



Enterprise Compliance, Risk & Governance Office

Memorandum

March 1, 2024

To: CalPERS Team

From: Kevin Fein
Chief Compliance Officer

Subject: Post-Employment Laws

The purpose of this memorandum is to inform you of various laws that restrict the activities of former public officials. The term "public official" contemplates both employees and Board members as used in this memorandum.ⁱ As a former CalPERS public official, these laws will, as described below, restrict your activities in certain areas.

This memorandum is of a general nature. It is intended to help familiarize you with the basic legal requirements. However, it is not a substitute for directly consulting the law or a public or private attorney.

If specific questions arise, we urge you to seek advice to ensure that you are complying with the law. Advice may be obtained from the following:

- CalPERS Legal Office, P.O. Box 942707, Sacramento, CA 94229-2707, (916) 795-3675;
- Fair Political Practices Commission, 1102 Q Street, Suite 3000, Sacramento, CA 95811, (916) 322-5660;
- Government Law Section, Office of the Attorney General, 1300 I Street, Suite 1101, Sacramento, CA 95814, (916) 324-5481; and
- Private counsel.

This memorandum provides a brief overview of the pertinent statutes. The overview is followed by a summary of each of the provisions.

OVERVIEW

Several statutes prohibit former public officials from engaging in certain activities. As a general rule, the following activities are prohibited:ⁱⁱ

Public Employees' Retirement Law and Political Reform Act Provisions

- For one to four years depending on your position, representing, or assisting in representing, any person (for compensation) before CalPERS, for the purpose of influencing administrative or legislative action, or influencing the issuance, award, amendment, or revocation of a permit, license, grant, or contract, or the purchase/sale of property. This is commonly known as the "revolving door" provision.

- Representing any person (for compensation) in connection with a proceeding involving the state, if you participated in the proceeding while you were a CalPERS employee. This is colloquially known as the permanent ban on “switching sides.”ⁱⁱⁱ

Public Contract Code Provisions

- For two years, entering into a contract in which you engaged in any of the negotiations, planning, or any part of the transaction or decision-making process while you were a CalPERS employee.
- For one year, entering into a contract with CalPERS, if it would involve the same general subject area you worked on in a policy-making capacity during the last twelve months of your tenure as a CalPERS employee.

Additionally, general principles prohibiting conflicts of interest by state officials and employees may come into play.

A discussion of the various provisions and their exceptions is set forth below.

DISCUSSION OF RELEVANT LEGAL PROVISIONS

A. POLITICAL REFORM ACT

Former public officials are subject to Government Code sections 87400 et seq., relating to the "Disqualification of Former Officers and Employees." These provisions are part of the Political Reform Act and are enforced by the Fair Political Practices Commission (FPPC).

The Political Reform Act provisions fall into the three categories described below. Some of these provisions raise significant issues of interpretation.

1. One Year, Two Year, and Four-Year Bans

A "one-year ban" was enacted by the legislature in 1990 for all public officials. Formally titled the Milton Marks Post-government Employment Restrictions Act of 1990, the pertinent restrictions are found in Government Code section 87406.

Interpretive regulations are found at California Code of Regulations sections 18746.1-18746.4.

The Act restricts, for a one-year period from the time of leaving office, the activities of certain government officials. These officials include designated employees of a state administrative agency, and "any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest." (Gov. Code § 87406, subd. (d)(1).)

More specifically, it prohibits covered individuals from acting as agent, attorney, or representative for any person, by making any formal or informal appearance, or by making any oral or written communication before CalPERS, for the purpose of influencing administrative or legislative action, or influencing the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (*Ibid.*)

This provision prohibits a former CalPERS employee, for a one-year period, from being paid to appear before CalPERS to attempt to influence the award of a contract. It would also prohibit a

former CalPERS employee from being paid to appear before CalPERS to influence the purchase or sale of real property.^{iv} Unlike provisions relating to the "permanent ban," described below, this law applies even if the former CalPERS employee had no involvement in the particular matter before he or she left CalPERS.

In addition, since October 11, 2009, Government Code section 20098 of the Public Employees' Retirement Law imposes a two-year revolving door ban on members of the Board of Administration, the chief executive officer, general counsel, the chief actuary, chief investment officer, chief financial officer, chief operating officer, chief health director, deputy executive officers, assistant executive officers and other investment officers and portfolio managers whose positions are designated managerial (i.e., associate investment managers and above).

Finally, as of January 1, 2012, the group of public officials subject to the two-year ban of Government Code section 20098, as well as any information technology or health benefits manager with a career executive assignment designation, are subject to a four-year revolving door prohibition. (Gov. Code § 87408, subd. (a).)

2. Permanent Ban

The permanent ban is found in Government Code sections 87400 through 87405. Interpretive regulations are found at California Code of Regulations section 18741.1.

The ban applies to "state administrative officials." This term is defined, for purposes of these provisions, to include "every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity." (Gov. Code § 87400, subd. (b).)

Generally, the permanent ban prohibits, without time limitation, a former public official who participated in a particular "proceeding" while with the agency, from receiving compensation to:

- Represent (as an agent, attorney, or otherwise) any other person by making any formal or informal appearance in or by making any oral or written communication with the intent to influence the outcome of the same proceeding. (Gov. Code § 87401.)
- Aid, advise, counsel, consult, or assist in representing any other person with the intent to influence the outcome of the same proceeding. (Gov. Code § 87402.) In other words, indirect participation through assisting the representation is also prohibited.

The term "proceeding" includes judicial and quasi-judicial, as well as other types of proceedings between specific parties. It includes any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving specific parties in any court or state administrative agency, including but not limited to any proceeding governed by the Administrative Procedure Act.^v (Gov. Code § 87400, subd. (c).)

"Participated" in the proceeding means having taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice, or investigation or use of confidential information. (Gov. Code § 87400, subd. (d). See also Lucas Opinion (2000) WL 1529073

[<https://www.fppc.ca.gov/content/dam/fppc/documents/Opinions/lucas.PDF>].)

Thus, for example, the permanent ban would prohibit a former CalPERS employee from doing the following for compensation:

- Assisting a company in obtaining a contract with CalPERS if he or she participated in the bid solicitation or review process before leaving CalPERS.
- Assisting in an appeal from a contract bidding process in which he or she participated during his or her tenure at CalPERS.
- Representing a CalPERS member in an appeal from a CalPERS determination, if he or she participated in making the CalPERS determination.

These restrictions do not apply where the former CalPERS employee is acting on behalf of another state agency or the State of California after he or she leaves state service, regardless of whether the proceeding would involve matters on which he or she worked as a state official.^{vi} (See Gov. Code §§ 87401 and 87402.)

There are some specific narrow statutory exceptions to the permanent ban, e.g., testifying as a non-compensated witness in a proceeding (Gov. Code § 87403, subd. (a)), or providing a statement based on the official's own special knowledge in the area, where the proceeding requires the official's qualifications, and the public interest would be served. (Gov. Code § 87403, subd. (b).) Additionally, with respect to appearances or communications in a proceeding in which a court or state administrative agency has issued a final decision or judgment but has retained jurisdiction, the prohibitions do not apply if CalPERS consents to the appearance or communication, at least five years have elapsed since the termination of CalPERS employment and the public interest would not be harmed. (Gov. Code § 87403, subd. (c).)

3. Influencing Prospective Employment

The Political Reform Act also prohibits public officials from making, participating in, or influencing governmental decisions directly relating to a prospective employer, with whom they are negotiating employment or after they have reached an employment arrangement. (Gov. Code § 87407; 2 Cal. Code Regs., § 18747.)

This law expands the Political Reform Act's conflict of interest disqualification obligations (otherwise applicable to public officials) to situations where the prospective employer is not yet an "economic interest" of (e.g., a source of income to) the official. Therefore, when an official is "negotiating employment" or has reached an "employment arrangement," the official must recuse him/herself from participating in any governmental decisions directly relating to the prospective employer.

Submitting a resume or job application alone is not enough to trigger the disqualification obligation. The following types of contacts, however, can trigger application of this law:

- An interview with an employer or his/her agent (e.g., search firm);
- Discussing an offer of employment with an employer or his/her agent;
- Accepting an offer of employment (even if precise terms are still to be developed).

A decision is "directly related" to a prospective employer if the employer (or agent) is before

CalPERS for a decision regarding investment funding or a contract, or if the employer will be financially affected by a CalPERS decision. The FPCC's definitions of financial effect, for purposes of conflict-of-interest disqualification requirements, apply in this circumstance also.

Exceptions to this prohibition apply if the prospective employer is a governmental agency, or if the financial effect on the prospective employer is substantially the same as the effect on a "significant segment" of the public in general.^{vii}

B. A.B. 873 – Effective January 1, 2012

Effective January 1, 2012, the Legislature added three sections to the Political Reform Act that impact CalPERS Board members and certain employees. (Stats. 2012, ch. 551.) The new provisions apply specifically to members of the Board of Administration, the chief executive officer, general counsel, chief actuary, chief investment officer, chief financial officer, chief operating officer, chief health director, deputy executive officers, assistant executive officers, investment officers and portfolio managers whose positions are designated managerial (i.e., associate investment managers and above), and information technology or health benefits managers with a career executive assignment designation ("Covered Employees.")

First, as referenced in section 1 above, A.B. 873 adopted a four-year revolving door ban for Covered Employees. (Gov. Code § 87408, subd. (a).) Second, AB 873 prohibits Covered Employees for two years after leaving office from receiving compensation for aiding, advising, consulting with, or assisting a business entity in obtaining an award of, or in negotiating, a contract or contract amendment with CalPERS. (Gov. Code § 87409, subd. (a).) Finally, AB 873 prohibits Covered Employees from accepting compensation for providing services as a placement agent in connection with investments or other business of CalPERS or CalSTRS for a period of ten years after leaving CalPERS. (Gov. Code § 87410, subd. (a).)

C. Violations

A knowing or willful violation of the Political Reform Act constitutes a misdemeanor. (Gov. Code § 91000.) A person who violates these provisions is also subject to civil liability and administrative fines, up to \$5,000 per occurrence. (Gov. Code § 91005.5.)

D. PUBLIC CONTRACT CODE

The conflict of interest provisions of the Public Contracts Code prohibit certain former state officials from entering into specified contracts after they leave their state positions. (Pub. Cont. Code § 10411.)

1. Applicability

These provisions apply to any "formerly employed person of any state agency or department employed under the state civil service or otherwise appointed to serve in state government." (Pub. Cont. Code § 10411.)

2. Prohibitions

For a two-year period after separation, a covered former state official may not enter into a contract in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process while in state service.^{viii} (Pub. Cont. Code § 10411, subd. (a).) The phrase "enter into a contract" is undefined and we are not aware of

any published cases interpreting the provision.

This provision arguably prohibits a former CalPERS employee, for a two-year period, from working as an employee or contractor for any person or organization (e.g., law firm, investment management firm, or health maintenance organization) that contracts with CalPERS, if he or she were involved in the process of negotiating or awarding the contract, at least insofar as he or she would be working in a capacity which relates to CalPERS. Because the statute is somewhat unclear and its potential application is so broad, we recommend that you seek legal counsel if the situation arises.

Additionally, for a one-year period from separation, a covered former state official may not enter into a contract with the former agency if he or she was in a policy-making position in that agency, in the same general subject area as the proposed contract, within the one-year period prior to the termination of employment. (Pub. Cont. Code § 10411, subd. (b).) In other words, a former employee may not, for a one-year period after leaving CalPERS, contract with CalPERS for services which would fall within the same subject areas in which he or she worked within one year before leaving.

3. Violations

Contracts entered into in violation of these provisions are void. (Pub. Cont. Code § 10420-10421.) A civil action may be brought to determine whether a contract violates these provisions. (Pub. Cont. Code § 10421.) Furthermore, a willful violation of these provisions constitutes a misdemeanor. (Pub. Cont. Code § 10425.)

E. GOVERNMENT CODE SECTION 1090

Government Code section 1090 prohibits a state officer from having a financial interest^{ix} in any contract he or she makes in his or her official capacity. Section 1090 may apply after a state officer leaves state employment if he or she participated in the making of the contract while with state service and then leaves state service and enters into a contract with his or her former employer.

The penalty for willfully violating this provision is a fine of not more than \$1,000, or imprisonment in the state prison, and permanent disqualification from holding any office in this state. (Gov. Code § 1097.) Additionally, contracts made in violation of this section may be avoided by any person except the interested official.

F. OTHER CONSIDERATIONS

Even if a certain situation does not fall precisely within the statutory proscriptions, principles of common law prohibit self-dealing by public officials. (See, for example, 40 Ops.Cal.Atty.Gen. 210, 212 (1962); 42 Ops.Cal.Atty.Gen. 151, 155 (1963).)

Additionally, given the unique circumstances of a particular situation, other provisions, e.g., the ethical requirements of the State Bar, may be triggered. Therefore, each set of circumstances you encounter should be scrutinized to ensure that it does not violate the public trust you hold (or held) as a public officer.

ⁱ We have noted, as appropriate, where the law differs in its application based on whether the public official is a former employee as opposed to a former Board member.

ⁱⁱ These restrictions (and possibly others) may also apply with respect to other state positions you have held and left. This memorandum is limited to restrictions arising out of your tenure as a CalPERS employee.

ⁱⁱⁱ On a related note, the Political Reform Act prohibits you (while still employed with CalPERS) from using your official CalPERS position to influence any governmental decision directly relating to anyone with whom you are negotiating, or have any arrangement concerning, prospective employment. (See Gov. Code § 87407 and 2 Cal. Code Regs., § 18747.)

^{iv} The statute does not expressly prohibit a former official from appearing before the former agency to influence an investment transaction. However, in our opinion it is likely that the FPPC would interpret the scope of this provision broadly enough to include investment transactions.

^v We are not aware of any FPPC rulings that interpret the term "proceeding" with respect to investment transactions. Again, we believe it likely that the FPPC would interpret the provision broadly to include investment transactions within its scope.

^{vi} However, see the discussion below regarding Public Contract Code section 10411, with respect to entering into future contracts with CalPERS.

^{vii} Another exemption (if you are "legally required" to participate in the decision) is not generally applicable in the CalPERS context.

^{viii} These provisions do not apply to "members of boards or commissions who receive no payment other than payment of each meeting of the board or commission, payment for preparatory time, and payment for per diem." (Pub. Cont. Code § 10430, subd. (c).)

^{ix} Government Code section 1091 sets forth specific situations where an officer is not considered to be interested in a contract because the interest is "remote" and the officer has disqualified him or herself and has disclosed the interest. Section 1091.5 also sets forth several categories of non-interests that are excluded from the prohibition in section 1090 (although excluded, some non-interests include a requirement of disclosure; for example, § 1091.5, subd. (a)(9) requires disclosure of a government salary interest).