

**STATE ETHICS COMMISSION  
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**August 22, 2019**

**TO: State Officials and Employees**

**SUBJECT: Summary of Public Ethics Law Restrictions on Secondary or Outside Employment and Ownership of Financial Interests**

The purposes of the Public Ethics Law (“Ethics Law”) are to avoid conflicts of interest, ensure impartiality and independence of judgment and avoid the appearance of conflicts of interest. The State Constitution also expresses a similar standard stating the need for officials to act diligently, faithfully and without partiality or prejudice.

### **SECONDARY EMPLOYMENT**

The Ethics Law restricts secondary employment by officials and employees of the State. For purposes of the Ethics Law, the State position is primary employment and all other employment is secondary employment.<sup>1</sup>

#### **Types of Employment**

Secondary employment includes compensated employment with an entity and non-compensated service involving a fiduciary relationship such as service on a board of directors. Secondary employment under the Ethics Law includes the following situations:

- Compensated employment with a for-profit or non-profit entity;
- Compensated employment with local government or a federal agency;
- Compensated employment with another State agency;
- Service as an elected official at the local level<sup>2</sup>;
- Service on a State, federal, or local government board or commission with or without compensation<sup>3</sup>; or
- Service on a for-profit or non-profit board or commission with or without compensation.

#### **Basic Secondary Employment Prohibitions**

The Ethics Law includes three provisions which may restrict secondary employment.

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<sup>1</sup>This memorandum does not apply to Judges or Members of the General Assembly as their restrictions are administered by other ethics agencies.

<sup>2</sup>Other Ethics Law restrictions may also apply.

<sup>3</sup>Other Ethics Law restrictions may also apply.

- Section 5-502(b)(1) prohibits an official or employee from having secondary employment with an entity that does business with, is regulated by, or is under the authority of the State department or agency with which the official or employee is affiliated. The Ethics Law authorizes the Commission to grant exceptions to this restriction under very limited circumstances. The Commission's exception regulations are published in COMAR Title 19A and delineate specific requirements for an exception. Generally, the Commission will not grant an exception if the employee or official has State duties relating to the private employer, is affiliated with the unit of the State agency that has duties relating to the private employer, or has duties with the private employer relating to the State department or agency with which the official or employee is affiliated.
- Section 5-502(b)(2) of the Ethics Law prohibits secondary employment that would impair the impartiality and independent judgment of the official or employee.
- Section 5-503(b) prohibits an official or employee who has duties relating to a contract from being employed by an entity that is a party to that contract.

Sometimes an employee or official may wish to hold two State positions, either through employment with two State agencies or through service on a State board in addition to State employment. In these situations, the Commission's analysis focuses on the provisions of § 5-502(b)(2) and whether the service in one State position will impair or create the appearance of impairment of the individual's independence of judgment in the other State position.

Section 5-704(f)(3) generally bars a regulated lobbyist from being an official or employee of the State. The Commission's regulations (COMAR 19A.07.01) allow a regulated lobbyist to serve on a State board or commission under limited circumstances and subject to certain restrictions. However, a State official or employee may not be a lobbyist required to register as a regulated lobbyist with the State Ethics Commission.

The Commission has issued numerous formal advisory opinions providing detailed discussions of many different situations involving secondary employment. You may find the formal advisory opinions at the website of the Division of State Documents in the Office of the Secretary of State at <http://www.dsd.state.md.us/comar/SearchTitle.aspx?scope=19A> or on our website at <http://ethics.maryland.gov>. If you have a specific question regarding secondary employment, you should contact the Commission for advice.

## **EX OFFICIO SERVICE**

Activity involving uncompensated service as a director or board member of an organization may be part of an official's or employee's State duties rather than secondary employment. It requires a determination by the Ethics Commission of whether the service is in a private capacity or as a representative of the individual's State agency. In many instances, a person may be appointed to serve on an organization's board in an ex officio capacity as an agency representative. In order for an official or employee, consistent with established law and policy, to serve as an officer or director of an organization while using State time and resources (i.e. in an ex officio capacity), the following conditions must apply:

1. The goals and mission of the organization must be clearly aligned with those of the agency and the position held by the official or employee must be designated for a State official or

employee or must have as a requirement that it be held by an individual employed by a governmental entity.

2. The agency must determine that the mission of the agency is enhanced by participation of the official or employee in a management role for the organization, and the continued service and the amount of State time and State resources committed to that service must be closely monitored by the agency;
3. The official or employee may not receive compensation or reimbursement from the organization unless that compensation or reimbursement meets the requirements of a Gift to the State (*see* the Commission's Gift Memo), but may be reimbursed for actual expenses by the agency consistent with State policy and regulation;
4. The official or employee may not participate in any actions or take any positions contrary to an officially defined position of the State or the official's or employee's agency;
5. The official or employee may not participate in fundraising activities on behalf of the organization or otherwise use the official's or employee's State title for the private gain of the organization;
6. The official or employee must adhere to the Ethics Law's prohibition on the use of confidential information.

An official or employee who accepts a position as an organization's officer or board member that is determined by the Ethics Commission to satisfy the conditions for ex officio service described above should notify the organization of those conditions so there is no misunderstanding as to the nature of their service.

### **OWNERSHIP INTEREST PROHIBITIONS**

Section 5-502 prohibits State employees and officials from having financial interests in entities that do business with or are regulated by the State Department or agency with which the employee or official is affiliated. The Ethics Law defines "financial interest" to include ownership of an interest in which the owner is currently receiving, has received in the past three years, or in the future is entitled to receive \$1,000 or more per year. The Commission has interpreted financial interest to include an interest for which the owner is entitled to receive \$1,000 or more upon sale of the interest. "Financial interest" also includes ownership of more than 3% of a business entity by an official, employee or the spouse of an official or employee. The Commission's regulations authorize the Commission to grant an exception to this strict prohibition under limited circumstances. The regulations include a requirement that the financial interest be disclosed and the Commission must determine that there is no conflict or appearance of conflict. Not all situations are appropriate for an exception. For example, an energy official could not have financial interests in oil companies; a health official could not have financial interests in a hospital; and a utilities commission member could not have financial interests in utility companies. If you have a specific question regarding financial interests or wish the Commission to consider granting you an exception, you should contact the State Ethics Commission.

## **SPECIAL EXEMPTIONS AND RELATED RESTRICTIONS**

The Ethics Law contains some special exemption provisions that may allow, under very limited circumstances, an official or employee to hold secondary employment or a financial interest that the Ethics Law would otherwise prohibit. Most of the provisions are applicable solely to part-time members of State boards and commissions. Other situations generally require a request for exemption from the Governor and the agency involved and are seldom used. (See § 5-502(d)).

It is important to note that even when the Commission grants an exception or exemption, all of the other provisions of the Ethics Law continue to apply. For example, the employee or an official may not participate in any matters on behalf of the State relating to the employee's secondary employer or entity where the ownership interest lies even if the Commission grants an exemption or exception.

Note that as a general approach to outside employment matters, the Commission has developed criteria that rely on both the secondary employment provision of the Ethics Law, as discussed above, and the provision governing the intentional misuse of the prestige of one's office for one's own economic gain or that of another (§5-506). Although the employment may be permissible, unless it is determined to be ex officio service as discussed above, the activity may not be conducted on State time or with State materials or equipment. (See Opinions 99-06 and 08-01).