

# STATE ETHICS COMMISSION

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October 1, 2014

**TO: Regulated Lobbyists, Employers, and Prospective Regulated Lobbyists**

**SUBJECT: Lobbyist Contingent Fee Restrictions**

This is a State Ethics Commission staff informational memorandum. It is not an opinion of the State Ethics Commission. This discussion is limited to contingent fee issues and does not address other standards of conduct applicable to lobbyists.

The Public Ethics Law contains provisions prohibiting regulated lobbyists from engaging in lobbying for contingent compensation, including fees or other compensation arrangements. Because the Law applies to regulated lobbyists (which covers employers and individual regulated lobbyists), this prohibition covers both employers as to the manner in which they compensate their lobbyists and individual regulated lobbyists as to the manner in which they are compensated.

## **Lobbying Legislative Action**

Section 5-101(v)(l) defines legislative action as an official action or non-action relating to:

- a bill, resolution, amendment, nomination, appointment, report or other matter within the jurisdiction of the General Assembly, or
- a bill presented to the Governor for signature or veto.

Legislative action includes introduction, sponsorship, consideration, debate, amendment, passage, defeat, approval or veto.

## **Executive Action**

Section 5-101(l) defines executive action as an act for which the executive branch of State government is responsible and that is taken by an official or employee of that branch.

## **General Prohibition**

The prohibition on contingent compensation is found in §5-714(1) of the Law. It provides that a regulated lobbyist (including individual lobbyists and their employers) may not be engaged for lobbying purposes for compensation that in any manner is dependent on:

- the enactment or defeat of legislation,
- any other contingency related to legislative action,
- the outcome of any executive action relating to the solicitation or securing of a procurement contract, or
- any other contingency related to executive action.

## **General Discussion**

In view of the restrictions established in the Ethics Law, lobbying compensation generally should be a flat fee, established salary, hourly fee, or some combination thereof. The statutory prohibition against paying or receiving contingent fees is an important and significant prohibition to protect against a lobbyist's having incentives that may suggest improper attempts to influence action.

Examples of prohibited contingent fees include:

- a fee structure dependent on whether legislation is introduced, passed, defeated or amended. This also applies to two-tier fee arrangements in which a retainer is paid and the fee increases based on some legislative action or inaction.
- a lobbying fee that is dependent on some executive procurement decision or other executive administrative action or inaction.
- an arrangement by which a lobbyist will receive an interest in a business entity depending on whether the legislation lobbied for allows the entity to be established or operate in a new manner.
- an arrangement by which a lobbyist may receive other types of non-lobbying employment or fees related to the success of the lobbying effort . For example, the State Ethics Commission advised in Opinion 88-13 that if a firm's future legal fees depended on success in lobbying for a State contract, the fee was considered to be a contingent.

## **Preferred Approach**

Although the Ethics Law (§5-409) requires detailed records to support all regulated lobbyist compensation and expenses, there is no express provision that specifies the documentation needed to establish the basis for the compensation. In order to clearly demonstrate compliance with the Law, we recommend that regulated lobbyists obtain a written fee agreement prior to the start of lobbying activity. If such an agreement is not developed or is developed after the lobbying process has begun, it will be difficult to establish compliance with the Law or document that the fee was not contingent. Contemporaneous documentation of the fee structure is the most effective way to establish that the fee was not contingent.

If you have any questions about the compensation restrictions or other provisions of the Ethics Law, we encourage you to contact the State Ethics Commission for guidance.