

Mind Your Ps (and Qs): Pay-to-Play and Procurement Lobbying for the Government Contractor

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If there are two political law compliance issues that perennially bedog federal, state, and local government contractors, it is the myriad of state and local pay-to-play laws and procurement lobbying laws. In the FAQs below, we try to shine a light on these issues and how to increase compliance in these areas.

1. PAY-TO-PLAY LAWS

What are pay-to-play laws?

Pay-to-play laws are those laws, ordinances, and rules that try to prevent the making or raising of political contributions (“paying”) in order to receive government contracts (“playing”). These laws may prohibit, limit, or require the reporting of political contributions or political fundraising activities.

Are there federal pay-to-play laws?

Yes, there are federal pay-to-play laws. For federal government contractors, there is a prohibition against making any expenditures in connection with a federal election. Since all corporate contributions to federal candidates are already prohibited, this government contractor prohibition for corporations bans contributions to federal super PACs, the making of federal “electioneering communications,” and the making of federal “independent expenditures.” For a government contracting entity, the federal prohibition does not extend to officers, directors, shareholders, or employees. On the other hand, individuals who have direct contracts with federal agencies are banned from making personal contributions to federal candidates,

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Practice Areas

Election Law & Government Ethics
Ethics Advice & Compliance Audits and Plans
Federal & State Lobbying
Federal & State Pay-to-Play Compliance
Government Contracts

PACs, party committees, etc.

Separately, for those in the financial services arena, there are federal pay-to-play rules from the U.S. Securities and Exchange Commission (SEC), the Municipal Securities Rulemaking Board (MSRB), the Commodity Futures Trading Commission (CFTC), and the Financial Industry Regulatory Authority (FINRA), but these rules pertain to state and local government contracts and not federal contracts.

Are there state and local pay-to-play laws?

Yes, the vast majority of pay-to-play laws are located at the state and local levels and relate to current and potential state or local government contractors. The rules vary greatly from jurisdiction to jurisdiction, and some extend to persons seeking land use changes and persons seeking other government action such as grants, loans, or other determinations.

Do the pay-to-play laws extend beyond the corporation to related persons?

Yes. Although the laws vary greatly from jurisdiction to jurisdiction, many state and local pay-to-play laws extend the contribution ban, contribution limit, fundraising ban, and/or reporting obligation to contributions made by directors, officers, or other employees of the contracting company or the potential contractor. Some even regulate the political activity of spouses and unemancipated children. PACs connected to the business entity also are often covered by the laws, as are related entities such as parent corporations, subsidiary corporations, and sister companies.

What are the penalties for noncompliance?

The penalties for violating the state and local pay-to-play laws vary widely across the various jurisdictions. Penalties include fines, cancellation of government contracts, and preclusion from future contracts for a number of years.

What are some jurisdictions with pay-to-play laws?

Not every state or locality has pay-to-play laws, but some can be found in the following: California, Connecticut, Hawaii, Illinois, Iowa, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia; and Chicago, Dallas, Houston, Los Angeles, New York City, Philadelphia, and San Francisco. These lists are not exhaustive. We have also found pay-to-play laws in other states and major municipalities, as well as in dozens of small jurisdictions such as the Broward County School District in Florida and Cambridge, MA.

What is the first line of defense against violating the pay-to-play laws?

We recommend a preclearance program targeted at directors, officers, and other employees as may be covered in the jurisdictions in which your business has government contracts or seeks government contracts. Through this type of program, covered persons would preclear state and local contributions and fundraising activity to ensure that the proposed activity does not void existing contracts or preclude the business from future contracts and to ensure that the data is collected for any required pre-contract or periodic reports or

certifications.

2. PROCUREMENT LOBBYING LAWS

What are procurement lobbying laws?

Procurement lobbying laws are a subset of a jurisdiction's lobbying laws that cover attempts to influence, among other things, the award of a contract, grant, or loan.

Do procurement lobbying laws apply to salespersons?

Yes, the procurement lobbying laws in many jurisdictions apply to sales activity with government agencies. A number of the jurisdictions (such as Georgia and New Jersey) have exceptions for *bona fide* salespersons or *bona fide* sales activities, but the parameters of these exceptions vary, and these exceptions are not universal. Where there is not an applicable exception, sales activity can trigger lobbyist registration and reporting obligations and other requirements such as tighter gift rules.

Do procurement lobbying laws prohibit lobbying or sales activity?

No, procurement lobbying laws generally do not prohibit lobbying or sales activity since lobbying activity is enshrined as a right in the Constitution. Nevertheless, communications about a procurement may be significantly limited during an RFP process "quiet period."

Does federal law regulate procurement lobbying?

The federal lobbying law, known as the Lobbying Disclosure Act (LDA), applies to, among many other things, communications about federal contracts when those communications are made with covered Legislative branch officials or covered Executive branch officials. These covered officials include Members and staff of Congress; persons in the Executive Office of the President; high-level federal political appointees, Schedule C federal political appointees, and military officers grade O-7 and higher.

Government contract law also makes many kinds of lobbying unallowable with respect to using appropriated funds or charging the government, and the law also requires the filing of Standard Form LLL to disclose certain outside lobbying activities for the award of a contract, loan, grant, etc.

Will one contact trigger lobbyist registration and reporting?

Generally, one lobbying contact will not trigger lobbyist registration and reporting obligations, for most jurisdictions have a threshold before which registration is required. For example, the threshold at the federal level is ultimately 20% of one's work time in a calendar quarter (including preparation, research, and other background work supporting lobbying contacts). Other registration threshold examples: Pennsylvania - compensation of more than \$3,000 in a calendar quarter and spending more than 20 hours in a calendar quarter; Idaho - compensation of \$250 in a calendar quarter; and Kansas - employed "in considerable degree for lobbying." Under certain circumstances, Florida is an example of a jurisdiction without a lobbyist

registration threshold.

What are some other effects of having to register as a lobbyist?

The rules vary across jurisdictions, but registration as a lobbyist can bring one within a ban on compensation contingent on the lobbying activity, which in the sales arena can be commissions. See New York City as an example. Lobbyist registration can also trigger related rules that limit gifts from lobbyists and lobbyist employers and that limit campaign finance activity or contributions by lobbyists or lobbyist employers.

What steps can be taken to ensure compliance with procurement lobbying laws?

Training is very important so that employees in the sales and other departments know that communications about sales in some jurisdictions may trigger procurement lobbying reports. Moreover, contacts with government officials should be centralized with the government relations function for messaging and so that the lobbying thresholds and other requirements can be vetted before contacts are made (in case registration needs to be made before lobbying commences, such as in Florida).