

Top 5 Takeaways from New Jersey's 2023 Pay-to-Play Reform

Political Law Podcast

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In this episode, partner Mark Renaud discusses what corporations and government contractors need to know following New Jersey's April 2023 campaign finance reform bill, which includes significant revisions to state and local pay-to-play laws, political contributions, non-profit disclosures, and the organization of the Election Law Enforcement Commission. Mark discusses how these reforms may impact you or your business.

Transcript

You're listening to Wiley's Political Law Podcast, a series of podcasts on Election Law, Ethics, and Government Investigations. In each podcast, attorneys at Wiley, a Washington, D.C. law firm, break down an aspect of the political law landscape with our unique insight into issues faced by clients.

Mark Renaud

Hello, it's Mark Renaud, a partner in Wiley's Election Law and Government Ethics practice group here, and today, we're talking about some recent legislation that was signed into law the first week of April in New Jersey. This was a campaign finance reform bill that included provisions related to political contributions, provisions related to nonprofit disclosure, provisions related to pay-to-play law,

Related Professionals

D. Mark Renaud
Partner
202.719.7405
mrenaud@wiley.law

Practice Areas

Election Law & Government Ethics

and provisions related to the agency that's tasked with enforcing campaign finance and other rules in New Jersey, which was the Election Law Enforcement Commission. There was a long fight about these rules that looked at, for a while, that the good government groups and the Republicans would coalesce to defeat this legislation which they opposed. But, ultimately, the Democratic majority, which is substantial in the New Jersey legislature, prevailed, and the governor signed the bill into law.

Recent press accounts say that the governor didn't think the bill was perfect, so we may see some follow-up legislation. Of course, the governor took quite a bit of heat in the press and the members of the Election Law Enforcement Commission all resigned as result of the law, but in any event, many of the provisions went into effect immediately, and some of the other provisions go into effect after the June primary of this year. This is an election year for the legislature, at least in New Jersey, although the governor is not up for election or reelection this year. So, I just wanted to present, because in the Election Law group here, we cover all aspects of campaign finance and political law, but in particular, we focus for corporations on pay-to-play laws around the country and those are rules that prevent corporations that [often] hold or seek contracts with the government agencies from making political contributions, or from their officers, directors, or other related entities from making political contributions that could be seen as trying to influence those contract awards.

New Jersey was one of the epicenters of pay-to-play and continues to be so, even after these campaign finance reforms passed. Our clients tend to be corporations, trade associations, and other nonprofits, [but] not always – we do have candidates and others. But for in this space, we're looking out for how do these rules and of course, changes to these rules, affect businesses that [are] private sector, generally, and some of whom do business with governments agencies, therefore, they have to consider and be prepared to deal with the pay-to-play regimes around the country.

There [are] five things I think we can take from the reform that [are] the most important to the corporate community, the trade associations and other nonprofits that are affiliated with the corporate community. The first thing is that this new law in New Jersey eliminated a labyrinth of local county and municipal pay-to play laws by fiat. It did away with these rules [in] a number of places. Scores really, of places, had their own local ordinances such as Atlantic County and Jersey City, and some of these rules were, to tell you the truth, unconstitutionally vague and broad, but nobody was going to pay to challenge those, but there were tight rules in some places, [in] other places they were not much more in addition to state law. But, obviously, contractors in the state, if you did business in one county or another, you may have had to deal with two sets of government rules about pay-to-play, about political contributions, about disclosure limits, maybe bans on contributions. And so, legislators decide to get rid of those. Obviously, some of the state rules do apply for county, municipal, and other local contracts, but they're not nearly as broad as some of these local rules that were eliminated.

The second aspect, which is a big one, is that for the most part, the new law eliminated the coverage – meaning that these contributions are no longer limited or banned – of contributions to state and county political party committees. That is also true, for the most part, with respect to municipal party committees and legislative leadership committees. So, prior to this legislation, those kinds of contributions would have, could have – they were the wrong amount, et cetera – led to the loss of state contracts, preclusion from state

contracts for 18 months to five and a half years, depending on when you made them and to whom you made them, and would have been reportable on the annual report and in the various precontract reports that are required when you try to get business in New Jersey. So now, for the most part, they're eliminated and that's big news – that means that a lot of these contributions can be made by companies that are holding or seeking contracts, officers, other employees, or PACs related to those folks who are trying to get contracts or seek contracts. The ban still exists with respect to candidate contributions, etc., but which now don't apply to contracts awarded pursuant to a fair and open process, a significant change. Now, the one area where there's a little bit of gray is that, with respect to executive branch contracts in the state of New Jersey, it wasn't just legislation in place – there was also an Executive Order No. 117 of Governor Corzine from back in 2008, which still seems to be relevant. We'll have to see how the different agencies, particularly the treasury, which has its own review of these kinds of contributions before contracts, or let approaches the executive order after this legislative change.

The third important result with respect to corporations is that after the June 2023 primary, many of the contribution limits in the state are doubled or almost doubled, which they weren't particularly low to begin with as things go across the country. Obviously, the Supreme Court of the United States over the years has set a threshold which is too low, but over the years across the country, there are definitely places with lower contributions than what existed in New Jersey. But now, for many of those, they're going to be double what they were [contributing], which can push up into the tens of thousands of dollars per year for an election. Importantly, also is that they created housekeeping accounts for political party committees and certain types of political party committees, which these exist in other places, particularly in New York state. They're regulated in that you have to report contributions to those accounts on their public reports, but the parties can't use them for supporting contributions to candidates or making election related communications. But, they can use it for housekeeping, paying the overhead, their building funds, things like that – that's what's viewed here in New Jersey. Part of the reason that, or part of the backstory on why these past two changes here that we just discussed, eliminating these party committees from these pay-to-play rules and also increasing the limits in creating housekeeping accounts, is that the leader of ELEC, the Election Law Enforcement Commission, Jeff Brindle, had been supporting as many other academics of trying to strengthen party committees in light of *Citizens United* back in 2010, which allowed independent groups to collect and use greater amounts of money which become rivals to the party committees. Some academics see that as weakening the political system of the United States or in a particular state like New Jersey, and so there had been some calls for this type of reform before. And so, it came to fruition in this bill, which is kind of interesting because part of the backstory of this particular bill is that the governor was trying to get rid of Brindle and there [are] a lot of changes that are not important really to the corporate community, at least immediately about how they vote for, appoint people to the Election Law Enforcement Commission, and how the governor has more power, et cetera.

And so, the combination of these two items, which is, the lifting of the pay-to play rules with respect to party committees and the increasing of contribution amounts and the creation of housekeeping accounts, there's going to be a lot of pressure on corporations and other types of contributors to give money, including people who do business with the state or want to do business with state, so the governor was particularly active when

he ran for re-election and pretty much for any contribution [the campaign] could get. Now, some of those folks that made [contributions] unfortunately were covered by the pay-to-play rules and therefore, the treasury department or others went after them after the fact, so you do have to be careful and you've got to continue to be careful with all campaign finance rules around the country, particularly pay-to-play. But the loosening of these rules means that the amount of solicitations of contributions in New Jersey [that] you're going to see are going to increase exponentially from the party committees and from others.

Fourth, there is a provision in this new law that talks about disclosure of various types with respect to nonprofits that engage in political activity, and this is dark money as many people call it. I don't call it dark money, but many people call it because the tax rules do not require these donors to be disclosed. It's based on the amount of activity that they're doing in New Jersey that would or would not trigger disclosure. So, the view is that the governor and the legislators want to have more disclosure in this area, and this is the tact they took which will benefit some organizations and be the detriment of other organizations that want to keep their donors nonpublic.

And then finally, a very seemingly technical aspect of the campaign finance reform, but it has an impact on pay-to-play laws and is that the rule reduces the threshold at which political committees have to disclose when someone makes a contribution. So, it used to be that if you had to give over \$300 in order to be disclosed per election or per year, as depending on the committee. They've reduced that to \$200 so more contributors will be disclosed, although they're still very low dollar as things go for contributors. But it's very important in the pay-to-play regime in New Jersey because that triggering point was the limit for the contributions under the pay-to-play regime, and also was the reporting obligation on the pay-to-play reports. Therefore, those kinds of disclosures are going to increase because the number has gone down from \$300 to \$200, and of course a \$300 contribution now would be problematic if you made it to a covered campaign committee that you're not supposed to [have] made a contribution to if you were seeking or holding a contract. Importantly, on the reports, if someone gave contributions that [are] covered by the annual report which includes certain officers, directors, and family members, then, they may not be impermissible and it may not prevent you from getting a contract, but it is going to trigger the long form of the annual report which then requires you to disclose all your government contracts with every level of non-federal government in the state of New Jersey, which most of our clients want to avoid and is painful if nothing else.

So, this reform has its pluses and its minuses for folks engaging in political activity in New Jersey, particularly those who hold contracts or may seek contracts at the state or local level. And so, it's very important to get your handle on this, to incorporate these new rules in your pay-to-play compliance program, and we'd be happy to help folks with those as they try to address these intersections of business with First Amendment rights and political contributions across the country not just in New Jersey where they just amended the rules, but in other places such as Illinois, Connecticut, and California. So, thank you for listening today and I wish you all the best.

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