

September 23, 2011

Hon. Kamala D. Harris
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Dawn McFarland
Initiative Coordinator

Dear Attorney General Harris:

Pursuant to Elections Code Section 9005, we have reviewed the proposed initiative regarding public official conflicts of interests (A.G. File No. 11-0029). The measure does not specify whether it seeks to amend the State Constitution or statutes or both.

Background

In many cases, pension benefits for employees or a government's promised contributions to cover the costs of these benefits constitute a contract with these employees. In particular, California courts have ruled that public employee pensions constitute an element of an employee's compensation, and a contractual right to these pensions accrues upon acceptance of employment. The U.S. Constitution and the State Constitution each contain a "contract clause." The contract clauses limit the power of the state to modify its own contracts with other parties. Accordingly, the ability of public entities to modify pension benefits for current or past employees is limited.

Proposal

The measure deems state and local elected and appointed officials, candidates, judges, some public administrators, and some private sector contractors to be "offending politicians" if they propose or vote for actions that are contrary to the measure's conflict of interest provisions.

While the measure's conflict of interest provisions are not clear, they appear to include proposing or voting to institute (1) a benefit that the "offending politician" would enjoy, but that would not be granted to other citizens or (2) a requirement that would apply to other citizens, but not to the "offending politician." The measure's conflict of interest provisions also appear to include advocating for a change in the terms of this measure through a process other than one that includes a vote of the electorate.

Under the measure, the vote of the “offending politician” would be automatically nullified and the individual would be subject to a wide range of sanctions, which appear to include:

- Being barred from voting or serving as a determining influence regarding any governmental matter for the remainder of his or her elected or appointed term of office.
- Being barred from campaigning for or serving in any public office or working for government again.
- Forfeiting all future publicly funded retirement income, employee compensation, and employee benefits.
- Serving one year in jail or prison, without eligibility for parole.
- Paying a \$50,000 fine.

The measure also specifies that all future actions to establish salaries and benefits for “politicians” must be approved by voters at a general election.

Authorizes Oversight Agency. The measure creates a new agency to monitor compliance with its terms, the Equity in Law Oversight Organization (EILOO), with an elected director. The measure specifies that EILOO shall have a budget “of a reasonable amount as determined by the elected” director, but does not specify a state or local government funding source for this purpose. The measure limits the number of EILOO staff to no more than 5 percent of the individuals subject to its provisions. No current or former elected officials, candidates for public office, administrators, or private government contractors may be elected to or serve in EILOO.

Fiscal Effect

Oversight Agency. The cost to administer the oversight agency is not known, and would depend on the decisions of the EILOO director. Given the number of government officials, administrators, and contractors subject to the measure and its wide-ranging provisions, administering EILOO could require hundreds of employees costing tens of millions of dollars annually. These costs could be borne by the state of California or shared in some fashion between the state and local governments.

Significant Uncertainties. Many other provisions of the measure could have a fiscal effect on state or local government—such as those requiring “offending politicians” to serve one year in jail and pay fines. The fiscal effect would depend on future actions by government officials and other parties. In other cases, provisions in the measure would be subject to significant legal challenges. For example, the measure’s provisions eliminating retirement income for certain individuals likely would face claims that it impairs pension and other contracts with current and past public employees.

Fiscal Summary. The measure would have the following major fiscal impact:

- Increased state or local government costs to administer a new oversight agency, potentially in the tens of millions of dollars annually.

Sincerely,

Mac Taylor
Legislative Analyst

Ana J. Matosantos
Director of Finance