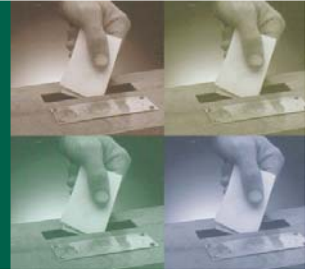
July 2004

Election Law News

A Publication of the WRF Election Law Practice Group



Florida Changes Campaign Finance Laws

On May 26, 2004, Florida Governor Jeb Bush signed into law the Florida Advertising Campaign Exposure Act (Act), former SB 2346. Following in the footsteps of the Bipartisan Campaign Reform Act of 2002 (BCRA), which the U.S. Supreme Court largely upheld in December 2003, the new law regulates issue advocacy in general and political advocacy on the Internet and modifies the reporting requirements for Florida Committees of Continuous Existence (CCE). The new law, which became effective July 1, 2004, is primarily designed to disclose the identity of persons paying for political or issue-related advertising during elections. According to press reports, some of the impetus for the bill comes from an increasing number of "last-minute attack ads" in recent legislative and statewide races.

For More Changes in the States, See Page 6

Issue Advocacy Regulation

The Act regulates through reporting requirements a new category of issue advocacy, "electioneering communications," which it defines as "paid expression in any communications media" (excluding direct, spoken conversation) that clearly refers to or depicts a candidate or an issue to be voted on without expressly advocating for the election or defeat of a candidate or passage or defeat of a ballot issue. Under the definition, in order to be electioneering communications, advertisements referring to a candidate also must be targeted to the "relevant electorate" and be published after the candidate qualifying period for the office sought. Advertisements about ballot issues are considered electioneering communications if they are issued 120 days before the election or after the issue is designated a ballot position, whichever comes first.

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Practical Tip: Post-Government Employment

Beware the Revolving Door!

With a national election on the horizon, Washington, DC may soon witness another large-scale turnover of officials in both the legislative and executive branches of the federal government, regardless of who wins. In the states, too, the revolving door of government service constantly sends many individuals back into the private sector. Those who employ persons leaving government jobs must cast a careful eye toward rules and regulations that restrict legally permissible contact with previous employers. These restrictions can last for long periods of time and can affect a potential employee's utility. A brief discussion of the federal rules and the rules for California and Texas as representative examples follows below.

Federal Restrictions

Legislative Branch Officials and Members of Congress

The employment restrictions of former legislative branch members are all one year in duration. The former employee's position is the only distinction that the law makes, with elected officials subject to the ban with the broadest scope. By federal law and for one year, all members of Congress are banned from attempting to influence any

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New FLSA Regulations for Corporations and Their Federal PACs

The Federal Election Commission's (FEC) regulations permit a corporations to use the Fair Labor Standards Act (FLSA) and associated Department of Labor (DOL) regulations as a "guideline" in determining which non-shareholder employees are in the corporation's "restricted class" and are thus solicitable for the company's federal PAC.

Although the FEC has warned in Advisory Opinion 1993-16 that the definitions under the FLSA are not determinative as a matter of campaign finance law, recent changes to the DOL's regulations merit investigations as to what employees are "exempt" and "non-exempt" for PAC purposes, as well as for overtime and other labor law reasons. The final regulations were issued on April 20, 2004 and become effective in late August unless Congress intervenes legislatively. *See* 69 Fed. Reg. 22,121 (April 23, 2004). A summary description of the changes affecting white-collar workers follows below.

Overview

In addition to raising the salary threshold (the salary level below which workers automatically qualify for overtime) for exempt employees from $8,060 to $23,660 annually, the "duties" tests for the white-collar exemptions have been significantly updated and simplified. While the new rules continue to apply a three-part analysis—a salary level, salary basis and duties test—these standards include some critical changes that every employer will need to know and understand.

Salary Level Test

In addition to raising the salary threshold to $455 a week, the revised rules generally exempt from overtime requirements those white-collar employees who earn a "total compensation" of more than $100,000 per year provided they perform "office or non-manual work" and "customarily and regularly perform" any one or more of the exempt duties of an executive, administrative or professional employee.

Duties Test

For white-collar employees who earn between $23,660 and $100,000 to be exempt under the FLSA from the overtime requirements, they will have to meet the duties tests of the executive, administrative, professional or outside sales exemption or some combination thereof. The "long test" and "short test" have been replaced by a single set of tests for each exemption. Obsolete references to "legmen" and "straw bosses" have been replaced by detailed rules covering medical technologists, paralegals and other modern occupations. The new rules also clear up the question of "discretion and independent judgment," a hallmark of white-collar occupations and a source of considerable confusion and past litigation. In addition, the new rules provide explicit guidance on which occupations involve sufficient discretion to qualify as exempt.

Executive Exemption Duties

As before, an employee will meet the duties test for the executive exemption if his or her "primary duty" is management of the enterprise or of a customarily recognized department or subdivision, and if he or she "customarily and regularly" directs the work of two or more full-time employees. Under the new rules, the employee must also have the authority to hire or fire other employees or make recommendations that are given particular weight with respect to such personnel decisions. For "working supervisors," concurrent performance of exempt and nonexempt work does not automatically disqualify an employee from exemption, but exempt executives generally decide when to perform nonexempt duties while nonexempt employees generally are directed by a supervisor to perform exempt work for defined time periods. Significantly for some retail employers, the new rules eliminate the "sole charge" exception, but include a concurrent duties exception aimed at store managers and assistant managers.

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"Corporations and PACs: More Important Than Ever" by WRF Partners Jan Witold Baran and Carol A. Laham, appeared in the July 2004 issue of *The Metropolitan Corporate Counsel*.

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Summaries of Recent FEC Advisory Opinions

CANDIDATE CAN WORK AS CONSULTANT

On June 24, 2004, the FEC allowed a candidate for the U.S. House of Representatives from Texas to work as a consultant for a law firm during her candidacy. In Advisory Opinion 2004-17, the Commission allowed the candidate to receive compensation on an hourly basis "that will not exceed that paid to similarly qualified consultants who perform similar services." The compensation must be for "*bona fide* employment genuinely independent of" her candidacy. Given such a situation, the FEC ruled that the payments from the law firm would not be "contributions" under the Federal Election Campaign Act, as amended. ■

501(C)(4)'S AD WOULD BE AN "ELECTIONEERING COMMUNICATION"

At its meeting on June 24, 2004, the FEC stated that a proposed ad by a 501(c)(4) social welfare group about its planned documentary film would, under certain circumstances, be prohibited by the "electioneering communication ban." The ads would be prohibited corporate advertisements if they feature a candidate for the president of the United States and air on television or radio within 30 days of a primary, within 30 days of the pertinent national political party nominating convention or within 60 days of the general election on November 2, 2004. For the latter two time periods, the blackout would be nationwide. The prohibition applied, according to the Commission, regardless of the purpose of the ads, which in this case was to advertise a documentary film produced by the 501(c)(4). The FEC chose not to address the applicability of the media exception to this activity. ■

SEVERANCE PACKAGE FOR CANDIDATE

On April 30, 2004, the Federal Election Commission issued Advisory Opinion 2004-08 authorizing the American Sugar Cane League's (ASCL) severance package to its former president. The ASCL represents Louisiana sugar cane growers and processors. Its president and general manager, Charles Melancon, resigned on February 20, 2004, to become a candidate for the U.S. House of Representatives. The ASCL proposed a severance package that provided Mr. Melancon, who had worked 11 years for the ASCL, with 6 months to one year of salary and health benefits. The FEC decided that the ASCL could present Mr. Melancon with such a severance package because the ASCL's history of providing severance packages combined with Mr. Melancon's documented work record demonstrated that the package "is tied exclusively to services provided by him as a part of his *bona fide* employment." Secondly, the ASCL showed that the severance was not greater than warranted because it was comparable to packages received by other employees who had performed services similar to those of Mr. Melancon. The fact that the ASCL did not have a formal severance policy was not fatal in light of the organization's small size. ■

For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or D. Mark Renaud (202.719.7405 or mrenaud@wrf.com).

WRF Calender

Noteworthy Attorney Appearances

Complying with Campaign Finance, Lobbying & Ethics Laws

Jan Witold Baran, Co-Chair
Corporate Political Activities 2004
Washington, DC

Registration and more information:
www.pli.edu

Best Practices for Political Action Professionals

Jan Witold Baran, Panelist
NABPAC Post-Election Conference
Miami, FL

For more information:
www.nabpac.org

Upcoming Dates to Remember

Deadline	Filing
July 15, 2004	Second quarter FEC report due for federal PACs filing quarterly and for federal candidates
July 15, 2004	Second quarter IRS report due for nonfederal PACs filing quarterly*
July 20, 2004	July monthly FEC report due for federal PACs filing monthly
July 20, 2004	July monthly IRS Form 8872 due for nonfederal PACs filing monthly*
July 29, 2004	End of Democratic National Convention and of the nationwide 30-day, convention-related blackout for corporate and union-funded television and radio ads featuring or mentioning Senator Kerry
July 31, 2004	Commencement of the nationwide 30-day, pre-convention blackout for corporate and union-funded television and radio ads featuring or mentioning President Bush
August 16, 2004	Lobbying Disclosure Act filing due
August 20, 2004	August monthly FEC report due for federal PACs filling monthly
August 20, 2004	August monthly IRS Form 8872 due for nonfederal PACs filing monthly*
September 2, 2004	End of Republican National Convention and of the nationwide 30-day, convention-related blackout for corporate and union-funded television and radio ads featuring or mentioning President Bush
September 3, 2004	Commencement of 60-day nationwide, pre-general election blackout period for corporate and union-funded television and radio ads featuring or mentioning President Bush or Senator Kerry
September 3, 2004	Commencement of 60-day, pre-general election blackout period for corporate and union-funded television and radio ads featuring or mentioning candidates for federal office and aired in the relevant Congressional districts or states

Deadlines are not extended if they fall on a weekend.

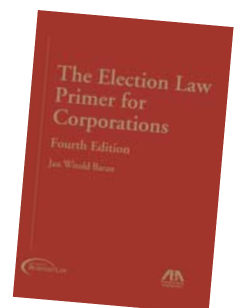
* Qualified state and local political organizations are not required to file Form 8872 with the IRS.

The Election Law Primer for Corporations, Fourth Edition Now Available

The American Bar Association has published *The Election Law Primer for Corporations, Fourth Edition*, authored by Jan Witold Baran, chair of Wiley Rein & Fielding's Election Law & Government Ethics Practice.

The primer provides a practical analysis of the federal and state statutory and regulatory schemes affecting the political affairs of corporations, PACs, personnel and trade associations. Campaign finance, lobbying and soft money are covered by the primer, which has been revised to incorporate new advisory opinions and FEC regulations, as well as the U.S. Supreme Court case *McConnell v. FEC*.

Also included in this *Fourth Edition* are updates to reflect the new regulation of electioneering communications and the 2002 amendments to Section 527 of the Internal Revenue Code. The appendices include model PAC Articles of Organization, IRS questions and answers on when advertising by tax-exempt organizations may constitute "exempt function" expenditures under Section 527 and charts on state campaign finance laws and agency websites.



WRF's premier Election Law & Government Ethics Practice represents many of the country's largest corporations, as well as trade associations, non-profit organizations, individuals and political committees. ■

To purchase the Election Law Primer online visit www.abanet.org/abapubs or for more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com).

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Convention Advice from the FEC and House Ethics Committee

The two national political party nominating conventions are fast approaching. The Democrats hold their convention later this month in Boston, MA and the Republicans are scheduled to convene in New York, NY at the end of August. The conventions are traditionally a time of celebrating the U.S. political system, its institutions and its political leaders. Nonetheless, all celebratory events must comply with federal election law and the ethics rules of Congress, the Executive Branch and the various states and localities (depending on who attends the event). To assist with this endeavor, we point out two recent sources of applicable rules.

First, the House Committee on Standards of Official Conduct recently issued an advisory memorandum on conventions, summarizing the applicable House ethics rules. It can be found at **www.house.gov/ethics/m_Convention_letter_3_04.htm**. *See also* **www.house.gov/ethics/m_Convention_memo.htm**, clarifying Committee statements.

Second, in the July 2004 issue of the FEC's in-house publication, *The Record*, the Commission addresses the campaign finance rules relating to delegates attending national conventions. A question and answer section can be found at **www.fec.gov/pdf/record/2004/jul04.pdf**.

More detailed information on House and Senate ethics rules can be found online at **www.house.gov/ethics** and **www.ethics.senate.gov**. The FEC's convention rules can be found at part 9008 of its regulations. ■

For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Caleb P. Burns (202.719.7451 or cburns@wrf.com).

Tax Corner: Political Activities of Social Welfare Organizations and Trade Associations

Q: *What are the restrictions on the campaign activities of 501(c)(4) and 501(c)(6) tax-exempt organizations?*

A: 501(c)(4) and 501(c)(6) tax-exempt organizations may engage in political campaign activities, but such activities may not be their primary purpose. There is no clear standard on how much political activity is too much, but if an organization is found to be engaging primarily in intervening in election campaigns, then it could lose its tax-exempt status (organizations may also be subject to a tax based on the amount of their campaign-related expenditures). An organization that contributes money to a candidate is clearly intervening in election campaigns; however, it is less clear if an organization runs an advertisement that contains some political elements.

In an attempt to clarify the issue, the IRS issued a revenue ruling earlier this year (Rev. Rul. 2004-6 Jan. 26, 2004), which identified factors that will tend to make a communication "political." The IRS gave examples of communications that would be deemed political. Common in each of these examples was a communication that:

(i) Identified a candidate;

(ii) Appeared shortly before, and targeted voters in, a particular election and

(iii) Commented on a candidate rather than speaking about an issue or legislation.

A few weeks ago, the American Bar Association sent a letter to the IRS requesting that it establish a clear standard for how much a 501(c)(4) could permissibly spend on election-related activities without risking its tax-exempt status. The IRS has not taken any action in response to the ABA's letter, leaving organizations with only vague guidelines on which to rely during this upcoming election season. ■

For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Thomas W. Antonucci (202.719.7558 or tantonuc@wrf.com).

Changes in the States

California

Limits Imposed on Contributions to Ballot Measure Committees

On June 25, 2004, the California Fair Political Practices Commission (FPPC) instituted limits on contributions to ballot measure committees that are controlled by state candidates. The highest state candidate contribution limit applies to ballot measure committees that are controlled by more than one candidate. The new rules become effective on November 3, 2004.

Another new FPPC regulation, effective upon filing with the Secretary of State, imposes limits on persons that pay for certain communications that feature, but do not expressly advocate for or against, a candidate and are made at the behest of the candidate.

Connecticut

Changes to Gift Law and Government Contracts

On June 1, 2004, Governor Rowland of Connecticut signed former House Bill No. 5025 into law. In Public Act 04-425, the state changes one of its gift rules and adds a provision dealing with contracts and gifts.

First, the state eliminates the "major life event" exception from the definition of "gift" for gifts from persons "(i) doing business with or seeking to do business with the department or agency in which the official or employee is employed or (ii) is engaged in activities which are directly regulated by such department or agency." Major life events include weddings, bar mitzvahs and the birth of a child.

Second, the state attaches gift disclosure requirements to those seeking and receiving contracts. All persons, corporations and firms bidding on or proposing contracts with state agencies or quasi-public agencies must now submit sworn affidavits, subject to the penalties for false statements, if the contract is a "large state contract." These affidavits must include the following information:

> Whether or not (A) such person, firm, corporation, (B) any principals and key personnel of the person, firm or corporation, who participated substantially in preparing the bid or proposal, or (C) any agent of such person, firm, corporation or principals and key personnel, who participated substantially in preparing the bid or proposal, provided a gift during the two-year period preceding the submission of such bid or proposal, to (i) any public official or state employee of the state agency or quasi-public agency soliciting bids or proposals for the contract, who participated substantially in the preparation of the bid solicitation or request for proposals for the contract, or (ii) any public official or state employee of any other state agency, who has supervisory or appointing authority over such state agency or quasi-public agency.

The affidavits also must attest that "no such principals and key personnel of the person, firm or corporation or agent of such person, firm, corporation or principals and key personnel knows of any action by the person, firm or corporation to circumvent the requirements of this subdivision by providing for any other principals and key personnel, official, employee or agent of the person, firm or corporation to provide a gift to any such public official or state employee." If any gift described had been provided, the affidavit must include the name of the recipient, a description of the gift and the value and approximate date of the gift.

Moreover, the state agency or quasi-public agency must obtain from any person, firm or corporation executing a large public contract a sworn affidavit, subject to the penalties for false statements, that attests to whether or not gifts were provided by the same persons between the date of the bid or proposal affidavit and the date of execution of the contract, to "(i) any public official or state employee of the state agency or quasi-public agency soliciting bids or proposals for the contract, who participated substantially in the preparation of the bid solicitation or request for proposals for the contract or the negotiation or award of the contract; or (ii) any public official or state employee of any other state agency, who has supervisory or appointing authority over such state agency or quasi-public agency." If any such gift was provided, the affidavit shall include the name of the recipient, a description of the gift and the value and approximate date of the gift.

Indiana

Changes Made to Lobbying and Ethics Laws

On April 27, 2004, the Governor of Indiana issued Executive Order 04-08 and Executive Order 04-11, which make three changes to the state's ethics and lobbying rules. The pertinent provisions of these Executive Orders took effect on July 5, 2004.

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First, Executive Order 04-08 prohibits state agency employees from accepting gifts, favors, services, entertainment, food or drink in any amount from a person who has a business relationship with the employee's agency. This prohibition is also extended to independent corporate and political bodies of the state. Importantly, the many gift exceptions found in the state ethics statute are also applicable to the Executive Order.

Second, the Governor now requires that all contracts with state agencies "contain a provision requiring that the contractor and its agents...abide by all ethical requirements that apply to persons who have a business relationship with an agency." An agency may terminate a contract if the contractor or its agents violate any applicable ethics standard.

Third, the Governor ordered the Commissioner of the Indiana Department of Administration to promulgate rules requiring the registration of individuals who lobby the Executive Branch. According to Executive Order 04-11, the term "lobby" must mean "contacts made to promote, support, influence, modify, oppose, or delay the outcome of an Executive Branch action by direct communication with designated Executive Branch officials and employees." Reporting must be at least semi-annually.

To view the Governor's executive orders, or for more information visit **www.in.gov/gov/execorders**.

New Jersey

Dramatic Expansion of Lobbying Law

On June 16, 2004, Governor McGreevey of New Jersey signed into law several amendments to the state's lobbying and campaign finance statutory requirements. Effective immediately, five amendments are of particular interest in the way they expand the coverage of the lobbying laws (applicable to lobbyists, who are now known as "governmental affairs agents") or give new powers to the lobbying enforcement agency. Several other amendments change the campaign finance laws. Finally, the state created a broad "Pay to Play" policy, but this new policy does not become effective until January 1, 2006.

First, the state commences regulation of attempts to influence "governmental processes," which include a whole host of governmental activities such as the negotiation and award of public contracts, procedures for purchasing decisions, ratemaking, etc. This expansion of lobbyist regulation goes beyond the previous areas of legislation and regulation and requires registration within 30 days of the enactment of these amendments.

Second, the state expands certain lobbyist reporting requirements to include expenditures for certain public grassroots communications. Covered communications are those disseminated to the general public through direct mail or in the form of a paid advertisement in a newspaper, magazine or other printed publication of general circulation or aired on radio, television or other broadcast medium. Communications covered by the new lobbying provisions also must explicitly support or oppose a particular item or items of legislation or regulation or be reasonably understood, irrespective of whether the communication is addressed to the general public or to persons in public office or employment, as intended to influence legislation or to influence regulation.

In addition, the state specifically allows random audits of lobbyists' records and eliminates the ability of lobbyists to be compensated on a contingent basis. Finally, the state imposes a lobbyist registration fee. The state's enforcement agency, the New Jersey Election Law Enforcement Commission (ELEC), is still digesting how to enact each of these laws, but plans to post updates on procedures and new regulations on its website at **www.elec.state.nj.us**.

Changes to Campaign Finance Laws

The state, through legislation signed on June 16, 2004, also changed various aspects of the campaign finance regime. First and among other things, the state created a registration system for certain political fundraisers who raise more than $5,000 per year for political entities in the state. Second, the state lowered the itemization threshold for certain campaign finance reports. Third, the state prohibited contributions on state-owned land. Fourth, the state added telephone calls with recorded messages to its campaign advertisement policy.

"Pay to Play"

On January 1, 2006, a "Pay to Play" statutory regime will become effective in New Jersey. In short, this regime will restrict the ability of certain businesses that contract with the state, a county or a municipality to

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give certain campaign contributions and prohibits those that do give such contributions from entering into certain contracts with the state, a county or a municipality. More details will be provided in future *Election Law News* as the effective date approaches.

Oklahoma

New "Levin Fund" Rule and Other Changes

On July 1, 2004, several campaign finance changes made by the Oklahoma Ethics Commission (Commission) became effective. These changes are part of an annual review conducted by the Commission. Pertinent changes are summarized below.

First, the Commission sets at $10,000 per year the contribution limit for individual contributions to the "Levin Funds" of state, district and local political party committees. Although the figure $10,000 does not appear in the text of the new rule, the synopsis of the rule changes shows the limit as $10,000, *see* Commission, *Synopsis of 2004 Amendments* (Feb. 3, 2004), and the Executive Director of the Commission has indicated that a $10,000 limit was the intent of the rule change. Moreover, contributions to these Levin Funds are not aggregated with other contributions to state parties for purposes of the individual and family yearly contribution limits. Levin Funds or Levin Accounts are those accounts created by the BCRA from which state, district and local party committees may spend money on certain "federal election activities," such as voter registration within 120 days of a federal election, get-out-the-vote activities, and voter identification activities.

Second, last minute reports of contributions, receipts and independent expenditures no longer may be filed on diskette.

Finally, PACs in Oklahoma are no longer required to file paper reports after filing reports electronically.

The Oklahoma Ethics Commission Annual Review can be found at **www.ethics.state.ok.us/finalrules04.pdf**. *Synopsis of 2004 Amendments* (Feb. 3, 2004) is available at **www.ethics.state.ok.us/synopsis04.pdf**. ■

For more information, please contact Carol A. Laham (202.719.7301 or claham@wrf.com) or D. Mark Renaud (202.719.7405 or mrenaud@wrf.com).

New FLSA Regulations

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Administrative Exemption Duties

An employee will meet the duties test for the administrative exemption if the employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and such duty includes the exercise of "discretion and independent judgment" with respect to matters of significance. The test is largely the same as the long-standing administrative exemption test, as the proposed language on "position of responsibility" and "high level skill or training" has been eliminated. The new rules provide extensive examples of the types of duties within each job that indicate that the job is related to management or general business operations.

Professional Exemption Duties

"Learned professionals" will continue to be exempt if their primary duty is the performance of work requiring "advanced knowledge" in a "field of science or learning" that is customarily acquired by a "prolonged course of specialized intellectual instruction." The regulations now make it clear that an employee need not necessarily obtain a degree in this field and that work experience can potentially substitute for some purely academic instruction. The new rules are again instrumental to employers and employees alike by providing extensive and updated examples of duties and definitions.

Outside Salesperson Exemption Duties

The outside salesperson rules have been revamped so that the percentage of time limitations on non-outside sales work no longer render an employee nonexempt so long as his or her primary duty remains making outside sales.

What This Means for Employers

While the rules are likely to face numerous legal challenges in the months ahead, the rules should go a long way in meeting the concerns of employers who argued that the half-century-old rules failed to address the modern workplace. The new rules should also reduce the number of class-action lawsuits that have proliferated in the courts. According to DOL Secretary Elaine Chao, "there are more class action complaints against companies over overtime pay than there are about harassment." While the changes will require employers to understand and apply a number of significant changes to the regulations, the new rules go a long way in clarifying which employees are eligible for overtime. An employer can now readily perform an audit of job responsibilities to avoid litigation landmines that have

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member, officer or employee of Congress (House or Senate) from representing or advising a foreign entity, and from using confidential information obtained through trade and treaty negotiations in any private situation.

As for non-elected Congressional employees, only individuals who meet an annual salary threshold of 75 percent of the basic pay rate of a member of Congress in *any* 60-day period during the final year of employment are covered by federal statutory restrictions upon post-employment activities (the 2004 threshold is $118,575).

The general rules for Congressional staffers are as follows:

- A personal staff employee who meets the 75 percent threshold is banned for one year from seeking official action from his former employer or any of his current staff members.
- A committee staff employee is barred for one year from seeking to influence anyone, either involved with the specific committee during the time of employment (including members of Congress) or with the committee currently, regarding any matter, not just those within the committee's jurisdiction.
- A leadership staff employee for one year may not attempt to influence any current member of the chamber's leadership or any current staff member.
- All other legislative employees are restricted for one year from lobbying any current member of the office in which the former employee worked.

In addition to federal law, the Senate imposes rules of its own upon former Senators and former Senate employees who become lobbyists. These rules cover *all* former employees, *regardless of salary threshold*—a scope of coverage greater than that of federal law. Former Senators may not lobby any current Senator or employee of the Senate for one year, while Senate employees may not lobby their former offices or any offices in which they held "substantive responsibilities" for that same period. Substantive responsibilities involve actually assisting with drafting committee bills or with hearings and mark-up, rather than merely monitoring a committee or serving as a liaison for a member's personal office. Therefore, a personal Senate staff member is not necessarily free to lobby the committees on which his former employing Senator sat. Rather, one must look at the staffer's past work and involvement with the committee.

Former Executive Branch Officers and Employees

For executive branch members, post-employment restrictions vary by the type of work performed for the government and the depth of one's involvement in that work. In general, the more immersed one was in a particular matter, the longer lasting the restrictions upon that person.

To begin, anyone who participated "personally and substantially as [an] officer or employee" in a specific matter is banned for life from acting overtly with the intent to influence on behalf of another party, other than the United States, in that same matter. In comparison, the prohibition against a former employee acting on behalf of another, with the intent to influence, in matters "actually pending" during his tenure over which the employee had an "official responsibility" is merely two years.

The two-year ban upon applicable former employees makes use of two key phrases not found in the lifetime ban: "official responsibility" and "actually pending." Official responsibility involves any authority to "approve,

Anyone who participated "personally and substantially as [an] employee" in a specific matter is banned for life from acting overtly with the intent to influence on behalf of another party, other than the United States, in that same matter.

disapprove, or otherwise direct Government action," including anything that an employee knew or should have known would fall under his purview, either as the intermediate or final authority, and anything over which the employee would have exerted authority had he not recused himself. All matters that any of the former employee's subordinates had been in the process of considering during his supervision are encompassed by matters that were "actually pending." Therefore, any future employer must take a close look at the employment activities of all new hires to determine not only the matters on which the new hire actually worked, but also the matters over which the new hire had decision-making power, regardless of whether he actually exercised that power.

While the above restrictions apply to all members of the executive branch, the law also makes distinctions between different levels of personnel, creating special restrictions for "senior personnel" and "very senior personnel." In general, the higher the office held, either in pay or influence, the broader the restrictions will be. For those

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in a senior position, a one year ban is imposed upon any communication, with the intent to influence, regarding any matter before anyone in his or her former department. For those in a very senior position, the scope of the one-year prohibition broadens to include not only those in the employee's former department, but also most employees in executive-appointed positions within any department.

As mentioned above, distinctions also are made between types of work. Additional prohibitions are placed on those involved in trade or treaty negotiations. Anyone who participated "personally and substantially" in such a negotiation is barred for one year from representing or advising any other party involved in or affected by that negotiation. Like the other bans, this restriction does not apply to advising or representing the United States, any of its entities or the employee himself. Like other executive branch work restrictions, a distinction is made by personnel level, with U.S. Trade Representatives and Deputy U.S. Trade Representatives prohibited from representing or advising any foreign entity for one year after leaving office.

State Restrictions

Former Government Officials

While federal law and Senate rules cover a wide range of former employees and their post-employment activities, a 2002 Center for Ethics in Government study found that fewer than thirty states have any sort of limited time ban on lobbying or other "revolving door" statute. Nearly forty states, however, have an ethics commission or other agency charged with investigating conflict of interest complaints and overseeing the ethical standards of other state agencies, public officials, and governmental employees. Generally, those commissions and agencies govern post-employment activity compliance where such restrictions exist. Two states are highlighted below: California and Texas.

California

In California, overseen by the state's Fair Political Practices Commission, all state employees, elected officials and state board or commission members are forbidden, for one year, from representing any party before the state agency by which they were formerly employed. For legislators, this ban includes any appearance before or communication with a legislator, employee, committee or subcommittee. For employees, the ban includes not only the agency of previous employment but also any other agency that would fall under the direction or control of the former agency. A lifetime ban also exists against switching sides in a matter on which an official worked while employed by or elected to the state government.

Texas

In contrast to the breadth of California's coverage, the length of the post-employment ban in Texas is doubled, but the scope is much smaller. The "revolving door provisions," which fall under the purview of the Texas Ethics Commission, only apply to former officers and employees of the executive branch; in Texas, unlike California, a former legislator or legislative employee can begin to lobby current legislators and legislative employees the day after termination of employment, subject only to general state lobbying provisions. In the executive branch, no board member or executive head of a regulatory agency may appear before or communicate with the officers or employees of the board or agency on which he or she served for two years. In addition, no former agency employee or officer who was paid above a certain salary threshold may represent a party or receive compensation from a party regarding any "particular matter" in which the employee "participated" during his or her government service or for which the employee was responsible—a lifetime ban.

"Particular matter" is defined quite narrowly to be a specific proceeding, so that a former employee would be barred from representing a party in a specific permit application process in which the employee participated but not in that permit application process generally. Thus, a former employee can work on behalf of clients who appeared before his or her former agency, just not on specific matters that came before the former agency while the employee worked there and not for two years after employment if the former employee was a board member or executive head of a regulatory agency.

Conclusion

While profound differences in post-employment restrictions exist among the several states and within the different branches of the federal government, the key, when one is contemplating employing individuals who are leaving government posts, is to research the scope of their government duties and to understand how that scope will affect future employment. As can be seen in the examples provided above, laws restricting post-employment activities often limit the immediate plans of a former government employee and may carry additional lifetime restrictions upon future employment. ■

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In addition to direct, spoken conversation, several other types of communications are excluded from the definition of electioneering communications, including:

- Internal newsletters of existing organizations;
- Editorials, news stories or commentary by recognized news sources;
- Public debates or forums including at least two opposing candidates/positions on issues and hosted by a "recognized news medium" or charitable organization that does not engage in other electioneering communications;
- Independent expenditures and
- Contributions to political campaigns.

To further delineate electioneering communications from other forms of advocacy, the law modifies the word "advocating" with "expressly" in the definition of "independent expenditure" and includes "expressly advocate[ing]" the defeat or election/passage of a candidate/issue in the definition of "political advertisement."

Also under the Act, the definitions of "contribution" and "expenditure" are amended to include "making an electioneering communication." An expenditure for an electioneering communication occurs when the contract for the communication is executed, a partial or full payment for the communication is made or the communication is publicly disseminated, whichever occurs first.

Further, the law adds a new provision exempting from the definition of political committees organizations that limit their activities to making expenditures or accepting contributions for electioneering communications. These electioneering communications-only organizations, however, are required to register and report contributions and expenditures in the same time and manner, and are subject to the same penalties, as political committees. All electioneering communications are subject to disclaimer requirements and must prominently state "[p]aid electioneering communication paid for by (Name and address of person paying for the communication)." Failure to comply with this requirement is a misdemeanor of the first degree.

Moreover, rules regarding reports and disclaimers for independent expenditures now apply to electioneering communications, making them subject to the same reporting requirements as independent expenditures. According to a press release issued by Governor Bush, "[a]ny person or group that engages in political advertising or other elections-type communication will now be required to register as a political committee and report contributions and expenditures as provided in current law." The Governor's press release is available at **http://sun6.dms.state.fl.us/eog_new/eog/library/releases/2004/May/2004-05-26-campaign_finance.pdf**. Thus, the new electioneering communications reporting requirements apparently cover electioneering communications made by corporations using their own treasury funds. In addition to the information currently required under Florida law, the reports now must include the name and address of the person making the expenditure and the issue to which it relates. These reports are subject to the same penalties as political committee reports.

"Further, the law adds a new provision exempting from the definition of political committees organizations that limit their activities to making expenditures or accepting contributions for electioneering communications."

Independent Expenditures and Political Advertising

Under the new law, disclaimers on political advertisements paid for by independent expenditures, with the exception of novelty items with a retail value less than $10 that do not oppose a candidate, must include the address of the person paying for the advertisement. Similarly, political advertisements paid for by a candidate must include

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a disclaimer stating the advertisement is a "[p]olitical advertisement paid for and approved by" (name and party affiliation of the candidate and the office sought). "Any other political advertisement[s]," circulated prior to the election must now also include the name and address of the persons sponsoring the advertisement. Other changes to the rules governing independent expenditures include a lifting of the restriction that capped at $1,000 contributions from one person to another person for making independent expenditures.

Finally, "[t]he Internet" is added to the definition of "communications media." Costs associated with internal communications of a campaign or group that use a computer information system, however, are not considered expenditures for communications media.

Committees of Continuous Existence

The law closes what is known as the "membership dues loophole" by requiring CCE's to include in their regular reports the full name, address and occupation of individuals making one or more contributions, including contributions of more than $250 per calendar year that are considered the payment of membership dues. (Please note that CCEs are not regular political committees and that federal PACs making contributions in Florida do not become CCEs.) The CCE reports must also now include the full name and address of the person making the CCE expenditures; the amount, date and purpose of the expenditure; the full name and address and office sought of the beneficiary of CCE expenditures and the total amount of expenditures by the CCE.

The law also clarifies a disputed topic in Florida law: CCE's may not make electioneering communications. ■

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New FLSA Regulations

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become all too commonplace under the FLSA. Finally, in the realm of election law, corporate employers have a new guide to assist them in determining who is in the "restricted class" of a connected federal PAC.

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If you would like more information on the new FLSA rules, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Carol A. Laham (202.719.7301 or claham@wrf.com).

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