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California Attorney General Offers Guidance on Scope of Government Code Section 1090

Pair of Recent Opinions Clarifies Conflict-of-Interest Statute



California Attorney General Kamala Harris recently issued two opinions illuminating the scope of Government Code section 1090, the powerful and far-reaching provision of law that prohibits a government official from being “financially interested” in any contract made by him or her in an official capacity, or

by any public body on which he or she sits.

In the first, (Op. 13-702) Harris was asked two questions: (1) whether a community college trustee who is married to a tenured professor could participate in the collective bargaining process between the district and the bargaining unit that represents his wife and, (2) whether the trustee, a retired district employee (president) receiving health benefits from the district equal to those of current employees, could participate in the process of renegotiating health benefits provided to current employees.

In regard to bargaining with the wife’s unit, Harris opined that the board member could participate, but only because Government Code section 1091.5(a)(6) defines as a “non-interest” a spouse of an officer in his spouse’s employment if the spouse’s employment has existed for at least a year prior to the official’s election or appointment to the agency board. Those were the facts in this circumstance. However, Harris held that the official could not participate in renegotiating the health care benefits of current employees that would affect his health care benefits, as that created a direct and forbidden financial interest in that contract. Harris pointed out that the “government salary” exceptions in the Government Code do not apply. Harris did conclude that the community college board, with the conflicted member recused, could renegotiate the health benefits under the “rule of necessity,” which allows a public agency to perform essential business despite a member’s conflict.

In her second opinion (Op. 13-303), Harris was asked whether a city council

People



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could purchase products from a vendor in which a council member has a 50 percent ownership interest. Harris concluded that the council could not, as the council member who owned half the business has an obvious “financial interest” in any contract between the city and the business. Also, the “rule of necessity” does not apply because there are other vendors which the city could deal with. Next, she found that none of the statutory “remote” or “non-interests” applied in this circumstance. Finally, and perhaps most critically, Harris noted that, even if city staff routinely made retail purchase decisions without direction or consultation with the council, the staff’s decisions are delegated by the council and not independent from it. Further, recusal of the conflicted council member is no cure, as the conflicted member is conclusively presumed to be involved in the making of the contract, even if done by staff.

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