Id.*
- 134 Cal. Gov't Code § 54959.
- 135 See Cal. Penal Code § 19.
- 136 Cal. Gov't Code § 54960(a).
- 137 Cal. Gov't Code § 54960(b).
- 138 Cal. Gov't Code § 54960.5.
- 139 See 42 U.S.C. § 1983.
- 140 See 42 U.S.C. § 1988.
- 141 Cal. Const. art. I, § 3(b)(1).



CHAPTER 5:

# Fair Process Laws and Merit-Based Decision-Making



# 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. It should be noted that the interest need not be financial.<sup>1</sup>

*Local officials are much less constrained when the body is acting in a legislative, as compared to a 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 common requirements or principles to specific situations, much as a judge applies the law to a particular set of facts.

The kinds of impermissible bias<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

### » **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.<sup>5</sup>
- **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).<sup>6</sup>

» **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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup> Nevertheless, if an official has made very strident and unequivocal statements for or against a pending project or issue, a court could find that the official could not participate as an unbiased decision-maker when the project or issue comes before the agency.<sup>11</sup> 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](http://www.ca-ilg.org/bias).
- » “When Your Decision Will Affect a Friend or Supporter,” available at [www.ca-ilg.org/resource/when-your-decision-will-affect-friend-or-supporter](http://www.ca-ilg.org/resource/when-your-decision-will-affect-friend-or-supporter).
- » Understanding the Basics of Local Agency Decision- Making, 2009, available at [www.ca-ilg.org/decisionmaking](http://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](http://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.<sup>12</sup>

### 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.<sup>13</sup>

#### FOR MORE INFORMATION

On the effect of ethics law violations, see [www.ca-ilg.org/consequences](http://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.”<sup>14</sup>

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 transparency and integrity of the policy-making process is compromised.

Note that the California 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.<sup>15</sup>

#### FOR MORE INFORMATION

On vote trading, see [www.ca-ilg.org/votetrading](http://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) . . .”<sup>16</sup> A conviction for vote-trading will also lead to an immediate loss of office and permanent disqualification from holding any office in the state.<sup>17</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://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.<sup>18</sup>

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).<sup>19</sup> Personal loans over \$500 from others must meet certain requirements (for example, be in writing, clearly state the date, amounts and interest payable).<sup>20</sup> For further discussion of ethics laws related to personal loans and other economic interests, see Chapter 2.

### 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.<sup>21</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>22</sup>
- » Prohibition from seeking elected office in the future;<sup>23</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>24</sup> and
- » Jail time of up to six months.<sup>25</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://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 proscription 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.<sup>26</sup> "Immediate family" includes one's spouse or domestic partner and dependent children.<sup>27</sup> For further discussion of conflict of interest disclosure and disqualification, see Chapter 2.

Some jurisdictions have also adopted additional policies to prevent nepotism in hiring, promotions and appointments. For example, marital status policies regarding supervisor/supervisee relationships, consensual workplace romance policies, and anti-fraternizations policies. For more information about hiring family members, see "Hiring: When a Relative Wants a Job," available at [www.ca-ilg.org/fair-processes](http://www.ca-ilg.org/fair-processes).

## 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.<sup>28</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>29</sup>
- » Prohibition from seeking elected office in the future;<sup>30</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>31</sup> and
- » Jail time of up to six months.<sup>32</sup>

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).<sup>33</sup> For more information about Government Code section 1090, see Chapter 2.

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

When a disqualified official participates in a decision, it can also void the decision.<sup>34</sup> 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](http://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.<sup>35</sup> 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.<sup>36</sup> These requirements are discussed on Chapter 4.

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.<sup>37</sup> 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.<sup>38</sup> Campaign contributions may be both monetary (dollars) and "in-kind" (goods or services) contributions.<sup>39</sup>

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.<sup>40</sup>

### 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).<sup>41</sup>

Other covered officials include appointed board or commission members who become or have been candidates for elective office.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup>

## 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.<sup>46</sup>

- » **California Law.** Extortion under California law is a misdemeanor.<sup>47</sup> Misdemeanors are punishable by up to six months in county jail, a fine of up to \$1,000 or both.<sup>48</sup> Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.<sup>49</sup>
- » **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.<sup>50</sup>

## 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.<sup>51</sup>

Examples of land use permits include conditional use permits,<sup>52</sup> zoning variances,<sup>53</sup> and tentative subdivision and parcel maps.<sup>54</sup> Examples of covered contracts include consulting contracts, whether engineering, architectural or legal.<sup>55</sup>

## 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.<sup>56</sup> 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.<sup>57</sup>

The disclosure must be made prior to the agency making any decision in the proceeding (without the covered official's participation).<sup>58</sup>

### 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.<sup>59</sup> 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.<sup>60</sup>

(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.<sup>61</sup>

### 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.<sup>62</sup>

### 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).<sup>63</sup> This prohibition includes a prohibition against soliciting, receiving or directing contributions on behalf of another person or on behalf of a campaign committee.<sup>64</sup>

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.<sup>65</sup>

## 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.

## PENALTIES

The disqualification requirements are part of the Political Reform Act. A refusal to disqualify one-self 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.<sup>66</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>67</sup>
- » Prohibition from seeking elected office in the future;<sup>68</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>69</sup> and
- » Jail time of up to six months.<sup>70</sup>

## FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## FOR MORE INFORMATION

See the following resources:

- » "Raising Funds for Favorite Causes," available at [www.ca-ilg.org/fundraising](http://www.ca-ilg.org/fundraising).
- » Institute resources on ethics on the campaign trail, see [www.ca-ilg.org/campaigning-office](http://www.ca-ilg.org/campaigning-office).
- » "FPPC resources on campaign contribution limits, see [www.fppc.ca.gov/learn/campaign-rules/state-contribution-limits.html](http://www.fppc.ca.gov/learn/campaign-rules/state-contribution-limits.html).
- » "Campaign Disclosure Manual 2 - Information for Local Candidates, Superior Court Judges, Their Controlled Committees, and Primarily Formed Committees for Local Candidates," 2016. Available at [www.fppc.ca.gov/learn/campaign-rules/campaign-disclosure-manuals.html](http://www.fppc.ca.gov/learn/campaign-rules/campaign-disclosure-manuals.html).

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



# 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.<sup>71</sup>

Soliciting campaign funds from agency officers or employees is also unlawful.<sup>72</sup> There is an exception if the solicitation is made to a significant segment of the public that happens to include agency officers or employees.<sup>73</sup> Candidates also may not offer or arrange for an increase in salary for an agency employee in exchange for a political contribution.<sup>74</sup>

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 maintaining their independence from the political process. As a result, both organizations encourage their members not to make campaign contributions to local officials.<sup>75</sup>

### **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.<sup>76</sup> Local agencies and school districts may impose additional restrictions on the political activities of employees during working hours or while on agency property.<sup>77</sup> Such restrictions can include wearing political buttons during work hours and displaying political signs at one's workstation.<sup>78</sup>

Additionally, California law prohibits employees or officers of local agencies from engaging in political activities of any kind while in uniform.<sup>79</sup>

For more information about the use of public resources for political purposes, see Chapter 3.

## PENALTIES

Violation of the prohibition against soliciting campaign funds from agency staff is punishable as a misdemeanor.<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> Presumably violations would fall into the catchall penalty for misconduct in office, which is loss of office.<sup>83</sup>

Public officials face both criminal and civil penalties for using public resources for political benefit.<sup>84</sup> See Chapter 3 for more details.

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://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.<sup>85</sup>

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.

A similar but different conflict can arise when a local agency officer engages in incompatible employment activities. Here, there is only one public office with the conflict arising from the outside employment activity.<sup>86</sup>

## BASIC RULES

California law prohibits public officers from simultaneously holding multiple offices that are "incompatible" with one another.<sup>87</sup> 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 the position of making decisions that affect the official's economic interests. This issue is covered in Chapter 2;

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.<sup>89</sup>

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.<sup>90</sup> The restriction does not apply to positions of employment in an agency,<sup>91</sup> although employees may be prohibited from serving on the governing bodies of agencies in which they are employed.<sup>92</sup>

Note there can be specific legislative exceptions to this rule.<sup>93</sup> Under some circumstances, local agencies may allow simultaneous occupancy of what would otherwise be incompatible offices.<sup>94</sup>



*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.<sup>95</sup> If the employee does not resign, the individual's employment automatically terminates upon being sworn into office.<sup>96</sup> Volunteer firefighters are exempt from these provisions if the firefighter receives no salary.<sup>97</sup>

### Individual Agency Guidelines

Local agencies must adopt rules regarding incompatible employment activities.<sup>98</sup>

#### FOR MORE INFORMATION

On holding multiple offices see "Holding Two Positions" available online at [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/conflict-of-interest/holding-two-positions.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/conflict-of-interest/holding-two-positions.html).

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, the prior office automatically terminates when the official is sworn into the second office.<sup>99</sup>

#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://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.<sup>100</sup>

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.<sup>101</sup>

Many competitive bidding requirements are locally imposed, for example by charter cities as part of their municipal affairs authority.<sup>102</sup> California law also authorizes local agencies to adopt procedures for acquisition of supplies and equipment.<sup>103</sup> Most 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.<sup>104</sup> For county projects, the threshold is based on population: \$6,500 (counties with populations of 500,000 or over),<sup>105</sup> \$50,000 (counties with populations of 2 million or over)<sup>106</sup> and \$4,000 (all other counties).<sup>107</sup> Note that it is a misdemeanor to split projects to avoid competitive bidding requirements.<sup>108</sup>

The contract for a competitively bid public project must be awarded to the lowest responsible bidder.<sup>109</sup> A responsible bidder is one who is able to perform the contract if awarded.<sup>110</sup>

## 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.<sup>111</sup>

### Professional Services

Contracts for professional services such as private architectural, landscape architectural, engineering, environmental, and 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.<sup>112</sup> 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.<sup>113</sup>

### 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.<sup>114</sup> 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.<sup>115</sup>

## 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”). Local agencies (defined to include cities, counties and special districts<sup>116</sup>), with approval of the agency’s governing body, may use design-build contracting for building construction projects over one million dollars.<sup>117</sup> Local agencies may award design-build projects using either the lowest responsible bidder or best value.<sup>118</sup>

### FOR MORE INFORMATION

On public agency procurement processes, see the Institute resources available at [www.ca-ilg.org/post/fair-procurement](http://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.<sup>119</sup>

### HONEST SERVICES, FRAUD AND EXTORTION

Under federal wire and mail fraud laws, the public has the right to the “honest services” of public officials.<sup>120</sup>

The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.<sup>121</sup> 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.<sup>122</sup> Specifically, honest services fraud refers to actions that constitute bribery and kickback schemes.<sup>123</sup>

“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.<sup>124</sup>

An official’s refusal to award a contract unless the individual receives benefits can also be prosecuted as extortion.<sup>125</sup> 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.<sup>126</sup>

**For more information** about honest services, fraud and extortion, see “Making a Federal Case Out of Corruption,” available at [www.ca-ilg.org/fedcase](http://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.<sup>127</sup> 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.<sup>128</sup> These protections apply specifically to local agency employees.<sup>129</sup>

California law requires employers to post the state attorney general’s whistle-blower hotline number at the workplace.<sup>130</sup> Any employee or member of the public can call the hotline at (800) 952-5225 to register their concerns about potentially unlawful practices.<sup>131</sup>

### FOR MORE INFORMATION

On whistle-blower protections, see the following resources:

- » “For Whom the Whistle Blows,” available at [www.ca-ilg.org/whistle](http://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](http://www.ca-ilg.org/WhatToDo).

## PENALTIES

Violation of whistle-blower protection laws is a misdemeanor.<sup>132</sup> The maximum criminal penalty for an individual is a year of jail time, a fine of \$1,000 or both.<sup>133</sup> In the case of corporations, the criminal penalty is a fine of up to \$5,000.<sup>134</sup>

In addition, retaliation against an employee for whistle-blowing activities could result in a suit for violation of the employee’s civil rights.<sup>135</sup> Such actions carry the prospect of damages<sup>136</sup> and attorney’s fees awards.<sup>137</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Endnotes and Additional Information

**Note:** The California Codes are accessible at <http://leginfo.ca.gov/>. Fair Political Practices Commission regulations are accessible at [www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html](http://www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html). A source for case law information is [www.findlaw.com/cacases/](http://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 *Nasha v. City of Los Angeles*, 125 Cal. App. 4th 470, 482, 22 Cal. Rptr. 3d 772 (2004).
- 12 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).
- 13 See 42 U.S.C. §§ 1983, 1988.
- 14 Cal. Penal Code § 86.
- 15 91 Cal. Op. Att'y Gen. 46 (2008).
- 16 Cal. Penal Code § 86.
- 17 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).
- 18 Cal. Gov't Code § 87460(a), (b).
- 19 See Cal. Gov't Code § 87460(c), (d).
- 20 See Cal. Gov't Code § 87461.
- 21 See generally Cal. Gov't Code §§ 91000-14.
- 22 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).
- 23 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).
- 24 Cal. Gov't Code § 91000(b).
- 25 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).
- 26 2 Cal. Code Regs. § 18700.
- 27 See Cal. Gov't Code § 82029.
- 28 See generally Cal. Gov't Code §§ 91000-14.
- 29 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).
- 30 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).
- 31 Cal. Gov't Code § 91000(b).
- 32 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).
- 33 See, e.g., *People v. Honig*, 48 Cal. App. 4th 289, 55 Cal. Rptr. 2d 555 (1996).
- 34 See Cal. Gov't Code § 91003(b).
- 35 This is a requirement of the Political Reform Act. See generally Cal. Gov't Code §§ 84100-511.
- 36 Cal. Gov't Code § 82015; 2 Cal. Code Regs. § 18421.1.
- 37 *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).
- 38 Cal. Gov't Code § 84308(c).
- 39 See Cal. Gov't Code § 82015; 2 Cal. Code Regs. § 18215.
- 40 See Cal. Gov't Code § 84308(b).
- 41 See Cal. Gov't Code § 84308(a)(3); 2 Cal. Code Regs. § 18438.1.

- 42 See Cal. Gov't Code § 84308(a)(4); 2 Cal. Code Regs. § 18438.1. See also Davis Advice Letter No. A-02-344.
- 43 See Cal. Gov't Code § 84308(b), (c); 2 Cal. Code Regs. § 18438.4.
- 44 See Cal. Gov't Code § 84308(a)(2).
- 45 *Id.*
- 46 Cal. Pen. Code § 518; 18 U.S.C. § 1951.
- 47 Cal. Penal Code § 521.
- 48 Cal. Penal Code § 19.
- 49 Cal. Gov't Code §§ 3060-3074.
- 50 18 U.S.C. § 1951(a). See generally 18 U.S.C. § 3571(b).
- 51 See Cal. Gov't Code § 84308(a)(5); 2 Cal. Code Regs. § 18438.2.
- 52 Cal. Gov't Code § 65901.
- 53 Cal. Gov't Code § 65906.
- 54 Cal. Gov't Code §§ 66411-413.5.
- 55 Cal. Gov't Code §§ 4526, 37103, 53060.
- 56 Cal. Gov't Code § 84308(d); 2 Cal. Code Regs. § 18438.8.
- 57 Cal. Gov't Code § 84308(c).
- 58 *Id.*
- 59 *Id.*
- 60 *Id.*
- 61 *Id.*
- 62 *Id.*
- 63 Cal. Gov't Code § 84308(b).
- 64 *Id.*
- 65 Cal. Gov't Code § 84308(d).
- 66 See generally Cal. Gov't Code §§ 91000-14.
- 67 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).
- 68 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).
- 69 Cal. Gov't Code § 91000(b).
- 70 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).
- 71 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.
- 72 See Cal. Gov't Code § 3205.
- 73 See Cal. Gov't Code § 3205(c).
- 74 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.
- 75 The ICMA Code is available on the ICMA website at: <http://icma.org/codeofethics>.
- 76 See Cal. Gov't Code § 8314.
- 77 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).
- 78 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.").
- 79 Cal. Gov't Code § 3206. See also Cal. Gov't Code § 3302.
- 80 See Cal. Gov't Code § 3205.
- 81 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.
- 82 See Cal. Gov't Code §§ 3204, 3206.
- 83 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).
- 84 See Cal. Penal Code § 424; Cal. Gov't Code § 8314.



- 85 See Cal. Gov't Code § 1099.
- 86 See Cal. Gov't Code § 1126.
- 87 Cal. Gov't Code § 1099(a).
- 88 Cal. Gov't Code § 1099(a)(1)-(3).
- 89 91 Cal. Op. Att'y Gen. 25 (2008)
- 90 Cal. Gov't Code § 1099(a).
- 91 Cal. Gov't Code § 1099(c).
- 92 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).
- 93 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).
- 94 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).
- 95 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).
- 96 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).
- 97 See 85 Cal. Op. Att'y Gen. 230 (2002) ("salary" does not include per-call and equipment stipends).
- 98 Cal. Gov't Code § 1126(c).
- 99 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.
- 100 See Cal. Pub. Cont. Code § 100.
- 101 *Id.*
- 102 *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.
- 103 Cal. Gov't Code §§ 54201-25.
- 104 Cal. Pub. Cont. Code § 20162.
- 105 Cal. Pub. Cont. Code § 20122.
- 106 Cal. Pub. Cont. Code § 20123.
- 107 Cal. Pub. Cont. Code § 20121.
- 108 Cal. Pub. Cont. Code § 20163.
- 109 Cal. Pub. Cont. Code § 20162.
- 110 See Cal. Pub. Cont. Code § 1103.
- 111 Cal. Pub. Cont. Code §§ 1102, 20168, 22050.
- 112 Cal. Gov't Code § 4526.
- 113 *City of Inglewood-Los Angeles County Civic Ctr. Auth. v. Superior Court*, 7 Cal. 3d 861, 103 Cal. Rptr. 689 (1972).
- 114 Cal. Gov't Code § 53060.
- 115 *Cal. School Employees Ass'n v. Sunnyvale Elementary Sch. Dist.*, 36 Cal. App. 3d 46, 60, 111 Cal. Rptr. 433, 442 (1st Dist. 1973).
- 116 Cal. Pub. Cont. Code § 22161(f).
- 117 Cal. Pub. Cont. Code § 22162.
- 118 Cal. Pub. Cont. Code § 22164.
- 119 *Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.*, 23 Cal. 4th 305, 315-16, 96 Cal. Rptr. 2d 747 (2000).
- 120 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 121 *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).
- 122 *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).
- 123 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).
- 124 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.").
- 125 18 U.S.C. § 1951.
- 126 18 U.S.C. § 1951(a).
- 127 See Cal. Lab. Code § 1102.5(c) ("An employer, or any person acting on behalf of the employer, shall 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 of or noncompliance with a local, state, or federal rule or regulation.").
- 128 Cal. Lab. Code § 1102.6.
- 129 See Cal. Lab. Code § 1106.
- 130 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).
- 131 See Cal. Lab. Code § 1102.7 (requiring the Attorney General to set up the hotline).
- 132 Cal. Lab. Code § 1103.
- 133 *Id.*
- 134 *Id.*
- 135 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).
- 136 42 U.S.C. § 1983.
- 137 42 U.S.C. § 1988.



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