

HIGHLIGHTS OF ALABAMA'S ETHICS LAW

The crux of Alabama's Ethics Law is that a public official or public employee must at all times be conscious of and avoid conflicts of interest and that a public official or public employee must never use the office or position for personal gain for himself/herself or for members of his/her family.

Unfortunately, the law can be a little difficult to understand because of the way it is written. A very brief overview of the most important provisions for county employees is set out below.

CONFLICT OF INTEREST

The Ethics Law defines a "conflict of interest" as, "A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust". *Ala. Code § 36-25-1(8)*. A conflict occurs when:

- Any action, inaction, or decision by a public official/employee in the discharge of his or her official duties would materially affect his or her financial interest or that of his/her family or business in a manner different from how it affects other members of the class to which he or she belongs

A conflict also exists when a public official/employee has a substantial financial interest or is an officer in a company which is uniquely affected by proposed or pending legislation

- "Substantial financial interest" means ownership, control, or the exercise of power over more than 5% of the value of a company or other business entity

PERSONAL USE OF OFFICE

The Ethics Law prohibits a public official/employee from using his or her official position to obtain personal gain for himself or herself, or for a family member or any business with which he or she is associated unless the use and gain is otherwise specifically authorized by law. *Ala. Code § 36-25-5*.

- Personal gain is achieved when the public official/employee or his or her family member receives, obtains, exerts control over, or otherwise converts to personal use the object constituting personal gain

- A public official/employee is prohibited from soliciting use of, using, or causing to be used public time, labor, or property under his or her discretion or control for his or her private or business benefit
- It is also a violation of the Ethics Law for any individual to request use of public time or property for his or her personal benefit
- An individual is prohibited from offering or giving a public official/employee a thing of value for the purpose of influencing official action
- There is also a prohibition against a public official/employee soliciting or receiving a thing of value for the purpose of influencing official action

USE OF INFLUENCE FOR THING OF VALUE

The law protects against a public official or employee using his or her office or position for influence. Under *Ala. Code § 36-25-7*, as amended by *Act No. 2010-764* and *Act No. 2011-632*), there is a prohibition against an individual offering or giving a public official or employee anything for the purpose of corruptly influencing official action, regardless of whether or not the thing solicited is a thing of value (as defined in *Ala. Code § 36-25-1(31)*).

- To act “corruptly” means “to act voluntarily, deliberately, and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result”
- There is also a prohibition against a public official/employee soliciting or receiving anything for the purpose of corruptly influencing official action
- These prohibitions extend to family members and businesses as well

In addition to the above, *§ 36-25-7* specifically provides that no public official/employee shall solicit or receive any money in addition to that received in an official capacity for advice or assistance on matters concerning the body of which he or she is a member.

Ala. Code § 36-25-12 also addresses prohibitions against offering a thing of value to or from a member of a regulatory body in exchange for certain action. This provision states that, other than in the ordinary course of business, no person shall offer or give to a member or employee of a regulatory agency, board, or commission with which the person is associated a thing of value while the member or employee is associated with the regulatory body.

- This section also provides that no member or employee of a regulatory body shall solicit or accept a thing of value

THING OF VALUE

The definition of “thing of value” was substantially rewritten in 2010 and these changes were at the heart of the legislative intent to “strengthen” the law. These changes have led to much confusion about proper practices between public officials/employees and persons or entities with whom business is transacted. However, the major changes in the new law are as follows:

- Limits “gifts” to those of “de minimus value”¹
- Eliminates ability to provide tickets to events except those of de minimus value
- Limits hospitality to situations which are an integral part of an educational or economic development function, work session, or widely attended event
- Limits meals provided by lobbyists to \$25 a meal with a total of \$150 per year per person

The new definition of “thing of value” does make a specific exception for expenditures by an organization such as the Association of County Commissions of Alabama made on behalf of members of the organization. This allows the Association to continue past practices with regard to conferences and conventions, and to allow the Association to provide lunches and the like for members as necessary or convenient.

ETHICS TRAINING

Another important change in the Ethics Law made in 2010 is a new requirement for ethics training by public officials and certain public employees. (See, *Act No. 2010-762*, codified at *Ala. Code § 36-25-4.2*). Aimed at ensuring that all public officials are exposed to ethics training, this new law requires ethics training by lobbyists, certain public officials, and certain public employees.

Public officials required to complete the training course are:

- Members of the Legislature
- State constitutional officers
- Cabinet officers and executive staff
- Mayors and city council members
- County commissioners
- Local boards of education

¹ *Act No. 2012-433* defines “de minimus” as, “A value \$25 or less per occasion and an aggregate of \$50 or less in a calendar year from any single provider, or such other amounts as may be prescribed by the Ethics Commission from time to time by rule pursuant to [APA] or adjusted each four years . . . to reflect any increase in the cost of living as indicated by the [CPI].”

All public employees required to complete the Statement of Economic Interests each year are also required to complete the ethics training.

- Affected employees who were employed when the law took effect were required to take an online educational review no later than April 30, 2011.
- Employees hired after January 1, 2011 have 90 days from the date they begin working to comply.
- Evidence of completion of the educational review must be provided to the Ethics Commission via an electronic reporting system provided on the official website.

Act No. 2011-762 included an “exception” to the training offered by the Ethics Commission for county commissioners who successfully complete the 10-hour course on ethical requirements of public officials provided by the Alabama Local Government Training Institute. However, this special provision *only* applies to county commissioners. County employees are *not* exempt from this requirement if they have completed the ethics training class offered under the County Government Education Institute.

REVOLVING DOOR

Clearly the most complicated and confusing provision of Alabama’s Ethics Law is the “revolving door” section. *Ala. Code § 36-25-13*. The intent of this section is to ensure that former public officials and employees do not improperly use or benefit from their public position. Unfortunately, it is probably the most misunderstood and misinterpreted provision of the Ethics Law. However, since it affects virtually every person who is or has been in public service, it is an extremely important provision.

Under *§ 36-25-13*, a former public official or employee shall not for a period of two years after leaving public service:

- Lobby or otherwise represent clients before his or her former employer
- Act as counsel, advisor, or consultant in connection with a matter in which he or she participated personally and substantially or which was within or under his or her official responsibility as an official or employee
- Enter into, solicit, or negotiate a contract, grant, or award with his or her former governmental agency if, while in public service, he or she had authority to make purchases, or participated in the negotiation or approval of contracts, grants, or awards
- Solicit or accept employment with a business he or she personally and directly regulated, audited, or investigated while in public service

When considering what restrictions apply to a person leaving public office or employment, it is important to carefully consider what the person's responsibilities were during their tenure. This can have a significant impact on what employment the person can accept once they leave public service.

The Ethics Commission has attempted to address this issue in several opinions, although at times their decisions appear somewhat inconsistent. They have established a good analysis to follow in considering options, set out in *Ethics Opinion No. 98-44*. Excerpts from that Opinion are set out below:

"The "Revolving Door" provisions were inserted in the 1995 Ethics Reform Act in an effort to prevent public officials and public employees from being in a position whereby they could use their public office to benefit themselves, either by having leverage in dealing with a private business and thereby obtaining employment with that private business or an individual leaving public service and returning in either a lobbying capacity or other representative capacity before the department, agency, board or commission on which they served or with which they were employed.

The crucial determinations to make in determining whether or not there are circumstances when a retired individual may come back to work are as follows:

1. Was that individual, prior to his or her retirement or separation from public service, in a position of authority with hiring/firing authority, purchasing or contracting authority.
2. Was that individual, prior to his or her retirement or separation from public service, a third or fourth tier employee or a line employee who did not have any authority over purchasing, contracting, or any involvement in the hiring process.

[Section 36-25-13(c)] recognizes that certain individuals by virtue of their position, such as public officials, directors, departmental or division chiefs, etc., have inherent in their job classification, certain responsibilities and have the authority to determine to some degree the outcome of the contractual process, grant process and hiring process. It is clear that these individuals, as well as those individuals with the express authority to make purchases or negotiate or approve contracts, grants or awards, may not retire or leave public service and contract back with that governmental agency for a period of two years. Otherwise, these individuals would potentially have the leverage to arrange for themselves, part-time employment prior to their retirement.

On the other hand, those individuals without the above authority, such as the average line employee, secretaries, clerical aides, etc., do not have the ability to influence or affect contracts, purchases or the hiring practices of that department. It

is these individuals, who under certain circumstances, may be allowed to return to the department or agency from which they retired or left.

The Ethics Commission concludes Opinion No. 98-44 by holding that:

An individual who, prior to his or her retirement, or otherwise leaving public service, held a position of authority with hiring and firing authority, purchasing or contracting authority, **may not**, for a period of two years after retiring or otherwise leaving public service, contract back, accept part-time employment or re-employment with the entity from which he or she retired or otherwise separated from public service.

An individual who, prior to his or her retirement, or otherwise leaving public service, did **not** hold a position of authority nor had the authority to make purchases, approve or grant contracts nor was involved in the hiring process, may accept part-time or re-employment with the entity from which he or she retired or otherwise separated from public service.

There are hundreds of Ethics Opinions issued on the subject of the “revolving door”. Unfortunately, they are not always consistent. Therefore, affected government officials and employees must carefully consider their personal circumstances in making decisions about employment opportunities once they leave county government.

STATEMENT OF ECONOMIC INTERESTS

Under *Ala. Code § 36-25-14*, all public officials and certain public employees are required to file a statement of economic interests with the Ethics Commission no later than April 30 of each year. Examples of persons required to file are:

- All elected or appointed public officials
- Any public employee whose base pay is \$75,000 or more
- All candidates
- Appointed members of boards and commissions having statewide jurisdiction
- Chief clerks, chief managers, chief administrators
- Any public official or public employee whose primary duty is to invest public funds
- Purchasing or procurement agents having the authority to make any purchase
- Chief financial and accounting directors
- Chief grant coordinators
- All supervisors

The requirement for supervisors to complete this form was added effective August 1, 2012. Under the law, "supervisor" is defined as:

Any person having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, or discipline other public employees, or any person responsible to direct them, or to adjust their grievances, or to recommend personnel action, if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.

If the information is not properly filed, the Ethics Commission shall notify the public official or employee of his or her failure to file and the official or employee has ten (10) days to file following notification.

- The commission may impose a fine of \$10 a day, not to exceed \$1,000 for failure to file timely
- An intentional violation can result in administrative fines, a Class A misdemeanor conviction, or both
- A person unintentionally neglecting to include the required information has 90 days to file an amended statement of economic interests without penalty

REPORTING REQUIREMENTS FOR RELATIVES/BUSINESS INTERESTS

In addition to the Statement of Economic Interests, there are other reporting requirements for certain other persons or activities involving public officials or employees and/or their family members or businesses.

- *Section 36-25-16* requires that persons related to officials or employees of a state regulatory body report the relationship to the Ethics Commission if they represent clients for a fee before that regulatory body
- *Section § 36-25-16* also requires that, except where items are competitively bid, persons contracting with an agency for goods or services in excess of \$7500 must report names of a child, parent, spouse, or sibling who is an official or employee of the agency with whom the contract is made
- *Section § 36-25-10* requires that any public official or employee who represents a client or constituent for a fee before any quasi-judicial board or commission, regulatory body, or state agency file notice of the representation with the Ethics Commission at least 10 days after the first day of the appearance

- A family member or business with which the official or employee is associated must also file notice within 10 days if representing a constituent for a fee before any such body

REPORTING GOVERNMENT EMPLOYMENT/CONTRACTS

In addition to the changes related to "thing of value", *Act No. 2011-674* also created a new *Ala. Code § 36-25-5.1* which requires public officials and their spouses to notify the Ethics Commission within 30 days of any employment or contract with the state or federal government. All filings are public record and shall be made available on the Commission's website.

- This means employment with a company receiving 50% or more of its revenue from the state

The law sets out specifically what information must be provided to the Commission:

- (1) The name of the public official or candidate.
- (2) The name of the spouse of the public official or candidate.
- (3) The department or agency or county or municipality with whom the public official, candidate, or spouse is employed or with whom the public official, candidate, or spouse has a contract.
- (4) The exact job description or, if applicable, a description of the contract.
- (5) The beginning and ending dates of employment or of the contract.
- (6) The compensation, including any and all salary, allowances, and fees, received by the public official or his or her spouse or the candidate or his or her spouse.

The law also requires that if the terms of employment or of the contract change, the public official or candidate or his or her spouse shall promptly provide the Commission with updated information concerning the change within 30 days.

REPORTING VIOLATIONS BY AGENCY HEADS

A governmental agency head shall report to the Commission on any ethics violations that come to his or her attention in his or her official capacity within ten (10) days and shall cooperate as possible in any investigation or hearing conducted by the commission. *Ala. Code § 36-25-17.*

There is no definition of "governmental agency head" found in the Ethics law. However, an Ethics Opinion issued in 2008 held that an assistant county administrator would be required

to report a violation under § 36-25-17. See, *Ethics Opinion No. 2008-18*. In that opinion, the Ethics Commission also offered some guidance on how this provision should be interpreted:

Because the intent of the Legislature is that suspected violations be reported, the Commission staff has informally, over the years, included under the definition of “governmental agency heads” department heads, division chiefs, etc. The Commission staff has also long told individuals when asked this question that, while certain people may not have a legal responsibility to report violations, all public officials and public employees should feel that they have a moral responsibility to report suspected violations, in order that the public’s interests are best served.

PROTECTION AGAINST RETALIATORY DISCHARGE

Ala. Code § 36-25-24 protects a public employee who files a complaint with the Ethics Commission for an alleged violation, provided the complaint is filed in good faith. Under this provision, a supervisor cannot discharge, demote, transfer, or otherwise discriminate against an employee for filing an ethics complaint in good faith or for giving truthful statements or testimony concerning an alleged ethics violation.

- This does not prevent discipline, discharge, or transfer not connected to the filing of a complaint or giving truthful statements or testimony
- A supervisor alleged to have violated this section shall be subject to civil action
- A public employee who files a complaint against a supervisor without a good faith belief in the truthfulness and accuracy of the complaint is subject to civil action and personnel action

PENALTIES

An intentional violation of the Ethics law is a Class B felony, punishable by imprisonment for 2 to 20 years and/or a fine of not more than \$10,000.

Any other violation is a Class A misdemeanor, which is punishable by not more than one year in county jail and/or a fine of not more than \$2,000.00.

The Ethics Commission has authority to resolve minor violations by levying an administrative penalty not to exceed \$1,000.

- “Minor violation” means economic gain or loss of less than \$250
- The Commission shall also order restitution

CONSTITUTIONAL RESTRICTIONS ON USE OF PUBLIC FUNDS/PROPERTY

SECTION 94 OF THE CONSTITUTION

Alabama's Constitution includes a strict prohibition against a governmental entity performing work on private property or otherwise granting any "public money or thing of value in aid of" any private interest. *Section 94 of the Constitution of Alabama 1901, as amended by Amendment 112*, provides that:

The legislature shall not have power to authorize any county, city, town, ***or other subdivision of this state*** to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company by issuing bonds or otherwise. It is provided, however, that the legislature may enact general, special, or local laws authorizing political subdivisions and public bodies to alienate, with or without a valuable consideration, public parks and playgrounds, or other public recreational facilities and public housing projects, conditional upon the approval of a majority of the duly qualified electors of the county, city, town, or other subdivision affected thereby, voting at an election held for such purpose.

This constitutional prohibition is the basis for the long-held view that counties and other local governmental entities are prohibited from performing work on private property or from providing labor or materials to individuals. There are many Attorney General's Opinions addressing specific questions raised in regard to this prohibition.

EXCEPTIONS TO GENERAL RULE

There are certain recognized exceptions to the general rule. Most of these will have no application to county revenue officers, but a general overview of the exceptions is set out below.

Local Legislation

The attorney general has consistently held that work may be performed on private property where there is local legislation authorizing such work to be done, if it provides that the entity will be fully reimbursed for the labor, materials, and equipment used in the work, and there is a provision of certainty in the legislation that the entity will be paid. *See, e.g., AG's Opinion ## 2001-188; 96-61, 94-245, 90-257, 89-89, and 84-393.*

However, at least two Circuit Courts in Alabama have struck down local laws authorizing county work on private property, declaring that they violated *Section 94, as amended*. The

attorney general has “hinted” that these local laws may have problems, but that office does not issue opinions on constitutionality of a statute.

Amendment 112 does authorize local legislation to provide assistance for certain public purpose projects such as parks or housing projects, if approved by the electorate. However, this would have very limited application.

Statutory Exceptions

The attorney general has also recognized exceptions to the general prohibition against performing work on private property based upon statutory provisions authorizing certain actions, such as provisions allowing counties to assist school boards or volunteer fire and rescue organizations.

Special Circumstances

Other exceptions have been recognized by the attorney general's office because of a special circumstance, such as where it can be shown that there is a genuine benefit to the governmental entity and/or public. A few examples are listed below:

- County may work on private property to correct health problem or nuisance, where the county health department certifies to county commission that there is a public health or safety hazard (such as an abandoned well). *AG's Opinion ## 88-223, 2001-188; 96-61, 94-221, and 93-303.*
- County may work on roadway belonging to public water authority since it is a public corporation and a road belonging to that corporation would be a public road. *AG's Opinion # 82-72.*

Each of the above exceptions should be very narrowly applied. And there are many examples where exceptions have not been allowed, such as the following:

- County may not perform maintenance and repairs on a private road leading to a water authority. *AG's Opinion # 2001-231.*
- County cannot perform work on private property for the purposes of parking or turnaround. *AG's Opinion ## 94-245, 96-214 and 82-72.*

Public Purpose Doctrine

The Supreme Court has held that public entities may donate public money or other things of value where there is a “public purpose”, which has as its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community. The test should be whether the expenditure confers a direct public benefit of a reasonably general character (i.e. a significant part of the public). *Slawson v. Alabama*

Forestry Commission, 631 So.2d 953 (Ala. 1994). The Supreme Court and the attorney general have generally held that this is largely a decision to be made by the governing body. However, entities should be very careful in applying this doctrine, and ensure that there will be a direct public benefit of a general character. The attorney general has written numerous decisions discussing this principle. A few are set out below:

- City may assist the county program on aging in the renovation of a building for the activities of the program. *AG's Opinion # 2002-039*.
- City may not place ad in a souvenir booklet published by a political organization if the ad does not serve a public purpose. *Opinion # 1997-220*.
- County may make appropriation to a charitable organization such as the Boys and Girls Club if it determines that a public purpose is served, but the better practice would be to contract for services. *Opinion # 1997-099*.
- The restrictions of Section 94 do not apply where a governmental entity enters into a contract with mutual benefits to each party and consideration on both sides. *AG's Opinion # 2005-017*.

The Attorney General's office has begun to look more closely at whether there is some statutory authority to support the use of public monies. For example, in *AG's Opinion # 2012-044*, that office held:

Absent statutory authority to promote the general welfare and development of citizens who are mentally and developmentally disabled, the Geneva County Commission may not use and appropriate county funds to the Geneva County Association for Retarded Citizens for the payment of fire and hazard insurance on a building owned by the Association.

SECTION 68 OF THE CONSTITUTION

Another Constitutional prohibition, similar to Section 94, prohibits an increase or decrease in the compensation of a public officer during his or her term of office and prohibits granting any extra compensation or allowance to any public officer or employee after services have been rendered. This provision states as follows:

The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employee, agent or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not apply to allowances made by commissioners' courts or boards of revenue to county

officers for ex officio services, nor prevent the legislature from increasing or diminishing at any time the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners.

Regarding County Employees' Compensation

Section 68 has been interpreted to prohibit any additional compensation or benefit to a governmental employee after the services have already been rendered. In other words, it is not possible to "reward" an employee for exceptional work by providing an unanticipated bonus – or authorize additional pay for past special work. There are many attorney general's opinions on this subject. A few are set out below:

- Governmental entity cannot grant retroactive pay increase unless there was expectation or agreement of increased payment. *AG's Opinion # 2000-105.*
- Section 68 prohibits granting employees retroactive pay increase beyond the first day of the pay period for which compensation is due. *AG's Opinion # 88-136.*

Application to Other Benefits

Section 68 and Section 94 have both been consistently used as authority for the proposition that government employers cannot use public funds to provide gift certificates, awards plaques, hold appreciation dinners, and the like for county employees using public funds. Each circumstance must be considered individually, and the attorney general's office has applied the "public purpose doctrine" discussed above in some instances to authorize certain activities like providing lunch or refreshments at a working meeting, but in general, there is a strong prohibition against such practices. A small sampling of opinions is set out below:

- Purchase of gift certificates for employees with public funds prohibited under Section 94 and Section 68 of Alabama's Constitution. *AG's Opinion # 2002-133.*
- A governmental entity may not purchase flowers, etc. for families of deceased employees, officials, relatives, or members of the general public with public funds. *AG's Opinion # 2001-129.*
- Governmental entity may allow employees to use civic center at discounted rate if made a part of the employees' compensation. *AG's Opinion # 2004-188.*
- Governmental entity may have retirement incentive program if treated as part of employees' compensation and is made pursuant to a written, specified personnel policy. *AG's Opinion # 2002-191.*

Political Activities

Ala. Code § 17-1-4 specifically authorizes county and municipal employees to participate in political activities, but places restrictions on persons seeking political office. *Ala. Code § 17-17-5* makes it a crime to use public time or property for the political activities.

Under *§ 17-1-4*, no county or municipal employee shall be denied the right to participate in political activities to the same extent as any other citizen of the State of Alabama, including:

- Endorsing candidates and contributing to campaigns
- Joining local political clubs and organizations and political parties
- Publicly supporting issues and petitions in support of referendums

Ala. Code § 17-1-4 (b) does, however, place severe restrictions on employees seeking public office by requiring that any employee who qualifies to seek a political office ***with the governmental entity with which he or she is employed*** take an ***unpaid*** leave of absence from his or her employment.

- The employee may use accrued overtime leave, or use accrued vacation time
- Any employee who violates this provision forfeits his or her employment
- This provision does not apply to elected officials

The leave must be taken from the date he or she qualifies to run for office until the election results are certified, the employee is no longer a candidate, or there are no other candidates on the ballot.

As noted above, *Ala. Code § 17-17-5* specifically prohibits government employees from using any government time or property for political activities. That section also states that, "Any [government employee] shall be on approved leave to engage in political action or the person shall be on personal time before or after work and on holidays."

Section 17-17-5 also prohibits any solicitation of contributions or coercion regarding political campaigns on subordinate employees.

Any person violating *§ 17-17-5* is guilty of the crime of trading in public office found at *Code of Alabama 1975, § 13A-10-63*. This offense is a Class A misdemeanor, punishable by imprisonment of not more than one year and a fine of \$6,000.