

Memorandum 2013-2

Incompatible Activities

Government Code Section 19990 provides that a state employee shall not engage in activities that are “clearly inconsistent, incompatible, in conflict with, or inimical” to the employee’s duties. The statute also lists a number of specific activities that are deemed, as a matter of law, to be incompatible with state service.

In addition, each agency is required to determine, subject to the approval of the Department of Personnel Administration (“DPA”), what activities would be incompatible with the particular duties of its own employees. *Id.* That agency-specific determination is known as the agency’s “Incompatible Activities Statement” (“IAS”).

The DPA has adopted a regulation that establishes a procedure for revising an agency’s IAS. See 2 Cal. Code Regs. § 599.870. It requires that an agency submit a proposed revision to its employees, for review and comment. The proposal must then be provided to DPA for review and approval.

This memorandum discusses whether one aspect of the Commission’s IAS — the treatment of outside employment — needs to be revised. If the Commission decides to make changes to its IAS, the next step would be to run the proposed revisions through the DPA-mandated revision procedure.

Materials relevant to this discussion are attached as an Exhibit, as follows:

| | |
|--|-------------------|
| | <i>Exhibit p.</i> |
| • Gov’t Code § 19990 | 1 |
| • 2 Cal. Code Regs. § 599.870 | 2 |
| • CLRC Incompatible Activities Statement | 3 |

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

OUTSIDE EMPLOYMENT RESTRICTIONS

With an exception not relevant here, Government Code Section 19990 expressly yields to any conflicting provision of a Memorandum of Understanding (“MOU”). Consequently, in order to fully understand the rules restricting an employee’s outside employment, one must read Section 19990, the IAS, and the MOU together, with any conflicts resolved in favor of the MOU.

The relevant provisions of the Commission’s IAS and the MOUs for the Bargaining Units that represent Commission staff are discussed below.

Commission IAS

The Commission’s IAS prohibits its staff from performing outside legal work for compensation, with two exceptions:

The following specific activities are determined to be inconsistent, incompatible, or in conflict with duties as an employee [fn. “Employee” does not include a Commission member.] of the California Law Revision Commission:

...

3. Performing any legal work (other than for the Commission) for any compensation or benefit, but this does not preclude either of the following:

(1) Participating (on an irregular, infrequent basis) in the Continuing Education of the Bar program or other activities primarily of an educational nature.

(2) Performing outside legal work for compensation on an infrequent basis outside normal business hours if prior approval is obtained from the Executive Secretary in each instance, and such approval shall be withheld in any case of conflict or incompatibility with the employee’s duties as an employee. The Executive Secretary may not perform any outside legal work for compensation under this exception.

4. Paragraph 3 applies only to full-time employees.

Appeal from any decision of the Executive Secretary made pursuant to this statement shall be directly to the Law Revision Commission itself.

Notably, those rules do not apply to part-time employees. Nor do they apply to non-legal work.

Memorandum of Understanding

The MOU for Bargaining Unit 2 (representing “California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment,” also known as “CASE”) provides:

The State shall not prohibit outside employment that does not conflict with the applicable incompatible activity statement.

Agreement between State of California and California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) § 13.2 (Effective April 1, 2011 through July 1, 2013).

Given that an MOU trumps conflicting language in Section 19990, the provision set out above would seem to mean that outside employment can only be prohibited on the basis of agency-specific rules provided in an IAS, rather than on the basis of the general rules provided in Section 19990.

It is therefore important that the Commission's IAS comprehensively address outside employment issues. If the IAS has any gaps in its coverage, the Commission may not have the authority to regulate any conflicts that arise within those gaps.

Part-Time Employees

As noted above, the outside employment provisions of the existing IAS do not apply to the Commission's part-time employees. Under the CASE MOU, this probably means that the Commission does not currently have authority to restrict "incompatible" outside employment by its part-time staff attorneys. That could be a problem.

The Commission's effectiveness as a law reform agency is grounded, in large part, on its reputation for policy neutrality. If a Commission employee were to perform legal work for an entity that has business before the Commission, or that is strongly identified with a particular constituency at issue in a Commission study, the Commission's reputation for neutrality could be undermined.

In addition, state employees are barred from participating in making decisions in which they have certain conflicts of interest. See Gov't Code § 87100 ("No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."). If an employee's outside employment creates a conflict of interest that disqualifies the employee from working on certain Commission studies, that could be a significant operational problem.

The staff sees no reason why these problems would be limited to full-time employees. If anything, part-time employees are more likely than full-time

employees to seek outside employment, creating a greater chance that they would take on outside work that conflicts with their duties to the Commission.

For that reason, the staff recommends that the IAS be revised to include rules regulating outside employment by part-time employees.

However, any such rules should be narrowly drawn. Part-time employees are more likely to *require* an outside source of income, in order for their Commission work to be economically feasible. If the rules on outside employment are unduly strict, they could impair the Commission's ability to recruit and retain talented staff.

One possible approach, which would be consistent with the approach taken in the existing IAS for incidental work by full-time employees, would be to require the review and approval of the Executive Director, before a part-time employee could begin any paid outside employment. As under the existing IAS, the Executive Director would disapprove any proposed outside employment that is in conflict with or incompatible with an employee's duties to the Commission.

What types of outside employment might be barred as incompatible with an employee's duties to the Commission? The staff see three general categories of such work, which are discussed below:

(1) *Legislative Advocacy on Matters Assigned to the Commission for Study.* As a first principle, any work that involves advocating for the passage, defeat, or veto of legislation "concerning matters assigned to the commission for study" should be prohibited, because such advocacy is already prohibited by statute:

8288. No employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to Section 8293, advocate the passage or defeat of the legislation by the Legislature or the approval or veto of the legislation by the Governor or appear before any committee of the Legislature as to such matters unless requested to do so by the committee or its chairperson. In no event shall an employee or member of the commission appointed by the Governor advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor, in his or her official capacity as an employee or member.

(2) *Other Legislative Advocacy.* The first sentence of Section 8288 flatly bars all direct legislative advocacy by Commission employees, but only with regard to legislation relating to topics that the Commission has been authorized to study.

The second sentence is both broader and narrower in its effect. It is broader in that it bars direct legislative advocacy on *any* topic, regardless of whether the Commission has been authorized to study it. But it is narrower in that it only applies when an employee is acting “in his or her official capacity as an employee.”

Nothing in Section 8288 directly addresses the situation where an employee acts in a *non-official* capacity to advocate for the passage, failure, or veto of legislation that does *not* concern matters that the Commission has been authorized to study. Consequently, Section 8288 would not preclude all outside employment as a legislative advocate.

Nonetheless, the staff does believe that outside employment as a legislative advocate could be problematic. The Legislature is a principal gatekeeper on the Commission’s work. It sets our budget and agenda. It also decides whether to enact Commission recommendations into law. It is essential that the Legislature continue to see the Commission and its staff as neutral and even-handed, with undivided loyalty to the People of California. If Commission staff were to act as paid legislative advocates for outside employers, it is possible that actions or positions taken as part of that advocacy could undermine the Commission’s reputation or its working relationship with the Legislature.

If the Commission believes that paid legislative advocacy for an outside employer could be inimical to the Commission’s reputation and effectiveness, it could categorically prohibit all such outside employment.

(3) *Other Outside Employment.* Any type of outside employment — legal or non-legal — could potentially be in conflict with an employee’s duties to the Commission.

Such work could create a financial interest that would disqualify the employee from participating in a Commission study.

Even if the outside work does not create a legally disqualifying financial interest, it might still create a perception of bias or divided loyalties that would complicate the employee’s participation in a Commission study.

Such matters can sometimes be addressed through internal compartmentalization. A “firewall” can be erected to bar an employee’s participation in a study in which the employee has a real or perceived conflict of interest. Consequently, the existence (or perception) of a conflict need not be an absolute bar to outside employment.

Bear in mind, however, that the Commission has a very small staff. There could be circumstances in which the use of firewalls becomes unworkable, because we simply do not have enough employees to compartmentalize to the degree necessary to avoid the conflict.

In light of the discussion above, it would probably make sense to prohibit *any* outside employment that is in conflict with or incompatible with the employee's duties to the Commission, but only if it is impracticable to manage the conflict through compartmentalization.

Uncompensated Activities

The outside employment provisions in the Commission's existing IAS only apply to "compensated" work. That seems appropriate.

There are many types of uncompensated "activities" that are different from outside employment and should not be governed by the same set of rules. For example, an employee might privately advocate for the passage of a particular bill that has no relation to any Commission study. While the Commission may decide to prohibit *paid* outside employment as a legislative advocate, it should be more cautious in regulating the private political expressive activity of its employees. Any attempt to do so could run afoul of the employee's protected speech rights.

So long as an employee's unpaid private activities are not "outside employment," they will not be covered by the CASE MOU language restricting the prohibition of outside employment. Consequently, those non-employment activities would be governed by the general provisions of Section 19990. That seems sufficient.

PROPOSED REVISIONS

The ideas discussed above could be implemented by revising the IAS to replace the existing employment rules with language along the following lines:

The following specific activities are determined to be inconsistent, incompatible, or in conflict with duties as an employee of the California Law Revision Commission:

...

(c) Paid outside work, if the Executive Director determines that any of the following conditions are true:

(1) The outside work would involve advocating for the passage, defeat, or veto of legislation in California.

(2) The outside work would be in conflict with or incompatible with the employee's duties to the Commission and it would not be practicable to avoid the conflict or incompatibility by limiting the employee's work assignments.

(d) Paid outside legal work performed by the Executive Director. This paragraph does not preclude the Executive Director from performing non-legal work if the Commission's Chair determines that none of the conditions listed in subdivision (c) are true.

Appeal from any decision of the Executive Director made pursuant to this statement shall be directly to the Law Revision Commission itself.

As used in this statement, "employee" does not include a member of the Commission.

In addition to addressing the matters discussed earlier in this memorandum, the draft set out above would make a few other minor changes. Those miscellaneous changes are described below.

Timing Considerations

The existing IAS only permits outside work that is "irregular" or "infrequent." Those restrictions would not be appropriate for regulating the outside employment of a part-time employee.

Proposed paragraph (c)(2) would provide a more flexible approach to workload and scheduling concerns. It would grant the Executive Director discretion to disapprove any outside employment that is "incompatible" with an employee's duties to the Commission. This would permit the Executive Director to make an individualized assessment of whether the workload or scheduling of proposed outside employment would be compatible with an employee's duties, based on the employee's time-base and other relevant circumstances.

Educational Activities

The existing IAS provides a categorical exception for educational activities, presumably on the assumption that such activities could never be in conflict with an employee's duties to the Commission. The staff believes that assumption is misplaced. For example, the Commission recently conducted a study involving charter schools. Outside employment with a charter school would probably have created a conflict with regard to that study, even if the work could be described as "educational."

The proposed revisions would treat educational employment in the same way as other types of outside employment. This would give the Commission authority to prohibit such employment in the cases where it is in conflict with or incompatible with an employee's duties to the Commission.

Outside Employment of Executive Director

The existing IAS categorically bars outside legal work by the Executive Director. Proposed subdivision (d) would continue that rule.

In addition, subdivision (d) would fill a potential gap, by requiring that any *non-legal* outside employment of the Executive Director be scrutinized in the same way as the outside work of other employees. For practical reasons, the Commission's Chair would conduct that analysis.

Appeals

The existing IAS provides a right to appeal an adverse determination to the Commission as a whole. That could sometimes be impractical, when time is of the essence or the Commission's workload is very heavy.

An alternative approach would be to permit an appeal to the Commission's Chair, outside the context of a Commission meeting. That would be quicker and more efficient, but perhaps less rigorous.

Should that rule be changed?

NEXT STEP

If the Commission decides to make any of the changes discussed in this memorandum, the staff will work with DPA to promulgate a revised IAS.

In preparing the formal draft for use in that process, the staff anticipates making very minor stylistic changes, to conform the IAS to statutory drafting conventions (e.g., assigning conventional subdivision and paragraph enumeration throughout).

Should the IAS be revised? If so, how?

Respectfully submitted,

Brian Hebert
Executive Director

Gov't Code Section 19990. Incompatible Activities

19990. A state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee.

Each appointing power shall determine, subject to approval of the department, those activities which, for employees under its jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees. Activities and enterprises deemed to fall in these categories shall include, but not be limited to, all of the following:

(a) Using the prestige or influence of the state or the appointing authority for the officer's or employee's private gain or advantage or the private gain of another.

(b) Using state time, facilities, equipment, or supplies for private gain or advantage.

(c) Using, or having access to, confidential information available by virtue of state employment for private gain or advantage or providing confidential information to persons to whom issuance of this information has not been authorized.

(d) Receiving or accepting money or any other consideration from anyone other than the state for the performance of his or her duties as a state officer or employee.

(e) Performance of an act in other than his or her capacity as a state officer or employee knowing that the act may later be subject, directly or indirectly to the control, inspection, review, audit, or enforcement by the officer or employee.

(f) Receiving or accepting, directly or indirectly, any gift, including money, or any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value from anyone who is doing or is seeking to do business of any kind with the officer's or employee's appointing authority or whose activities are regulated or controlled by the appointing authority under circumstances from which it reasonably could be substantiated that the gift was intended to influence the officer or employee in his or her official duties or was intended as a reward for any official actions performed by the officer or employee.

(g) Subject to any other laws, rules, or regulations as pertain thereto, not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her hours of duty as a state officer or employee.

The department shall adopt rules governing the application of this section. The rules shall include provision for notice to employees prior to the determination of proscribed activities and for appeal by employees from such a determination and from its application to an employee. Until the department adopts rules governing the application of this section, as amended in the 1985-86 Regular Session of the Legislature, existing procedures shall remain in full force and effect.

If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the

memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

2 Cal. Code Regs. § 599.870. Incompatible Activities Statements

(a) To develop or revise an incompatible activities statement the appointing power shall:

(1) Publish the proposed statement or revision and a supporting statement of rationale for review and written comment by affected employees for at least 30 calendar days. The appointing power shall use a manner of publication which reasonably and likely assures the opportunity for affected employees to be informed of the proposed statement or revision. The published notice shall indicate how and by when comments are to be submitted.

(2) Respond in writing to concerns expressed by affected employees and their representatives about the statement during the review period by either making changes to the statement that are responsive to their concerns or informing them why such changes are not being made.

(3) File with the Department of Personnel Administration for approval a copy of the statement, the statement of rationale, a summary of the process followed in developing or revising the statement, a summary of the written comments received from employees and their representatives and the appointing power's response to the comments.

(b) The statement shall describe as specifically as possible the kinds of activities that are deemed incompatible.

(c) Except as provided by section (d) below, the statement shall be effective on the day it is approved by the Department.

(d) The statement or revision may take effect immediately for a period not to exceed 90 days, when the appointing power establishes and the director concurs that delaying adoption of the proposed statement or revision until the process outlined in subsection (a) is completed could significantly impair agency operations. Such statements or changes shall not remain in effect for longer than 90 calendar days unless they are approved by the Department after being publicized and submitted as specified in subsection (a).

(e) Each appointing power shall describe within the statement the process for employees to appeal the application of an incompatible activities statement to them. The final review level in the process shall be the appointing power or his or her designee.

(f) Each appointing power shall ensure that its incompatible activities statement is kept current and that employees are aware of and have access to it. New employees shall be given a copy of the statement upon appointment. The statement shall also be available for public review upon request.

STATEMENT OF ACTIVITIES THAT ARE INCONSISTENT,
INCOMPATIBLE, OR IN CONFLICT WITH DUTIES AS AN
EMPLOYEE OF THE CALIFORNIA LAW REVISION COMMISSION

In protecting the integrity of the California state service, the law includes standards of conduct with which state officers and employees are expected to comply. Government Code Section 19990 provides:

19990. A state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee.

Each appointing power shall determine, subject to approval of the department, those activities which, for employees under its jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees. Activities and enterprises deemed to fall in these categories shall include, but not be limited to, all of the following:

(a) Using the prestige or influence of the state or the appointing authority for the officer's or employee's private gain or advantage or the private gain of another.

(b) Using state time, facilities, equipment, or supplies for private gain or advantage.

(c) Using, or having access to, confidential information available by virtue of state employment for private gain or advantage or providing confidential information to persons to whom issuance of this information has not been authorized.

(d) Receiving or accepting money or any other consideration from anyone other than the state for the performance of his or her duties as a state officer or employee.

(e) Performance of an act in other than his or her capacity as a state officer or employee knowing that the act may later be subject, directly or indirectly to the control, inspection, review, audit, or enforcement by the officer or employee.

(f) Receiving or accepting, directly or indirectly, any gift, including money, or any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value from anyone who is doing or is seeking to do business of any kind with the officer's or employee's appointing authority or whose activities are regulated or controlled by the appointing authority under circumstances from which it reasonably could be substantiated that the gift was intended to influence the officer or employee in his or her official duties or was intended as a reward for any official actions performed by the officer or employee.

(g) Subject to any other laws, rules, or regulations as pertain thereto, not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her hours of duty as a state officer or employee.

The department shall adopt rules governing the application of this section. The rules shall include provision for notice to employees prior to the determination of proscribed activities and for appeal by employees from such a determination and

from its application to an employee. Until the department adopts rules governing the application of this section, as amended in the 1985-86 Regular Session of the Legislature, existing procedures shall remain in full force and effect.

If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

Section 8288 of the Government Code sets forth a limitation specifically applicable to employees of the California Law Revision Commission. This section provides:

8288. No employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to Section 8293, advocate the passage or defeat of the legislation by the Legislature or the approval or veto of the legislation by the Governor or appear before any committee of the Legislature as to such matters unless requested to do so by the committee or its chairperson. In no event shall an employee or member of the commission appointed by the Governor advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor, in his or her official capacity as an employee or member.

The following specific activities are determined to be inconsistent, incompatible, or in conflict with duties as an employee¹ of the California Law Revision Commission:

1. The use for private purposes of state equipment or supplies.
2. Soliciting or accepting, directly or indirectly, any money, loan, employment, business, benefit, or other thing of value (in addition to the salary paid by the state) for the performance or nonperformance of duties as an employee or that would tend to influence, directly or indirectly, the performance or nonperformance of duties as an employee.
3. Performing any legal work (other than for the Commission) for any compensation or benefit, but this does not preclude either of the following:
 - (1) Participating (on an irregular, infrequent basis) in the Continuing Education of the Bar program or other activities primarily of an educational nature.
 - (2) Performing outside legal work for compensation on an infrequent basis outside normal business hours if prior approval is obtained from the Executive Secretary in each instance, and such approval shall be withheld in any case of conflict or incompatibility with the employee's duties as an employee. The Executive Secretary may not perform any outside legal work for compensation under this exception.

¹ "Employee" does not include a Commission member.

4. Paragraph 3 applies only to full-time employees.

Appeal from any decision of the Executive Secretary made pursuant to this statement shall be directly to the Law Revision Commission itself. Any violation of the requirements of this statement by the Executive Secretary shall be brought to the attention of the Law Revision Commission for appropriate disciplinary action.
