

DECEMBER 3, 2010

MEMO from Long and DiPetro, LLP Attorneys at law

NEW STATE ETHIC REGULATIONS ON GIFT GIVING AND ACCEPTANCE

A. BACKGROUND

The State Ethics Commission has approved amendments to 930 CMR 5.00, the regulatory framework for the state's conflict of interest law, M.G.L. c. 268A. The new regulation is entitled "Exemptions from M.G.L. c. 268A and M.G.L. c. 268B related to Gifts".

The new Amendments will become effective on publication in the Mass Register on or before December 24, 2010. We recommend that all clients assume henceforth that the new regulations are currently in effect and follow them accordingly when accepting or receiving gifts this holiday season.

The newly amended 930 CMR 5.00 is now approximately twenty (20) single spaced pages containing changes to many aspects of the conflict of interest law. Given the time of year, this memorandum will be focused on the changes that affect gift giving and receiving for public school employees. This memo contains several examples of permitted and prohibited gift giving/receiving and a summary is attached.

930 CMR 5.00 contain exemptions to the statutory language contained in M.G.L. c. 268A and 268B. These exemptions apply to the following statutory language:

- **M.G.L. c. 268A, § 3**, which prohibits gifts, offers, and promises of substantial value for or because of official acts performed or to be performed.
- **M.G.L. c. 268A, § 23(b)(2)(1)**, which prohibits public employees from soliciting or receiving anything of substantial value for or because of the public employee's official position.
- **M.G.L. c. 268A, § 23(b)(3)**, which prohibits a public employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence the employee or unduly enjoy the employee's favor in the performance of the employee's official duties, or that the employee is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.
- **M.G.L. c. 268B, § 6**, which prohibits executive or legislative agents from knowingly and willfully offering or giving, to certain public employees and their immediate family members, any gift of any kind or nature, and also prohibits certain public employees and their immediate family members from knowingly and willfully soliciting or accepting from any executive or legislative agent any gift of any kind or nature.

B. 5.05 SUBSTANTIAL VALUE; HOW DETERMINED

As a reminder the term "substantial value" is a gift' worth \$50 or more. The value is determined by the fair market value of the "gift, cost, or face value, whichever is greater".

The new regulations now make clear that in determining substantial value, the Commission "may aggregate all gifts offered or given... to a public employee within any 365 day period". Therefore, gifts given by parents, whether for the holidays, end of year or any other occasion, will be added together and if the aggregate value from anyone parent/student is over \$50 in one year, the gifts will be considered of "substantial value" and therefore subject to M.G.L. c. 268A and M.G.L. c. 268B and applicable regulations.

Section 5.05 of the amended regulation also includes updated and new definitions by example of what would be considered "substantial value" that were not present in the prior regulation. The new examples are the following (for a complete listing of all examples please see the amended regulation which is attached):

- **Example:** The face value of a ticket to a concert is \$40, but due to the scarcity of such tickets, the fair market value is \$500 at the time of the gift. The value of the ticket is \$500, and it is a gift of substantial value. A person who is given the opportunity to purchase, and does purchase, the ticket at face value has received a gift of \$460, which is of substantial value.

¹ Gift is defined as anything of value that is given without something of equivalent fair market value being given in return. See 930 CMR 5.11 and 930 CMR 5.04.

- Example: The fair market value of meals and entertainment at a charitable event is \$40, but the face value or cost of a ticket to the event is \$150. The value of the ticket is \$150, and it is a gift of substantial value.
- Example: The total cost, including tax and tip, for a dinner for ten people is \$750. Each public employee attending the dinner is presumed to have received a \$75 dinner, which is of substantial value. This presumption may be rebutted as to a particular individual by evidence that the cost of the items ordered or consumed by that individual and any guests, plus tip, was less than \$50.
- Example: There is no admission charge to an event but the estimated per person cost of food and drink is \$90. The presumed value of the admission is \$90, and of substantial value. This presumption may be rebutted as to a particular individual by evidence that the cost of the items ordered or consumed by that individual and any guests, plus tip, was less than \$50.
- Example: The host of an event pays a set fee of \$75 per person for a catered event. The \$75 per person cost includes all refreshments, taxes, service charges, and the rental of the banquet hall. The value of attendance to each attendee is \$75, and it is a gift of substantial value.
- Example: A company plans a training event to which public employees will be invited. The company pays a fee to rent an auditorium where the training will be held, and separately pays for refreshments to be served during the day. The value of attendance to the public employees who attend is determined by dividing the cost of the refreshments by the number of attendees. The auditorium rental fee is not included.

C. 5.06 NO VIOLATION AND NO EXEMPTION NEEDED: GIFTS UNRELATED TO OFFICIAL ACTION, POSITION, OR PERFORMANCE OF DUTIES.

(Formally 5.04 (1))

The amended Regulations clarify that public employees may accept any gift that is entirely unrelated to any official action taken by the public official, their official position, or their official duties, from any person other than lobbyists. No disclosure is required for the acceptance of these gifts but now, **if within six (6) months** of accepting the gift the gift giver comes before the public employee or, if after acceptance of the gift the public employee takes official action involving the gift giver, the employee must make a written public disclosure concerning the gift.

D. 5.07 NO VIOLATION: GIFTS WORTH LESS THAN \$50; DISCLOSURE MAY BE REQUIRED; DEFINITION OF DISCLOSURE

As is stated above the general rule is that if the value of the gift is less than \$50, the employee does not have to file a disclosure. The amended regulations **now require a disclosure** for certain gifts that are under the \$50 threshold.

Disclosures are now required, "if a reasonable person, having knowledge of the relevant circumstances, would conclude that the public employee could unduly favor the giver or be influenced by the giver when performing official duties". In other words, a disclosure is required, if accepting the gift would create the appearance of a conflict of interest.

One of the examples of when a disclosure is required for a gift under \$50 is the following:

- Example: A public school teacher accepts a \$25 gift certificate from the parent of a current student. The teacher must make a disclosure.

Pursuant to this example in order for a teacher to legally accept a gift of any value from a **current student** they must file a disclosure.

5.08. Gifts worth \$50 or More and Related to Official Action or Position: Exemptions.

(8) Gifts Among Public Employees.

The new amended regulations continue to allow employees to give and receive gifts of substantial value from other employees (provided they are not their direct supervisors or subordinates) for the following occasions:

holidays; occasions of religious significance; occasions of personal significance including weddings, engagements, birthdays, the birth or adoption of a child, illness, a relative's illness or death; occasions of professional significance including hiring, promotions, and noteworthy accomplishments or achievements; and occasions that terminate a professional working relationship, such as retirement, transfer, or resignation.

However, public employees **are not** allowed to give gifts to their "official superiors" and supervisors are not allowed to receive gifts from their subordinates **except** in the following circumstances in which occasional gifts are allowed (no disclosure is required):

1. gifts other than cash or gift certificates that are valued at no more than \$10;
2. food and refreshments shared in the office;
3. personal hospitality in the employee's home that is the same as that customarily provided to personal friends;
4. gifts given in connection with the receipt of personal hospitality that are customary to the occasion, such as a bottle of wine to the host of dinner party; and
5. transferred leave, provided that it is done in a way that prevents donors from targeting identified recipients, and recipients from learning the identity of donors.

In addition, "on special infrequent occasions" such as the following:

- marriage, illness, or the birth or adoption of a child; or
- occasions that terminate the subordinate-superior relationship, such as retirement, resignation, or transfer.

Employees are allowed to "solicit or contribute, on a strictly voluntary basis, nominal amounts of \$10 or less for a group gift to an **official superior** on a special infrequent occasion, and occasionally for items such as food and refreshments to be shared among employees at the office."

(10) Retirement Gifts.

A public employee is not prohibited from accepting gifts of substantial value appropriate to the occasion from members of the public with whom the public employee has worked when the public employee retires, provided that such gifts reflect general goodwill toward the retiring employee or recognize the employee's service generally, and are not intended as a reward for any specific past official action. 930 CMR 5.08(tO) does not authorize acceptance of testimonial dinners that would be prohibited by M.G.L. c. 268, § 9A.

(14) Class Gifts to Teachers

Teachers are allowed to accept a gift(s) with an aggregated value of up to a maximum of \$150 per year from current public school students and/or their parents as long as the gift is identified only as being from the class, and the identity of givers and the amounts given are not identified to the recipient.

Teachers may also accept a gift from a group of students that is for the classroom or school (in accordance with the policies of the school district).

The amended regulation provides the following examples:

- Example: A teacher has a class with 23 students. Parents of 20 of the students collect money and give the teacher a \$150 gift certificate to a book store, indicating that it is a class gift. One of the parents who did not contribute to the class gift gives the teacher a \$25 certificate to a spa. The teacher may accept the \$150 class gift certificate and no disclosure is required; the teacher may not accept any other gift from the parents who contributed to the class gift. The teacher may accept the \$25 spa certificate, but must file a disclosure pursuant to M.G.L. c. 268A, § 23(b)(3).
- Example: A teacher has a class with 23 students. Parents of 13 of the students collect money and give the teacher a \$130 gift certificate to a book store, indicating that it is a class gift. Parents of the other 10 students collect money and give the teacher a \$100 gift certificate to an office supply store, indicating that the gift is a gift to the classroom and that the teacher should use it to buy necessary classroom supplies. The teacher can accept the first gift on his own behalf and the second on behalf of the classroom. He must spend the \$100 office supply gift certificate on classroom supplies and should keep receipts documenting those purchases. Items purchased with money that is a gift to the classroom are the property of the school district. The teacher may not knowingly accept any additional gift from parents who participated in the class gift.

F. SUMMARY OF CHANGES TO 930 CMR 5.00

- A gift of substantial value is gifts valued at \$50 or more. Gifts are aggregated for a 365 day period, in other words public employees may not accept gifts where the combined value within a year is for more than \$50.
- Public employees may accept any gift that is entirely unrelated to any official action taken by the public official, their official position, or their official duties, from any person other than lobbyists. No disclosure is required for the acceptance of these gifts but if within six (6) months of accepting the gift the gift giver comes before the public employee or if after acceptance of the gift the public employee takes official action involving the gift giver the employee must make a written public disclosure concerning the gift.
- No disclosure is required for gifts less than \$50 except for when accepting a gift that would create the appearance of a conflict of interest. A teacher accepting a gift of less than \$50 from a current student, according to the regulations, may create the appearance of a conflict of interest and therefore a disclosure is required.
- Co-workers may give and receive holiday and gifts for other occasions (listed above) of substantial value. Gifts may not be given to direct supervisors or received by supervisors from subordinates except in the five (5) instances set out above.
- A public employee may receive gifts of substantial value upon his/her retirement as long as the gift "reflects general goodwill" toward the retiree and is not intended as a reward for any specific past official action.
- A teacher may accept a group gift of up to \$150 (per year) from his or her class as long as the gift is identified as being from the entire class, and the identity of the contributors and the amounts given is not identified to the teacher.
- A teacher may accept a gift to the classroom that is to be used for the class and which will become the property of the school district.