NEW JERSEY LOCAL UNIT
PAY TO PLAY LAWS

WHERE WE’VE BEEN AND WHERE WE’RE GOING

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I. INTRODUCTION

a. Background

i. “Pay to Play” refers to the alleged practice of campaign contributions being given to obtain personal benefits which may eventually result in, or be provided in exchange for, the award of government contracts.

ii. Beginning in 2004, the New Jersey Executive and Legislature began enacting a series of executive orders and statutes that restrict the ability of contractors to participate in the political system by way of contributing to campaigns and political organizations.

iii. In 2006, counties and localities -- including agencies, authorities, school boards, and fire districts -- were given permission to pass their own pay to play laws that supplement the State.

iv. Various agencies -- including Treasury, ELEC (“Election Law Enforcement Committee”), and Department of Community Affairs (“DCA”), Division of Local Government Services -- were given some portion of advisory, interpretive, and/or enforcement power.

v. The result is a tapestry of highly-nuanced laws that are sometimes ambiguous or even contradictory with a variety of sources of guidance, but little controlling case law.

b. Two Basic Types of Laws

i. Disqualification Laws

1. Contributions render contractor ineligible to receive contract awards for prescribed period of time.

2. Contractor required to certify that no disqualifying contributions have been made.

3. Business is prohibited from making disqualifying contribution during pendency of the contract. However, it is unclear what consequence follows from such contribution -- i.e., automatic termination of contract, discretion on part of contracting agency, etc.

4. Examples: EO 134/Ch 51, EO 117, Ch 19.
ii. Disclosure

1. Contractor must make disclosure of political contributions either prior to contract award or as part of annual disclosure statement.

2. Generally more expansive than disqualification laws -- i.e., scope of relevant contributors and recipients is broader.

3. Examples: Chapter 271.

c. Major Issues

i. Relevant Contracts

1. Fair and Open vs. Non-Fair and Open

   a. Many pay to play laws contain exceptions for fair and open contract, which include those awarded under the following:

      i. Public competitive bidding;

      ii. Competitive contracting (RFP); or

      iii. Public advertisement, publication of award criteria, public opening of proposals, and public award of contract by governing body.

   b. Major Exceptions to Fair and Open Exclusion

      i. EO 134/Ch 51 and EO 117: apply to all contracts over $17,500, no exclusion for fair and open contracts.

      ii. Ch 271 Annual Disclosure Statement: requires disclosure of all contracts, even those that are fair and open.

2. Dollar Threshold -- More Than $17,500

   a. Contracts valued at $17,500 or less are excluded from most pay to play laws.

   b. Most laws speak in terms of “value” and apply when the government is buying or selling services, land, etc.
c. Exception: Ch 271 Annual Disclosure Statement requires disclosure of money “received from” government.

ii. Relevant Contributions

1. More Than $300

   a. All State pay to play laws are limited to contributions of $300+ -- EO 134/Ch 51, EO 117, EO 118, Ch 19, Ch 217

   b. Some county and local laws may have lower limits (see § VIII below).

2. Attribution Rules

   a. Whose contributions are attributed to the business? E.g., major shareholders, subsidiaries, partners, officers, directors, spouses, resident children.

   b. Substantial variation among the pay to play laws as to the scope of individuals whose contributions are attributed to the company.

3. Aggregation Rules

   a. Small contributions can be combined to exceed $300.

   b. For candidates -- per election (primary or general).

   c. For organizations -- per calendar year.

   d. Contributions by different individuals are generally not aggregated together, except under some county and local laws.

iii. Relevant Recipients of Contributions

   1. E.g., candidates for elective office at various level of government, State, county, or local political party committees, PACs.

   2. Scope of relevant recipients also differs considerably under the various laws.
iv. **Indirect Violations**

1. All pay to play laws contain language punishing contributions made with the intent to circumvent the pay to play laws. E.g., providing employees with company money for the specific purpose of making contributions that the company or its owners could not make.

II. **EXECUTIVE ORDER 134 (“EO 134”) / CHAPTER 51 (“CH 51”): STATE CONTRACTING PAY TO PLAY**

a. **Procedural History**


iii. Effective October 15, 2004 -- contracts entered and contributions made prior to that date are not subject to EO 134/Ch 51.

b. **Relevant Contracts**

i. Contracts or agreements for services, materials, supplies, or equipment, or to acquire, sell, or lease any land or building.

ii. Value of transaction exceeds $17,500.

iii. Applies to all contracts, including those subject to competitive public bidding or otherwise considered fair and open.

iv. Broadly interpreted to include contracts with all State-level executive agencies, departments, divisions, commissions, authorities, and instrumentalities. E.g., DOT, Turnpike Authority, DPMC, UMDNJ.

c. **Attribution Rules** -- Contributions by the following are attributed to the business:

i. The business itself;

ii. 10%+ owners (shareholders, partners, members, etc.);

iii. Any subsidiaries or PACs that are controlled by the business; and

iv. For sole proprietors -- spouse and resident children.
d. **Disqualifying Contributions**
   
i. More than $300 to:
   
   1. Governor or candidate for Governor;
   
   2. State political party committees; and
   
   3. county political party committees.

e. **Effect of Disqualification**
   
i. Disqualification of at least 18 months. Can be extended to the entire Governor’s next term if contribution is made within last 18 months of current Governor’s term and next Governor is of same party.

f. **Disclosable Contributions**
   
i. Contributions to “continuing political committees” (i.e., PACs formed under New Jersey law) must be disclosed for the previous 4 years.
   
   ii. Such contributions are subject to “conflict of interest” review by Treasury -- i.e., whether there is a “nexus” between a specific contract and the PAC receiving the contribution.

g. **Safe Harbor**
   
i. In the event that a business “inadvertently” makes a disqualifying contribution, there is a safe harbor if the business requests and receives the refund within 30 days of the date of the contribution.
   
   ii. “Receives” has been stringently interpreted by Treasury to require actual physical receipt with no exceptions -- *In re Earle*.

III. **Executive Order 18: FHWA-Funded DOT Contracts Excluded**
   
a. In response to threats by the Federal Highway Administration (“FHWA”) to cut off hundreds of millions in transportation funding to New Jersey, Acting Governor Codey signed Executive Order 18 to formally carve-out NJDOT contracts that are funded in whole or in part by FHWA.
   
b. To date, this exclusion has not been applied to contracts involving non-FHWA federal funds. It is unclear whether the influx of federal stimulus dollars has modified the scope of the EO 18 exception.
IV. EXECUTIVE ORDER 117: STATE CONTRACTING PAY TO PLAY EXPANDED

a. Procedural History

   i. On September 24, 2008, Governor Corzine issued EO 117 as part of a pay to play and ethics reform package. EO 117 significantly expands the scope of EO 134/Ch 51.


b. Relevant Contributors Expanded

   i. All those included in EO 134/Ch 51 plus:

   ii. Any partner, LLC member, or shareholder of a professional corporation -- regardless of level of ownership;

   iii. Corporate officers; and

   iv. For each individual included (e.g., partners, officers, 10%+ shareholders), the individual’s spouse or civil union partner and children who reside with the individual may also be attributed to the business. (Such spousal/child contributions are exempt if made to a candidate for whom the spouse/child is entitled to vote or to a political committee located in the jurisdiction where the spouse/child resides.)

c. Relevant Recipients Expanded

   i. Governor or candidate for Governor;

   ii. State political party committees;

   iii. county political party committees;

   iv. [[New]] Legislative leadership committees;

   v. [[New]] Municipal political party committees; and

   vi. [[New]] Lieutenant Governor or candidate for such office.
V. **EXECUTIVE ORDER 118: STATE REDEVELOPMENT PAY TO PLAY**

a. Applies stringent pay to play provisions to State redevelopment agreements that are similar to the combined EO 134/Ch 51 and EO 117, except the relevant contributors are even broader.

b. Contributions are disqualifying if made by companies retained by the redeveloper to serve as a professionals, consultants, and/or lobbyists, including those companies’ partners, members, corporate officers, souses, resident children, etc.

c. The result is a strikingly broad scope of relevant contributors: For example, a redeveloper that retains a law firm to provide counsel in connection with the redevelopment project can be disqualified by a contribution made by the resident child of a partner of that firm.

d. EO 118 applies only to redevelopment agreements with “State redevelopment entities,” identified by Treasury as follows: (i) New Jersey Meadowlands Commission; (ii) New Jersey Redevelopment Authority; and (iii) Capital City Redevelopment Corporation.

e. EO 118 does not currently apply to county or local redevelopment agreements, but pending legislation would extend these provisions in that direction.

VI. **CHAPTER 19: LEGISLATIVE, COUNTY & LOCAL PAY TO PLAY**

a. **Procedural History**


ii. In the interim, Gov. McGreevy signed EO 134 and the Legislature rushed to enact Ch 51.

b. **Relevant Contracts**

i. Contracts having an anticipated value in excess of $17,500.

ii. Only applies to contracts that are not subject to a fair and open process.

c. **Attribution Rules** -- Contributions by the following are attributed to the business:

i. The business itself;

ii. 10%+ owners (shareholders, partners, members, etc.);
iii. Any subsidiaries or PACs that are controlled by the business; and

iv. For sole proprietors -- spouse and resident children.

d. **Disqualifying Contributions**

i. Unlike all other pay to play laws, under Chapter 19, contributions are only disqualifying if made to the “winners” of elective office. That is, contributions will generally not be disqualifying if made to the candidate or party that does not win the election.

ii. **Legislative Contracts**

1. More than $300 to (1) the State political party committee of the Senate Majority Leader or Speaker of the Assembly; or (2) a legislative leadership committee established by the Senate Majority Leader or Speaker of the Assembly.

iii. **County Contracts**

1. More than $300 to (1) any county political party committee in that county if a member of that political party is serving in an elective public office of that county when the contract is awarded; or (2) to any candidate serving in an elective public office of that county when the contract is awarded.

iv. **Local Contracts**

1. More than $300 to (1) any municipal political party committee in that municipality if a member of that political party is serving in an elective public office of that county when the contract is awarded; or (2) to any candidate serving in an elective public office of that municipality or local government unit when the contract is awarded.

e. **Effect of Disqualification**

i. Disqualification of 12 months.

ii. If ELEC determines that contribution or nondisclosure is made “willfully and intentionally,” business can be debarred for up to 5 years.
f. **Safe Harbor**

   i. Must have requested and received refund within 60 days of date of contribution.

VII. **CHAPTER 271: DISCLOSURE**

a. Three major provisions: (1) broad “per contract” disclosure; (2) broad annual disclosure requirement; and (3) local government permitted to enact its own pay to play laws (see § VIII below). L. 2005, ch. 271 (codified at N.J.S.A. 40A:11-51, 19:44A-20.26 to -20.27).

b. **Per Contract Disclosure**

   i. For non-fair and open contracts at all levels of government, the business must submit disclosure forms setting forth various contributions over the prior 12 months.

   ii. Very broad attribution rules includes contributions by (1) the business; (2) 10%+ shareholders; (3) partners, members, officers, and directors, and their spouses; or (4) subsidiaries or PACs controlled by the business.

   iii. Disclosure of contributions to (1) any State, county, and municipal political parties; (2) any PACs; (3) any legislative leadership committee; (4) any State, county, or municipal candidate in the jurisdiction where the contracting entity is located.

c. **Annual Disclosure Statement** (“Form BE”)

   i. If a business received $50,000 or more in the aggregate from contracts with any level of government in a calendar year, then the business must submit an annual disclosure form to ELEC. There is no exception for fair and open contracts.

   ii. Same broad attribution rules as the “per contract” disclosure provision described above.

   iii. Required to make disclosure of contributions to practically any candidate or political organization at any level of government in the State of New Jersey during the calendar year at issue.

   iv. If the business had at least one such contribution, it must set forth detailed contact information, including the contracting agency involved, the subject matter of the contract, and the amount of money received by the business.
v. Disclosure Form must be filed electronically with ELEC no later than March 31 for the prior calendar year.

d. Recordkeeping Requirement

i. The business is required to make or obtain and maintain for a period of 4 years from the actually filing date or the filing due date (whichever is later) all records and supporting documents used in completing the Form BE so as “to permit an adequate basis for auditing” by ELEC.

e. Violations

i. Failure to make disclosure is punishable by a fine levied by ELEC based on the amount undisclosed.

VIII. **CHAPTER 304: NONPROFITS EXCLUDED FROM CHAPTER 271**

a. On January 13, 2008, the Legislature enacted Chapter 304, which excludes nonprofit companies from Chapter 271. L. 2007, ch. 304.

b. Nonprofits were expressly excluded from EO 117 and EO 118 when those orders were signed.

c. Nonprofits appear to still be included under Chapters 19 and 51, and may still be subject to county and local pay to play laws.

IX. **EXECUTIVE ORDER 7: PUBLIC UNIONS [[STRIKED DOWN]]**

a. Issued by Governor Christie on January 7, 2010, EO 7 sought to place restrictions on public employee unions that have contracts with government in New Jersey. However, after several public unions sued to enjoin the enforcement of EO 7, it was struck down by the Appellate Division on May 7, 2010. *Communic. Workers of Am. v. Christie*, 413 N.J. Super. 229 (App. Div. 2010).

b. The court did not base its decision on the First Amendment, but rather on a separation of powers argument. Stated differently, the court held that unions are already governed by existing legislation and provisions of the New Jersey Constitution, which were infringed upon by the Governor’s further legislation by way of an executive order.

c. It is an open question whether such an argument as whether other executive orders are susceptible to a similar attack. For example, EO 117 considerably broadened the scope of disqualifying contributions under Chapter 51.
X. COUNTY & LOCAL PAY TO PLAY LAWS

a. By ordinance (municipalities) or resolution (counties, other local units).

b. County and local laws often mimic the State laws, but are frequently more restrictive. Key possible differences to watch out for:
   i. Lower contract amount threshold;
   ii. No fair and open exclusion;
   iii. Broader attribution rules;
   iv. Lower contribution limits;
   v. Different aggregation rules (e.g., law violated if any combination of contributions by different key personnel exceed $2,500 to mayor and/or municipal council); and
   vi. Broader scope of relevant recipients.

c. Must be filed with NJ Secretary of State, which posts them online at http://www.state.nj.us/state/secretary/ordinance.html.

d. Businesses must consult the local and county laws for each location the business currently does or contemplates seeking government work.

XI. PENDING LEGISLATION

a. The Legislature is current considering legislation to extend the provisions of EO 134/Ch 51 and EO 117 to all county and local contracts, and the provisions of EO 118 to the county and local redevelopment agreements.

b. Legislation is also being considered to reduce “wheeling” -- i.e., the transfer of contribution money between political organizations at different levels of government.

XII. COMPLIANCE ISSUES

a. Sources of Authority to Consult
   i. Executive Orders
   ii. Statutes
      1. Including Governor’s signing statements
      2. Limited legislative history
iii. Regulations

iv. Case law

v. Websites of Treasury, ELEC, and DCA

   1. Including extensive Q&As

vi. Other guidance -- New Jersey Register, ELEC Advisory Opinions, Attorney General Opinions, etc.

b. Fact-Sensitive Analysis

   i. Analysis is very fact-sensitive -- a slight change in the type of contract, the identity of the contributor, the type of recipient, etc. can have a major impact on the consequences, if any, of a particular contribution.

   ii. Every business is different --

      1. ownership structure

      2. types of government contracting (publicly bid, no bid, etc.)

      3. different levels of government and in a variety of locations,

      4. differing attitudes and traditions of political involvement

   iii. All of these and other factors must be considered before deciding a policy on political giving.

c. Bottom Line -- Consider NOT Making Contributions

   i. There is very little judicial or administrative case law to clarify the application of the laws, and agencies such as Treasury have taken a hard-line approach to enforcement (i.e., “good faith” defense has not been recognized).

   ii. Additionally, given the extreme consequences of disqualification along with the breadth of the disclosure requirements, monitoring and controlling the contributions of the various relevant individuals can be burdensome. Every company must establish very clear policies and internal controls.

   iii. Accordingly, no legal advice in this area would be complete without suggesting that no political contributions be made.