

SB

24

<TARGET><BILL>SB 24</BILL><SUBJECT>SB
24</SUBJECT><COMM>HJUD29</COMM></TARGET>

ALASKA STATE LEGISLATURE

WORLD TRADE

RULES COMMITTEE

ADMIN REG REVIEW

EDUCATION COMMITTEE



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SENATOR BERTA GARDNER

SENATE MINORITY LEADER

Sponsor Statement

SB24 - *"An Act relating to the applicability of the Legislative Ethics Act to legislative interns, legislative volunteers, consultants, independent contractors, sole proprietorships, and other legal entities."*

In 2014, through the routine advisory opinion process, the Legislative Ethics Administrator discovered that independent contractors and consultants were considered legislative employees in statute and subject to the ethics code. SB24 seeks to remedy the issue that arose from considering consultants and contractors as legislative employees.

In statute, anyone who has a contract with the legislature, or works as an independent consultant, must go through the full ethics training required for legislative employees, and they must follow the proper disclosures, candidate restrictions, gift requirements, etc. levied on members of the legislature and their staff.

Since the statute was written, in the late 1990's, independent contractors and consultants have not been filing said disclosures, attending trainings, or adhering to any part of the ethics code outside of their contract, which in no way suggest or implies they have been unethical in conduct.

Practically speaking, it's highly unlikely that the small ethics staff could realistically follow up on gift and financial disclosures for every contract and consultant to the legislature. Corporations often contract with the legislature as well, complicating the problem.

SB24 takes independent contractors and consultants out of the legislative employee definition and applies a certain suite of reasonable and practicable ethics requirements to them.

The Ethics Committee requests a fix to the problem through legislation and I ask for your support for this solution.

ALASKA STATE LEGISLATURE

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Senator Berta Gardner *Senate District I*

To: Representative Gabrielle LeDoux
House Judiciary, Chair

From: Senator Berta Gardner

Date: 6 April 2016

Re: Summary of Changes Between SB 24 Version W and Version E

A summary of changes between the first and second versions is as follows:

- In Version W, page 2, line 15 and 16, the language "public member of the committee, a staff member of the committee, and a" was deleted. This is because it was redundant language to existing law.
- Language was rephrased on page 1 to make it more succinct. Instead of reading "A legislative intern or legislative volunteer is a legislative employee for purposes of compliance with..." it now reads, "A legislative intern or volunteer shall comply with..."

If you have any questions or concerns, please don't hesitate to contact Stephen Sweet in my office at (907) 465-4930.

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version:	CSSB 24(JUD)
Fiscal Note Number:	2
(S) Publish Date:	3/2/2016

Identifier: SB24-LEG-COU-02-19-16
 Title: LEGIS. ETHICS ACT: CONTRACTORS,INTERNS
 Sponsor: GARDNER
 Requester: Senate Judiciary

Department:
 Appropriation:
 Allocation:
 OMB Component Number: 0

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates					
			FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	
OPERATING EXPENDITURES								
Personal Services								
Travel								
Services								
Commodities								
Capital Outlay								
Grants & Benefits								
Miscellaneous								
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None								
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time								
Part-time								
Temporary								

Change in Revenues								
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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency?
 If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Initial Version. One page. Zero note.

Prepared By:	Jessica Geary, Finance Manager	Phone:	(907)465-6626
Division:	Legislative Affairs Agency	Date:	02/19/2016 12:36 PM
Approved By:	Pam Varni, Executive Director	Date:	02/19/2016
Agency:	Legislative Affairs Agency		

ALASKA LEGISLATIVE ETHICS ACT -- AS 24.60

Interns/Volunteers

Article 1. Purpose and Applicability

010. Legislative Findings and Purpose

020. Applicability; relationship to common law and other laws

Article 2. Standards of Conduct

030. Prohibitions related to conflicts of interest and unethical conduct Yes

031. Restrictions on fundraising Yes

033. Restrictions on employee candidacies Yes

035. Protection of whistle blowers Yes

037. Open meetings guidelines Yes

039. Discrimination prohibited Yes

040. Contracts or leases

050. State programs and loans

060. Confidential information Yes

070. Disclosure of close economic associations

075. Compassionate gift exemption

080. Gifts Yes

085. Restrictions on earned income and honoraria

090. Nepotism

100. Representation

105. Deadlines for filing disclosures

112. Applicability to legislative interns and volunteers

115. Disclosure required of a legislator, legislative employee, or public member of the committee after final day of service

Article 3. Legislative Ethics Committee; Opinions; Complaints

130. Select Committee on Legislative Ethics

131. Alternate members

134. Prohibited conduct by public members and committee employees and contractors

140. Authority of the committee and its subcommittees

150. Duties of the committee

155. Legislative ethics course

158. Advice by staff Yes

160. Advisory opinions Yes

165. Use of information submitted with request for advice Yes

170. Proceedings before the committee; limitations Yes

174. Recommendations to legislature where violator is a legislator

176. Recommendations where violator is a legislative employee Yes

178. Sanctions recommended by committee Yes

Article 4. Required Annual Financial Disclosure

200. Financial disclosure by legislators, public members of the committee, and legislative directors

210. Deadlines for filing of disclosure statements

220. Administration of AS 24.60.200 – 24.60.260

230. Statements as public records

240. Civil penalty for late filing

250. Effect of failure to file

255. Administrative complaints

260. Prohibited conduct relating to disclosures; penalties

Article 5. Miscellaneous and General Provisions

970. Actions by the attorney general

980. Cooperation by state agencies

990. Definitions

995. Short title

Independent Contractor and Consultant AS 24.60 Legislative Ethics Act

Recommendations by H. Conner Thomas, Chair Gary J. Turner, and Joyce Anderson

Prepared November 10, 2014

General Comments:

- Remove the terms “independent contractor, or consultant” from the definition of “legislative employee” in AS 24.60.990(a)(11).
- Create a new statutory section addressing the provisions of AS 24.60, Legislative Ethics Act, applicable to independent contractors and consultants. (Similar to AS 24.60.112, Applicability to legislative interns and volunteers.)
- No disclosure requirements.
- No ethics training.
- Focus is directed on conflict of interest statutes and gifts; including advice and complaints.
 - AS 24.60.030(a)(1) and (a)(3) Conflict of Interest and Unethical Conduct.
 - AS 24.60.031 Restrictions on fundraising – certain sections.
 - AS 24.60.033 Restrictions on employee candidacies.
 - AS 24.60.039 Discrimination prohibited.
 - AS 24.60.060 Confidential Information.
 - AS 24.60.080 Gifts – certain sections.
 - AS 24.60.158 Advice by staff.
 - AS 24.60.160 Advisory opinions.
 - AS 24.60.165 Use of information submitted with request for advice.
 - AS 24.60.170 Complaints
 - AS 24.60.176 Recommendations where violator is a legislative employee.
 - AS 24.60.178 Sanctions recommended by committee.

AS 24.60.030 Conflict of Interest and Unethical Conduct

(a) A legislator or legislative employee may not

- (1) solicit, agree to accept, or accept a benefit other than official compensation for the performance of public duties; this paragraph may not be construed to prohibit lawful solicitation for and acceptance of campaign contributions, solicitation or acceptance of contributions for a charity event, as defined in AS 24.60.080(a)(2)(B), or the acceptance of a gift under AS 24.60.075 or 24.60.080;
- (2) *(not included)*
- (3) knowingly seek, accept, use, allocate, grant, or award public funds for a purpose other than that approved by law, or make a false statement in connection with a claim, request, or application for compensation, reimbursement, or travel allowances from public funds;

***RATIONALE:** Section (a)(1) and (a)(3) cover the basic conflict of interest concerns – prohibition of receipt of a benefit other than official compensation for work performed as an independent contractor or consultant for the legislature; and submitting false claims for compensation.*

OR – Include the more detailed sections of the Conflict of Interest section.

(The Ethics Office does not recommend including the more detailed sections below.)

(a) A legislator or legislative employee may not

- (1) solicit, agree to accept, or accept a benefit other than official compensation for the performance of public duties; this paragraph may not be construed to prohibit lawful solicitation for and

- acceptance of campaign contributions, solicitation or acceptance of contributions for a charity event, as defined in AS 24.60.080(a)(2)(B), or the acceptance of a gift under AS 24.60.075 or 24.60.080;
- (2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of the legislator, legislative employee, or another person; this paragraph does not prohibit
 - (A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;
 - (B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;
 - (H) reasonable use of the Internet by a legislator or legislative employee except if the use is for election campaign purposes;
 - (3) *(not included)*
 - (4) require a legislative employee to perform services for the private benefit of the legislator or employee at any time, or allow a legislative employee to perform services for the private benefit of a legislator or employee on government time; it is not a violation of this paragraph if the services were performed in an unusual or infrequent situation and the person's services were reasonably necessary to permit the legislator or legislative employee to perform official duties;
 - (5) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for the purpose of political fund raising or campaigning; this paragraph does not prohibit
 - (A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;
 - (B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;
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AS 24.60.031 Restrictions on fundraising.

(a) A legislative employee may not

- (1) on a day when either house of the legislature is in regular or special session, solicit or accept a contribution or a promise or pledge to make a contribution for a campaign for state or municipal office; however, a legislative employee may, except in the capital city, or in the municipality in which the legislature is convened in special session if the legislature is convened in a municipality other than the capital city, solicit or accept a contribution, promise, or pledge for a campaign for state or municipal office that occurs during the 90 days immediately preceding the election for that office; or
- (2) accept money from an event held on a day when either house of the legislature is in regular or special session if a substantial purpose of the event is to raise money on behalf of the legislative employee for political purposes; however, this paragraph does not prohibit a legislative employee from accepting money from an event held in a place other than the capital city or a municipality in which the legislature is convened in special session if the legislature is convened in a municipality other than a capital city during the 90 days immediately preceding an election for state or municipal public office in which the legislative employee is a candidate.

***RATIONALE:** Should an independent contractor and consultant be prohibited from soliciting or accepting a contribution for a campaign for state or municipal office? This subject matter is a policy call.*

AS 24.60.033. Restrictions on employee candidacies.

A legislative employee may not file a letter of intent to become a candidate or file a declaration of candidacy for the legislature.

RATIONALE: An independent contractor and consultant would have a conflict of interest if performing work for the legislature and running as a candidate for the legislature at the same time.

AS 24.60.039. Discrimination prohibited.

(a) A legislator or legislative employee may not engage in acts of discrimination in violation of AS 18.80.220.

(b) If a person files a complaint with the committee under AS 24.60.170 alleging a violation of this section, the committee may refer the complainant to the State Commission for Human Rights and may defer its consideration of the complaint until after the complainant establishes to the satisfaction of the committee that the commission has completed its proceedings in the matter.

RATIONALE: Standard language in a contract.

AS 24.60.060. Confidential information.

(a) A legislator, legislative employee, or public member of the committee may not knowingly make a n unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law.

(b) A legislator or legislative employee who is the subject of a complaint under AS 24.60.170 violates this section if the legislator or legislative employee violates a protective order issued under AS 24.60.170(i).

RATIONALE: Standard language in a contract.

AS 24.60.080. Gifts.

- (a) Except as otherwise provided in this section, a legislator or legislative employee may not
- (1) solicit, accept, or receive, directly or indirectly, a gift worth \$250 or more, whether in the form of money, services, a loan, travel, entertainment, hospitality, promise, or other form, or gifts from the same person worth less than \$250 that in a calendar year aggregate to \$250 or more in value;
 - (2) solicit, accept, or receive a gift with any monetary value from a lobbyist, an immediate family member of a lobbyist, or a person acting on behalf of a lobbyist, except
 - (A) food or beverage for immediate consumption;
 - (B) a contribution to a charity event, tickets to a charity event, and gifts to which the tickets may entitle the bearer; however, under this subparagraph a legislator or legislative employee may not solicit, accept, or receive from the same lobbyist, an immediate family member of the lobbyist, or a person acting on behalf of the lobbyist, tickets to a charity event, gifts to which the tickets may entitle the bearer, or both, that in a calendar year aggregate to \$250 or more in value; in this subparagraph, "charity event" means an event the proceeds of which go to a charitable organization with tax-free status under 26 U.S.C. 501(c)(3) and that the Alaska Legislative Council has approved in advance; the tickets may entitle the bearer to admission to the event,

to entertainment, to food or beverages, or to other gifts or services in connection with the charity event;

- (A) a gift that is unconnected with the recipient's legislative status and is from a member of the legislator's or legislative employee's immediate family;
- (B) a gift delivered on the premises of a state facility and accepted on behalf of a recognized nonpolitical charitable organization; or
- (C) a compassionate gift under AS 24.60.075.

RATIONALE: An independent contractor and consultant should be restricted from receiving a gift that is connected to their work for the legislature that has a value of \$250 or more – similar to the restriction for legislators and legislative staff. Additionally, the same restrictions should apply for gifts from a lobbyist. Both types of gifts could create possible conflicts of interest.

AS 24.60.158. Advice by staff.

The committee shall authorize and train its staff to give oral advice and provide a written informal nonbinding advice letter to persons seeking guidance as to the spirit or legal requirements of this chapter, provided that the advice is given with the express stipulations that

- (1) the opinions given are not necessarily those of the committee;
- (2) although the advice is given in good faith, the person seeking the advice relies on it at the person's own risk; and
- (3) the advice is not binding upon the committee.

RATIONALE: Independent contractors and consultants should be able to ask for advice from the Ethics Office in order to comply with the requirements of the Legislative Ethics Act.

AS 24.60.160. Advisory opinions.

(a) On the request of the committee, the Alaska Public Offices Commission, a person to whom this chapter applies, or a person who has been newly elected to the legislature, the committee shall issue an advisory opinion within 60 days as to whether the facts and circumstances of a particular case constitute a violation of ethical standards. If it finds that it is advisable to do so, the committee may issue an opinion under this section on the request of a person who reasonably expects to become subject to this chapter within the next 45 days. The 60-day period for issuing an opinion may be extended by the committee if the person requesting the opinion consents.

(b) An opinion issued under this section is binding on the committee in any subsequent proceedings concerning the facts and circumstances of the particular case unless material facts were omitted or misstated in the request for the advisory opinion. An opinion issued under this section must be issued with sufficient deletions to prevent disclosing the identity of the person or persons involved. Advisory opinion discussions and deliberations are confidential, unless the requester and anyone else named in the request who is covered by this chapter waives confidentiality. The committee's final vote on the advisory opinion is a public record.

RATIONALE: Independent contractors and consultants should be able to ask for formal advice from the Ethics Office in order to comply with the requirements of the Legislative Ethics Act.

AS 24.60.165. Use of information submitted with request for advice.

The committee may not bring a complaint against a person based upon information voluntarily given to the committee by the person in connection with a good faith request for advice under AS 24.60.158 or

24.60.160, and may not use that information against the person in a proceeding under AS 24.60.170. This section does not preclude the committee from acting on a complaint concerning the subject of a person's request for advice if the complaint is brought by another person, or if the complaint arises out of conduct taking place after the advice is requested, and does not preclude the committee from using information or evidence obtained from an independent source, even if that information or evidence was also submitted with a request for advice.

RATIONALE: Necessary statutory section for AS 24.60.158 and AS 24.60.160.

ETHICS COMPLAINTS

RATIONALE: The next three sections relate to procedures regarding ethics complaints. The complaint section is necessary to provide consequences if the requirements of the Act as specified are not followed.

Contract Subcommittee member, Conner Thomas, and Chair Gary J. Turner, recommend adding to AS 24.60.178(b), Sanctions recommended by committee, a new section to read: "in the case of an independent contractor or consultant, revocation of the contract."

AS 24.60.170. Proceedings before the committee; limitations.

(a) The committee shall consider a complaint alleging a violation of this chapter if the alleged violation occurred within five years before the date that the complaint is filed with the committee. The committee may not consider a complaint filed against all members of the legislature, against all members of one house of the legislature, or against a person employed by the legislative branch of government after the person has terminated legislative service. However, the committee may reinstitute proceedings concerning a complaint that was closed because a former employee terminated legislative service if the former employee resumes legislative service, whether as an employee or a legislator, within five years after the alleged violation.

(b) A complaint may be initiated by any person. The complaint must be in writing and signed under oath by the person making the complaint and must contain a statement that the complainant has reason to believe that a violation of this chapter has occurred and describe any facts known to the complainant to support that belief. The committee shall upon request provide a form for a complaint to a person wishing to file a complaint. Upon receiving a complaint, the committee shall advise the complainant that the committee or the subject of the complaint may ask the complainant to testify at any stage of the proceeding as to the complainant's belief that the subject of the complaint has violated this chapter. The committee shall respond to a complaint concerning the conduct of a candidate for election to state office received during the campaign period in accordance with (o) of this section. The committee shall treat a complaint concerning the conduct of a candidate for election to state office that is pending at the beginning of a campaign period in accordance with (p) of this section. The committee shall immediately provide a copy of the complaint to the person who is the subject of the complaint.

(c) When the committee receives a complaint under (a) of this section, it may assign the complaint to a staff person. The staff person shall conduct a preliminary examination of the complaint and advise the committee whether the allegations of the complaint, if true, constitute a violation of this chapter and whether there is credible information to indicate that a further investigation and proceeding is warranted. The staff recommendation shall be based on the information and evidence contained in the complaint as supplemented by the complainant and by the subject of the complaint, if requested to do so by the staff member. The committee shall consider the recommendation of the staff member, if any, and shall determine whether the allegations of the complaint, if true, constitute a violation of this chapter. If the committee determines that the allegations, if proven, would not give rise to a violation, that the complaint is frivolous on its face, that there is insufficient credible information that can be uncovered to warrant further

investigation by the committee, or that the committee's lack of jurisdiction is apparent on the face of the complaint, the committee shall dismiss the complaint and shall notify the complainant and the subject of the complaint of the dismissal. The committee may ask the complainant to provide clarification or additional information before it makes a decision under this subsection and may request information concerning the matter from the subject of the complaint. Neither the complainant nor the subject of a complaint is obligated to provide the information. A proceeding conducted under this subsection, documents that are part of a proceeding, and a dismissal under this subsection are confidential as provided in (l) of this section unless the subject of the complaint waives confidentiality as provided in that subsection.

(d) If the committee determines that some or all of the allegations of a complaint, if proven, would constitute a violation of this chapter, or if the committee has initiated a complaint, the committee shall investigate the complaint, on a confidential basis. Before beginning an investigation of a complaint, the committee shall adopt a resolution defining the scope of the investigation. A copy of this resolution shall be provided to the complainant and to the subject of the complaint. As part of its investigation, the committee shall afford the subject of the complaint an opportunity to explain the conduct alleged to be a violation of this chapter.

(e) If during the investigation under (d) of this section, the committee discovers facts that justify an expansion of the investigation and the possibility of additional charges beyond those contained in the complaint, the resolution described in (d) of this section shall be amended accordingly and a copy of the amended resolution shall be provided to the subject of the complaint.

(f) If the committee determines after investigation that there is not probable cause to believe that the subject of the complaint has violated this chapter, the committee shall dismiss the complaint. The committee may also dismiss portions of a complaint if it finds no probable cause to believe that the subject of the complaint has violated this chapter as alleged in those portions. The committee shall issue a decision explaining its dismissal. Committee deliberations and vote on the dismissal order and decision are not open to the public or to the subject of the complaint. A copy of the dismissal order and decision shall be sent to the complainant and to the subject of the complaint. Notwithstanding (l) of this section, a dismissal order and decision is open to inspection and copying by the public.

(g) If the committee investigation determines that a probable violation of this chapter exists that may be corrected by action of the subject of the complaint and that does not warrant sanctions other than correction, the committee may issue an opinion recommending corrective action. This opinion shall be provided to the complainant and to the subject of the complaint, and is open to inspection by the public. Within 20 days after receiving the opinion, the subject of the complaint may request a confidential meeting with the committee at which meeting the committee shall explain the reasons for its recommendations. The committee may divulge confidential information to the subject of the complaint. The information remains confidential. The subject of the complaint may comply with the opinion or may request a hearing before the committee under (j) of this section. After the hearing, the committee may amend or affirm the opinion. If the subject of the complaint agrees to comply with the opinion but later fails to complete the corrective action in a timely manner, the committee may formally charge the person as provided in (h) of this section or may refer the matter to the appropriate house of the legislature, in the case of a legislator, or, in the case of a legislative employee, to the employee's appointing authority. The appropriate house of the legislature or the appointing authority, as appropriate, may take action to enforce the corrective action or may decline to take action and refer the matter to the committee. In either case, the committee may formally charge the person under (h) of this section.

(h) If the subject of a complaint fails to comply with an opinion and the committee decides under (g) of this section to charge the person, or if the committee determines after investigation that there is probable cause to believe that the subject of the complaint has committed a violation of this chapter that may require sanctions instead of or in addition to corrective action, the committee shall formally charge the person. The charge shall be served on the person charged, in a manner consistent with the service of summons under

the rules of civil procedure, and a copy of the charge shall be sent to the complainant. The person charged may file a responsive pleading to the committee admitting or denying some or all of the allegations of the charge.

(i) A person charged under (h) of this section may engage in discovery in a manner consistent with the Alaska Rules of Civil Procedure. The committee may adopt procedures that

- (1) impose reasonable restrictions on the time for this discovery and on the materials that may be discovered;
- (2) permit a person who is the subject of a complaint to engage in discovery at an earlier stage of the proceedings;
- (3) impose reasonable restrictions on the release of information that the subject of a complaint acquires from the committee in the course of discovery, or on information obtained by use of the committee's authority, in order to protect the privacy of persons not under investigation to whom the information pertains; however, the committee may not impose restrictions on the release of information by the subject of the complaint unless the complainant has agreed to be bound by similar restrictions and has not made public the information contained in the complaint, information about the complaint, or the fact of filing the complaint.

(j) If the committee has issued a formal charge under (h) of this section, and if the person charged has not admitted the allegations of the charge, the committee shall schedule a hearing on the charge. The committee may appoint an individual to present the case against the person charged if that individual does not provide other legal advice to the committee except in the course of presenting cases under this subsection. The hearing shall be scheduled for a date more than 20 and less than 90 days after service of the charge on the person charged, unless the committee schedules a later hearing date. If the complainant prevents the hearing from starting before the 90-day deadline passes and a quorum of the committee determines by vote of a majority of committee members the delay is not supported by a compelling reason or will result in the person charged being deprived of a fair hearing, the committee may dismiss the complaint with prejudice or enter some other order the committee determines is appropriate. At the hearing, the person charged shall have the right to appear personally before the committee, to subpoena witnesses and require the production of books or papers relating to the proceedings, to be represented by counsel, and to cross-examine witnesses. A witness shall testify under oath. The committee is not bound by the rules of evidence, but the committee's findings must be based upon clear and convincing evidence. Testimony taken at the hearing shall be recorded, and evidence shall be maintained.

(k) Following the hearing, the committee shall issue a decision stating whether or not the subject of the complaint violated this chapter, and explaining the reasons for the determination. The committee's decision may also indicate whether the subject cooperated with the committee in its proceedings. If the committee finds a violation, or lack of cooperation by the subject, the decision shall recommend what sanctions, if any, the committee believes are appropriate. If there has not been a hearing because the person charged admitted to the allegations of the charge, the committee shall issue a decision outlining the facts of the violation and containing a sanctions recommendation.

(l) Proceedings of the committee relating to complaints before it are confidential until the committee determines that there is probable cause to believe that a violation of this chapter has occurred. Except to the extent that the confidentiality provisions are waived by the subject of the complaint, the person filing a complaint shall keep confidential the fact that the person has filed a complaint under this section as well as the contents of the complaint filed. The complaint and all documents produced or disclosed as a result of the committee investigation are confidential and not subject to inspection by the public. If in the course of an investigation or probable cause determination the committee finds evidence of probable criminal activity, the committee shall transmit a statement and factual findings limited to that activity to the appropriate law enforcement agency. If the committee finds evidence of a probable violation of AS 15.13, the committee shall transmit a statement to that effect and factual findings limited to the probable violation

to the Alaska Public Offices Commission. All meetings of the committee before the determination of probable cause are closed to the public and to legislators who are not members of the committee. However, the committee may permit the subject of the complaint to attend a meeting other than the deliberations on probable cause. The confidentiality provisions of this subsection may be waived by the subject of the complaint. Except to the extent that the confidentiality provisions are waived by the subject of the complaint, if the committee finds that a complainant has violated any confidentiality provision, the committee shall immediately dismiss the complaint. Dismissal of a complaint under this subsection does not affect the right of the committee or any other person other than the complainant to initiate a complaint based on the same factual allegations.

(m) All documents issued by the committee after a determination of probable cause to believe that the subject of a complaint has violated this chapter, including an opinion recommending corrective action under (g) of this section and a formal charge under (h) of this section, are subject to public inspection. Hearings of the committee under (j) of this section are open to the public, and documents presented at a hearing, and motions filed in connection with the hearing, are subject to inspection by the public. Deliberations of the committee following a hearing, deliberations on motions filed by the subject of a charge under (h) of this section, and deliberations concerning appropriate sanctions are confidential.

(n) The committee shall dismiss a complaint against a person employed by the legislative branch of government if the person terminates legislative service. The committee may in its discretion dismiss a complaint against a former member of the legislature whether the complaint was filed before or after the former member departed from the legislature.

(o) The committee shall return a complaint concerning the conduct of a candidate for state office received during a campaign period to the complainant unless the subject of the complaint permits the committee to assume jurisdiction under this subsection. If the committee receives a complaint concerning the conduct of a candidate during the campaign period, the committee shall immediately notify the subject of the complaint of the receipt of the complaint, of the suspension of the committee's jurisdiction during the campaign period, and of the candidate's right to waive the suspension of jurisdiction under this subsection. The candidate may, within 11 days after the committee mails or otherwise sends notice of the complaint to the candidate, notify the committee that the candidate chooses to have the committee proceed with the complaint under this section. If the candidate does not act within that time or if the candidate notifies the committee that the candidate is not waiving the suspension of committee jurisdiction, the committee shall return the complaint to the complainant with notice of the suspension of jurisdiction under this subsection and of the right of the complainant to file the complaint after the end of the campaign period.

(p) When the committee has a complaint concerning the conduct of a candidate for state office pending before it at the beginning of a campaign period that has not resulted in the issuance of formal charges under (h) of this section, the committee may proceed with its consideration of the complaint only to the extent that the committee's actions are confidential under this section. The committee may not, during a campaign period, issue a dismissal order or decision under (f) of this section, issue an opinion under (g) of this section, or formally charge a person under (h) of this section. If the committee has formally charged a person under (h) of this section and the charge is still pending when a campaign period begins, the committee shall suspend any public hearings on the matter until after the campaign period ends. The parties to the hearing may continue with discovery during the campaign period. If a hearing has been completed before the beginning of a campaign period but the committee has not yet issued its decision, the committee may not issue the decision until after the end of the campaign period. Notwithstanding the suspension of public proceedings provided for in this subsection, a candidate who is the subject of a complaint may notify the committee in writing that the candidate chooses to have the committee proceed with the complaint under this section.

(q) A campaign period under this section begins on the later of 45 days before a primary election in which the legislator or legislative employee is a candidate for state office or the day on which the individual files as a candidate for state office and ends at the close of election day for the general or special election in which the individual is a candidate or on the day that the candidate withdraws from the election, if earlier. For a candidate who loses in the primary election, the campaign period ends on the day that results of the primary election showing that another individual won the election are certified.

AS 24.60.176. Recommendations where violator is a legislative employee.

(a) If the person found to have violated this chapter is or was a legislative employee, the committee's recommendations shall be forwarded to the appropriate appointing authority which shall, as soon as is reasonably possible, determine the sanctions, if any, to be imposed. The appointing authority may not question the committee's findings of fact. The appointing authority shall assume the validity of the committee's findings and determine and impose the appropriate sanctions. The appointing authority has the power to impose a sanction recommended by the committee or to impose a different sanction. The appointing authority shall enforce the sanction and shall report to the committee at a time specified by the committee concerning the employee's compliance with the sanction.

(b) In this section, "appointing authority" means

- (1) the legislative council for employees of the Legislative Affairs Agency and of the legislative council and for legislative employees not otherwise covered under this subsection;
- (2) the Legislative Budget and Audit Committee for the legislative fiscal analyst and employees of the division of legislative finance, the legislative auditor and employees of the division of legislative audit, and employees of the Legislative Budget and Audit Committee;
- (3) the appropriate finance committee for employees of the senate or house finance committees;
- (4) the appropriate rules committee for employees of
 - (A) standing committees of the legislature, other than the finance committees;
 - (B) the senate secretary's office and the office of the chief clerk of the house of representatives; and
 - (C) house records and senate records;
- (5) the legislator who made the hiring decision for employees of individual legislators; however, the legislator may request the appropriate rules committee to act in the legislator's stead;
- (6) the ombudsman for employees of the office of the ombudsman, other than the ombudsman;
- (7) the legislature for the ombudsman.
- (8) the victims' advocate for employees of the office of victims' rights, other than the victims' advocate;
- (9) the legislature for the victims' advocate.

AS 24.60.178. Sanctions recommended by committee.

(a) When the committee finds that a person has violated this chapter, the committee may recommend appropriate sanctions, including sanctions set out in (b) of this section.

(b) The sanctions that the committee may recommend include

- (1) imposition of a civil penalty of not more than \$5,000 for each offense or twice the amount improperly gained, whichever is greater;
- (2) divestiture of specified assets or withdrawal from specified associations;
- (3) additional, detailed disclosure, either as a public disclosure or as a confidential disclosure to the committee;
- (4) in the case of a legislative employee, suspension of employment with or without pay for a stated period of time or until stated conditions are met, or termination from legislative employment;
- (5) restitution of property or reimbursement of improperly received benefits;

- (6) public or private written reprimand;
- (7) censure, including, in the case of a legislator, removal from a leadership position or committee membership and a determination that the legislator will not be appointed to serve in a leadership position or on a committee during the remainder of that legislature;
- (8) placing the person on probationary status;
- (9) in the case of a legislator, expulsion from the house of the legislature;
- (10) any other appropriate measure.

(c) In addition to or in place of a sanction recommended under (b) of this section, the committee may recommend that the subject of a complaint be required to pay all or a portion of the costs related to the investigation and adjudication of a complaint.



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Research Brief

TO: Joyce Anderson, Administrator
FROM: Susan Haymes, Legislative Analyst
DATE: April 28, 2014
RE: Consultants and Independent Contractors Subject to State Ethics Laws
LRS Report 14.298

You asked about laws governing ethics compliance and training for consultants and independent contractors. Specifically, you wished to know if consultants and contractors are considered public employees and subject to state ethics laws or if they are subject to ethics compliance through different laws. You asked for examples from 25 state governmental bodies.

State ethics laws seek to prevent conflict between private interests and public duties, foster integrity in public service, and promote the public's trust and confidence in that service by placing restrictions on what state employees and officials may do on the job, after hours, and after leaving public service. Typically, ethics laws include provisions for activities related to conflict of interests, gifts, use of confidential information, financial disclosure, and post-employment. Most states have an ethics commission or board that administers and enforces state ethics laws.¹ The commissions may have jurisdiction over public officials and employees from more than one branch of government—for example, legislators, legislative employees, executive branch officials, state employees, candidates, judicial officials, local officials, lobbyists, and contractors. Thus, not all provisions of an ethics law may necessarily apply to all public officers and employees, and some apply primarily to the interaction of private individuals and entities with public officers. In addition to a States Ethics Act, some states also require each state department to develop a code of conduct for employees. For example, state procurement offices often include codes of conduct in contracts with vendors.

Each state's law defines terms such as *public employee*, *state employee*, *public officer*, and *public official* to indicate who is covered under the various ethics provisions. For example, most states require some form of personal financial disclosure for public officers, including candidates, elected public officials, and certain appointed public officers, but generally not for most public or state employees.

With regard to consultants and independent contractors, we researched ethics laws and advisory opinions from 25 states, spoke with ethics staff from numerous states, and requested relevant information from the National Conference of State Legislatures (NCSL).² For the purposes of this report, we focus primarily on whether contractors and consultants are subject to state ethics laws governing public employees and officials. However, we also include examples from states that have enacted ethics codes specifically for contractors or vendors. For example, in Georgia, contractors are not considered public employees and are thus not subject to the State Ethics Act, but are subject to a Vendor Disclosure Law. In Pennsylvania, contractors are not public employees but are subject to Contractor Integrity Provisions, which cite sections in the Public Officials and Ethics Act.

¹ States that do not have an ethics commission include Arizona, Idaho, New Mexico, North Dakota, South Dakota, Vermont, Virginia, and Wyoming.

² As you know, state and local governments offer contracts for many goods and services. Most contracts are awarded through a process of competitive bidding. Two common exceptions to competitive bidding are for professional services and sole sources. Competitive bidding is usually not required for professional services that generally involve specialized expertise, use of professional judgment, or a high degree of creativity in the performance of the contract.

Some states, such as Iowa, specifically exclude contractors in its definition of state employees. Other states—such as California, Hawaii, Idaho, Indiana, Louisiana, Massachusetts, and North Carolina—specifically include contractors or consultants in definitions of state or public employees. Most of these states do not consider all contractors subject to ethics laws, but only those contractors who are performing a governmental function, such as providing specialized expertise to help define policies or draft laws. In other cases, whether a person is defined as an independent contractor or public employee often depends upon the specific circumstances of the contract. For example, some states, such as Illinois and Nevada, consider consultants or contractors who are under the direction of or subject to the control of a state official to be subject to the state Ethics Act. In 17 of the 25 states, consultants and independent contractors are subject to the state ethics law in some fashion.

In the following pages we describe ethics laws from each of the 25 states whose laws we reviewed and how they relate to independent contractors and consultants (emphasis added).³ This, of course, is not a definitive account of all ethics laws that may exist in these states that impact contractors or consultants. We also provide a summary of the information we found in the attached table. When contractors and consultants are subject to state ethics law, we indicate whether they are subject to conflict of interest provisions, gift restrictions, or financial disclosure provisions. We also indicate whether ethics training is required for contractors.

Alabama

The Alabama Ethics Commission administers and enforces the state's ethics law, which apply to the executive and legislative branches of government, as well as to local government officials.⁴ The definition of *public employee* is as follows:

Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income.⁵

According to Hugh Evans, General Counsel for the Alabama Ethics Commission, generally, a contractor or consultant who works 40 hours a week for a single entity is considered a public employee.⁶ However, he noted that such determinations are fact-specific and may vary depending on the circumstances. The Commission offers ethics training for all public employees. However, ethics training is only mandatory for lobbyists, legislators, and public officials and public employees who are required to file a statement of economic interests (Code of Ala. § 36-25-14).⁷ The Alabama Ethics Law prohibits public employees from using an official position for personal gain or accepting gifts from lobbyists. Any person who enters a

³ The 25 states are Alabama, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia.

⁴ More information on the Alabama Ethics Commission and the Alabama Ethics Law can be accessed at <http://ethics.alabama.gov/default2.aspx>.

⁵ Code of Ala. § 36-25-1(26).

⁶ Mr. Evans can be reached at 334.242.3747.

⁷ All elected public offices, candidates, members of the Alabama Ethics Committee, public employees whose base pay is at least \$75,000 annually, and fire chiefs, among others, are required to file a statement of economic interests.

contract with the State of Alabama or any county or municipality in an amount exceeding \$7,500 must report to the commission the names of any adult child, parent, spouse, brother, or sister who is a public official or public employee (Code of Ala. § 36-25-16).

California

The California Fair Political Practices Commission (FPPC) administers and enforces the Political Reform Act, which sets ethics rules for state and local government officials, including rules regulating conflict of interest, gifts, and post-government employment (Cal Gov Code Title 9). The FPPC also regulates campaign financing and spending and lobbyist registration and reporting.⁸

The Political Reform Act defines *agency official* as any member, officer, employee or consultant of any state agency who as "part of his official responsibilities participates in any administrative action in other than a purely clerical, secretarial or ministerial capacity."⁹ Similarly, *legislative official* means any employee or consultant of the Legislature whose duties are not solely secretarial, clerical, or manual (Cal Gov Code § 82038). The FPPC has determined that these definitions do not include every consultant retained by state agencies and the Legislature, but are instead limited "to those persons who participate in governmental decisions, and who may be influenced improperly by the actions of lobbyists and their employers."¹⁰

In *Morrissey*, Advisory Opinion No. 75-120, the FPPC faced the question of whether the term "consultant" refers only to an employee of the State having that job title, or whether it also includes a person who provides consultation services to the Legislature or a state agency under independent contract. The FPPC determined that a consultant who furnishes information, advice, recommendation, or counsel to an agency or the Legislature, but who functions independently of the agency and does not possess authority with respect to any government decisions, is not an agency official or a legislative official.

Under the Political Reform Act all public agencies are required to adopt a conflict-of-interest code. The code must, among other things, designate positions required to file Statements of Economic Interests and assign disclosure categories specifying the types of interests to be reported. In September 2011, the FPPC adopted Form 805 for agencies to document filing requirements for persons serving as consultants who make or participate in governmental decisions. We include a copy of Form 805 as Attachment B.

California law requires state officials to complete an ethics training course within six months of hire and every two years thereafter. The Office of the California Attorney General provides ethics training for state and local officials.

Connecticut

The Connecticut Office of State Ethics (Office) is charged with administering ethics laws and providing education, guidance and advice to state employees, public officials, lobbyists, and legislators.¹¹ The Code of Ethics for Public Officials applies to public officials and state employees (Conn. Gen. Stat. Title 1, Ch. 10). Just one provision of the Ethics Code applies to consultants or independent contractors. This provision (Conn. Gen. Stat. § 1-86e) prohibits a consultant's use of confidential information,

⁸ More information on the FPPC can be accessed at <http://www.fppc.ca.gov/>.

⁹ Cal Gov Code § 82004.

¹⁰ *Opinion Re: Morrissey*, No. 75-120, August 3, 1976. We include the opinion as Attachment A.

¹¹ More information on the Connecticut Office of State Ethics and state ethics laws can be accessed at <http://www.ct.gov/ethics/site/default.asp>.

the acceptance of other state contracts which would impair his or her independent judgment, or the acceptance or giving of anything of value that influences the consultant's actions. We identified several advisory opinions, which we include as Attachment C that provide interpretations of § 1-86e. For example, Advisory Opinion 1997-22 found that when consultants or independent contractors are faced with decisions involving their or their families' financial interest, they must notify the contracting state agency to approve or disapprove of the action. Advisory Opinion 1999-14 notes that "the application of § 1-86e to independent contractors and consultants is not intended to interfere with their business, but rather to prevent a private entity from using state money to, for example, hire immediate family members without appropriate oversight."

In Connecticut, ethics training is mandatory for public officials, which include state-wide elected officers, legislators, and Governor's appointees, among others (Conn. Gen. Stat. § 1-81c). The Office of State Ethics also offers in-person and online ethics training for state employees, lobbyists, state contractors, and other interested groups. In addition, each state agency has its own ethics policy which may be more restrictive than the Office of State Ethics. For example, the State Contracting Standards Board requires state employees involved in procurement and certain prequalified state contractors and "substantial subcontractors" to take the ethics training course (Conn. Gen. Stat. § 4e-4[h][2]).

Delaware

The Delaware Public Integrity Commission administers and implements the State Employees', Officers and Officials' Code of Conduct for the executive branch, financial disclosure laws for the executive, judicial, and legislative branches, and lobbyists' registration and expense reporting laws (29 Del. C. § 58). According to the Commission's Legal Counsel, Deborah Moreau, the definition of state employee or state officer does not include independent contractors or consultants, and therefore they are not subject to the ethics law (29 Del. C. § 5804).¹²

Florida

The Florida Commission on Ethics administers the Code of Ethics for Public Officers and Employees, which applies to public officers, employees, candidates, lobbyists, and others in Florida state and local government, with the exception of judges (Fla. Stat. § 112.311, *et seq.*). The Commission on Ethics has issued several opinions on the status of consultants and contractors under ethics laws. Generally, the commission has found that independent contractors are not salaried employees and, therefore, are not considered public employees or officers and are outside the purview of state ethics laws.¹³ The opinions distinguish between an employee and independent contractor based on two main factors: whether the contractor has an independent business or occupation, and whether the contractor is subject to the control of the employer as to manner or detail of the performance of the contracted work.¹⁴

Georgia

The Georgia Government Transparency and Campaign Finance Commission administers and enforces the Transparency and Campaign Finance Act, which applies to the executive, legislative, and judicial branches of government (O.C.G.A. 21-5-1 *et seq.*). According to Holly LaBerge, Executive Secretary, while contractors and consultants are not public employees and

¹² Ms. Moreau can be reached at 302.739.2399.

¹³ We include advisory opinions, CEO 74-6, CEO 77-132, and CEO 14-05 as Attachment D.

¹⁴ The opinions cite Am. Jur. 2d Independent Contractors s. 1, 1968, which defines an independent contractor as "One who, in exercising an independent employment, contracts to do certain work according to his own methods, without being subject to the control of his employer as to manner or detail of performance of the contracted work."

subject to the ethics act, they are subject to the Vendor Disclosure Law, which is also administered by the Commission. A vendor is any person who sells to or contracts with any state agency for the provision of any goods or services.¹⁵

The vendor disclosure law requires the following:

Any vendor who, either directly or through another person, makes a gift or gifts to one or more public employees exceeding in the aggregate \$250.00 in value during any calendar year shall file a disclosure report with the commission in the form specified by the commission listing the amount and date of receipt, the name and mailing address of any vendor making the gift, and the name, address, and position of each public employee receiving such a gift.¹⁶

Hawaii

The Hawaii State Ethics Commission administers the State Ethics Code (HRS § 84) and the Lobbyists Law (HRS § 97). The State Ethics Code governs elected officers and public employees of the State. Under the Ethics Code, *employee* means

any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.¹⁷

The Ethics commission has interpreted this definition to mean that a state employee may be someone hired under contract to the State; however, not all contractors or consultants are necessarily employees of the State. The Commission has addressed this issue on a case-by-case basis. For example, in Advisory Opinion No. 89-2, the Ethics Commission determined that an attorney who had contracted with a state board to review and revise its regulations was not an employee and therefore not subject to the Ethics Code.¹⁸ In its decision, the Commission considered the substance and terms of the contract as well as the person's actual working relationship with the agency. The Commission noted the attorney was engaged in a business, she was required to provide her own facilities, supplies, and support staff, and the length of time of her contract was 40 hours over a three-month period. All of these factors indicated the attorney was an independent contractor and not an employee.

Contractors and consultants who are considered to be employees are subject to the Ethics Code, which prohibits legislators and employees from accepting gifts that are intended to reward or influence the legislator or employee (HRS § 84-11). They are also required to file a gifts disclosure statement each year under certain conditions (HRS § 84-11.5) and are subject to conflict of interest rules (HRS § 84-14).

Hawaii requires mandatory ethics training for legislators, members of the board of education, trustees of the offices of Hawaiian affairs, the governor, the lieutenant governor, and executive department heads and deputies, but not to any other officer or employee of the State (HRS § 84-41).

¹⁵ Ms. LaBerge notes that other Georgia state agencies may have ethics rules regarding contractors and consultants. Ms. LaBerge can be reached at 404.463.1980.

¹⁶ O.C.G.A. 45-1-6G. More information on the vendor disclosure law is available at <http://ethics.ga.gov/filer-information/vendor-gift-disclosures/>.

¹⁷ HRS § 84-3.

¹⁸ We include a copy of Opinion No. 89-2 as Attachment E.

Idaho

While Idaho does not have an independent ethics commission or board, the Office of the Attorney General provides external oversight on ethics issues. Three primary statutes govern ethics in Idaho government: the Bribery and Corrupt Influence Act (Idaho Code § 18-1351, *et seq.*), the Prohibition against Contracts with Officers Act, and the Ethics in Government Act (Idaho Code § 59-7). The Bribery and Corrupt Influence Act regulates the conduct of public servants in potential problem areas, including conflicts of interest and nepotism. Unless otherwise stated, the Bribery Act applies to all *public servants*, defined as follows:

any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function, but the term does not include witnesses.¹⁹

The Ethics in Government Act applies to all *public officials*. An employed public official is defined as follows:

any person holding public office of a government entity by virtue of employment, or a person employed by a governmental entity on a consultative basis.²⁰

As is the case in California, consultants who perform a governmental function are subject to Idaho's ethics laws.

Illinois

The Illinois State Officials and Ethics Act applies to the executive and legislative branches of government (5 ILCS 430/1, *et seq.*).²¹ The Illinois Executive Ethics Commission enforces the Ethics Act for all employees of the Executive Branch of state government. The Office of the Legislative Inspector General enforces the Ethics Act for members of the General Assembly and state employees who are employed by a legislative member, the Senate Operations Committee, or the Joint Committee on Legislative Support Services.

Under the Ethics Act, an *employee* means

any person employed full-time, part-time, or pursuant to a contract and whose employment duties are subject to the direction and control of an employer with regard to the material details of how the work is to be performed or (ii) any appointed or elected commissioner, trustee, director, or board member of a board of a State agency, including any retirement system or investment board subject to the Illinois Pension Code or (iii) any other appointee.²²

Similar to practices of other states, the consultant's or contractor's status as an employee or independent contractor depends on the working relationship with the state agency. The Ethics Act prohibits State employees, legislators and officers from soliciting or accepting gifts, with certain exceptions (5 ILCS 430/10), and from engaging in prohibited political activities during

¹⁹ Idaho Code § 59-7.

²⁰ Idaho Code § 59-703(10)(d).

²¹ The Illinois State Officials and Employees Ethics Act can be accessed at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ChapterID=2&ActID=2529>.

²² 5 ILCS 430/1-5.

working hours (5 ILCS 430/5-15). All State of Illinois employees, including full-time, part-time, and contracted employees and appointees are required to complete annual ethics trainings (5 ILCS 430/5-10).²³

Indiana

The Indiana Office of Inspector General investigates criminal and ethics violations by state employees, writes the Indiana Code of Ethics, staffs the State Ethics Commission, and educates and advises state workers on the Code of Ethics (42 IAC 1-5-1, *et seq.*). In addition to state officers and employees, the Indiana Code of Ethics applies to contractors and consultants. For purposes of the Ethics Act, an *employee* means

an individual who is employed by an agency on a full-time, a part-time, a temporary, an intermittent, or an hourly basis. The term includes an individual who contracts with an agency for personal services.²⁴

Under the section of the Ethics Code providing for ethics training, contractors are specifically included as follows:

All state officers, employees, and special state appointees shall be properly trained in the code of ethics as described in this article. All persons who have a business relationship with a state agency are obligated to abide by the code of ethics.²⁵

All contractors and consultants are required to take the Contractor and Executive Branch Lobbyist Ethics Training course.²⁶ The Indiana Ethics Code, with certain exceptions, prohibits state employees from accepting or soliciting gifts, divulging confidential information, and engaging in bribery and conflict of interest activities, and also restricts certain post-employment activities.

Iowa

The Iowa Government Ethics and Lobbying Act governs the executive and legislative branches of government (Iowa Code § 68B). The Iowa Ethics and Campaign Disclosure Board administers the Ethics Act for executive branch officials, employees, candidates for statewide office, and executive branch lobbyists. The conduct of members and persons connected with the General Assembly is regulated by the standing Ethics Committees in each house, which in addition to the Ethics Act have adopted their own ethics rules.

Iowa law specifically excludes contractors from the definition of *state employee* as follows:

A person who is not an official and is a paid employee of the state of Iowa and does not include an independent contractor, an employee of the judicial branch who is not an employee of the office of attorney general, an employee of the general assembly, an employee of a political subdivision of

²³ More information on Illinois ethics training can be accessed at <https://www2.illinois.gov/eec/Pages/faq.aspx>.

²⁴ IC 4-2-6-1(9). Indiana legislators are governed by the Indiana Code of Legislative Ethics, which is enforced by the House ethics committee and Senate ethics committees (IC 2-2.1-3, IC 2-7-2, and IC 35-44).

²⁵ 42 IAC 1-4-1(a). The Indiana Department of Administration provides a step-by-step registration process for vendors and contractors that do business with the State. Step 3 of this process is a review of the Ethics Code, which prohibits certain actions for "state employees and contractors." More information can be accessed at <http://www.in.gov/ldaa/2355.htm>.

²⁶ The Indiana Contractor and Executive Branch Lobbyist Training course can be accessed at <http://www.in.gov/ig/2689.htm>.

the state, or an employee of any agricultural commodity promotional board, if the board is subject to a producer referendum.²⁷

Local employee means a person employed by a political subdivision of this state and does not include an independent contractor (Iowa Code § 68B.2[14]). *Legislative employee* means "a permanent full-time employee of the general assembly but does not include members of the general assembly" (Iowa Code § 68B.2[12]). *Public employees* mean state employees, legislative employees, and local employees (Iowa Code § 68B.2[20]). As specifically stated, independent contractor or consultants are not subject to the Iowa Ethics Act.

Louisiana

The Louisiana Ethics Administration Program administers the Code of Governmental Ethics for all state and local public employees, appointed members of boards and commissions, and elected officials other than judges (La R.S. 42:1101 *et seq.*) The Ethics Code defines a *public employee* as follows:

Anyone, whether compensated or not, who is (a) an officer or official of a governmental entity who is not filling an elective office; (b) appointed by an elected official to a position to serve the government or government agency, when the elected official was acting in his official capacity; (c) engaged in the performance of a governmental function; or (d) is under the supervision or authority of an elected official or another governmental employee.²⁸

In Opinion No. 93-266, the Commission on Ethics was faced with the question of whether an attorney who provided legal services to a public entity under a contract was a public employee and subject to the Code of Governmental Ethics. The attorney contended that he was an independent contractor and subject only to the Rule of Professional Conduct for attorneys. The Commission, citing two judicial decisions on this issue, determined the attorney was a public employee and subject to the ethics code because

- 1) Private practicing attorneys who accept compensation for rendering legal services to governmental entities are engaged in the performance of a governmental function and, accordingly, become public employees as that term is defined at Section 1102(18) of the Code and,
- 2) That such attorneys are subject not only to the Rules of Professional Conduct but, also, to the prohibitions contained in part two of the Code of Governmental Ethics.²⁹

Specifically, the attorney and members and employees of his law firm were prohibited from accepting compensation for services from entities that have a business, contractual, or financial interest in the public entity for which he is under contract (La R.S. 42:1111C[2][d]). The ethics code prohibits public employees from accepting gifts, with certain exceptions, and subjects public employees to conflict of interest laws and certain post-employment restrictions.

²⁷ Iowa Code § 68B.2(25).

²⁸ La R.S. 42:1102.

²⁹ We include EC Opinion 93-266 as Attachment F. The two decisions are *Midboe v. Commission on Ethics for Public Employees*, 646 So. 2d 351 (Louisiana 1994); and *Louisiana Insurance Guaranty Association v. Commission on Ethics for Public Employees*, 656 So. 2d 670 (Louisiana 1995).

Public servant includes *public employees* and elected officials. Beginning January 1, 2012, each public servant shall receive a minimum of one hour of education and training on the Code of Ethics during each year of his or her public employment or term of office (La. R.S. 42:1170).

Massachusetts

The State Ethics Commission is a non-partisan, independent state agency, which oversees the administration and enforcement of the conflict of interest (ALM GL ch. 268A) and financial disclosure (ALM GL ch. 268B) laws.³⁰ The conflict of interest law sets standards of conduct for all state, county, and municipal employees and officials. The financial disclosure law requires public officials, political candidates, and state county officials in designated policy-making positions to file an annual statement of their financial interests and private business associations. In 2009, lawmakers established mandatory conflict of interest education and training requirements for all public employees. Specifically, each year all public employees must receive, and acknowledge in writing, a copy of the summary of the law. Every two years, all public employees must complete a conflict of interest online training program.

With respect to the conflict of interest law, the definitions of state, county and municipal employees are very broad. The definitions are not limited to paid full-time public employees, but apply to persons who are paid or unpaid, volunteers, part-time employees, seasonal employees, "special employees" and individuals working under a contract.³¹ For example, the definition of *state employee* is as follows:

a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, **on a full, regular, part-time, intermittent or consultant basis**, including members of the general court and executive council.

Not all contractors or consultants are subject to conflict of interest laws or the required training. For example, the employees of a firm that delivers art supplies to school departments are not public employees, and are not subject to the mandatory education and training requirements. Neither are the employees of a bank that provides financial services to various municipalities. However, if a public agency expressly or impliedly contracts for the personal services of a particular individual employed by a private firm, then the particular employee may be considered a public employee for purposes of the conflict of interest law. For example, if a public agency hires a real estate consulting firm to provide development services, and the contract specifies that a particular partner will provide those services, then the partner is a public employee. By contrast, if a school department contracts with a school bus company to drive its students and the company can assign any of its drivers to do that work, the drivers are not public employees for conflict of interest law purposes. In short, employees of consulting firms who provide specialized services, such as legal, design, or architectural services, are more likely to be considered public employees than are employees of firms that provide goods or non-specialized services agencies.³²

Because consultants may be considered state employees, the Massachusetts Ethics Commission issued Advisory Opinion 06-01, which explains how the conflict of interest law applies to consultants and attorneys who personally perform services for state, county, and municipal government.³³ According to the advisory opinion, a consultant who becomes a public employee

³⁰ Massachusetts ethics laws can be accessed at <http://www.mass.gov/ethics/laws-and-regulations/>.

³¹ "Special" public employees include those who hold positions for which no compensation is provided and whom the relevant public entity has classified as special employees because their positions allow them to hold other jobs during normal working hours or because they work a limited number of hours for the public entity. Special public employees are subject to certain less restrictive prohibitions.

³² More information on vendors and contractors can be accessed at <http://www.mass.gov/ethics/education-and-training-resources/faqs.html>.

³³ We include the advisory opinion as Attachment G.

is subject to all of the restrictions of the conflict of interest law concerning bribes, gifts and gratuities, self-dealing and nepotism, standards of conduct, and certain post-employment restrictions. A partner of such a public employee may also be subject to restrictions.³⁴

We also include as Attachment H, a 1982 ethics opinion, EC-COI-82-153, that addresses the status of an attorney employed part-time as a consultant by a Legislative House committee. The consultant wished to also represent a private organization by drafting enabling legislation and providing advice during the legislative session. The opinion found that as a part-time employee he was considered a "special" state employee and therefore, subject to certain less restrictive prohibitions under the law (ALM GL ch. 268A § 4). Nonetheless, the consultant was advised to, among other things, refrain from representing the organization or other private clients in any proceedings which involve parties with whom he dealt in his official legislative capacity.

Michigan

The Michigan State Board of Ethics administers the State Ethics Act for executive branch employees and public officers only (MCL § 15.341, *et. seq.*). According to staff at the State Board of Ethics, the law applies to classified and non-classified employees and does not include independent contractors or consultants.³⁵

Nevada

In Nevada, public officers and public employees are governed by a Code of Ethical Standards that is intended to prevent abuse of public office by prohibiting situations in which conflicts of interest may arise (NRS 281A). The Nevada Commission on Ethics administers the Ethics Code for executive and legislative branch employees and officials. Among other things, the Code of Ethical Standards prohibits public officers and employees from accepting gifts, contracting with government entities, accepting private compensation for public duties, using confidential information for personal gain, and engaging in self-dealing (NRS 281A.400).

A *public officer* means a person who is elected or appointed to a position established by the Nevada Constitution or state or local laws and who exercises discretion over the formulation of public policy, the expenditure of public funds, and the administration of laws and rules (NRS 281A.160). A *public employee* means a person who performs duties under the direction of a public officer for compensation paid by the State or a political subdivision (NRS 281A.150).

Depending on the terms of the contract, a consultant or contractor could be considered a public employee and subject to state ethics laws. Such a determination is made by the Commission on a case by case basis. The main issue is whether the consultant is working under the direction of a public officer. For example, in Advisory Opinion No. 12-42C, the Commission determined a principal of a local school district who was employed under a contract was not a public employee but an independent contractor and therefore the Commission did not have jurisdiction. The Commission found the principal did not perform his public duties under the direction or control of any person. Rather his duties were controlled by the terms of his contract and he undertook those responsibilities independent of any supervision or direction.³⁶

³⁴ These restrictions do not apply to the consultant's employees or associates with whom he is not in partnership.

³⁵ The Michigan State Board of Ethics can be reached at 517.373.3644.

³⁶ We include Advisory Opinion No. 12-42C as Attachment I.

New Jersey

The New Jersey Conflicts of Interest Law governs the conduct of all officers and employees in the executive and legislative branches of state government, including compensated and uncompensated, part-time and full-time, classified and unclassified personnel (N.J. Stat. 52:13D-12). The New Jersey State Ethics Commission administers and enforces the Conflict of Interest Law for the executive branch while the Joint Legislative Committee on Ethical Standards administers and enforces for the legislative branch. Ethics training is mandatory for state employees and special state officers.

According to the Ethics Commission, the Conflicts Law does not directly govern the conduct of independent contractors hired by the state.³⁷ However, independent contractors may be governed by Executive Order (EO) No. 189, which requires state agencies to adopt standards for persons providing goods and services to or performing contracts for the state. Among other things, EO 189 requires individuals who seek to submit a bid or negotiate for a state contract to certify they have read the Plain Language Guide to Ethical Business Conduct. Consistent with the Conflicts of Interest Law, the Guide to Ethical Business prohibits independent contractors from

- Profiting from a conflict of interest on the part of State employee,
- Providing gifts to State employee,
- Making illegal campaign contributions, and
- Profiting from confidential information.³⁸

Similar to other states, ethics codes adopted by specific State agencies may contain provisions applicable to independent contractors hired by that agency.

New York

In 2011, the New York State Legislature passed comprehensive ethics legislation known as the Public Integrity Reform Act (PIRA). The PIRA established an independent agency, the New York State Joint Commission on Public Ethics to oversee both the Executive and Legislative Branches.³⁹ Public Officers Law §73 governs business or professional activities by state officers and employees and Public Officers Law §74 is the Code of Ethics. *Legislative employee* means any officer or employee of the legislature, but does not include members of the legislature. *State officer or employee* means heads of state departments and their deputies, officers and employees of statewide elected officials, officers and employees of state departments, boards, bureaus, divisions, and commissions, and members or directors of public authorities. Consultants and independent contractors are not considered employees and therefore are not covered under the ethics laws. However, consultants and independent contractors may be covered under ethics policies developed by state agencies and under state procurement rules.

³⁷ This topic is addressed in frequently asked questions at <http://www.state.nj.us/ethics/faqs/>.

³⁸ The New Jersey Business Ethics Guide can be accessed at http://www.state.nj.us/treasury/purchase/ethics_guide.shtml.

³⁹ More information on the New York State Joint Commission on Public Ethics can be accessed at <http://www.jcope.ny.gov/>.

North Carolina

The North Carolina State Ethics Commission administers, investigates, and enforces the State Government Ethics Act (N.C. Gen. Stat. § 138A).⁴⁰ The State Government Ethics Act covers executive branch officials, legislators, legislative employees and judicial branch officials. The Act contains three primary components: disclosure of financial interests, identifying and avoiding conflicts of interest, and a gift ban. The Commission shares administrative responsibilities for the lobbying laws with the Secretary of State (N.C. Gen. Stat. § 120C).

The definition of *public servant* includes, among others, "individuals under contract with the State" working for state officials (N.C. Gen. Stat. § 138A-30(m)). *Legislative employees* means

Employees and officers of the General Assembly and consultants and counsel to committees of either house of the General Assembly or of legislative commissions, who are paid by state funds, but not including legislators, members of the Council of State, or pages.⁴¹

According to Kathy Edwards, Assistant Director/Compliance Officer, North Carolina State Ethics Commission, consultants are subject to the Government Ethics Act.⁴² Legislative employees are subject to conflict of interest and gift provisions of the law, but not financial disclosure provisions.

Public servants are required to attend ethics training within six months of the person's election, appointment, or employment and to attend a refresher course at least every two years thereafter. Every legislative employee is required to participate in an ethics presentation within three months of employment, and a refresher ethics education presentation at least every two years thereafter (N.C. Gen. Stat. § 138A-14).

Ohio

The Ohio Ethics Commission administers the Ohio Ethics Law, which governs all public officials and employees (ORC Ann. § 102 and ORC Ann. §§ 2921.42 and 2921.43). The Joint Legislative Ethics Commission oversees and administers the Ohio Ethics law for members and employees of the General Assembly. The Ohio Ethics Law defines a *public official or employee* to include a person who is elected or appointed to an office or is an employee of any public agency (ORC Ann. § 102.01). In a 1975 Advisory Opinion, the Ethics Commission found that, generally, independent contractors of public agencies are not included "in that class of persons described by the phrase 'employed by' as used in Section 102.04 of the Revised Code." The primary test for purposes of ethics legislation is whether the person employed is engaged in a distinct occupation or business and the extent of control over the person by the employer.

However, restrictions in ORC Ann. § 2921.42 apply to any *public official*.⁴³ The term *public official* is defined in ORC Ann. § 2921.01(A) as "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity." Because a consultant is not elected or appointed to an office or an employee of the state, the consultant's status rests on whether he or she is an *agent* of a public entity. In Advisory Opinion No. 92-001, the Ethics

⁴⁰ More information on the North Carolina Ethics Commission can be accessed at <http://test.ethicscommission.nc.gov/index.htm>.

⁴¹ N.C.G.S. § 120C-100(6) and N.C.G.S. § 138A-3(21).

⁴² Ms. Edwards can be reached at 919.715.2257.

⁴³ ORC Ann. § 2921.42 prohibits public officials from using influence to secure contracts or the use of public funds for which the public official or the public official's family has an interest.

Commission determined that person is an *agent* of a public entity for purposes of ORC Ann. § 2921.42 if all three of the following apply:

- 1) The individual has the authority to enter into contracts with others and thus has the authority to act on the public entity's behalf and bind the public entity;
- 2) The public entity exercises the right of control over the individual; and
- 3) The individual's contractually prescribed actions are directed toward the attainment of any objective sought by the public entity.⁴⁴

Similarly, restrictions in ORC Ann. § 2921.43 prohibit *public servants* from accepting "any compensation" with certain exceptions, while performing official duties as a public servant or from receiving a supplement to public compensation. ORC Ann. § 2921.01(B) defines *public servant* to mean

- 1) Any public official;
- 2) Any person performing ad hoc a governmental function, including, but not limited to, a juror, member of a temporary commission, master, arbitrator, advisor, or consultant;
- 3) A person who is a candidate for public office, whether or not the person is elected or appointed to the office for which the person is a candidate.⁴⁵

For purposes of ORC Ann. § 2921.43, the question is whether the consultant is performing an ad hoc governmental function. In Advisory Opinion No. 93-013, the Ethics Commission found that a consultant who was procuring and providing insurance benefit plans for county employees was performing a governmental function and subject to ORC Ann. § 2921.43. Therefore, the consultant was prohibited from receiving money from any party, other than from the public entity he served for performing tasks and duties pursuant to his contract.

Oregon

The Oregon Government Ethics Commission administers the provisions of the Government Ethics Law (ORS § 244) and Lobby Regulation Law (ORS § 171.725 – § 171.785 and § 171.992).⁴⁶ The Oregon Government Ethics Law applies to all elected and appointed officials, employees and volunteers at all levels of state and local government in all three branches. For purposes of the Government Ethics Law, *public official* means

Any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body as defined in ORS 174.019 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services.

The Commission adopted a regulation clarifying the use of "agent" in the definition of public official that reads as follows:

As defined in ORS 244.020(14), a public official includes anyone serving the State of Oregon or any of its political subdivisions or any other public body in any one of the listed capacities, including as an "agent." An "agent" means any individual performing governmental functions. Governmental

⁴⁴ We include Advisory Opinion No. 92-001 as Attachment J.

⁴⁵ We include Advisory Opinion No. 93-013 as Attachment K.

⁴⁶ More information on the Oregon Government ethics Commission can be accessed at <http://www.oregon.gov/OGEC/Pages/Index.aspx>.

functions are services provided on behalf of the government as distinguished from services provided to the government. This may include private contractors and volunteers, depending on the circumstances. This term shall be interpreted to be consistent with Attorney General Opinion No. 8214 (1990).

We include Attorney General Opinion No. 8214 as Attachment L. The Opinion found that within the definition of public official, the phrase "officer, employee, agent or otherwise" is all-inclusive, exhibiting the Legislature's intent that every person "serving" the government is a "public official" regardless of the precise legal characterization of the person's relationship with the government. Further, the definition embodies the concept of government service. Thus, the substantive requirements and prohibitions of the ethics law apply only to persons who are part of government. The Opinion concludes as follows:

[A] person does not become a "public official" subject to the ethics law merely by contracting to provide services to the government under contract. Rather, only persons who are part of the government as subject to ethics law. Thus, an individual who, pursuant to contract, performs governmental functions or responsibilities on behalf of the government—e.g., a hearing officer—is a "public official" subject to the ethics law. Similarly, where a corporation or other entity that is essentially governmental (i.e., performs governmental functions on behalf of government) contracts with a state agency, that entity's officers, employees and agents are "public officials."⁴⁷

The Oregon Ethics Law prohibits public officials from using their position or office for financial gain and from using confidential information (ORS 244.040). Under certain circumstances the aggregate value of gifts is also restricted. According to Tammy Hedrick, Oregon Government Ethics Commission, ethics training is not statutorily required but voluntary.⁴⁸

Pennsylvania

The Pennsylvania State Ethics Commission enforces the Public Officials and Ethics Act (65 Pa. C.S. § 11) and has additional responsibilities under the Lobbying Disclosure Law and the Race Horse Development and Gaming Act. Ethics training is not mandatory but is offered by the Commission to all public officials and public employees. While contractors are not considered public employees for purposes of the Ethics Act, they are subject to Contractor Integrity Provisions, which set out extensive ethics standards for contractors and are to be included in all Commonwealth contracts.⁴⁹

The Contractor Integrity Provisions, among other things, prohibit contractors from influencing or attempting to influence government employees as set forth under the State Ethics Act, offering or giving any gratuity to public officials or employees, disclosing confidential information, or having a financial interest in other public contracts. Contractors are also subject to provisions in the Campaign Finance and the Lobbying Disclosure Act (65 Pa C.S. § 13A).

Rhode Island

The Rhode Island Ethic Commission enforces and administers the Code of Ethics, which sets forth standards of conduct for all state and municipal elected and appointed officials, as well as for employees of state and local government, boards,

⁴⁷ OAR 199-005-0035(7).

⁴⁸ Ms. Hedrick can be reached at 503.378.5105.

⁴⁹ *Commonwealth Official Procurement Handbook*, Part I, Chapter 14, Contractor Responsibility. The Handbook can be accessed at http://www.portal.state.pa.us/portal/server.pt/community/procurement_handbook/14304. We include a copy of the Pennsylvania Contractor Integrity Provisions as Attachment M.

commissions, and agencies (R.I. Gen. Laws § 36-14). The Rhode Island Code of Ethics also covers state vendors—persons or business entities that sell goods or provide services to any state agency. Specifically, the Ethics Code prohibits state vendors from providing goods or services for less than fair market value for the personal use of a state procurement official if the vendor has sold goods or services during the preceding 24 months to the state agency employing the person (R.I. Gen. Laws § 36-14.1.2).

The Code of Ethics also prohibits public officials and employees from engaging in a financial transaction, including private employment, loans, monetary, political, or charitable contributions, with an employee, contractor, or consultant over whom he or she exercises supervisory responsibilities. Exceptions include transactions in the normal course of a regular commercial business, or if the subordinate initiates the financial transaction, or for charitable events that are sponsored by the highest official or governing body of the state or municipality (R.I. Gen. Laws § 36-14-5011).

Texas

The Texas Ethics Commission administers and enforces ethics laws pertaining to state officers and executive branch employees, local government officials, legislators and legislative branch employees, as well as conflict of interest rules involving the Texas Comptroller of Public Accounts (CPA).⁵⁰ Specifically, the Commission administers and enforces rules for employees, vendors, and potential vendors acting under the delegated authority of the CPA (Tex. Gov't Code § 2155.003). Accordingly, the CPA's Texas Procurement and Support Services (TPASS) adopted a Code of Ethics, which, among other things prohibits vendors or potential vendors from giving a state employee anything of value.

The Commission is required to provide training for legislators, legislative employees, and state employees in cooperation with state agencies. Because independent contractors are not defined as state employees, they are not required to receive ethics training. The TPASS does, however, provide relevant ethics rules at its website and in manuals explaining purchasing rules to vendors.⁵¹

Washington

The Washington State Executive Ethics Board is an independent body made up of five persons appointed by the Governor. The Office of the Attorney General provides staff for the Board, which administers the Ethics in Public Service Act for state officers and employees (Rev. Code Wash § 42.52). Under the Ethics Act, a *state employee* means an individual who is employed by an agency in any branch of state government. *State officer* includes every person holding a position of public trust in or under an executive, legislative, or judicial office of the state, including among others, judges and members of the legislature (Rev. Code Wash § 42.52.010).

According to Ruthann Bryant, administrative officer, Executive Ethics Board, consultants and independent contractors are not considered state employees or officials. Consequently, the Board does not have jurisdiction over consultants or contractors and they are not subject to the Ethics Act.⁵² Ms. Bryant notes that the Ethics Board has developed a brochure for contractors, which explains the restrictions on gifts to state employees.

⁵⁰ Tex. Gov't Code § 572, § 573, § 574 and § 575. More information on the Texas Ethics Commission can be accessed at <http://www.ethics.state.tx.us/index.html>.

⁵¹ The Ethics Code for procurement can be accessed at <http://www.window.state.tx.us/procurement/pub/manual/1-2.pdf> and <http://www.window.state.tx.us/procurement/pub/contractguide/>.

⁵² Ms. Bryant can be reached at 360.586.3265.

West Virginia

The West Virginia Ethics Act applies to all public servants including employees, elected officials, and appointed officials, whether full-time or part-time, in the legislative, judicial, and executive branches of state, county and municipal government (W. Va. Code § 6B). According to Joan Parker, Executive Director, West Virginia Ethics Commission, independent contractors or consultants are not considered public employees and therefore are not subject to the Ethics Act.⁵³ The Ethics Commission relies on the definition of employee as determined by the federal Internal Revenue Service (IRS).⁵⁴ Ms. Parker notes that employees receive a paycheck with the standard withholdings subtracted from their salary, and receive a Form W-2 at year's end. In contrast, independent contractors receive a Form 1099 for the full amount of pay without undergoing any withholdings for taxes, social security, and other deductions.

We hope this is helpful. If you have questions or need additional information, please let us know.

⁵³ Ms. Parker can be reached at 304.558.0664.

⁵⁴ We include West Virginia Ethics Commission Advisory Opinion No. 2011-04, May 5, 2011, as Attachment N.

Consultants and Independent Contractors Subject to State Ethics Law in Selected States

Regulating Entity	Cover Contractors Y/N	Citation	Branch		Conflict of Interest	Gifts	Ethics Training	Financial Disclosure	Notes
			Exec.	Leg.					
Alabama Ethics Commission	Y	Code of Ala. § 36-25	Y	Y	Y	Y	Y	N	Contractors who work at least 40 hours a week for the Legislature, or a state or local government agency are generally considered to be public employees and subject to the Alabama ethics laws. Ethics training is mandatory only for those public employees who are required to file a statement of economic interest.
California Fair Political Practices Commission	Y	Cal Gov Code Tit. 9	Y	Y	Y	Y	Y	Y	The definitions of agency and legislative employees include consultants who make or participate in governmental decisions. Such consultants are subject to relevant ethics laws, including financial disclosure.
Connecticut Ethics Commission	Y	Conn. Gen. State. Title 1, Ch. 10; Conn. Gen. Stat. § 1-86e	Y	Y	Y	Y	N	N	For most purposes a consultant is neither a public nor state official and therefore not subject to the Ethics Code. However, one provision applies to contractors and consultants and prohibits the consultant's use of confidential information, the acceptance of other state contracts which would impair their independent judgment, or the acceptance or giving of anything of value that influences the consultant's actions.
Delaware Public Integrity Commission	N	29 Del. C. § 58	Y	Y	Contractors not covered by state ethics law.				The definition of state employee or state officer does not include independent contractors or consultants.
Florida Commission on Ethics	N	Fla. Stat. § 112.311 et seq.	Y	Y	Contractors not covered by state ethics law.				Independent contractors who are not salaried employees are not considered public employees or officers and are therefore outside the purview of state ethics laws.
Georgia Government Transparency and Campaign Finance Commission	Y	O.C.G.A. 45-1-6G	Y	Y	N	Y	N	N	Independent contractors are not defined as public employees, but contractors are subject to the vendor disclosure law.
Hawaii State Ethics Committee	Y	HRS § 84	Y	Y	Y	Y	N	N	The definition of employees subject to the Ethics Code include those under contract to the State. Depending on the substance and terms of the contract and the working relationship, however, the contractor may not be considered an employee but an independent contractor.
Idaho Office of the Attorney General	Y	Idaho Code § 18-1351 Idaho Code § 59-7	Y	Y	Y	Y	Y	N	Ethics laws apply to consultants performing a governmental function based on the definitions of public servant and public officials.
Illinois Executive Ethics Commission	Y	5 ILCS 430/1 et seq.	Y	Y	Y	Y	Y	N	The definition of employee includes persons employed pursuant to a contract and whose employment duties are subject to the control of the employer.

Consultants and Independent Contractors Subject to State Ethics Law in Selected States

Regulating Entity	Cover Contractors Y/N	Citation	Branch		Conflict of Interest	Gifts	Ethics Training	Financial Disclosure	Notes
			Exec.	Leg.					
Indiana Office of Inspector General	Y	42 IAC 1-5-1 <i>et seq.</i> 42 IAC 1-4-1	Y	N	Y	Y	Y	N	Executive branch contractors and consultants are subject to the Indiana Ethics Code. Individuals who have a business relationship with the State of Indiana must take the Contractor and Executive Branch Lobbyist Ethics Training course.
Iowa Ethics and Campaign Disclosure Board	N	Iowa Code § 68B	Y	Y	Contractors not covered by state ethics law.				Consultants and independent contractors are not subject to the Ethics Code. The definition of state and local employees specifically excludes independent contractors.
Louisiana Ethics Administration	Y	R.S. 42:1102 R.S. 42:1170	Y	Y	Y	Y	Y	N	Consultants and contractors who perform a governmental function are public employees and subject to the Code of Governmental Ethics.
Massachusetts State Ethics Commission	Y	ALM GL ch. 268A	Y	Y	Y	Y	Y	N	Some consultants and contractors may be considered public employees and subject to ethics laws. Consultants who provide specialized services are more likely to be considered public employees than are employees of firms that provide goods or non-specialized services agencies.
Michigan State Board of Ethics	N	MCL § 15.341 <i>et seq.</i>	Y	N	Contractors not covered by state ethics law.				The law applies to classified and non-classified employees only and does not include independent contractors or consultants.
Nevada Commission on Ethics	Y	NRS 281A	Y	Y	Y	Y	N	N	Depending on the terms of the contract, a consultant or contractor who is under the direction of a public officer could be considered a public employee.
New Jersey State Ethics Commission	Y	Executive Order No. 189	Y	N	Y	Y	N	N	The Conflict of Interest Law does not directly govern independent contractors hired by the state. Executive Order No. 189 requires state agencies to adopt standards of conduct for contractors and requires contractors to comply with the Plain Language Guide to Ethical Business Conduct.
New York State Joint Commission on Public Ethics	N	NY CLS Pub O § 73 NY CLS Pub O § 74	Y	Y	Contractors not covered by state ethics law.				Consultants and independent contractors are not considered employees and therefore are not covered under the State Ethics Act.
North Carolina State Ethics Commission	Y	N.C. Gen. Stat. § 138A N.C. Gen. Stat. § 120C	Y	Y	Y	Y	Y	N	Consultants and contractors are subject to the Government Ethics Act. The definition of legislative employee specifically includes consultants and counsel to committees of either house of the General Assembly or legislative commissions.
Ohio Ethics Commission	Y	R.C. § 102 R.C. § 2921.01 R.C. § 2921.43	Y	Y	Y	Y	N	N	Generally, independent contractors are not considered to be public employees or officials under the ethics law. Consultants are, however, included in the definition of public servant and, therefore are prohibited from receiving compensation from any party, other than the public entity he or she serves.

Consultants and Independent Contractors Subject to State Ethics Law in Selected States

Regulating Entity	Cover Contractors Y/N	Citation	Branch		Conflict of Interest	Gifts	Ethics Training	Financial Disclosure	Notes
			Exec.	Leg.					
Oregon Government Ethics Commission	Y	ORS § 244; OAR 199-005-0035(7)	Y	Y	Y	Y	N	N	Private contractors who perform governmental functions or responsibilities on behalf of the government become public officials and are subject to ethics laws.
Pennsylvania State Ethics Commission	Y	65 Pa. C.S. § 11 65 Pa C.S. § 13A.	Y	Y	Y	Y	N	N	Contractors are subject to Contractor Integrity Provisions, which require compliance with state ethics laws and provisions in the Campaign Finance and Lobbying Disclosure Act.
Rhode Island Ethics Commission	Y	R.I. Gen. Laws § 36-14	Y	Y	N	N	N	N	The Ethics Code prohibits state vendors from providing goods or services for less than fair market value for the personal use of a state procurement official if the vendor has sold goods or services during the preceding 24 months to the respective state agency.
Texas Ethics Commission	Y	Tex. Gov't. Code § 2155.003 1 TAC § 111.4	Y	Y	Y	Y	N	N	Independent contractors are not included in the definition of state employees; however, the Commission administers and enforces ethics laws for contractors (vendors) that do business with the Texas Procurement and Support Services division.
Washington State Executive Ethics Board	N	Rev. Code Wash § 42.52	Contractors not covered by state ethics law.						Consultants and independent contractors are not considered state employees and therefore are not covered under the State Ethics Act.
West Virginia Ethics Commission	N	W. Va. Code § 6B	Contractors not covered by state ethics law.						Independent contractors or consultants are not considered public employees and therefore not subject to the Ethics Act. The Ethics Commission relies on the definition of employee as determined by the federal Internal Revenue Service (IRS).

Notes: We describe how state ethics laws relate to independent contractors and consultants in 25 states. This is not a definitive account of all ethics laws that may exist in these states that impact contractors or consultants.

Sources: Alabama, <http://ethics.alabama.gov/default2.aspx>; California, <http://www.fppc.ca.gov/>; Connecticut, <http://www.ct.gov/ethics/site/default.asp>; Deborah Moreau, Delaware Public Integrity Commission, 302.739.2399; Florida, <http://www.ethics.state.fl.us/>; Georgia, <http://ethics.ga.gov/>; Hawaii, <http://ethics.hawaii.gov/>; Idaho, <http://www.ag.idaho.gov/index.html>; Illinois, <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ChapterID=2&ActID=2529>; Indiana, <http://www.in.gov/ig/>; Iowa, <http://www.iowa.gov/ethics/>; Louisiana, <http://www.ethics.state.la.us/>; Massachusetts, <http://www.mass.gov/ethics/>; Michigan State Board of Ethics, 517.373.3644; Nevada, <http://ethics.nv.gov/>; New Jersey, <http://www.state.nj.us/ethics/>; New York, <http://www.jcopc.ny.gov/>; North Carolina, <http://test.ethicscommission.nc.gov/index.htm>; Ohio, <http://www.ethics.ohio.gov/index.shtml>; Oregon, <http://www.oregon.gov/OGEC/Pages/Index.aspx>; Pennsylvania, <http://www.ethics.state.pa.us/portal/server.pt/community/home/8992>; Rhode Island, <http://www.ethics.ri.gov/>; Texas, <http://www.ethics.state.tx.us/index.html>; Washington, <http://www.ethics.wa.gov/>; West Virginia, <http://www.ethics.wv.gov/Pages/default.aspx>.

Alaska State Legislature

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February 11, 1997

Advisory Opinion 96-06

Subject: Ethics Committee Contracts

RE: Whether the prohibitions of AS 24.60.134 apply to every employee in a professional limited liability company which has a personal services contract with the Select Committee on Legislative Ethics.

You perform personal services for the Select Committee on Legislative Ethics under a personal services contract and therefore are covered by the legislative ethics code. You have requested an advisory opinion concerning whether other employees of the professional limited liability company by which you are employed are subject to the ethics code because of the contract between the company and the ethics committee.

Statement of Facts

The facts and circumstances that you have related, and on which the committee relies in answering your questions, are as follows:

You are employed by a professional limited liability company which holds a contract to provide services to the ethics committee. You are the primary person designated by the company to provide those services. In addition, a number of other employees of the company, both professional and nonprofessional, assist you in providing the services. The company has implemented procedures to ensure the security and confidentiality of the documents and files of the ethics committee. Only staff assigned to work for the committee has access to them. You ask whether, given these circumstances, staff who do not have access to confidential committee information or perform work for the committee are required to comply with AS 24.60.134.

Discussion

Under AS 24.60.134(a), "a person under contract to provide personal services to the committee" may not engage in various partisan political activities or act as a lobbyist.¹ The Alaska Statutes define "person" as used throughout the laws of the state to include "a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person." AS 01.10.060(8). Applying the definition of "person" to AS 24.60.134(a), the committee concludes that the company that enters into a personal services contract with the ethics committee is covered by AS 24.60.134(a) and should not, itself, engage in the prohibited activities. However, that conclusion does not directly address how to apply the restriction to the individuals employed by the company. Should restrictions that apply to the company be considered to apply to each of its employees or should the employees be treated differently, depending on their involvement in the contract?

To answer that question, it is helpful to review AS 24.60.020(a), which sets out the individuals to whom the legislative ethics code applies, and AS 24.60.990(a)(10), the definition of "legislative employee" for the ethics code. Under AS 24.60.020(a), the ethics code applies to legislators, legislative employees, and public members of this committee.²

¹ AS 24.60.134(a) states

(a) In addition to the requirements of this chapter, a public member of the committee, an employee of the committee, or a person under contract to provide personal services to the committee may not

(1) participate in political management or in a political campaign during the person's term of office, employment, or contract;

(2) participate in the campaign of, attend campaign fundraising events for, or make a financial contribution to

(A) a candidate for the legislature;

(B) an incumbent legislator or legislative employee who is a candidate for another public office; or

(C) a person running for another office against an incumbent legislator or legislative employee; or

(3) participate in lobbying activities that would require the person to register as a lobbyist except as required to inform the legislature concerning legislation requested by the committee or other matters related to the committee.

² AS 24.60.020(a) states

(a) Except as otherwise provided in this subsection, [the legislative ethics code] applies to a member of the legislature, to a legislative employee, and to public members of the [ethics] committee. This chapter does not apply to

(1) a former member of the legislature or to a person formerly employed by the legislative branch of government unless the provision specifically states that it applies;

Under AS 24.60.990(a)(10),

"legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who perform functions that are incidental to legislative functions, including security, messenger, maintenance, and print shop employees, and other employees designated by the committee[.]

From these two provisions, it appears that the ethics code is intended to apply to persons "performing regular or substantial services for the legislature" and that individuals who perform "incidental" services of a type that do not involve policy decisions or access to confidential information are excluded from coverage. The ethics committee also may designate additional groups of employees who are excepted from the requirements of the code.

The committee finds that it is appropriate to use its power to exclude employees from coverage under the ethics code in the situation raised in your request for this opinion. Accordingly, the committee finds that the phrase "a person under contract to provide personal services to the committee" as used in AS 24.60.134 includes the company that has entered into the contract and those employees of the company that perform regular or substantial services on behalf of the committee. In addition, given the committee's obligation to preserve its status as a nonpartisan body and to protect the integrity of confidential information, the committee finds that any other individuals who are permitted to have access to confidential committee files and documents should also be covered by that phrase. Both of those groups are obliged to refrain from the partisan political activity and lobbying covered by AS 24.60.134(a). Given the circumstances you have described in your request for this opinion, the committee believes that the "shield wall" around confidential committee information that has been erected by your company is sufficient to preserve the confidentiality of committee information.

Conclusion

For the reasons stated above, the committee finds that because the company for which you work has adopted policies and procedures that preserve the confidentiality of the files and documents of the committee, only those employees of the company who have access to the documents and perform regular or substantial services for the committee are subject to the restrictions set out in AS 24.60.134. In reaching this decision, the committee has relied on its power under AS 24.60.990(a)(10) to designate employees who are outside the scope of the ethics code.

(2) a person elected to the legislature who at the time of election is not a member of the legislature.

Adopted by the Select Committee on Legislative Ethics on February 11, 1997.

Members present and concurring in this opinion were:

Margie MacNeille, Chair
Joe Donahue
Shirley McCoy
Senator Jim Duncan
Senator Drue Pearce
Representative Con Bunde
Representative Kim Elton

Members absent were:

Ed Granger
Edith Vorderstrasse

TC:jdr:glc
97-006,jdr

Alaska State Legislature

Select Committee on Legislative Ethics

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Mailing Address:
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Anchorage, AK
99510 - 1468

November 4, 1999

ADVISORY OPINION 99-01

SUBJECT: Definition Employee – Contractual Services

RE: Do those who provide contractual services to the legislature fall within the definition of legislative employee?

You are a legislative employee and therefore covered by the legislative ethics code. You waived the confidentiality provision for advisory opinions, which allows the committee to discuss the matter in public.

STATEMENT OF FACTS

You asked "whether persons who provide personal services to the Legislative Branch, under a contract, fall within the definition of 'legislative employee' found in AS 24.60.990(a)(10)?" You state that, as you read the definition, "contractors who are not on contract directly with the Ethics Committee are not included in the definition." You reach this conclusion because you feel "personal services" should be read as meaning that the individual is paid through the state payroll system receiving wages or salary." You further state that this interpretation is "consistent with how the personal services line item is treated in state budgeting" in that there is a separate line for contractual services.

DISCUSSION

RELEVANT STATUTES: AS 24.60.990(a)(10) provides the following definition of legislative employee:

"legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who perform functions that are incidental to

legislative functions, including security, messenger, maintenance, and print shop employees, and other employees designated by the committee;

The committee finds that the terms "independent contractor, or consultant", as set out in AS 24.60.990(a)(10) are not limited to only those contracting with the ethics committee. The committee notes that there are additional restrictions on those who contract with the ethics committee, as set out in AS 24.60.134:

Sec. 24.60.134. Prohibited conduct by public members and committee employees and contractors.

(a) Except as provided in (c) of this section, in addition to complying with the other requirements of this chapter, a public member of the committee, an employee of the committee, or a person under contract to provide personal services to the committee may not, during the person's term of office or employment or during the life of the contract, participate in

(1) political management or in a political campaign for a candidate for election to federal, state, or local office, regardless of whether the campaign is partisan or nonpartisan, or for passage or defeat of a ballot measure of any type;

(2) the campaign of, attend campaign fund-raising events for, or make a financial contribution to

(A) a candidate for the legislature;

(B) an incumbent legislator or legislative employee who is a candidate for another public office; or

(C) a person running for another office against an incumbent legislator or legislative employee;

(3) a fund-raising event held on behalf of a political party or attend a political party fund-raising event; or

(4) lobbying activities that would require the person to register as a lobbyist except as required to inform the legislature concerning legislation requested by the committee or other matters related to the committee.

(b) A violation or alleged violation of this section shall be treated as any other violation of this chapter and shall be dealt with by the committee accordingly. During the pendency of a complaint against a member, committee employee, or committee contractor, the person complained against may not participate in official action of the committee.

(c) A person under contract to provide personal services to the committee who is part of a corporation or partnership that includes individuals who will not be participating directly in the work performed by the entity for the committee may request the committee to exclude members of the entity from some or all of the provisions of this section. The committee may grant the request if it finds that doing so will not lead to the appearance that the committee is subject to undue political influence and if there is no appearance of impropriety. (§ 25 ch 127 SLA 1992; am §§ 41,42 ch 74 SLA 1998)

The committee also notes that most contracts with the ethics committee have been professional contracts for legal and investigative services.

PREVIOUS EXEMPTIONS: On January 29, 1996 the ethics committee, under the authorizing language in AS 24.60.990, designated the following positions as being exempt from the definition of "legislative employee": print shop positions, maintenance positions, supply positions, Capitol Tour Guides, Range 15 and below positions in Legal and Research. The committee has not exempted any additional positions since that time.

CONTRACT TYPES: The definition of legislative employee refers to a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as full-time or part-time employee, independent contractor or consultant. Legislative employees paid through the state payroll system fall under the definition of legislative employee.

The Legislative Affairs Agency (LAA) is the agency responsible for preparing and co-authorizing contracts. There are generally two types of contracts issued by LAA.

1. **Reduced Benefit Contracts:** This type of contract is for employees who elect not to receive certain state benefits. They provide regular and substantial personal services, and though on contract, are paid through the state payroll system. Contractors paid under this type of contract fall under the definition of legislative employee, and are therefore subject to the ethics code, unless otherwise exempted by the committee.

2. **Services or Professional Services Contracts:** Contracts under this category cover a wide range, including but not limited to; construction, computer services, maintenance/repair, security, delivery, accounting/audit, document production, translation, utilities, leases, management, research, consulting, legal, etc.

The services or professional services contractors under category 2 above, have traditionally not been paid through the payroll system, do not occupy legislative office space or have access to state resources such as computers, etc. It is the committee's understanding that while this is true for the majority of these category 2 contractors, there may be occasions when a category 2 contractor is allocated space in a legislative office and is authorized to use state resources for the committee work (e.g. a judiciary committee contracts with an attorney to assist with issues before that committee for a key period of time). Furthermore, the contractor may be involved in policy matters or serve in a capacity to represent the legislature on policy matters.

REGULAR or SUBSTANTIAL SERVICES: The committee notes that the definition for legislative employee refers to those who are compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant. The terms "regular or substantial" are not defined in the ethics code. The term "regular" appears to clearly include those reduced benefit contractors who perform legislative duties, have set work schedules and are paid through the payroll system.

The committee looks to the \$5,000 figure set out in AS 24.60.040, (the restrictions on legislators and legislative employee's participation in certain contracts and leases) in defining "substantial" for the purpose of this advisory opinion. The restrictions in AS 24.60.040 do not apply to contracts or leases under \$5000. The committee uses this guideline in addressing whether personal services rendered under a contract are considered substantial.

FINDING: The committee believes the legislature did not intend to include all those who contract with the legislature, in the definition of legislative employee but in fact intended to include those who are paid through the state payroll system, regardless of contract status, and those who contract, under category 2, for over \$5,000 and who have access to use of state resources or who provide policy related services.

THE TEST: In evaluating whether a potential contractor falls within the definition of legislative employee and therefore subject to the ethics code, the committee sets out the following step-by-step test:

1. Will the contractor be paid through the state payroll system? If yes, will contractor fall under any of the previously exempt categories, (listed on page 2)? If the position is exempt the contractor is not subject to the ethics code. If the position is not exempt, the contractor is subject to the ethics code.

2. Is the contractor providing services to the Ethics Committee? If yes, the contractor is subject to the legislative ethics code.

3. Is the services or professional services contract value greater than \$5,000? If no, the contractor is not subject to the ethics code. If yes, see below:

(a) Will the contractor (including those providing legal services) incur more than incidental use of state resources such as computers, desks, phones, fax machines, or the like?

or

(b) Will the contractor (excluding those who represent the legislature in litigation or in an administrative matter before the state executive branch) provide legislative policy related services or represent the legislature in a policy-related capacity?

If the contractor falls within either 3(a) or 3(b) above, the contractor is subject to the legislative ethics code.

CONCLUSION

The committee finds that any contractors who are paid through the state payroll system, contractors (or those designated within a contracting firm or company) with the ethics committee and those services or professional

services contractors with legislative contracts over \$5,000, who will incur more than incidental use of state resources or who either contract for legislative policy related services or who are designated to represent the legislature in a policy-related capacity, fall within the legislative employee definition and are therefore subject to the legislative ethics code.

RECOMMENDATIONS

If the initial concern of the legislature was to limit possible unethical contracting practices, the legislature may wish to consider amending the legislative procurement policies or related procurement code to include a disclosure requirement for all those who contract with the legislature, regardless of contract type. The public disclosure could include any close economic associations with legislators or legislative employees and would be filed prior to signing the contract.

Further, the committee recommends the contract language reflect these changes, specifying which contractors are subject to the legislative ethics code.

Adopted by the Select Committee on Legislative Ethics November 4, 1999.

Members present and concurring in this opinion:

**Shirley McCoy, Chair
Senator Lyman Hoffman
Representative Pete Kott
Dennis "Skip" Cook
Ed Granger
Conner Thomas
Curt Wallace**

Members absent: Senator Torgerson, Representative Kookash

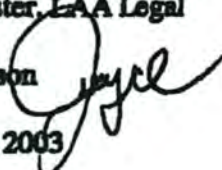
Alaska State Legislature

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99510 - 1468

TO: Wen Ibesate, LAA Administration
Terry Bannister, LAA Legal

FROM: Joyce Anderson 

DATE: February 13, 2003

RE: Contracts and Determination of Legislative Employee

This memo is in follow-up to our conversation from February 4, 2003 concerning whether a person on contract with the legislature is considered a legislative employee.

After reviewing the two sample contracts you provided and talking with Comer Thomas, Chair of the ethics committee, we recommend the following changes to all contracts over \$5000 except for professional services that relate to positions exempt under AS 24.60.990.

1. Include a statement in all contracts referencing Advisory Opinion 99-01.
2. Include a copy of the advisory opinion with each contract.

Let me know your thoughts on these suggestions.

** met with Karla 2/26/03
will include in all contract
language (those applicable & not
exempt) the "Conclusion" segment
from A.O. 99-01*

notice to the Consultant. If this contract is so terminated and the termination is not based on a breach by the Consultant, the Consultant shall be compensated for services provided under the terms of this contract to the date of termination if the Consultant provides the Agency with a written report containing a description of the services performed, a statement of the results or conclusions formed based upon any research or analysis performed, and a copy of the written material produced during the contract.

CLAUSE III - COMPENSATION AND METHOD OF PAYMENT

- (A) For the work specified in this contract the Consultant shall be compensated _____.
- (B) Payment shall be based on proper billing provided by the Consultant.
- (C) The Project Director must approve a billing before it may be paid.
- (D) If a payment is not made within 90 days after the Agency has received a proper billing, the Agency shall pay interest on the unpaid balance of the billing at the rate of 1.5 percent per month from, and including, the 91st day through the date payment is made. A payment is considered made on the date it is mailed or personally delivered to the Consultant.

REMINDER: If the Consultant requires to travel then this Paragraph should be added: If the Project Director requires the Consultant to travel outside of the Consultant's home base of _____, the Consultant will be reimbursed for reasonable travel expenses that are supported by receipts and that are approved by the Project Director.

- (E) Total payments under this contract may not exceed _____.

CLAUSE IV - PROJECT DIRECTOR

The Project Director is _____. The Project Director is authorized to oversee and direct the activities of the Consultant under this contract.

***CLAUSE V - COVERAGE UNDER THE ETHICS LAW**

The Consultant may be subject to the provisions of AS 24.60 (Legislative Ethics) as a legislative employee unless excluded from the definition of "legislative employee" under AS 24.60.990(10).


CLAUSE VI - EXPENSES AND DUPLICATION

Alaska State Legislature

Select Committee on Legislative Ethics

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Mailing Address:
P.O. Box 101468
Anchorage, AK.
99510 - 1468

TO: Karla Schofield
FROM: Joyce Anderson 
DATE: February 27, 2008
RE: Advisory Opinion 99-01
Contractual Services

I am providing a cleansed copy of informal advice given on the interpretation of Advisory Opinion 99-01. Let me know if you have any questions. I hope it will be helpful to you.

LIMITED NATURE OF INFORMAL ADVICE

My advice is informal and not binding on the Ethics Committee. Informal advice is cleansed of all identifying information and forwarded to the committee for review at their next meeting. The committee may question or object to any of the advice, at which point I contact the person who requested the advice to let him/her know the committee's concern and at the same time urge him/her to obtain a formal, binding opinion from the committee. By not objecting, the committee members endorse the advice, but again they do not bind themselves to the informal advice. If after reviewing my advice, you wish to request a formal advisory opinion, please let me know.

DISCUSSION

A.O. 99-01 addressed the issue of whether those who provide contractual services to the legislature fall within the definition of legislative employee. If a person on a contract is considered a legislative employee then that individual is covered by the ethics code and is required to adhere to the stipulations and requirements outlined in the ethics code, similar to a legislative employee on payroll.

Applicable Statute: AS 24.60.990(a)(10) states: "*Legislative employee*" means a person, other than a legislator, who is compensated by the legislative branch in return

for regular or substantial personal services regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who perform functions that are incidental to legislative functions, including security, messenger, maintenance, and print shop employees, and other employees designated by the committee.

I will briefly explain the step-by-step test set forth in A.O. 99-01 to determine if an individual on contract is considered a legislative employee and subject to the ethics code. There are three tests which are independent of each other. The first test is whether the person on contract is being paid through the state payroll system. Usually this type of contract is for legislative employees who elect not to receive certain state benefits. They would receive a yearly W-2 for tax purposes.

The second test asks if the contractor is providing services to the Ethics Committee. If the answer is NO to both of these questions, the third test must be considered.

The third test asks if the services or professional services contract will exceed \$5000. If YES, two subquestions must also be answered before a determination can be made if the person on contract is considered a legislative employee.

The first subquestion to consider is will the contractor incur more than incidental use of state resources such as a computer, desk, fax machines, use of an office in a legislative building, or the like. The term incidental is not defined in the ethics code, however, incidental use has also been described in past informal advice as infrequent use.

The supervisor responsible for the contract must determine if the use of state resources will be more than incidental use. Example: The consultant will be performing work for the legislature for two months. Some of that time will be in the capitol building using state resources. This scenario, as described, appears to lend itself to more than incidental use during the term of the contract but again that is a decision the supervisor of the contract must make.

The second subquestion to consider is will the contractor provide legislative "policy related services" or "represent the legislature in a policy-related capacity". There is no definition of "policy related services" in the ethics code nor is there an explanation of what constitutes "representing the legislature in a policy-related capacity".

However, I feel comfortable in saying that if the consultant is appearing before committees, boards, commissions, etc. to testify on policy related issues, then the proposed contract does fall under "representing the legislature in a policy related capacity".

Will the consultant provide "policy related services"? Examples might include: presenting a plan, course of action, guidelines, procedures, strategies, etc. This scenario

appears to fall within the category of policy related services. However the supervisor, who has a much more in-depth understanding of the services to be provided, must determine if the services are policy related.

CONCLUSION

The bottom line is that if the answer to either of the subquestions in test three is YES and the contract exceeds \$5000 then the contractor is considered a legislative employee.

If the contract exceeds \$5000 and the answer to the two subquestions in test three is NO, then the contractor is not considered a legislative employee and is not subject to the ethics code.

Alaska State Legislature

Legislative Affairs Agency

Office of the Executive Director

Terry Miller Legislative Office Building, Room 317

Mailing Address: State Capitol, Rm 3 Juneau, Alaska 99801-2197 Phone (907)463-3800 Fax (907)463-3234



MEMORANDUM

TO: Joyce Anderson, Ethics Committee Administrator
Select Committee on Legislative Ethics

FROM: Wen Ibesa, Administrative Assistant
Administrative Services

DATE: March 28, 2003

SUBJECT: Ethics Clause in Legislative Contracts

In response to your memo of February 13, 2003 relating to Advisory Opinion 99-01 and determination of legislative employees for purposes of the ethics statutes, we will be changing the ethics clause in legislative contracts. Thank you for pointing out that the current language needed updating.

I have discussed this matter with Terry Bannister, Pam Varni, and Karla Schofield. We will be changing our ethics clause to read as follows:

COVERAGE UNDER THE ETHICS LAW

The Consultant may be subject to the provisions of AS 24.60 (Legislative Ethics) as a legislative employee unless excluded from the definition of "legislative employee" under AS 24.60.990(a)(10). Select Committee on Legislative Ethics Advisory Opinion 99-01 concludes that "any contractors who are paid through the state payroll system, contractors (or those designated within a contracting firm or company) with the ethics committee and those services or professional services contractors with legislative contracts over \$5,000, who will incur more than incidental use of state resources or who either contract for legislative policy related services or who are designated to represent the legislature in a policy-related capacity, fall within the legislative employee definition and are therefore subject to the legislative ethics code."

We believe this is the most concise way to advise contractors of the possibility they may be subject to the ethics code. If any contractors wish to receive a complete copy of Advisory Opinion 99-01 we will be happy to provide it.

I hope this change in our contract language answers your concerns.

cc: Pam Varni, Executive Director, LAA
Terry Bannister, Legal Attorney, Legal Services
Karla Schofield, Deputy Director, Administrative Services

ETHICS COMMITTEE MEETING

January 23, 2014

ITEM 10: Ethics Training for Independent Contractors or Consultants

Included in the packet:

- AS 24.60.150. Duties of the committee; and AS 24.60.155 Legislative ethics course.
- AS 24.60.134. Prohibited conduct by public members and committee employees and contractors.
- Advisory Opinion 99-01, Definition Employee – Contractual Services.
- Advisory Opinion 96-06, Ethics Committee Contracts.
- February 13, 2003 memo to Wen Ibesate, LAA Administration, Contracts and Determination of Legislative Employee.
 - 2 sample contracts with language containing Coverage under the Ethics Law.
- February 27, 2003 memo to Karla Schofield, Deputy Director, Administrative Services, Explanation of AO 99-01.
- March 28, 2003 memo from Wen Ibesate, LAA Administration, Ethics Clause in Legislative Contracts.
- FY 13 (June 1, 2012 thru June 30, 2013) listing of contracts.
- Research of other states laws and definition of "employee" and "contractor."

Available to testify at the Committee meeting

- Doug Gardner, Director Legislative Legal Services.

GENERAL BACKGROUND INFORMATION:

Several inquiries have been received from legislative agencies within the last two months asking if independent contractors or consultants with the Legislature are required to complete ethics training. Another inquiry was received on Tuesday, January 14. The contract is for \$35,000 and is a personal services contract.

AS 24.60.990(a)(11) states:

In this chapter, "legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it include public members and staff of the committee; it does not include individuals who perform functions that are incidental to legislative functions, and other employees designated by the committee;"

Under the provisions of **AO 99-01**, an independent consultant and contractor is considered a "legislative employee" if certain conditions are met.

AO 99-01 TEST: In evaluating whether a potential contractor falls within the definition of legislative employee and therefore subject to the ethics code, the committee sets out the following step-by-step test:

1. Will the contractor be paid through the state payroll system? If yes, will contractor fall under any of the previously exempt categories, (listed on page 2)? *[Note: The statutorily exempt categories were removed from the definition of "legislative employee" with 2012 legislation. Additionally, in 1996 the committee designated several other job categories which are also no longer in effect.]*
 - a. If the position is exempt, the contractor is not subject to the ethics code.
 - b. If the position is not exempt, the contractor is subject to the ethics code.
2. Is the contractor providing services to the Ethics Committee? If yes, the contractor is subject to the Legislative Ethics Code.
3. Is the service or professional services contract value greater than \$5,000? If no, the contractor is not subject to the Ethics Code. If yes, see below:
 - a. Will the contractor (including those providing legal services) incur more than incidental use of state resources such as computers, desks, phones, fax machines, or the like? **(OR)**
 - b. Will the contractor (excluding those who represent the legislature in litigation or in an administrative matter before the state executive branch) provide legislative policy related services or represent the legislature in a policy-related capacity?

If the contractor falls within 3(a) or 3(b) above, the contractor is considered a 'legislative employee.'

NOTE: AO 84-06, which addresses an issue with a state contract, has relevance. In this opinion, "professional services contracts" are defined as:

professional, technical or consultant's services that are predominately intellectual in character and that include analysis, evaluation, prediction, planning or recommendation, and result in the production of a report or the completion of a task.

Keep in mind that contractors who provide goods (ex: West Law access), equipment (ex: moving vans), and labor (ex: work on the State Capitol building) would not fall in the category of "professional services contracts" under the definition in AO 84-06 in addition to the TEST in

AO 99-01; and therefore, these types of contractors would not be considered a legislative employee for purposes of the Act.

Under AO 96-06, the committee considered whether employees of the contractor who provides legal services to the Ethics Committee were required to comply with AS 24.60.134(c). [AS 24.60.134 addresses prohibited conduct in addition to the other requirements of the Act. Specifically, activity relating to partisan political activity, campaigns, fundraising and lobbying.]

AS 24.60.134(c) A person under contract to provide personal services to the committee who is part of a corporation or partnership that includes individuals who not be participating directly in the work performed by the entity for the committee may request the committee to exclude members of the entity from some or all of the provisions of this section. The committee may grant the request if it finds that doing so will not lead to the appearance that the committee is subject to undue political influence and if there is no appearance of impropriety.

The committee concluded "that because the company for which you work has adopted policies and procedures that preserve the confidentiality of the files and documents of the committee, only those employees of the company who have access to the documents and perform regular or substantial services for the committee are subject to the restrictions set out in AS 24.60.134. In reaching this decision, the committee has relied on its power under AS 24.60.990(a)(10) to designate employees who are outside of the scope of the ethics code."

It is important to note that the committee found that the phrase "a person under contract to provide personal services to the committee" as used in AS 24.60.134 includes the company that has entered into the contract and those employees of the company that perform regular or substantial services on behalf of the committee.

The bigger question is:

Do all the provisions under the Act apply to independent contractors and consultants if they meet the definition of "legislative employee" as determined in AO 99-01?

- Ethics training.
- Disclosures.
- Gift prohibitions.
- Restrictions on fundraising.
- Complaints.

All contracts currently contain the following clause:

Clause XYZ – Coverage under the Ethics Code

The Consultant may be subject to the provisions of AS 24.60 (Legislative Ethics) as a legislative employee unless excluded from the definition of "legislative employee" under AS 24.60.990(a)(11). Select Committee on Legislative Ethics Advisory Opinion 99-01 concludes that "any contractors who are paid through the state payroll system, contractors (or those designated within a contracting firm or company) with the Ethics Committee and those services or professional services contractors with legislative contracts over \$5,000, who will incur more than incidental use of state resources or who either contract for legislative policy related services or who are designated to represent the Legislature in a policy-related capacity, fall within the legislative employee definition and are therefore subject to the legislative ethics code."

In March 2003 the clause was changed to the current language. (Note: Please note that ethics training did not become 'mandatory' until the 2008 legislative session.) The 2003 language is as follows:

Clause XYZ – Coverage under the Ethics Law

"The Consultant may be subject to the provisions of AS 24.60. (Legislative Ethics) as a legislative employee unless excluded from the definition of "legislative employee" under AS 24.60.990(10)."

The reason for the change in 2003 was due to a contractor calling Mr. Wen Ibesate, LAA Administration, and this office asking for clarification of what it meant to be considered a "legislative employee" in relation to ethics compliance. Ethics staff consulted with H. Conner Thomas, chair of the committee at that time, and it was determined contract language should be updated. (See attached correspondence.)

CONTRACT INFORMATION - FY 2013 (July 1, 2012 through June 30, 2013)

(Note: Contracts issued for construction and labor are not included in these numbers.)

<u>NUMBERS</u>	<u>CATEGORY</u>	<u>AMOUNT/RANGES</u>
27	Contracts Issued during FY 13	\$5,000 - \$300,027
1	Legislative Affairs Agency	\$81,599
1	Victims' Rights	\$74,863
1	Alaska Arctic Policy Commission	\$25,000
9	Legislative Council	\$15,000 to \$149,000
10	Senate Finance	\$5,000 to \$300,027
0	Ombudsman	-0-
5	Ethics Committee	\$5,000 to \$10,000
	Legislative Budget and Audit Committee	

Note:

- It appears that 22 of the 27 contracts would fall under the definition of 'legislative employees' under the TEST conditions outlined in AO 99-01. Further, the threshold of \$5,000 or more was met by every contract listed. Keep in mind, the AO was issued 15 years ago.
- A review of the contracts shows that it is possible a contract may include a living allowance for the contractor. This factor was not considered in AO 99-01. Should this type of contract be looked at differently from those where no living allowance is included?

DISCUSSION:

Points to consider:

- Does AO 99-01 need to be revisited to re-evaluate the parameters (TEST) defining 'legislative employee' as it relates to independent consultants and contractors?
 - AO 96-06 addressed exempting employees of Ethics Committee contractors by defining what factors and work assignments would place the employee under the provisions of the Act. The opinion also provided a process by which the contractor could request an exemption for employees.
 - If AO 99-01 is revisited, should the opinion include such a clarification and option?
- Consider the volume of contracts issued by the Legislature and legislative agencies that would meet the definition of 'legislative employee' under AO 99-01?
 - Staff time to monitor contracts issued, follow up on compliance, and answer questions from contractors could be considerable for both the administrator and administrative assistant (authorized for 60% time).
- The term of the contract (from/to date) would determine whether ethics training was a requirement.
 - Currently only 'legislative employees' who will be on board for 30 days or more are required to complete ethics training.
 - AS 24.60.155 states, ". . . a person who begins employment . . . shall complete the course required by this section within 30 days after the person's first day of service. . ."
 - AS 24.60.155 states, "A legislative intern or legislative volunteer who serves fewer than 30 days in one legislature is not subject to the requirements under (a) of this section."
- What other sections of the Act apply to contractors? Is it reasonable for contractors to file ethics disclosures, follow the gift prohibitions, and be restricted from certain fundraising activities?
- Determine the process for administering the requirements and compliance components.

- Should the contractor be informed prior to signing off on the contract of the requirement to complete ethics training and/or other requirements outlined in the Act?
- Who is covered by the requirements of the Act? The individual performing the consultant work, any support staff working on the issue, or the entire organization if the contract is with an organization.
- Who must complete the training? Same questions.
- A specialized on-line ethics training designed for contractors is an option. The on-line system is already in place and could be tailored for this purpose as well.
- Research of other states indicates that a contractor is not considered a public employee or covered by ethics provisions.

RECOMMENDATION:

Staff has no recommendation at this time. See options below.

ACTION:

Options include:

- Further study.
- Request an advisory opinion based on the current facts presented in order to provide guidance to contractors, Ethics staff, and LAA staff.
- Determine today the issues regarding ethics training and compliance with other sections of the Act.
- Recommend a statutory change to the definition of "legislative employee" and/or recommend specific language addressing contractors and ethics compliance.

ETHICS COMMITTEE MEETING

January 23, 2014

Item 10: ETHICS TRAINING for Independent Contractors or Consultants – pursuant to AS 24.60.155

Legislative Budget and Audit Committee - current contracts.

They can also be found at: <http://lba.akleg.gov/documents/contracts/>

1) Janak Mayer

Amount: \$250,000, plus \$13,000 for living expenses

Duration: January 1, 2014 – January 31, 2015

Purpose: Advise the legislature on matters relating to the oil and gas fiscal and commercial structures in Alaska and around the world

2) Nikolaos Tsafos

Amount: \$250,000, plus \$13,000 for living expenses

Duration: January 1, 2014 – January 31, 2015

Purpose: Advise the legislature on matters relating to the oil and gas fiscal and commercial structures in Alaska and around the world

3) Roger Marks

Amount: \$250,000

Duration: January 31 2013 – January 31, 2015

Purpose: Analyze and evaluate oil and gas fiscal regimes in Alaska and around the world

ETHICS COMMITTEE MEETING

May 29, 2014

Item 11: Independent Contractors/Consultants – Compliance with the Legislative Ethics Act

Background: Continuation from the January 23, 2014 meeting.

ITEMS IN THE PACKET

- April 30, 2014, legal opinion, LAA Legal, Dan Wayne: Independent Contractors and Consultants as Legislative Employees.
- LAA Research Report.
 - Summary Table.
 - Research Brief.
- May 13, 2104, legal opinion, LAA Legal, Dan Wayne: Clarification of statutory language in HB 127 (awaiting transmittal to the Governor), Personal Services Contracts with Ombudsman's office.
 - HB 127, Ombudsman's operation.
- January 23, 2014, Item 10, materials.

RESEARCH REQUEST

On March 3, 2014, a research request was submitted to Legislative Research. The request asked for the following information from at least 25 governmental bodies:

- Are independent contractors/consultants considered an employee for purposes of ethics compliance?
- Are independent contractors/consultants covered under separate statutory language for purposes of ethics compliance?
- If yes, what statutory ethics requirements apply?
- If only certain contractors/consultants are covered, what detailed criteria are used to make that determination?

Below is a recap of the research report:

TOTAL CATEGORY

7 Does not include independent contractors and/or consultants in definition of employee

3 Covers contractors under ethics laws with no separate distinction or qualification

ENTITY

Delaware, Florida, Iowa, Michigan, New York, Washington, West Virginia (relies on the definition of employee as determined by the IRS)

North Carolina (definition of legislative employee specifically includes consultants and counsel to either house), Pennsylvania,

(subject to "Contractor Integrity Provisions which requires compliance with state ethics laws), Indiana (Executive Branch subject to "Contractor and Executive Branch Lobbyist Ethics Training" course)

- | | | |
|---|---|--------------------------|
| 1 | Covers contractors under an Executive Order which requires state agencies to adopt standards of conduct for contractors & requires contractors to comply with "Plain Language Guide to Ethical Business Conduct" | New Jersey |
| 3 | Covers contractors if they perform a 'government function' | Idaho, Louisiana, Oregon |
| 2 | Covers contractors if they are subject to the control of the employer | Illinois, Nevada |
| 1 | Covers contractors who make or participate in government decisions | California |
| 1 | Covers contractors who work at least 40 hours a week for the Legislature | Alabama |
| 1 | Does not cover consultants; separate provision applies to contractors and consultants regarding confidentiality, acceptance of other state contracts, and accepting or giving anything of value that influences their actions | Connecticut |
| 1 | Includes contractors in the definition of Employee; a contractor may be considered an independent contractor dependent upon the terms, substance, and working relationship | Hawaii |
| 1 | Includes contractors who provide specialized services | Massachusetts |
| 1 | Includes consultants but not independent Contractors | Ohio |
| 1 | Does not cover independent contractors but includes contractors (vendors) doing business | Texas |

with the Procurement and Support Services
division

- 1 Places restrictions on vendors who have sold Rhode Island
goods or services during the preceding 24
months

LEGAL OPINION from LAA LEGAL

Requested February 5, 2014. The request asked the following: What options would be available to the committee to provide clarity to the statutory definition "legislative employee" as defined in AS 24.60.990(a)(11).

- **Option 1: Issue an advisory opinion.**
 - "... the committee could adopt definitions of those undefined terms [*independent contractor and consultant*], based on the commonly understood definition of the terms."
 - The committee may not create a new meaning for the definition of "legislative employee."
 - The committee may make the existing statutory definition more specific and which could allow the committee to find that some types of contractors or consultants are not subject to the Legislative Ethics Act because they are not legislative employees within the statutory definition.

- **Option 2: Recommend legislation.**
 - The committee determines the statute is simply too narrow to allow the exemptions the committee feels are appropriate. ?
 - Areas to consider if recommending legislation:
 - Clarifying the definition of "legislative employee."
 - Defining "independent contractor" and "consultant."
 - Limiting the Act's applicability to independent contractors and consultants. (Similar to statutory language for legislative interns and volunteers.)
 - Creating a separate statutory section for independent contractors and consultants that specify which provisions of the Act apply.

Staff Recommendation: Staff recommends Option 2, statutory change. Staff recommends creating a new statutory section limiting the Act's applicability to "independent contractors" and "consultants." The committee under AS 24.60.150(b)(1) may "recommend legislation to the legislature the committee considered desirable or necessary to promote and maintain high standards of ethical conduct in government."

The committee should keep in mind that ethics legislation always opens up the entire Act to other changes.

Discussion: Committee discussion of pros and cons of moving forward under Option 1 or Option 2. Some questions to consider:

- Should independent contractors and consultants be considered "legislative employees?"
- What parameters of the Act should apply to independent contractors and consultants?

Action: Committee determines a course of action and makes specific recommendations for changes.