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ALERT

Pay-to-Play Compliance Down the Stretch in the 2023 Elections

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The 2023 elections are a little over a month away, and hopefully, if your corporation holds or seeks state and local government business, you have been regularly reminding your directors, officers, and other employees about preclearing their personal political contributions so that your company does not lose government contracts and isn't precluded from future contracts. Even in this last month, candidates and other committees will be combing the hills looking for additional contributions to help put them over the top, particularly in tight races. Since pay-to-play laws often cover contributions by directors, officers, and other employees, solely vetting corporate and PAC contributions does not eliminate the risk. This is particularly true for those in the financial services industry since, for them, there is an overlay of tight federal rules (SEC, MSRB, FINRA, CFTC) that apply to individual contributions.

Only a few states have elections this year, but several of these states do have pay-to-play laws. Below is a summary of the laws and relative risks (in reverse alphabetical order).

Virginia

Virginia's pay-to-play law focuses on only very large contractors with the state, but, when it applies, the contribution limit extends beyond corporate contributions to include officers and directors. Since the Governor is not up for election this year and cannot follow himself in any event, the limit with respect to the Governor's campaign is not important. Nevertheless, the contribution limit on contributions from these very large state contractors and their directors and officers does apply to contributions to the Governor's PAC.

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Practice Areas

Election Law & Government Ethics
Federal & State Pay-to-Play Compliance

Pennsylvania

Statewide elections are not held this year, but there are many local elections across the Commonwealth. Pennsylvania has an annual pay-to-play report covering 2023 that is due in February 2024, covering contributions from officers, directors, and employees of state or local government nonbid contractors made to Pennsylvania candidates and committees. There also are state-law contribution ban and disclosure obligations with respect to current and prospective contractors with municipal pension systems around the state. In addition, several local jurisdictions in Pennsylvania have their own pay-to-play laws and ordinances, including Philadelphia, Allentown, Delaware County, and Lehigh County.

New Jersey

The New Jersey legislature "reformed" or watered down its pay-to-play laws this past year, and that is good news for corporate compliance in this political law space. First, the state eliminated those pesky, convoluted, and likely (for many) unconstitutional local pay-to-play laws, so only state law remains. Second, the state enacted several exceptions for contracts awarded by a "fair and open" procurement process. There are still several state laws, however, but the toughest of them apply to gubernatorial candidates. There is no gubernatorial election this year, although this fact doesn't preclude seeking and making such contributions. For this year's elections, corporate and large owner contributions to county and municipal candidates can still risk no-bid contracts, and contributions over $200 per election must be reported on the annual pay-to-play report next March – including contributions by officers and directors and their spouses. There is also pre-contract reporting, which can be painstaking to assemble and shines a light on political activity. Finally, special rules exist for those who do business with state pension funds and state redevelopment entities.

Mississippi

Good news! Mississippi has no statewide or known local pay-to-play rules.

Louisiana

Louisiana has special pay-to-play contribution prohibitions for certain contractors with the state's Citizen Property Insurance Company and the Louisiana Lottery Corporation in addition to extensive rules regarding those in the gambling industry in the state. Some of these rules extend to executives and directors. Note that Jefferson Parish has a pay-to-play disclosure requirement of its own.

Kentucky

Kentucky has long had contribution limits that apply to contractors and prospective contractors for nonbid contracts at the state and local level. These limits extend beyond the company (and corporate contributions are prohibited in any instance) to cover officers, large owners, and employees of such concerns as well as family members. There also is an aggregate solicitation limit on the same persons.

In sum:

Although we only cover the pay-to-play laws in the above six states, there may be others around the country, including in Chicago, New York City, and Seattle, all of which have elections this year. In any event, if your company has significant state and local government contracts, it needs to implement a contribution preclearance program so that it can intercept potential contributions from officers, directors, and employees that could lead to the loss of a government contract or preclusion from future contracts. This is true even if the election is not in 2023, for there is no prohibition on candidates soliciting (and your personnel providing) contributions now for gubernatorial elections in New Jersey in 2025, or for elections in other states in 2024.