

**BNA's**

Corporate Counsel Weekly

CORPORATE PRACTICE SERIES**VOL. 21, NO. 24****JUNE 21, 2006**

Reproduced with permission from Corporate Counsel Weekly Newsletter, Vol. 21, No. 24, 06/21/2006. Copyright © 2006 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Is There a Lobbyist Among You? The Answer Is Important and May Surprise You

BY SONIA FOIS
AND LESLIE NICKEL

Most business executives understand that if they, or any of their employees or consultants, venture to the U.S. Capitol or to a state capital to seek a change in the law, they may have to register and report as “lobbyists.” What has come as a surprise to many of our clients, however, is the wide range of divergent interpretations (and consequences) of the terms “lobbying” and “lobbyist” across the country—interpretations that go well beyond contacting state legislators about pending legislation. In an increasing number of states, the term “lobbying” is broadly defined to include routine business activities, such as:

- selling goods and services to the government;
- seeking business or tax incentives from the state or locality;

- applying for licenses, permits, or waivers;
- working to shape a regulation affecting an industry or business;
- obtaining information from a government official; or
- simply having lunch with a government employee over which no official business is discussed.

The price for not identifying accurately the “lobbyist among you” can be steep for a company—debarment from government contracting, hefty fines, and imprisonment—as a growing number of states and localities expand their lobbying laws and increase their enforcement efforts.

Trends in State and Local Lobbying Regulation

While congressional efforts to reform federal ethics and lobbying rules have attracted widespread media attention, the significant and

varying reforms that have been adopted by states and municipalities have gone largely unnoticed in the mainstream press.

According to a March 2006 report by the Center for Public Integrity (see <http://www.publicintegrity.org/hiredguns/report.aspx?aid=781>), since 2003, 16 states have made substantive changes to their lobbying laws. These include states such as Connecticut, New York, New Jersey, and Florida, which already had relatively robust lobbying regulations. States with more narrow lobbying laws historically, such as Georgia, Louisiana, North Carolina, and Tennessee, also have expanded their lobbying regulatory regimes. Localities are also increasingly regulating lobbying activity at the municipal level—Dade County, Fla.; New York City; Chicago; and Los Angeles are just a few examples.

On June 13, New York City Mayor Bloomberg signed lobbying and gift law reform, which doubles penalties for violations and bans most gifts from lobbyists. In another recent development, Pennsylvania law was expanded to cover executive branch lobbying. While this change was made by executive order and is currently a voluntary system, over 600 persons have already filed as executive branch lobbyists,

Sonia Fois and Leslie Nickel are both partners at Arnold & Porter, LLP in Washington, D.C. Their practice focuses on servicing business clients with complex public policy or legal compliance issues at the federal, state, or local levels. The authors would like to thank Matthew Gannon, an associate, for his assistance in preparing this article.

likely in anticipation of mandatory requirements down the road.

The Resulting Impact on the Business Community

In 2007, it is estimated that fewer than 10 states will regulate only legislative branch contacts. This means that a business's interaction with a myriad of executive branch agencies, boards, commissions, and public corporations in the course of routine business or regulatory activity may constitute "lobbying" in the vast majority of states. Moreover, the definitions of "lobbying" and "lobbyist" have been broadened so significantly in many states that historical understandings of the terms do not accurately reflect the state of the law. For example:

■ In New Jersey, "lobbying" now means attempting to influence any "governmental processes," which is defined broadly to include promulgating executive orders; rate setting; public contracting; issuing, denying, reviewing, or revoking permits, licenses, or waivers; bidding procedures; imposing fines or penalties; purchasing procedures; financial assistance; grant and loan processing; and rendering administrative decisions. "Lobbying" includes not only attempts to influence but also efforts to simply obtain information about such processes from government officials.

■ New York State recently amended its laws, effective in January 2006, to include attempts to influence government contracts (procurement activity) and also to limit the contacts that may be made with government officials during the course of a procurement.

■ In 2005, in response to an ethics scandal that led to the incarceration

(continued on page 190)

(continued from back page)

of former Governor Roland, Connecticut also strengthened its lobbying provisions. It created an Office of State Ethics with increased enforcement powers and required more detailed disclosure on lobbying for government contracts.

■ In Florida and Illinois, among other states, lobbying registration and reporting obligations can be triggered by simply spending money on a public official, such as treating him or her to a meal, without any effort to influence any governmental action. The theory is that you are engendering the "goodwill" of the official for future lobbying efforts. It is not entirely clear, however, what is left of this provision in Florida in the light of the state's very recent ban on virtually all gifts to public officials.

■ In a majority of states, the common business activity of seeking business and tax incentives from the government now may rise to the level of "lobbying." For example, before applying for a grant for employee training or business expansion or relocation, an employer must assess whether such activity meets the definition of "lobbying" under that jurisdiction's laws. Similarly, if you are applying for a sales or use tax exemption, a real property tax exemption, or a tax credit, you may be "lobbying." This is the case whether you hire a consultant to obtain incentives or you simply have in-house employees make such contacts.

Registration and Reporting. Once lobbying has occurred (or once you have retained a lobbyist, in many states), certain filing obligations may result—registration with the governing authorities and periodic reports, which can range in frequency from every month to once a year. Whether these obligations apply to the individual lobbyist alone or the employer/client also has parallel responsibilities, varies across the country. In most jurisdictions, the lobbyist's employer/client has to report and either register or certify the lobbyist's filings. Generally speaking, filing obligations apply whether in-house personnel or retained consultants meet the definition of lobbyist. In some states, however, in-house employees whose primary duties do not include

lobbying activities are exempt from registration.

Restrictions on Providing Meals, Gifts, or Travel to Public Officials. The effects of becoming a lobbyist extend beyond submitting paperwork to the regulatory entity. In most jurisdictions, lobbyists and their employers/clients incur additional restrictions or lower monetary thresholds on the entertainment of public officials. If you are also a government contractor, even more stringent restrictions may apply.

Restrictions on Campaign Contributions and Fundraising. In a growing number of states, lobbyists, their employers/clients, and government contractors, face greater restrictions on their campaign activities than does the general public. For example, some so-called "pay to play states," like New Jersey and Ohio, impose more stringent political contribution restrictions on those seeking government contracts outside the open bid process. Connecticut restricts contributions from all government contractors regardless of the type of bid process involved.

Bonuses and Other Contingency Fee Arrangements. An increasing number of states ban "contingency fee," or success fee arrangements in which a lobbyist's compensation is tied to a successful outcome of a lobbying effort. Localities such as Dade County, Fla.; New York City; and Chicago also have adopted contingency fee bans. When lobbying was defined more narrowly, it was not so difficult for businesses to comply with these constraints. Now, a business has to assess whether the sales, tax, or financial specialists it employs or retains can be compensated on a success-fee basis for obtaining government contracts or other economic incentives from the state or locality.

Enforcement. Finally, while Congress rejected an independent oversight body in its recent actions on lobbying and ethics reform bills, over half the states have in place such enforcement schemes. Oversight authorities often can impose stiff penalties on violators. New York State's lobbying law provides for fines of up to \$50,000 and debarment from procurement lobbying for a second violation of the procurement lobbying

rules. In almost half the states, imprisonment is an available enforcement tool for violations of the law. For example, effective July 2004, Connecticut changed the penalty for multiple intentional violations of the law from a misdemeanor to a Class D felony with a potential sentence of up to five years in prison.

Compliance Guidelines

In the wake of these developments, businesses that have contacts with government—federal, state, or local—should implement a government affairs compliance system designed to prevent, uncover and punish violations. As part of this program, a company should:

Know the Law. Keeping on top of the varying and changing laws in the jurisdictions in which your company does business is critical. Changes to or clarifications of the law can occur through a statutory amendment, regulatory action, advisory opinion from the regulatory authority or from the jurisdiction's enforcement office. Commercial services track these developments to some extent, but you should not rely on them exclusively. Legal counsel also can be helpful in determining the rules governing particular activities in specific jurisdictions.

Designate a Compliance Team. Whether the team resides within the general counsel's office, the chief compliance officer's domain or elsewhere, the compliance team should be led by a high-ranking official, preferably not someone solely within the

government affairs sphere, to ensure that the program is a top priority of the company and that employees perceive it as such. Clients have found that designating compliance officers for specific business or practice areas or for specific regions can facilitate and streamline compliance initiatives.

Establish Clear and Simple Policies and Procedures. In addition to determining the applicable legal requirements, you will need to establish policies and procedures to help ensure that the company and its agents comply, in a timely and accurate manner, on a jurisdiction-by-jurisdiction basis, with: (1) lobbying filings and certifications; (2) restrictions on gifts, travel, entertainment, and campaign contributions to public employees and any accompanying reporting requirements; (3) any contingency fee restrictions that may affect contractual arrangements with employees or consultants; and (4) other applicable requirements or restrictions. Some companies find that it is more prudent to adopt a policy that, in some areas, may be stricter than the law requires. For example, the tracking procedures needed to ensure compliance in a state with very low aggregate dollar limits on gifts to public officials may prompt a company to adopt a "no gift" rule for that jurisdiction. In addition, your policies and procedures should be clearly and simply written in "layman's" language. Your goal should be for employees to learn how to "issue spot" in order to raise possible issues with your compliance officers and not necessarily to grasp legal nuances.

Cast a Wide Net in Distributing Such Policies and Procedures. Make sure that your policies and procedures in this area are widely distributed to anyone who could potentially be "lobbying" in a particular area. Do not limit it to those operating in the government affairs sphere. The public sector sales force of your company, for example, is another key audience.

Conduct Periodic Training of Your Personnel and Require Certification. It is not sufficient to simply circulate written materials to your employees and consultants. You should take steps to ensure that they understand the policies and procedures and that your company is serious about compliance, and know whom to contact to have their questions answered.

Monitor Compliance and Take Swift Action When Violations Are Uncovered. You should conduct periodic audits, establish mechanisms for employees to report violations, take quick action to correct violations, discipline those who break the rules where appropriate, and take other actions that are called for to prevent future violations.

Don't Forget the Consultants. Companies should thoroughly vet the backgrounds of employees and consultants who will lobby on their behalf. In addition, you should structure your contracts with retained consultants to require them to comply with all applicable requirements and restrictions. Finally, make sure that they are adequately trained and that violations of your policies and procedures can terminate their contracts.