

# California Fair Political Practices Commission

## Leaving State Employment

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The Political Reform Act places two restrictions on the post-governmental activity of officials who have left state service. They are called the “one-year ban” and the “permanent ban.” A third restriction, the ban on influencing prospective employment, prohibits current state officials from taking part in decisions that directly relate to a prospective employer. This provision will be discussed at the end of this guide.

### The One-Year Ban

The **one-year ban** prohibits certain officials, for one year after leaving state service, from representing any other person by appearing before or communicating with, for compensation, their former agency in an attempt to influence agency decisions that involve the making of general rules (such as regulations or legislation), or to influence certain proceedings involving a permit, license, contract, or transaction involving the sale or purchase of property or goods.

Additionally, beginning January 1, 2018, the one-year ban applies to a Member of the Legislature who resigns from office, beginning with the date of resignation and ending one year after the end of the session in which the resignation occurred. (Section 87406; Regulations 18746.1 and 18746.2.)

### ***Are you covered by the one-year ban?***

The following persons are subject to the one-year ban:

- Members of the Legislature and other elected state officials.
- Members of state boards and commission with decision-making authority.
- Any individual who holds a position designated in Section 87200 appointed or employed by a state agency.
- Any individual who manages public investments appointed or employed by a state agency.
- Any state official designated in his or her agency’s conflict-of-interest code.
- Any state official that *should be* designated in his or her agency’s conflict-of-interest code. (State agency employees, officers, and consultants should be designated in their respective agency’s conflict-of-interest code if they make or participate in making governmental decisions.)

The following persons *are not* subject to the one-year ban:

- Non-elected employees and consultants of the Legislature, the courts, and any agency in the judicial branch, unless they held other positions or offices subject to the ban. (Sections 87400 and 87406; see also *Dudley* Advice Letter, No. A-93-123.)

*Susan was a Project Coordinator for her department. While her position was not a designated position, Susan conducted studies and prepared reports evaluating proposed projects. Because Susan’s supervisors relied upon her reports and judgment when determining which projects to pursue, Susan has participated in the decisions. Susan’s position should have been designated in her agency’s conflict-of-interest code, so the one-year ban will apply to her future contacts with the department.*

### ***Have you permanently left?***

The one-year ban applies when an official permanently leaves any particular office or employment subject to the ban. An official has permanently left an office or employment on the date on which the official is no longer authorized to perform the duties of the office or employment and stops performing those duties, even if the official is still receiving compensation for accrued leave credits. (Regulation 18746.4(b); see also *Coler* Advice Letter, No. I-07-089.)

Under the one-year ban, an official has not permanently left an office or employment if the official takes a leave of absence or serves as an intermittent employee. Additionally, an official taking a leave of absence or serving as an intermittent employee is subject to the Act's conflict-of-interest provisions. (Regulation 18746.4(b); see also Commission Fact Sheet "Recognizing Conflicts of Interest.")

*Jim leaves his position as a designated employee of the Water Resources Control Board ("WRCB") and accepts a position with the Department of Water Resources ("DWR"). Within the same year, Jim is asked, in his private capacity, to represent a developer in a proceeding before the WRCB regarding a water permit. May Jim represent the developer? No, under the one-year ban, Jim may not represent the developer in the proceeding before the WRCB. Notwithstanding Jim's position with the DWR, the ban applies because Jim has permanently left his position with the WRCB.*

### **Are you making an appearance or communication within 12 months of leaving state service?**

The one-year ban applies to appearances and communications made within 12 months of permanently leaving state office or employment. An appearance or communication includes all of the following:

- Conversing by telephone or in person.
- Corresponding in writing or by electronic communication.
- Attending a meeting.
- Delivering or sending any communication. (Regulation 18746.2.)

*Tonia is retiring on December 31. While she will stop performing the duties of her position on October 31, she will receive compensation for accrued leave through December. Despite her official retirement date, Tonia permanently left state service on October 31, and the one-year ban will run from this earlier date.*

Although potentially prohibited under the permanent ban, assisting or advising clients or employers who might appear before or communicate with the official's former agency is not a prohibited appearance or communication under the one-year ban so long as the former official is not identified in connection with the appearance or communication.

*On September 1, Dave, a designated employee of the Air Resources Board ("ARB"), left state service to join a private consulting firm. May Dave consult with clients or others at the firm regarding an appearance before the ARB the following month relating to a proposed regulation? Yes, Dave may consult with clients or others at the firm so long as he is not personally identified in connection with their appearance. However, Dave may not personally make an appearance before the ARB to influence the regulation.*

### **Are you being compensated?**

An appearance or communication is prohibited only if the former official is compensated, or promised compensation. (Section 87406; Regulation 18746.1(b)(3).) "Compensation" has been defined broadly to include "remuneration or payment of any kind." (Souza Advice Letter, No. A-06-114.) "Payment" is defined by the Act to mean a "payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible." (Section 82044.)

Note, however, that a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not considered compensation.

### ***Are you representing another person?***

The one-year ban applies if the former official makes an appearance or communication in representation of another person. Except as noted below, *the ban applies even if the person represented is a local or federal agency.* (See *Dutton* Advice Letter, No. A-99-274 and *Beale* Advice Letter, No. A-00-146.)

Appearances or communications in representation of any of the following are not prohibited:

- A former official's personal interest as defined in Regulation 18704(d)(2).
- A state agency for which the person has become an officer or employee if the appearance or communication is for the purpose of influencing legislation or administrative action on behalf of the state agency.
- A local agency for which the person has become an elected official if the appearance or communication is for the purpose of influencing legislation or administrative action on behalf of the local agency.

### ***Are you making an appearance or communication for the purpose of influencing?***

An appearance or communication is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.

The one-year ban prohibits an appearance or communication if it is made by one of the following:

- A former Member of the Legislature for the purpose of influencing a legislative action.
- A former elected state official, other than a former legislator, for the purpose of influencing an administrative action, or any discretionary action involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.
- A former state official or employee, other than a former legislator or elected state official, subject to the one-year ban for the purpose of influencing a legislative or administrative action, or any discretionary action involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.

For purposes of the one-year ban, an "administrative action" includes any action relating to any rule, regulation or other action in any ratemaking proceeding or any quasi-legislative proceeding. (Section 82002.) A "legislative action" includes any action on a bill, resolution, amendment, report, nomination, or other matter by the Legislature or by either house or any committee thereof, or by a Member or employee of the Legislature acting in his or her official capacity. "Legislative action" also means the action of the Governor in approving or vetoing any bill. (Section 82037.)

Although the permanent ban, discussed below, may apply, the one-year ban does not limit an official from participation in any of the following proceedings:

- Appearances in a court of law.
- Hearings, preliminary hearings, settlement negotiations and other formal matters before an administrative law judge in which all parties are present and a transcript, recording or other record of the former official's contact with his or her former agency is made.
- A request for a formal legal opinion from an agency.
- Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.

*Betty, a former attorney with the Fair Political Practices Commission (“FPPC”), left state service to join a private law firm on January 15. On September 1, her firm asks her to represent a legislator charged with a violation of the Political Reform Act. The FPPC will prosecute the case before an administrative law judge. Betty was not involved with the case when she worked at the FPPC. May she represent this client? Yes, the one-year ban does not prohibit Betty from representing clients in enforcement actions and most other quasi-judicial proceedings of her former agency. (Also, note that the permanent ban does not prohibit Betty from representing this client because she did not work on the case, or supervise others working on the case, while at the FPPC.)*

The following conduct is not prohibited because it does not involve an attempt to influence a decision:

- Formal participation in a panel or conference for educational purposes or to disseminate research.
- Attendance at general informational meetings, seminars, or similar events.
- Making requests for information about any matter of public record.
- Communications with the press.

*Janet, a manager for the Department of Social Services (“DSS”), left state service to head a nonprofit agency that administers a computer services contract funded by DSS. The contract will expire in four years, and Janet will monitor the performance of the contract. May she contact DSS in connection with the performance of the terms of the contract? Yes, Janet may monitor the performance of the contract, as this does not involve the issuance, amendment, awarding, or revocation of a contract.*

*In monitoring the performance of the contract, Janet realizes that certain aspects should be amended upon renewal. She would like to contact DSS staff to determine if amendments are appropriate. May Janet contact her former agency in connection with future amendments within one year of leaving DSS? No, the one-year ban prohibits Janet from appearing before or communication with her former agency to influence any action involving the amendment of a contract.*

### ***Is the appearance before or communication made to your former agency employer?***

The following guidelines assist in determining when an appearance or communication is before an official’s former agency employer:

- Former legislators may not appear before or communicate with the Legislature (or any committee or subcommittee of the Legislature) or any present Member of the Legislature (or any officer or employee thereof).
- Former elected state officers, other than former legislators, may not appear before or communicate with any state administrative agency, including any officer or employee of that agency.
- Officials, other than legislators and elected state officers, subject to the one-year ban may not appear before or communicate with any officer or employee of any of the following:
  - The state administrative agency that the official worked for or represented prior to permanently leaving the particular office or employment that subjected the official to the one-year ban.
  - Any state administrative agency which budget, personnel, and other operations are subject to the direction and control of the agency that the official worked for or represented prior to permanently leaving the particular office or employment that subjected the official to the one-year ban. This is known as the “pyramid concept.” Note, however, that an agency is not under the direction or control of another agency merely because the agency has been provided technical assistance, legal advice, or is subject to the general oversight of the other agency pursuant to state law.

- Any state administrative agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor's office. However, appearances before and communications with constitutionally elected officeholders and statutorily independent agencies are not prohibited for former Governor's office employees. (*Davidian Advice Letter, No. A-97-076a.*) You should seek written advice if you believe the agency is "statutorily independent."

*Tom retired from the Department of Consumer Affairs ("DCA") on December 30. Since retirement, he has become a partner in a consulting firm that creates and assists in licensing tests. Within the following year, may Tom represent his firm for compensation by appearing before the Office of Professional Examination Services, which is subject to the direction and control of the DCA? No, applying the "pyramid concept," a designated employee's state administrative agency includes not only the agency for which he or she worked, but also any board or commission under that agency's control.*

*May Mary, a former designated employee in the Governor's Office, lobby the Department of Health Care Services within a year of leaving her position? No, as a former designated employee of the Governor's Office, Mary may not appear before any state agency in the executive branch for one year.*

## The Permanent Ban

The **permanent ban** on "switching sides" prohibits former state officials from working on proceedings that they participated in while working for the state. The ban prohibits appearances and communications to represent any other person, as well as aiding, advising, counseling, consulting or assisting in representing any other person, for compensation, before any state administrative agency in a proceeding involving specific parties (such as a lawsuit, a hearing before an administrative law judge, or a state contract) if the official previously participated in the proceeding. (Sections 87400-87405; Regulation 18741.1.)

### ***Are you covered by the permanent ban?***

The permanent ban applies to every "state administrative official," which is defined as "every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity." (Section 87400(b).) However, the ban does not apply to Members, officers, employees, or consultants of the Legislature, the courts, or any agency in the judicial branch of government, unless they held other positions or offices subject to the ban. (Sections 87400-87402.)

### ***Have you permanently left or taken a leave of absence?***

The permanent ban applies when an official permanently leaves any particular office or employment. In addition, the permanent ban also applies if the official takes a leave of absence. The ban applies on the date on which the official is no longer authorized to perform the duties of his or her office or employment and stops performing those duties, even if the official is still receiving compensation for accrued leave credits. (Regulation 18746.4(a)(1); see also *Coler Advice Letter, No. I-07-089.*)

*Nicole takes a leave of absence from state service on June 30. On October 1, Nicole takes a private job. Although Nicole will not return to state service, she will receive compensation for accrued leave from October 1 to October 31. Are Nicole's activities during the month of October limited by the permanent ban? Yes, the ban begins July 1 and continues permanently unless Nicole is authorized and returns to performing the duties of her office. (Regulation 18746.4(a)(2).)*

### ***Are you being compensated?***

Like the one-year ban, the permanent ban applies only if the official is compensated. Additionally, payments for travel in connection with voluntary services are not considered compensation.



### ***Are you representing another person, other than the State of California?***

In contrast to the one-year ban, the permanent ban applies if the official is representing any other person, other than the state of California. Thus, there is no exception under the permanent ban for representing one's own personal interest or a local governmental agency as an elected official of the agency.

Note that the permanent ban not only prohibits appearances and communication made in representation of another person, but also prohibits aiding, advising, counseling, consulting, or assisting in representing any other person making an appearance or communication before the official's former agency.

*Amy, a former attorney at the Department of Corrections and Rehabilitation, represented the department in an administrative hearing against a hospital. The hospital is now considering retaining the private law firm, for which Amy now works, to represent it in a continuation of the same hearing. May Amy work on the case? Under the permanent ban, Amy may not work on the case or assist another attorney in the firm working on the case. (Note the difference from the one-year ban, under which a former official may assist another person so long as the former official does not make an appearance or communication.) However, the firm may independently work on the case.*

### ***Are you making an appearance or communication, or assisting another person in making an appearance or communication, for the purpose of influencing?***

An appearance or communication is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.

The permanent ban only applies to a judicial or quasi-judicial proceeding such as any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency. (Section 87400(c).)

The following conduct is not prohibited because it does not involve an attempt to influence a decision:

- Formal participation in a panel or conference for educational purposes or to disseminate research.
- Attendance at general informational meetings, seminars, or similar events.
- Making requests for information about any matter of public record.
- Communications with the press.

### ***Did you previously participate in the proceeding?***

An official has previously participated in a proceeding if he or she has taken part in it personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information. Generally, participating in a proceeding means making, participating in making, or influencing a governmental decision. An official has not previously participated in a proceeding if the official's work with the agency was limited to clerical or ministerial acts. (Regulations 18741.1 and 18704(d)(1).)

*Todd, an employee of the Coastal Conservancy, received the initial telephone call regarding a suggested project but referred the call to another employee and did not take part in any decisions regarding the project. Did Todd "participate" in the proceeding? No, he engaged in a ministerial act.*

In addition, a former supervisor has participated in any proceeding that was "pending" before the official's former agency and that was under his or her supervisory authority. A proceeding is under a supervisor's "supervisory authority" if the supervisor:

- Has duties that include primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted;
- Has direct supervision of the person performing the investigation, review, or other action involved in the proceeding;

- Reviews, discusses, or authorizes any action in the proceeding; or
- Has any contact with any of the participants in the proceeding regarding the subject of the proceeding.

However, proceedings are not under an official's "supervisory authority," merely because the supervisor is responsible for the general oversight of the administrative actions or functions of a program, where the responsibilities concerning the specific or final review of the proceedings are expressly delegated to other persons in the agency's structure and the supervisor is not involved in the actual proceedings. (Regulation 18741.1(a)(4); see also *In re Lucas* (2000) 14 FPPC Ops. 15.)

*George, formerly the Deputy Director at Board of Equalization ("BOE"), oversaw the BOE's audit program. Now working for an accounting firm, George plans to represent taxpayers who are subject to audits before the BOE. As the Deputy Director at the BOE, George had no direct role, supervisory or otherwise, in the actual audit process. Moreover, his position did not involve reviewing any specific individual audit or audit decision, or otherwise supervising the audits. In light of his supervisory position, did George "participate" in the audits handled by the BOE? No. Although George was responsible for the creation and implementation of general policies, he was not involved "personally and substantially" in individual audits so long as there was no actual participation by him in supervising audits.*

### ***Is the current proceeding the same proceeding?***

Figuring out whether the "same proceeding" is involved is a factual question that can be complicated. Here are some general guidelines:

- The permanent ban applies for the duration of any proceeding.
- A general proceeding may be segmented into different phases, which may, under some circumstances, be treated as separate proceedings.
- A proceeding triggered by a technical defect in a prior proceeding is considered the same proceeding.

New contracts, even those involving the same parties, may be considered separate proceedings if they are based on new consideration and new terms in which the former employee did not participate. In addition, the application, drafting and awarding of a contract, license or approval is generally considered a new proceeding separate from the monitoring and performance of the contract, license or approval.

*Bob, a former engineer at CalTrans, designed the specifications for a bridge. Bob now works for a private firm that plans to bid on the bridge contract. May Bob assist the firm in making the bid? No, Bob may not represent or assist the construction firm in the bidding process.*

*Without Bob's assistance in the bidding process, Bob's firm is selected to build the bridge. CalTrans subsequently decides to build a feeder road to the bridge, and Bob's firm wants to bid on the road construction contract. May Bob participate? Yes, Bob may participate in the bid. This contract is a separate "proceeding" from the bridge contract. (Please note that this may raise issues under the California Public Contract Code. For more information, contact the Office of the Attorney General.)*

### ***Are there any other exceptions?***

The permanent ban does not prohibit an official from making any of the following:

- A statement based upon the official's special knowledge in a particular area that is the subject of the statement, so long as no compensation is received other than that regularly paid by law or regulation for witnesses.
- A communication before a court or agency solely for the purpose of furnishing information if the court or agency has found in writing that the official has outstanding or unavailable qualifications, that the official is acting in respect to a particular matter which requires such qualifications, and that the public interest would be served by the official's participation.

- An appearance or communication before a court or agency that has made a final decision in a proceeding, but has retained jurisdiction, if the former official's agency gives its consent to the participation by determining that at least five years have elapsed since termination of the former official's employment or term of office and the public interest would not be harmed.

## **Influencing Prospective Employment**

The ***ban of influencing prospective employment*** prohibits any public official from making, participating in making, or influencing a governmental decision that directly relates to a prospective employer while negotiating or after reaching an employment arrangement. (Section 87407; Regulation 18747.) In short, this law expands the Act's conflict-of-interest rules and related disqualification obligations to situations where a decision will have a reasonably foreseeable material financial effect on prospective employer even though the official does not yet have an economic interest in the employer.

### ***Are you covered by this law?***

The ban on influencing prospective employment applies to *all* "public officials" including every member, officer, employee or consultant of a state governmental agency. (Section 82048.)

### ***What activities trigger this prohibition?***

The ban on influencing prospective employment is triggered by negotiating or having an arrangement regarding prospective employment. While submitting a résumé or an application to a prospective employer does not trigger the ban, the following contacts will trigger the ban:

- An interview with an employer or his or her agent.
- Discussing an offer of employment with an employer or his or her agent.
- Accepting an offer of employment.

*Bill, an attorney at the Department of Health Care Services ("DHCS") receives a phone call from Granite Health, which would like to hire him as an in-house attorney. Bill has had several conversations with Granite Health and told them he was interested, but he is not sure what he wants to do. Bill is supposed to represent DHCS at a hearing regarding MediCal payments to Granite Health. May he do so? No. Bill is discussing his employment with Granite Health and, therefore, negotiating prospective employment. He may not participate in the hearing in any way.*

### ***When does a decision "directly relate" to a prospective employer?***

Under the ban on influencing prospective employment, an official may not make, participate in making or influence decisions that "directly relate" to a prospective employer. A decision "directly relates" to a prospective employer if:

- The employer, either directly or by an agent, has initiated a proceeding in which a decision will be made by filing an application, claim, appeal, or similar request.
- The employer, either directly or by an agent, is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.
- The employer will be financially affected by the decision, as defined in the Commission's conflict-of-interest regulations. (Regulations 18702.1 and 18702.3.) Officials should consult the conflict-of-interest regulations to determine the dollar threshold of the financial effect on the prospective employer that will trigger the official's disqualification from a decision.



### ***How do you determine the financial effect on the prospective employer?***

An official must try to obtain that information from the prospective employer. An official must make a good faith determination of the potential financial effect of the decision on the prospective employer.

### ***Do any exceptions apply?***

The ban on influencing prospective employment does not apply if:

- The prospective employer is a state, local, or federal governmental agency.
- The official is legally required to make or participate in the making of the governmental decision.
- The governmental decision will affect the prospective employer in substantially the same manner as it will affect a “significant segment” of the public generally.