

SB 1439 – Changes to the Levine Act

League of California Cities, OC Division

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- **Introductions**
- **The Levine Act & SB 1439**
- **New Requirements for Disclosure & Recusal**
- **Pre- and Post-Action Prohibitions**
- **Compliance Going Forward**



LEAGUE OF
**CALIFORNIA
CITIES**

◆ Orange County Division

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Randy is a partner in Manatt's Government & Regulatory group.

He has substantial experience involving California's Political Reform Act, and advises clients on conflicts of interest, ethics, lobbying, campaign

contribution requirements and restrictions, as well as providing guidance on ballot measure issues.

Randy also advises government agencies on compliance with California's open meeting laws (the Brown Act and the Bagley-Keene Act) and its Public Records Act.

Randy and Jake also advise nonprofits on corporate governance matters, grant making, and civic and political activities.



Jake is an associate in Manatt's Government & Regulatory group.

He has experience with California's

Political Reform Act, and assists Randy and others in advising clients on related matters.

Jake and Randy also handle government contracting matters, helping clients and municipalities navigate government contracting and procurement, including competitive bidding, contract negotiation and protest processes.

- Adopted in 1982 and codified as part of the Political Reform Act - Government Code §84308
- A form of a conflict of interest restriction - required a member of a **nonelected** body (such as a city planning commission or the Coastal Commission) to recuse themselves from considering or voting on an item
 - if the member receives or solicits a contribution of \$250 or more within the twelve (12) months preceding the vote
 - if the contribution is from a party, participant (or agent) in the proceeding
- Further prohibited from soliciting, directing or receiving campaign contributions during and for three months after the proceeding.

- Signed into law by Gov. Newsom on September 29, 2022
- Expands the Levine Act in two key ways:
 - Applies the Act's prohibitions to local **elected** officials (City Councils, County Boards, etc.)
 - Extends the prohibition on contributions of \$250 or more to 12 months (from 3) after the final decision

- SB 1439 was unsuccessfully challenged in court
- *Family Business Association of California, et al. v. FPPC* filed February 22, 2023
 - *Sacramento Superior Court*
 - On May 25, 2023, the court upheld SB 1439 in its entirety

- In addition to the new law, on June 15, 2023 the California Fair Political Practices Commission (FPPC) adopted regulations guiding compliance with the amended Levine Act's rules.
- The regulations clarify important points about the enforcement of the Act, including:
 - Who qualifies as an “officer” - 2 CCR § 18438.1
 - What qualifies as a “proceeding” - 2 CCR § 18438.2
 - Who qualifies as an “agent” - 2 CCR § 18438.3
 - Who qualifies as a “participant” - 2 CCR § 18438.4
 - How contributions are aggregated - 2 CCR § 18438.5
 - What constitutes a “solicitation” - 2 CCR § 18438.6
 - The disclosure process for contributions and conflicts - 2 CCR § 18438.8

Who is an “officer”

- An elected official (or appointee to an elected position)
- A member of a board or commission, and alternates
- The chief executive (CEO, ED, etc.) of an agency
- Person with decisionmaking authority with respect to the proceeding (if the person is a candidate for elected office or has been a candidate in the previous 12 months)
- Excluded - Legislature, Board of Equalization, Constitutional officers, judicial branch – unless acting as a voting member of another agency
- Committees:
 - Most candidates have one main committee – but also applies to controlled ballot measure committee, legal defense, officeholder, federal
 - Also applies to contributions “solicited” by the officer to another committee

What is a “proceeding”?

- A decision to grant, deny, revoke, restrict, or modify a business, trade, or land use license, permit, or other entitlement for use
- Non-general in nature
- Official’s action related to the proceeding is not purely ministerial
- Examples:
 - ◆ Contracts (not competitively bid); Franchises; Permits; Development agreements; Rezoning of a real estate parcel; Specific plan; Zoning variances

When is a proceeding pending?

- For a party or participant: when it is before the jurisdiction of the agency for its decision or other action
- For an officer: when the decision is on the agenda for discussion or decision, ***or the officer knows or has reason to know*** the decision is before the jurisdiction of the agency ***and it is reasonably foreseeable*** the decision will come before the officer

Two different sources of contributions are impacted

- A party and the party's agents
- A participant and the participant's agents

Who is a party? Who is an agent? (and why is this so confusing?)

■ Party

- Any individual or entity that is the subject of a body’s action; most often, the person who filed an application
- Includes persons, companies, owners, shareholders, any person who “directs and controls” contributions made by a party, and any PAC *controlled by a party*

■ Agent

- Individuals or entities acting (for compensation) on behalf of a party, including lobbyists, attorneys, architects, engineers, consultants, and anyone who appears at a proceeding or communicates with a decision-maker regarding the decision
 - ◆ Not in a *purely* technical capacity

■ ***Note that contributions from parties and their agents are aggregated for the \$250 limit***

Who is a participant?

- A person other than a Party who actively supports or opposes a particular decision in a proceeding (by lobbying, testimony, otherwise acts to influence)
- AND has a financial interest in the decision (fact specific analysis)
- Includes agents of a participant, and contributions must be aggregated with the participant
- For those cynics out there, seems to provide an opportunity for an opponent to a project to neutralize the votes of a member who favors a project

Note that contributions from participants and their agents are aggregated for the \$250 limit

- ‘Safe Harbor’ provision allows officials to return all or a portion of a prohibited contribution and not be required to recuse themselves
 - ◆ Must be within 30 days of when the officer knows ***or has reason to know*** of both the receipt of the contribution and the proceeding involving the party, participant or agent
- If an official does not return the contribution, they must recuse themselves
- Disclosure & recusal is required to be on the record, either orally or in writing, before a proceeding or as soon as the official learns of the conflicted contribution
- Parties are required to disclose any potentially disqualifying contributions when submitting an application or other request for action, or within 30 days if made after the proceeding has commenced (or been filed)

- An official cannot receive or solicit a contribution from a party, participant or agent for 12 months *after* a proceeding has closed.
- Note: For prohibited contributions received after a board or agency action, the ‘safe harbor’ provision requires that any contribution (in excess of \$250) must be refunded within 14 days

- Business as usual
 - Continue to make or receive contributions as usual
 - Rely on the ability to cure a disqualifying contribution
 - ◆ Risks:
 - Will the campaign have any funds available to make the refund?
 - Will an applicant want to request a refund from an elected?

- PAC contributions
 - For contributors, consider making campaign contributions to a PAC that supports candidates and interests
 - ◆ Risks:
 - Cannot “direct” a contribution, or it will still be disqualifying
 - Becomes indirect support, and a candidate may not know whether you support or oppose
- Independent Expenditure
 - Direct spending on advertisements, etc.
 - Would require additional compliance – committee formation, reports, etc.
- Fundraising (subject to local rules)

- FPPC issued Opinion O-22-002 on December 22, 2022 finding that contributions made or received in 2022 are not subject to SB 1439; FPPC has now adopted a regulation (§ 18438) states that SB 1439 does not apply to contributions dated prior to January 1, 2023
- **Officials** should be aware of the identities of their contributors (and contributors' agents), as well as the identities of participants appearing before them and whether they have made contributions (or are acting as agents of others)
- **Parties** seeking approvals or other actions should take pains to avoid potentially problematic contributions, and to be aware of any contributions which could create conflicts

■ For parties:

- Implement internal notification process for contributions:
 - ◆ By the entity
 - ◆ By principals
 - ◆ By employees who lobby etc.
 - ◆ By entity's agents
 - ◆ Note: *mandatory* pre-clearance is prohibited
- Keep track of pending proceedings
- Monitor contribution activity (backup)

For BOTH: Consider contributions to PACs

■ For officials:

- Implement pro-active contribution monitoring systems to ensure awareness of contributions by official and staff
- Consider requiring applicants to disclose campaign contributions made by the Party and any agents
- Implement pro-active monitoring of upcoming agenda items and cross-reference with contributions
- Ensure that campaign or fundraising staff review pending agenda items prior to fundraising solicitations

Questions



Thank you

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