

Public Finance and Litigation Alert: Massachusetts Ethics, Lobbying and Campaign Reform—How Will it Affect You?

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Yesterday, Massachusetts Governor Deval Patrick signed into law the much-awaited [ethics, lobbying and campaign finance reform bill](#) (Ethics Law), aimed at improving government regulation and oversight in these areas. The new Ethics Law increases penalties for public officials who accept improper gifts or violate Massachusetts ethics laws, closes a loophole in the current state campaign finance law that allowed politicians to circumvent campaign finance limits, and broadens the definition of lobbyists. The new law further amends the Massachusetts Open Meeting Law, and provides state officials increased authority to regulate and enforce ethics laws.

Increased Penalties

The new Ethics Law increases penalties for a number of civil and criminal violations related to Massachusetts ethics and lobbying laws. The penalty for a civil violation of ethics laws is increased from \$2,000 to \$10,000. The penalty for obstruction of justice in a civil ethics case is now a maximum fine of \$10,000 or five years in prison, or both; obstruction of justice in a criminal case can now result in a \$25,000 fine or 10 years in prison, or both. An individual who is convicted of giving or receiving a bribe to influence an official act is now punishable by a \$100,000 fine or 10 years in prison, or both. Individuals who violate state lobbying laws can now incur criminal penalties of up to five years in prison or \$10,000, which is double the previous maximum fine of \$5,000.

Gifts to Public Officials

Public officials still cannot receive any gift of “substantial value,” which is considered a gift worth \$50 or more, for or because of their position. Under the new Ethics Law, an official who improperly accepts a gift of \$50 or more can receive a fine of up to \$50,000 or five years in prison, or both. Exemptions under the no-gift rule still allow officials to receive gifts from family members and friends, ceremonial gifts, and gifts in situations that do not create a genuine risk or appearance of a conflict of interest. The new Ethics Law clarifies that lobbyists are banned from giving gifts of any value to government officials or employees.

Campaign Finance Reform

The recently signed law introduces a ban on the use of special campaign fund arrangements between state political parties and elected officials. Previously, governors' campaigns were able to spend monies for re-election purposes from state political parties, which can receive up to \$5,000 in individual contributions. The governor also had the ability to receive the standard campaign finance limit of \$500 in contributions from individuals. The new Ethics Law now prohibits this "special committee" fundraising method and limits the state party to receiving \$500 maximum contributions.

The new Ethics Law also requires individuals to disclose expenditures and funding sources for anonymous third-party mailings and ads that support or criticize a candidate or campaign. Penalties for late-filed campaign finance reports have increased to \$25 per day with a maximum fine of \$5,000, up from the previous late fees of \$10 per day with a maximum fine of \$2,500. Candidates for public office must now file campaign finance reports three times in an election year and twice in a non-election year. Individuals are prohibited from using campaign funds to pay fines for ethics violations, and candidates must now keep legal defense funds separate from campaign funds. The new law maintains the existing calendar-year limits on lobbyists' contributions to political campaigns at \$200, and \$500 for non-lobbyists.

Lobbying

The new Ethics Law broadens the scope of lobbying activity, likely requiring many more people to register as lobbyists and to comply with extensive lobbying regulations. The law expands the definition of a lobbyist to include people paid for strategizing, planning, and research related to communications with government employees. Lobbying activities that are incidental to other professional activities remain exempt from the registration requirement, but the statutory presumption of what "incidental" means has been narrowed. Under the new law, individuals who engage in lobbying activities for not more than 25 hours and receive less than \$2,500 during a six-month period are not required to register. The prior thresholds were 50 hours and \$5,000. The new Ethics Law also establishes a one-year waiting period for former executive branch employees before they can begin lobbying for their former government colleagues. In addition, the law dictates that anyone convicted of a felony is banned from lobbying for 10 years after the date of conviction.

Open Meeting Law

Under existing law, there are separate Open Meeting Laws governing activities at the state, county, and municipal level. The Massachusetts Attorney General is charged with enforcing the law relating to state agencies, and the various District Attorneys are charged with enforcing the other laws. Effective July 1, 2010, there will be one consolidated Open Meeting Law, and the Attorney General will have sole authority to enforce and regulate it. The Attorney General's office will have a new Division of Open Government to carry out its enforcement obligations, and an Open Meeting Law Advisory Commission will also be formed to make suggestions to the Attorney General's office for regulatory and educational improvements. The Attorney General will also be required to file an annual report on Open Meeting Law enforcement, including the number of complaints and violation summaries for the previous year.

For the most part, the newly consolidated Open Meeting Law is consistent with the prior versions, although the inconsistencies among the existing laws have been eliminated. Under the new law, the Attorney General will have the power to authorize remote participation by members of a public body not present at the meeting location (for example, by teleconference or videoconference). Under current law, the Attorney General and all but one of the District Attorneys have interpreted such remote participation to be a violation of the Open Meeting Law.

As under existing law, the state legislature will remain exempt from the Open Meeting Law, a sore point with some critics. In addition, the penalty provisions of the law will remain relatively weak, compared to the laws in many other states. The current law, which imposes a \$1,000 fine against a government body for violating the Open Meeting Law, will be replaced by a requirement that evidence of an intentional violation must be shown before the \$1,000 fine applies. Critics have noted that it is likely to be impossible to prove intention on the part of a governmental body. The legislature rejected proposals to impose individual liability on members of governmental bodies, for fear that it would become even more difficult to persuade citizens to volunteer service on local boards. In addition, the legislature rejected proposals to permit complainants of Open Meeting Law violations to recover costs and attorneys' fees.

Regulation and Enforcement

The Ethics Law expands the Massachusetts State Ethics Commission's authority to investigate and prosecute violations through increased subpoena power. Through December 2014, the new Ethics Law allows the Massachusetts Attorney General to convene a statewide grand jury for use in political corruption investigations. The law also provides the Secretary of State greater regulatory power and the ability to suspend or revoke a lobbyist's license if cause is shown. Additionally, training on ethics law is now required for state and municipal employees and elected officials. The new law does not, however, give wiretapping authority to the Attorney General's office, as Governor Patrick proposed.

The Ethics Law requires a state commission to report, by July 31, 2010, on the potential benefits of having a single state entity vested with ethics, lobbying and campaign finance oversight. The commission includes the Massachusetts Secretary of State, the head of the State Ethics Commission, the head of the Office of Campaign and Political Finance, and appointees selected by House and Senate leaders and the Massachusetts Attorney General.

Other Changes

The new Ethics Law also prohibits a candidate's name from appearing on a state ballot if a civil lawsuit has been brought against the candidate for failing to file reports or statements. Mayoral candidates who run in cities with populations of over 40,000 and who expect to raise \$5,000 must now file with the Massachusetts Office of Campaign and Political Finance. The law also specifies that income from bribes, corrupt gifts, and illegal activity qualifies as gross income for tax reporting purposes, thus allowing individuals who do not report income from such sources to be criminally responsible for tax evasion. Finally, the law closes the "success fees" loophole in

previous law that imposed fines for payments to public officials only when an official made a specific decision such as awarding a contract or defeating a piece of legislation.

Endnotes

¹ Appreciation to law clerk Kaci White for her work on this alert.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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