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NEWSLETTER

# New/Expanded Pay-to-Play Rules in Montana and San Francisco

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Public contractors are already subject to a bewildering array of so-called "pay-to-play" rules in dozens of states and municipalities. These rules, which may be in the form of statutes, regulations, executive orders, or even agency policies, impose certain bans, limits, and reporting requirements specifically on political contributions by government contractors and prospective contractors and certain of their affiliated individuals. These pay-to-play rules just got a little more complicated recently, as one additional state imposed a new reporting requirement for contractors and one municipality expanded its existing pay-to-play law.

**Montana**

Montana Gov. Steve Bullock issued an executive order last month that will require contractors doing business with the state's agencies to report certain of their political expenditures, nonprofit donations, and even trade association dues as part of the bidding process. The scope of covered transactions is so extensive that contractors will have to step up their monitoring of how their donations and dues payments are used, impose restrictions on such payments, or both.

Specifically, the order covers contractors seeking state contracts exceeding certain thresholds to report any "covered expenditures" of more than $2,500 that have been made during the previous two years by the contracting entity, its parent entities, affiliates, and subsidiaries. If a contract of 24 months or longer is awarded, the contractor also is required to file an updated report of its "covered expenditures" every 12 months.

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Election Law & Government Ethics

A "covered expenditure" includes contributions to and "expenditures [] on behalf of" Montana state candidates and political party committees. The term also includes any "contribution, expenditure, or transfer" to another entity that: (1) pays for an "electioneering communication"; or (2) that itself makes a "contribution, expenditure, or transfer" to a tertiary entity that pays for an "electioneering communication."

An "electioneering communication" in Montana is a paid public communication that is distributed within 60 days before the start of voting in any election that can be received by more than 100 individuals in the relevant jurisdiction, and that refers to a state candidate in that election, a political party, or a ballot measure. The executive order does not further define the terms "contribution," "expenditure," and "transfer."

Corporate contributions to state candidates and political parties are already prohibited in Montana, and the practice of corporations paying for independent expenditures to support or oppose candidates is generally rare. Thus, the apparent intent of the executive order is to focus on reporting of payments made by prospective state contractors to entities such as advocacy groups and trade associations, which may either sponsor so-called "electioneering communications" themselves or make payments to other organizations that do.

The executive order applies to contracts resulting from solicitations and applications received beginning on October 1, and the state Department of Administration is charged with issuing additional guidance by September 1 to implement the executive order.

**San Francisco**

San Francisco enacted an array of amendments to its ethics and campaign finance laws at the end of May. Of particular interest to many *Election Law News* readers are the changes to the city's/county's existing pay-to-play law. (San Francisco operates under a unified city/county government.)

Under the prior law, San Francisco contractors with certain contracts exceeding a certain threshold and their affiliated individuals were prohibited from making a political contribution to any elected city/county official who has approval authority over the relevant contract or who sits on a board with approval authority over the contract. The law also covers contracts with state agencies if a San Francisco elected official sits on the agency's board. The prohibition applied from the time a contractor submitted a bid until the termination of negotiations or, in the case of a successful bidder, six months from the date the contract is approved.

The recent amendments:

- Expanded the scope of contracts covered by the contribution ban;
- Lowered the ownership level at which a contractor's owners become subject to the ban;
- Doubled the time period after a contract is approved for when the ban continues to apply; and
- Raised the dollar threshold for covered contracts.

In addition, if a San Francisco local PAC receives contributions exceeding a certain threshold in a single election cycle from a business entity, the PAC must now specifically identify on its campaign finance reports whether the business entity has received any contract or grant from a San Francisco agency within the prior 24 months, and if so, certain information about the contract or grant. (The new reporting requirement only applies to PACs because corporate contributions to San Francisco candidates are otherwise already prohibited.)

San Francisco's new pay-to-play reporting requirement for recipients of political contributions is somewhat unusual in that these types of reporting requirements typically put the burden on the contractors to report their contributions. However, we are aware of at least one other jurisdiction that requires the recipients of contractor contributions to specifically identify such contributions on their campaign finance reports.

The amended/new San Francisco pay-to-play provisions go into effect on January 1, 2019.