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Skadden

State Lobbying Rules and Regulations

Public Affairs Council

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- Any time you communicate or interact with a public official, or spend money and a public official participates in the event or occasion, it is likely you are engaging in regulated activity.
 - If related to election or campaign, campaign finance and pay-to-play considerations.
 - If providing a personal benefit, gift considerations.
 - If in connection with influencing an official decision, lobbying considerations.



- Three categories of activities may trigger lobby registration and reporting requirements at federal, state, and local levels.
 - Attempt to influence legislation.
 - Attempt to influence legislation or formal rulemaking by executive branch agency.
 - Attempt to influence legislation or any decision of executive branch agency, including financial arrangements and contracts (e.g., seeking business from agency).
- Thresholds: Even if activity is considered lobbying activity, must meet thresholds (e.g., \$3,000 compensation in Connecticut; 25 hours or \$2,500 compensation in Massachusetts).
- Special issues when lobbying on behalf of an outside client
 - Both placement agent and client have to register in most states
- Placement agent restrictions under public pension fund policies

Traditional Lobbying Laws



- Category 1 lobbying (attempting to influence legislation)

Maine

North Dakota

Montana

Oregon

Nebraska

South Dakota

Nevada

Wyoming

- Category 2 lobbying (attempting to influence legislation or rulemakings)

Alaska

New Mexico

Colorado

South Carolina

Hawaii

Utah

Iowa

Vermont

Minnesota

Washington

(as to state actions or decisions)

West Virginia

Wisconsin

Trend Toward Category 3 Lobbying Laws



- Beyond "traditional" lobbying, trend toward regulation of Category 3 lobbying (including financial arrangements and contracts)

Alabama	Illinois	New Hampshire
Arizona	Indiana	New Jersey
Arkansas	Kansas	New York
California (placement agents only)	Kentucky	North Carolina
Connecticut	Louisiana	Ohio
Delaware	Maryland	Oklahoma
D.C.	Massachusetts	Pennsylvania
Federal	Michigan	Rhode Island
Florida	Minnesota*	Tennessee
Georgia	Mississippi	Texas
Idaho	Missouri	Virginia

* Metropolitan governmental units only



- Some state lobby laws cover local lobbying
 - Alabama, Arkansas, Georgia, Louisiana, Minnesota, Mississippi, Missouri, New York
- Some Florida county lobby laws cover lobbying municipalities within the county
 - Miami-Dade County, Palm Beach County

What is Direct Lobbying?



- Direct lobbying
 - Generally, direct lobbying includes preparation for (e.g., research, strategizing, or coordinating lobby activity) and communications with covered officials to influence legislative or executive
 - » Includes strategizing, planning, possibly other background work
 - Work performed with the intent that it will be used for lobbying purposes at the time it is created
 - » Can documents created for thought leadership be considered lobbying?
 - Education and strategic planning
 - » Strategizing with trade associations, task forces, and others in the industry
 - > Official need not be present, just need purpose to be attempting to influence
 - Must there be pending legislation, rulemaking, or RFP?
 - Ripening of preparation time that does not result in a contact
 - Travel time
 - Subject matter experts
 - Administrative time

What is Direct Lobbying?



- “Education” is often a good description of lobbying activity
- Door-opening
- Discussing legislation or policy at a site visit
 - » If there is an attempt to influence
 - » Prep time counts if purpose was to attempt to influence
- Attending a fundraiser and talking about legislation
 - » Generally, the time spent merely attending a fundraiser does not constitute lobbying. However, one-on-one opportunities to influence legislation should be included.
- C-Suite activity: leveraging activity and managing compliance
- Covered officials
 - » Concept varies widely across states. Some states cover virtually all public employees, unlike the limited federal definition.



- Grassroots lobbying: Communicating with the public or segment of the public, including with vendors and employees, asking them to contact their government representatives regarding legislation.
 - In 29 states, grassroots lobbying triggers registration.
 - In 6 additional states plus D.C., grassroots lobbying does not trigger registration but if already registered, grassroots expenditures must be reported (Alaska, Florida, Kentucky, Maine, Texas, Wisconsin).



- Generally the rules are not different from lobbying using traditional tools
- New York's new regulations classify various types of social media communications as direct or grassroots lobbying
- Social media can blur the personal and professional – is it company lobbying or personal activity?



- Types of social media communications, expanding lobbying footprint:
 - Direct messages
 - “Tagging” public officials
 - Likes and retweets
 - Emails
- Petitions
- Form letters
- Employee personal activity: when, if ever, is it lobbying for the company?
- State regulators are giving increased consideration to social media activity
 - Evolving area

Contingency Fee Bans



- Contingent fee restrictions under the lobbying laws (e.g., restriction in California, Florida, Massachusetts, New York, and Connecticut).
- Types of compensation that may be permissible under a contingency fee ban:
 - Retainer or flat fee
 - Target-based compensation
 - » This approach has some risk
 - Discretionary bonus
 - » Has to be based on a number of factors
 - » Cannot be formula-based
 - » No dollar of compensation should be traceable to a particular contract

Recent Developments



- Effective October 1, 2018, D.C. expressly covers procurement lobbying
- Effective July 1, 2018, Kansas expanded definition of lobbying to include procurement lobbying regardless of whether gifts provided
- Kentucky Executive Branch Ethics Commission guidance shifted from advising registration upon the second contact to advising registration upon the first contact
- Boston lobby law effective April 13, 2019
- On November 6, 2018, New Mexico voters approved ballot measure establishing an ethics commission with jurisdiction over lobbying.



- JCOPE regulations effective January 1, 2019
 - Define "direct lobbying" to include, for example:
 - » Direct messages to a public official through Facebook Messenger
 - » A post on a public official's Facebook page
 - » A tweet tagging a public official, when posted as part of job duties
 - » A billboard clearly intended to reach a public official
 - "Direct lobbying" does not include, standing alone:
 - » A social media post or tweet mentioning, but not tagging, a public official, even if the public official is a "friend" or "follower"
 - Expand the definition of "grassroots lobbying" to address social media communications
 - Challenge to regulations resulted in a settlement, providing the regulations do not have the full force and effect of law but are a statement for how JCOPE plans to administer and enforce the law



- Civil fines to criminal penalties.
- Losing business in Category 3 states.

There are increased certification requirements.

Requirement that company certify in RFP that it is in compliance with lobbying laws.

- Mandatory under law in Kentucky and L.A. County.
- Matter of practice in Ohio, Florida, and Dade County.



- Arizona Secretary of State's Office referred 116 lobbyists to Attorney General's Office for reporting violations
- In California, retirement systems are refusing to meet with individuals who should be registered as lobbyists but have not
- Colorado lobbyist fined \$74,000 for failure to register, state senator filed the complaint
- Chicago levies numerous fines for failure to register in the Rahm Emanuel e-mail case, led by a \$90,000 fine for one lobbyist
- Hawaii lobbyist and employer fined for failure to register, having misinterpreted an exemption
- Eighth Circuit upheld decision in favor of Missouri Ethics Commission that an uncompensated Missouri First lobbyist must register and report



- New York fines a lobbying firm \$180,000 for registration and reporting violations
 - \$62,000 settlement was reached but firm failed to comply with agreement terms
- New York fines a company \$98,000 for unreported lobby compensation and expenses
- New York City sweep based on New York State lobby filings
 - Detroit sweep based on Michigan lobby filings
- North Carolina: criminal charges brought against outside lobbyist for failure to register

Sexual Harassment Provisions Applicable to Lobbyists



- Beginning January 1, 2018, Illinois requires registrants to undergo sexual harassment training and adopt a harassment policy.
 - California incorporates anti-harassment policies into mandatory lobbyist training.
 - Georgia requires lobbyists to acknowledge and agree to abide by the General Assembly's sexual harassment policy when they register or renew.
 - Maine requires in-person sexual harassment training for lobbyists working in the capitol.
 - Maryland mandates that Ethics Commission training cover sexual harassment.
 - New Mexico offering voluntary sexual harassment training, with attendance indicated on lobbyist registration forms.
- Similar proposed legislation failed in Florida, Missouri, New York, Pennsylvania, and Utah.

Identifying the Lobby Client



- Follow the money
- What if a lobbyist is paid by one entity but lobbies in the interests of another?
- New York regs require disclosure of both contractual client and beneficial client
- Kentucky requires disclosure of “real party in interest” in addition to employer
- In Chicago, compensation is not required to trigger registration, and both a client and an employer must be disclosed
- In North Carolina, the principal is the entity that both pays for and benefits from the lobbying

How to Avoid Pay-to-Play Violations



- Avoid linkage: when making contributions or donations (political or charitable) or providing gifts
- Make sure that your consultants are properly vetted
- Comply with specific conflicts of interest laws (dual hatted employees and post-employment rules)
- Conflict of interests in government procurement process
- Be aware of strict liability pay-to-play laws (federal, state, and local)

What Is a Gift Law?



- Prohibition, limit, or restriction on providing personal benefit to public officials.
- Covered gifts include anything of personal value, such as meals, entertainment, transportation, and lodging, including in-kind gifts; but not in-kind political contributions.
 - Factors to consider
 - » Timing/Linkage
 - » Contacts with campaign staff or office staff?
 - » Content of presentation/meet and greets vs. campaign events
- Federal government, each state, and certain cities and counties have their own separate gift laws.

Types of State and Local Gift Laws



- Absolute ban regardless of value (e.g., Florida lobbyist law).
- Dollar limits – Some are per occasion (e.g., Florida non-lobbyist law – \$100 per occasion) and some are per period (e.g., California – \$500 per 12-month period).
- Prohibition on gifts that may reasonably tend to influence an official (Contrast: New Jersey and Nevada).

State and Local Gift Law Exemptions



- Single source issue – In states that have an aggregate gift limit, a company and its employees are considered part of a single source. Gifts made by those employees to a certain official are aggregated toward the same limit (e.g., Kentucky and Rhode Island). Subsidiaries are generally not included.
- Meals are sometimes exempt (e.g., Michigan lobby gift law).
- Travel and entertainment are sometimes exempt – usually, they must be provided in connection with giving a speech or as part of official duties (e.g., New York).
- Generally, gift laws apply to all corporate employees, not just lobbyists. However, lobbyists often have stricter limits.



- Valuation
 - Fair market value/face value vs. cost vs. value on secondary market (e.g., valuation of World Series tickets)
 - Actual consumption vs. pro rata share
- Tax and tip
- Buydowns
 - Permissible in California and Florida, impermissible under federal law and in Illinois and Chicago
- Splitting
 - Permissible in Florida, impermissible under federal law and for Louisiana's meal limit
- Bargained-for in an arms-length agreement (e.g., BPA, advisory board meetings)
- Legal liability
- Large events
- Gift to agency
- Consultant gifts

How to Comply?



- Types of preclearance strategy
 - Preclear everyone and everything
 - Preclearance thresholds
- Gift preclearance software

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