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LOCAL GOVERNMENT

Read This Before Making Your Next Political Contribution

Pay-to-play legislation expanded

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On November 15, two new executive orders went into effect that expand the scope of circumstances in which a business that makes political contributions may be disqualified from doing work for state-level executive agencies in New Jersey. Businesses that engage in (or contemplate seeking) such government work must immediately become familiar with these new “pay-to-play” laws to prevent disqualification for contributions made on or after November 15.

Among other changes, Executive Order 117 expands the scope of individuals whose contributions can disqualify a business to include all partners, LLC members, and corporate officers, as well as their spouses/civil union partners and children residing at home. Executive Order 117 also widens the categories of disqualifying political contributions. Executive Order 118 extends pay-to-play restrictions to state redevelopment projects. Finally, legislation has been pro-

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posed that would close a number of perceived “loopholes” in other pay-to-play laws.

The following is a summary of the new executive orders and proposed legislation.

A Brief Review of Pre-existing Pay-to-Play Laws

To understand the modifications brought about by the new executive orders, a brief review is warranted of the pre-existing pay-to-play laws applicable to state-level work. Under Executive Order 134 and Chapter 51, a business that has made a contribution of more than \$300 to the current Governor, any candidate for Governor, or any state or county political party committee is disqualified from contracts with state-level executive agencies for at least 18 months.

In addition, under Executive Order 134/Chapter 51, contributions made to political action committees (“PACs”) formed under New Jersey law are not automatically disqualifying. Rather, any such contribution made in the prior four years must be disclosed in advance of contract negotiations. The New Jersey Department of the Treasury may disallow any contract award if it finds that a

PAC contribution amounts to a “conflict of interest.”

Executive Order 117 — Which Contributions Matter?

Executive Order 117 expressly modifies the terms of Executive Order 134 (and, presumably, Chapter 51) and greatly expands the key personnel of the business whose contributions can result in disqualification. For example, under Executive Order 134/Chapter 51, only contributions by partners and LLC members owning 10 percent or more of the business could be attributed to the business. Now, under Executive Order 117, the 10 percent rule is applicable only to shareholders of ordinary corporations (i.e., C-corporations and S-corporations); thus, the contributions of any partner, LLC member, or shareholder of a professional corporation — regardless of level of ownership — are attributed to the business and will result in disqualification. Additionally, for the first time, contributions made by corporate officers are disqualifying. Finally, for each individual included in Executive Order 117 (e.g., partners, members, corporate officers), the contributions of that individual’s spouse or civil union partner and children who reside with the individual also may be attributed to the business. Such spousal/child contributions are exempt if made to a candidate for whom the spouse/child is entitled to vote or to a political committee located in the jurisdiction where the spouse/child resides.

Executive Order 117’s expanded attribution rules could have a dramatic ef-

fect on certain businesses, especially those with substantial portfolios of state work. Accordingly, such businesses are well-advised to implement a system to monitor and, if needed, control the political giving by their key personnel, their spouses or civil union partners, and resident children.

Relevant Recipients Expanded: In addition to expanding the universe of relevant contributors, Executive Order 117 also expands the scope of recipients to whom disqualifying contributions may be made. Previously, under Executive Order 134, only those contributions to the Governor, candidate for Governor, or any State or county political party committee could result in disqualification. Now, under Executive Order 117, disqualifying contributions include those to legislative leadership committees, municipal political party committees, or the Lieutenant Governor or candidate for such office. Contributions to PACs must still be disclosed and are subject to “conflict of interest” review by the Treasury.

Seeking Refund of Inadvertent Contributions: In the event that a disqualifying contribution is inadvertently made, a business can take steps to obtain a refund of the contribution and avoid disqualification, but the timeframe is exceedingly short. The business must issue a written request to the recipient candidate or organization for a refund of the contribution and physically receive the refund within thirty days. According to recent case law, the thirty-day time period will be strictly interpreted so that a business will face disqualification even if it sought a refund before thirty days had elapsed, but

the refund was delayed due to the inaction of the recipient political organization.

Executive Order 118 — Pay-to-Play Restrictions Applied to Agreements With State Redevelopment Entities

Executive Order 118 applies to redevelopment agreements with any “State redevelopment entity,” which is defined broadly to include state-level executive agencies, as well as independent State authorities, boards, and commissions. Under Executive Order 118, a redeveloper will be disqualified from redevelopment agreements by contributions made by the redeveloper’s partners, members, and corporate officers, and their spouses/civil union partners or resident children. The redeveloper can also be disqualified by the contributions of any “subsidiary business entity” and any “business entity” retained by the redeveloper to “perform professional, consulting, or lobbying services in connection with the redevelopment project.” The reach of these latter two provisions is particularly wide; for example, under Executive Order 118, a redeveloper that retains a law firm to provide counsel in connection with the redevelopment project can be disqualified by a contribution made by the resident child of a partner of that firm.

Under Executive Order 118, contributions are disqualifying if made to (i) the Governor or any candidate for Governor; (ii) the Lieutenant Governor or any candidate for Lieutenant Governor; (iii) any state, county, or municipal political party committee; (iv) any legislative leadership committees; or (v) any state, leg-

islative, county or municipal candidate or officeholder in the legislative district, county or municipality where the redevelopment project is located.

Additional Pay-to-Play Laws Proposed

Additional legislation was proposed to tighten the other pre-existing pay-to-play laws. Among the proposals is a plan to extend the broad disqualification scheme set forth in Executive Orders 117 and 118 to contracting and redevelopment activities at the county and municipal level. New pay-to-play restrictions would also apply to developers seeking government approvals and companies hired to conduct audits of governmental bodies. Additionally, the proposed legislation seeks to counteract “wheeling” — i.e., transfers of contributions between political organizations designed to allow contributors to circumvent campaign contribution limits and pay-to-play restrictions.

As these executive orders and legislative proposals demonstrate, New Jersey’s ever-changing legal and political landscape makes up-to-date knowledge of the pay-to-play laws essential for any business contemplating work with state, county or local government. Compliance with the complex statutory and regulatory scheme frequently involves significant information-gathering efforts coupled with highly fact-sensitive analysis. Careful consideration must therefore be given to the development of appropriate policies, protocols, and internal controls to avoid disqualification as a result of an unwitting political contribution. ■