Taking the Leap from Public Service to Private Sector

by Paul Josephson and Andrew Weiming Lee

Of the myriad transitions attorneys may undertake in the course of their careers, perhaps none is as anxiety inducing as the transition from public service to private practice. In addition to new billing, origination, and client-development responsibilities, attorneys departing public sector jobs must remain alert to 'revolving door' laws that regulate the careers of all public employees post-employment, plus the ethics rules that apply to attorneys whether their government service was in a legal or non-legal capacity.

The main purpose of these restrictions is to prevent former government employees from taking advantage of information and knowledge learned during public employment for the benefit of another person or entity and to the detriment of the government. These restrictions must be carefully balanced, however, to ensure they do not pose such a barrier to departure as to discourage the best and brightest from serving the public in the first place.

New Jersey Revolving Door Laws

In New Jersey, attorneys departing public employment at any level or branch, regardless of whether their government service was as an attorney or as a public officer or employee, are governed by RPC 1.11, which addresses successive government and private employment.[1]

In addition, the principal source of law governing the post-public employment activity of state executive branch employees, including attorneys employed by the state, is the New Jersey Conflicts of Interest Law (COIL), at N.J.S.A. 52:13D-12 *et seq*. The State Ethics Commission enforces this law and promulgates regulations and ethics codes to implement the statute, and can issue advisory opinions and informal advice to departing employees.[2]

In addition to the statute and regulations, a uniform ethics code, and agency-specific ethics codes, may apply as well. Pursuant to Section 23(a)(2) of the COIL, the State Ethics Commission promulgated a uniform ethics code to govern and guide the conduct of state employees in the executive branch, effective Sept. 11, 2006. The current version of this code, adopted in 2011, is the primary code of ethics for all state agencies.

In addition, each state agency is required to promulgate its own code of ethics to govern and guide the conduct of state employees and special state officers and employees in the agency, which must be approved by the commission and the attorney general.[3] Each code must conform to the general standards set forth in the COIL, but may be formulated with respect to the particular needs and problems of the agency to which the code is to apply and, when applicable, supplement the uniform ethics code.

The COIL imposes civil and criminal liability for violations of its post-employment restrictions. Violation of this prohibition can be punished criminally as a disorderly persons offense subject to a fine not to exceed $ 1,000 or imprisonment not to exceed six months, or both. While criminal prosecution may be rare, since the 2005 amendments were enacted civil penalties of up to $10,000 *per violation* can now be imposed by the commission on former employees—even after they have left state service. These enhanced civil penalties are not to be taken lightly: As recently as July 2014, the commission levied a $11,000 fine on a departed state employee for violating the law and an agency-specific ethics code.[4]

Finally, governors have routinely issued executive orders at the outset of their administration to impose ethics and financial disclosure obligations on their employees over and above those established by statute and regulation. No recent executive order has reached the issue of post-employment restrictions. Nevertheless, future governors may use an order to establish such restrictions, and it is always important to review the current administration's executive orders for policies, substantive obligations, and gloss that may be relevant to a specific employment scenario.

Whether the governor's constitutional authority to ensure the faithful execution of laws extends so far as to reach con-

duct beyond an employee's term of public employment may be debated. But there is current federal precedent for such limitations to be imposed by way of executive orders and employment contracts.[5]

County and Local Employees

With the notable exceptions of employees of county tax boards, county superintendents of elections and county boards of elections, which are deemed state agencies whose employees are subject to the COIL, all other county and local employees are governed by the Local Government Ethics Law (LGEL).[6] The LGEL does not expressly regulate post-employment conduct, except for members of independent local authorities.[7]

As a result, RPC 1.11 will be the principal, and perhaps only, regulation of a departing county or local employee's post-employment activities.

The LGEL permits, but does not require, that counties and municipalities establish their own ethics boards, in which case they must promulgate a code of ethics at least as restrictive or more restrictive than the LGEL. This permits counties and towns to establish their own post-employment restrictions, if they so choose. Moreover, in certain counties and municipalities there is a growing use of executive orders to implement ethics reforms. Departing county and local employees should determine whether such codes or orders have been issued and may apply to them.

In addition, the COIL limits post-employment activities of the municipal judge and municipal attorney of a municipality where a casino is located; any member of or attorney for the planning board or zoning board of adjustment of a municipality where a casino is located; and any professional planner, or consultant regularly employed or retained by such a planning board or zoning board of adjustment. This has been limited to Atlantic City officials, but with serious consideration of expanding casinos elsewhere this provision may soon reach others.

Lifetime 'Substantial and Direct' Ban

No state employee, subsequent to the termination of his or her office or employment with any state agency, *nor the firm or professional services corporation employing the former public employee*,[8] may:

- represent, appear for, negotiate on behalf of, or provide information not generally available to members of the public or services to
- any person or party other than the state
- in connection with any cause, proceeding, application or other matter with respect to which such state employee "made any investigation, rendered any ruling, given any opinion, or been otherwise *substantially and directly involved* at any time during the course of his office or employment."

It is important for employers to note this prohibition applies not only to the employee but also the partnership, firm or corporation "in which he has an interest," and any partner, officer or employee thereof.

This lifetime prohibition on involvement in matters in which the employee was substantially and directly involved has been interpreted in a number of cases. The term "matter" is defined narrowly to cover specific matters or projects and not general policies or legislation, while the term "substantially and directly" is defined broadly to embrace virtually any sort of contact with the matter while in public service.[9]

One-Year Agency Ban

Certain high-ranking state officials, who often are attorneys, may be subject to two categorical restrictions on their post-employment activities in addition to the lifetime, matter-specific prohibition. The Uniform Ethics Code specifies that for one year after the termination of state office or employment the following individuals may not represent, appear for, or negotiate on behalf of, or agree to represent, appear for, or negotiate on behalf of any person or party other than the state with or before any state agency in which he or she served:

- The head, deputy head or assistant head of any principal department, board, commission or authority, including the superintendent of state police,
- the governor's chief of staff, chief of management and operations, chief of policy and communications, chief counsel, director of communications, policy counselor, and
- any deputy or principal administrative assistant to any of the aforementioned members of the staff of the Governor's Office.

However, unlike the lifetime matter-specific ban, the one-year categorical ban on appearing before one's former agency does not limit the appearances or activities of any partnership, firm or corporation in which the former employee has an interest or is employed. Moreover, as an administratively adopted prohibition not adopted by the Legislature, it would appear the only sanction for a violation is a civil penalty.

Two-Year Casino Restrictions

The COIL also prohibits a larger cohort of high-ranking state—and local—employees and their immediate family members from subsequently working for holders of and applicants for New Jersey casino licenses. It also limits the work they may do for firms that represent casino licensees. The casi-

no prohibition lasts for two years after state employment:

> No person or any member of his immediate family, nor any partnership, firm or corporation with which such person is associated or in which he has an interest, nor any partner, officer, director or employee while he is associated with such partnership, firm or corporation, shall, within two years next subsequent to the termination of the office or employment of such person, hold, directly or indirectly, an interest in, or hold employment with, or represent, appear for or negotiate on behalf of, any holder of, or applicant for, a casino license in connection with any cause, application or matter, or any holding or intermediary company with respect to such holder of, or applicant for, a casino license in connection with any phase of casino development, permitting, licensure or any other matter whatsoever related to casino activity.[10]

This prohibits the former employee from holding (directly or indirectly) an interest in, or holding employment with, a casino licensee or applicant, and from representing, appearing for, or negotiating on behalf of a casino.

The casino restriction applies to a broad range of state employees down to the division head level at any state agency, including:

- any state officer or employee subject to financial disclosure by law or executive order;
- any other state officer or employee with responsibility for matters affecting casino activity;
- any special state officer or employee with responsibility for matters affecting casino activity;
- any full-time professional employee of the Governor's Office, or the Legislature;
- members of the Casino Reinvestment Development Authority;
- the head of a principal department; the assistant or deputy heads of a principal department, including all assistant and deputy commissioners;
- the head of any division of a principal department; and
- the governor and any member of the Legislature or full-time member of the Judiciary.

The State Ethics Commission is charged with enforcing the casino restrictions. Until recently, it was understood this law completely barred employment for two years after leaving state employment by a firm that represents New Jersey casinos. However, the current administration amended the Uniform Ethics Code in 2011, relaxing its prior position to permit a former employee to be employed by a partnership, firm or corporation providing professional services to a casino licensee. Now, the firm may continue to engage in casino-related matters, provided the former public employee or immediate family member: 1) is screened from these matters for a period of two years following the termination of the person's state employment, and 2) does not hold equity in the firm. This new safe harbor is not available to a firm that hires a former governor, lieutenant governor or attorney general.[11]

Waivers of the casino restriction for a state employee who is terminated as a result of a reduction in force (RIF) may be sought from the State Ethics Commission, the Joint Legislative Committee on Ethical Standards, or the Supreme Court, depending on the branch of service. A waiver may be granted at any time prior to the end of the two-year period to allow a RIFed employee, other than those who held a policy-making management position during the five years prior to termination, to accept employment with a casino licensee if it is found that employment will not create a conflict of interest, or a reasonable risk of the public perception of a conflict of interest, on the part of the employee.

This prohibition is separate from post-employment provisions of the Casino Control Act specific to gaming regulators.[12]

One-Year Lobbying Ban

Finally, the state's lobbying law prohibits the governor and each head of a principal department in the executive branch from registering as a "governmental affairs agent," for one year after the termination of office or employment. This effectively prohibits them from seeking to influence legislation, or influencing regulation or any other "governmental processes," by *any* state agency.[13] Note that as a function of the lobbying statute, this provision is enforced by the Election Law Enforcement Commission, rather than the State Ethics Commission.

RPC 1.11: Successive Government and Private Employment

Of course attorneys—regardless of the level or branch of government they have served—face an additional body of regulation as they leave any government service: the Rules of Professional Conduct. The Supreme Court extensively modified RPC 1.11 in 2003, based on the recommendations of Justice Stewart Pollack and the Pollack Commission, whose effort led to the elimination of the difficult "appearance of impropriety" standard from RPC 1.7 and RPC 1.11.

Those amendments created a bright-line, six-month period from the end of government service during which any attorney departing government service may not represent a private party whose "interests…are materially adverse to the appropriate government agency."[14]

Moreover, a former government attorney is prohibited from representing a pri-

vate client in any matter in which, during government service, the attorney:

- "participated personally and substantially"; or
- had "substantial responsibility."

In either circumstance, the conflict is personal, and not imputed to the attorney's new firm, provided: 1) the attorney is screened from participation and the fee, and (2) written notice is given to the government agency "to enable it to ascertain compliance" with RPC 1.11. However, the COIL does not permit screening in cases of personal participation or substantial responsibility, and the Supreme Court has deferred to that law in such circumstances.[15]

The converse is also true (*e.g.*, a private attorney entering government service may not switch sides and handle for the government matters in which he or she participated while in private practice), but the former private client can waive that conflict. Because government entities cannot waive conflicts in New Jersey, government entities cannot waive the conflicts of their former attorney-employees when they enter the private sector.[16]

The RPC also vests authority in government agencies to establish, by way of their conflict of interest rules, additional categories of matters that former employees are precluded from handling in subsequent private employment.[17] Thus, in promulgating agency-specific ethics codes, or county and municipal ethics codes, such public agencies have the ability to craft special post-employment rules specific to their peculiar circumstances and case load.

Federal Revolving Door Laws

Federal revolving door laws were enacted as early as 1872. The current statute, 18 U.S.C. § 207, was enacted in 1962, and with numerous subsequent amendments is the primary restriction limiting post-employment movement of individuals leaving U.S. Government service. None of the statute's restrictions bar former government employees from all or a segment of the practice of law, or prohibit employment by a category of employers. Rather, it disqualifies individuals from representational or advocacy-type activities in particular cases where participation would be unethical as a result of the individual's previous activity or participation as a government employee in the same matter.[18] However, other statutes described below do prohibit certain employers from hiring bank regulators and procurement officials.[19]

An individual who violates Section 207 may be imprisoned for a term of not more than one year, or five years in the case of wilful conduct. A fine of up to $50,000 for each violation may also be imposed. Separately, a court order from the appropriate United States district court prohibiting the former federal employee from continuing the offensive conduct may also be obtained by the attorney general.

Lifetime 'Personal and Substantial' Ban

Individuals who, during their former employment with the government, were involved or participated personally and substantially in any matter in which the United States was a party, are prohibited from communicating with or appearing before the government on behalf of another individual on that particular matter.[20] In the specific context of individuals leaving government service to join the legal industry, this would mean that the individual would be permanently barred from acting as an attorney on behalf of anyone in any matter in which he or she participated personally and substantially while in government and to which the United States was a party.[21]

The term "substantially" is defined to mean that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.[22]

Two-Year Official Responsibility Ban

A former employee whose participation or involvement in a particular matter was not personal and substantial, but had been pending under his or her official responsibility during his or her last year of government service, is prohibited from communicating with or appearing before the government on behalf of another individual on a particular matter that involved the parties for two years.[23]

In this regard, the term "official responsibility" is defined as the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government actions.[24]

Two-Year Agency Ban for Cabinet Officials

Former Cabinet-level officials are barred from representing any other person or entity to communicate or appear before the former employee's previous agency to seek official action on any matter for two years. The former employee is also prohibited from making such contact with executive-level officials at any agency or department in the executive branch for the same period of time.[25]

One-Year Agency Ban for Executives

Former executive-level employees are barred from representing any other person or entity to communicate or appear

before the former employee's previous agency to seek official action on any matter for a period of one year.[26] For example, a former Criminal Division employee cannot contact the Drug Enforcement Administration if circumstances support an inference of intent that his or her communications with the Drug Enforcement Administration will be shared, with attribution, with the Criminal Division. However, a former Criminal Division employee can contact an employee in the Civil Division on a new matter during the one-year period as long as there is no inference or indication that his or her communications will be shared, with attribution, with the Criminal Division.[27]

Foreign Entities and Treaties

Former executive-level employees are barred from representing a foreign government or political party before any agency of the United States for one year. Moreover, they are banned from even aiding or advising such a foreign entity with the intent to influence an employee of a federal agency during that period.

Separately, *all* former government employees of any level who 'personally and substantially' participated in ongoing treaty or trade negotiations within the last year of employment are prohibited from representing or advising any other person for one year on an ongoing treaty or a trade negotiation.[28]

Employer-Specific Bans for Procurement and Banking Officials

In addition to these restrictions on most former government employees, bank regulators and procurement officials are subject to durational prohibitions against working for those they previously regulated or did business with while in government. Thus, certain officers and employees of a federal banking agency or reserve bank involved in bank examinations or inspections are restricted from any compensated employment by or consulting to those depositary institutions they regulated, as well as their holding and controlling companies, for one year after leaving federal service.[29]

Likewise, procurement integrity provisions of federal law prohibit former federal officials who were involved in certain contracting and procurement duties for the government concerning contracts in excess of $10 million from receiving any compensation from the private contractor involved, as an employee, officer, consultant, or director of that contractor, for a period of one year after performing those procurement duties for the government.[30]

Contracting duties and decisions that trigger coverage under these provisions are very broad, and include acting as the "procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement" in excess of $10 million; serving as the program manager, deputy program manager, or administrative contracting officer for covered contracts; or being an officer who personally made decisions awarding a contract, subcontract, modification of a contract, or task order or delivery order in excess of $10 million, establishing overhead or other rates valued in excess of $10 million, or approving payments or settlement of claims for a contract in excess of the covered amount.

Negotiating Private Employment

No article on post-employment restrictions would be complete without mentioning the related duties when negotiating for private employment while still in government service. Such negotiations are fraught with the opportunity for questions to be raised by former colleagues or the press once the employee departs public service for his or her new employer. As a general rule, the departing attorney will be wise to follow certain commonsense principles:

- Do not use public agency phones, computers, or email services to solicit or discuss future employment. This is why they call it a 'smartphone.' Be smart, and use it.
- Do not circulate resumes to any interested party in a matter with whom you have direct and substantial contact.
- If solicited for potential employment by an interested party in such a matter, notify agency management and/or ethics officer.
- Once any discussions of possible employment commence, formally recuse from any matters involving the potential employer, and honor the recusal.
- Interviews, discussions, and negotiations should never be conducted on public time or premises.

Federal and state rules differ, as do agency-specific codes, and so should always be consulted for specific limits and processes *before* exploring private employment opportunities. ⚖

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ENDNOTES

1. RPC 1.11(a).
2. The commission also has administrative authority granted by the governor by Executive Orders 189 (Kean, 1989), 41 (Codey, 2005), 68 (Codey, 2005), 14 (Corzine, 2006), and 24 (Christie, 2010).
3. Section 23(a) (1) of the Conflicts Law.
4. *State v. Singh*, State Ethics Commission Dkt. No. 16-07 (July 22, 2014), accessible at state.nj.us/ethics/docs/final/singh_016-07.pdf.

5. Executive Order 13490 (74 F.R. 4673-74, Jan. 26, 2009)(requiring all full-time appointees to execute a binding ethics pledge agreeing not to lobby any Obama Administration official for the duration of the administration, and extending the ban on lobbying their former agencies for two years from the one year provided by statute).
6. N.J.S.A. 40A:9-22.1, *et seq*.
7. Independent authority members may not become employees of the authority for a year after their service on the authority, and they and their firms may not represent or appear on behalf of other parties before the authority on which they served. This provision regulates appointed members, but not employees, of such authorities. N.J.S.A. 40A:9-22.5(b).
8. N.J.S.A. 52:13D-13, defining an interest, provides that "[t]he provisions of this act governing the conduct of individuals are applicable to shareholders, associates or professional employees of a professional service corporation regardless of the extent or amount of their shareholder interest in such a corporation."
9. The State Ethics Commission provides some examples of such determinations on its website at nj.gov/ethics/statutes/guide/empl_restrictions.html. While the commission does not provide a comprehensive or searchable database of all decisions, most decisions of note since 1992 have been summarized in the commission's periodic publication, *Ethics Bulletin*, formerly *Guidelines*, past editions of which are located at nj.gov/ethics/publications/newsletters/.
10. N.J.S.A. 52:13D-17.2(c).
11. Uniform Ethics Code, at 12 (Feb. 2011 ed.).
12. Post-employment restrictions applicable to members and employees of the Casino Control Commission and employees and agents of the Division of Gaming Enforcement are set forth at N.J.S.A. 5:12-59 and -60.
13. N.J.S.A. 52:13C-21.4; *see* N.J.S.A. 52:13C-20 for definitions of "government affairs agent" and "governmental processes."
14. RPC 1.11(a)(3).
15. *In re* Prof'l Ethics Opinion 705, 192 N.J. 46, 58 (2007).
16. Compare RPC 1.11(d)(2) and 1.11(c).
17. RPC 1.11(e)(1).
18. *United States v. Nasser*, 476 F.2d 1111, 1116 (7th Cir. 1973).
19. A useful and concise compendium of federal revolving door provisions issued by the Congressional Research Service is Maskell, "Post-Employment Revolving Door Laws for Federal Personnel" (Jan. 7, 2014).
20. 18 U.S.C. § 207(a)(1).
21. *See* Senate Report No. 2213, Sept. 29, 1962, 2 U.S. Code Congressional and Administrative News, 1962, p. 3861.
22. *See* Office of Government Ethics Regulations, at 5 C.F.R. §§ 2637.201(d).
23. 18 U.S.C. § 207(a)(2).
24. 18 U.S.C. § 202.
25. 18 U.S.C. § 207(d).
26. 18 U.S.C. § 207(c).
27. *See* the Department of Ethics Office's "Summary of the Rules applicable to a job search" Jan. 2010.
28. 18 U.S.C. § 207(b).
29. 12 U.S.C. §1820(k).
30. 41 U.S.C. Sections 2103 and 2104.