



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Campaign Contributions –
Employee Work on Political
Campaigns

DATE: August 12, 2005

BACKGROUND

On February 2, 2005, Councilmember Reed requested that the San Jose Elections Commission determine whether the definition of a contribution under the City's Campaign Ordinance was subject to the Fair Political Practices Commission (FPPC) regulations implementing the Political Reform Act ((PRA), Govt. Code § 81000 *et seq*). The request concerned, in part, an FPPC regulation that establishes the circumstances under which compensation paid by an employer to an employee for services for political purposes constitutes a contribution or expenditure.

On April 7, 2005, the City Attorney's Office issued an opinion to the Elections Commission stating that the terms and provisions of the City's Campaign Ordinance are interpreted in accordance with the applicable definitions and provisions of the FPPC Regulations and the state Political Reform Act. The Elections Commission did not recommend any changes to the City's Campaign Ordinance at that time.

On April 19, 2005, Councilmember Reed requested that the Rules Committee place on the City Council Agenda a recommendation to amend the Municipal Code to provide that:

1. Employers who pay their employees to work on political campaigns are subject to the City's campaign contribution limits as if the payments were made directly to the campaign committee; and
2. Campaign committees who receive services from persons who are being paid while working on the campaign, must report those services as campaign contributions subject to the City's contribution limits.

This memorandum discusses legal issues raised by this proposed amendment.

DISCUSSION

A. FPPC Regulations

FPPC regulations provide that the payment of salary, the reimbursement for personal expenses, or other compensation by an employer to an employee who spends more than 10 % of his or her compensated time in a calendar month performing services for political purposes is a contribution or an expenditure of the employer if:

1. The employee renders services at the request or direction of the employer; or
2. The employee, with the consent of the employer, is relieved of any normal working responsibilities related to his or her employment in order to render the personal services, unless the “employee engages in political activity on bona fide, although compensable, vacation time or pursuant to a uniform policy allowing employees to engage in political activity.” (2 Cal. Adm. Code Section 18423).

Under the PRA, an employer makes a contribution or expenditure if, at the request or direction of the employer, an employee spends more than 10% of his or her time in any one month performing services for a political purpose. An employer also makes a contribution or expenditure if the employer consents to relieving the employee of normal working responsibilities for more than 10% of the employee’s compensated time to render personal services for a political purpose. However, this second definition of a contribution or expenditure does not apply if the employee engages in political activity on vacation time or “pursuant to a uniform policy allowing employees to engage in political activity.” The FPPC has informed our office that this latter exception is intended to apply when an employer establishes a uniform policy that permits employees to spend some amount of compensable time engaged in political activities of their own choosing. Thus if the employer limits or directs the political activities of an employee on vacation or pursuant to a uniform policy, this exception would not apply; the activities of the employee, if over the 10% threshold, would be a contribution charged to the employer.

B. Applicability of PRA To Existing City Campaign Ordinance

The San Jose Municipal Code provides that the words and phrases in Title 12 (Ethics Ordinances) have the same meanings and are interpreted in the same manner as those terms are interpreted under the state Political Reform Act. (SJMC Section 12.02.020.) Additionally, definitions in the City’s Campaign Ordinance are interpreted in accordance with the applicable definitions and provisions of the Political Reform Act and the FPPC regulations. (SJMC § 12.06.010.)

The City’s Campaign Ordinance also provides that contributions by business entities are limited in accordance with the PRA. (SJMC § 12.06.250.) A business entity is defined

as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association. (SJMC § 12.06.020.)

In light of these provisions, the criteria set forth in § 18423 establish when the political services of an employee constitute a contribution on the part of an employer apply to the City's Campaign Ordinance. Candidates and campaign committees who receive the services of compensated employees as set forth in § 18423 are required to report them as campaign contributions, and those contributions or expenditures are subject to the City's campaign limits. (SJMC § 12.06.910.)

Given the interplay of the relevant provisions of the PRA, FPPC Regulations, and the City Campaign Ordinance, the loophole concerns raised in Councilmember Reed's April 19, 2005 Memo to the Rules Committee are addressed by existing legislation. Under § 18423, where an employer directs or requests an employee to spend compensated time rendering services for political purposes, it is a contribution or expenditure of the employer if the employee spends more than 10% of his or her compensated time in any month engaged in such services. The exception for a uniform policy does not apply where an employee is acting at the direction or request of his or her employer. The uniform policy exception applies only when the employer consents to the employee being relieved of normal business activities pursuant to an established policy that permits employees to engage in political activities of their own choosing.

C. The Proposed Amendment

The proposed amendment to the Municipal Code would require that "employers who pay their employees to work on political campaigns are subject to the City's campaign contribution limits as if the payments were made directly to the campaign committee."

The proposed amendment can only apply to City campaigns or elections, and it would be advisable to state that clearly in the amendment. The term "political campaigns" is not defined under the Municipal Code, and the language of the proposed amendment as written is not limited to local elections. Thus the amendment might be found to reach issues of statewide concern, such as state or federal political campaigns, and not strictly a municipal affair over which the City has authority. (See CA FPPC Op. 0-01-112.)

The straightforward language of the proposed amendment would appear to eliminate two exceptions and one criterion of the state regulations under the PRA. First, the amendment would require that all compensable political activity be reported, even that which constitutes less than 10% of an employee's compensated time in a calendar month. Second, the proposed amendment would require an employer to report compensation paid for political activity undertaken by an employee during vacation or undertaken pursuant to a uniform policy allowing employees to engage in political activity of their own choosing. Finally, the language of the proposed amendment

apparently eliminates the requirement that a contribution or expenditure reported by an employer be done at the request, direction, or with the consent of, the employer.

D. The Political Reform Act & Preemption Issues

The PRA does not prevent a local agency from imposing additional requirements provided the requirements do not prevent a person from complying with the Act. (§ 81013.) This section establishes “the authority of local agencies to impose obligations beyond those set forth in the Act and makes clear that the Act is not intended to so occupy the field it regulates that state and local government agencies are powerless to enact additional requirements.” (CA FPPC Op. 0-01-112.) If an additional requirement prevents a person from complying with the Act, however, the provisions of the PRA prevail. (§ 81013.)

Permitting local agencies to impose additional restrictions not in conflict with the PRA reflects the general principle that the conduct of municipal elections, the manner and method by which municipal officers are elected, and the regulation of persons attempting to influence the outcome of a local election all fall within the parameters of a municipal affair. (Cal.Const., art. XI, Section 5. Johnson v. Bradley (1992) 4 Cal. 4th 389.)

Arguably, the exceptions eliminated by the proposed amendment may be viewed as additional requirements or obligations imposed beyond those set forth in the Act, as specifically permitted by under Government Code § 81013. For example, in reporting all compensated employee time spent on political activities as a contribution or expenditure, an employer would also comply with the 10% requirement under the PRA. An employer also comply with the PRA reporting contributions and the proposed amendment by reporting, in addition to activities that took less than 10% of the employee’s time, activities undertaken on vacation, under a uniform policy, or without the request, direction, or consent of the employer.

Even if these additional requirements were found to conflict with the PRA, they should nevertheless survive a preemption claim provided they concern only local elections. As municipal elections are a municipal affair and not a matter of statewide concern, the City contribution requirements would be “beyond the reach of” the PRA. (CA FPPC Op. 0-01-112.)

E. Constitutional Concerns

The municipal affairs of a charter city, however, are subject to the various guarantees of the state and federal constitutions. (88 Ops. Cal. Atty. Gen. 71; see *Johnson v. Bradley* (1992) 4 Cal4th 389, 403 fn. 15.) The First Amendment, which affords the broadest protection to political expression (*Buckley v. Valeo* (1976) 424 U.S. 1), generally applies to for-profit corporations. (*PG&E v. City of Berkeley* (1986) 60 Cal.App.3d 123.) In *Buckley*, the Court noted that federal legislation governing contribution and expenditure

limitations “operate in an area of the most fundamental First Amendment activities,” and held that to protect the First Amendment right of association in the context of campaign contribution limits, a government must “demonstrate a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgment of associational freedoms.” (See 85 Ops. Cal. Atty. Gen. 43.)

Requiring the reporting of all compensated employee time spent on political activities at the direction, request, or with the consent of the employer would not appear to implicate constitutional concerns. Thus the City could eliminate the requirement that only those activities over 10 % need to be reported as contributions or expenditures. Although at some point the record keeping requirements for *de minimis* political activities may prove burdensome, this would not raise a constitutional issue.

Eliminating the exception for political activities engaged in on an employee’s vacation time or pursuant to a uniform policy may, however, be problematic. If an employee chooses to use vacation time to perform political activities, presumably those activities would be of the employees own choosing and not at the direction of the employer. The FPPC has indicated its belief that “uniform policy” exception applies to a policy that permits an employ to engage in political activity of the employee’s choosing. Thus, with regard to these two exceptions, the employee is compensated for political activity engaged in without a request, direction, or with the consent of the employer.

The question raised is whether the First Amendment rights of association and speech of either the employer or employee might be violated by requiring an employer to report as a contribution or expenditure compensation paid to an employee for political activities when the employer has not directed, requested, consented to those political activities. A court would be required to use strict scrutiny to determine whether the ordinance is narrowly to avoid any real and appreciable impact on the exercise of these fundamental rights.

Several factors could be considered in any analysis. First, whether the net effect of these requirements discourages employers from developing or continuing a uniform policies permitting political activities, as well as discourage employees from participating in such programs or engaging in political activities while on vacation.

Second, whether requiring an employer to report as a contribution the activities of an employee that are not under the direction of, at the request of, or with the consent of an employer serves to further the goal of reducing corporate involvement and influence in campaign finance. The FPPC noted in a 1979 opinion that major purposes of both the state and federal campaign disclosure requirements were to allow voters to precisely place each candidate in the political spectrum and alert voters to the interests to which a candidate is most likely to be responsive, thus facilitating predictions of future performance. Where a certain disclosure failed to serve these interests, it was not required by the FPPC. (CA FPPC Op. 79-002.)

Finally, whether these requirements may implicate the privacy, speech, or association rights of an employee who, in order for the employer to satisfy the contribution and expenditure ordinances, is required to report to his or her employer political activities the employee engaged in during the employee's vacation or pursuant to a uniform policy permitting employee participation in political activities of the employee's own choosing. The FPPC opined in one opinion that under the circumstances before it, because the disclosure requirements did not truly promote the purposes of the Act, the privacy rights of employees could not be so affected. (*Id.*)

CONCLUSION

The City's Campaign Ordinance is interpreted in accordance with the Fair Political Practices Commission's (FPPC) regulations. An employers who requests or directs an employee to engage in political activities for more than 10% of an employee's compensated time in any one month makes a reportable contribution or expenditure under the City Campaign ordinance. Campaign committees that receive the services of paid employees under such circumstances would be required to report those services as campaign contributions subject to the City's campaign limits. It is also a reportable contribution or expenditure of an employer if the employer consents to the employee being relieved of normal working responsibilities to perform personal services, and the employee spends more than 10% of compensable time engaged in those services. The exceptions to the "consent" criteria are an employee who engages in political activity on 1) vacation time or 2) pursuant to a uniform policy permitting employees to engage in political activities of their own choosing.

The PRA specifically permits local agencies to have additional requirements than those set forth in state law, and, as the conduct of a municipal election is a municipal affair, the City could require that for local elections, all employee activities, even those that constituted less than 10% of an employee's compensated time in any one month, must be reported as a contribution by the employer.

Municipal affairs are, however, subject to constitutional constraints. A requirement that an employer to report as a campaign contribution employee political activities that occur during an employee's vacation or pursuant to a uniform policy of the employee's own choosing may implicate constitutionally guaranteed speech, associational, and privacy rights of either the employer or the employee.

RICHARD DOYLE
City Attorney

By 

LAURA PARTCH
Research Attorney