



## **HOW TO OBTAIN AN EMPLOYEE EXEMPTION FOR A NEW JOB OR A SECOND JOB**

### **What are the general restrictions in the Ethics Act regarding employment?**

The Ethics Act prohibits full-time public officials and employees:

- from seeking employment with or being employed by persons and businesses subject to their personal regulatory authority, or that of a subordinate; or
- from seeking employment with a vendor that has a contract with their agency over which they, or a subordinate, has authority or control.

This limitation applies to current matters pending before your agency as well as matters which have occurred in the past twelve (12) months. For purposes of this provision of the Ethics Act, employment includes working as an independent contractor.

### **What does it mean to regulate?**

The term regulate generally refers the act or process of controlling by rule or restriction. Black's Law Dictionary 1398 (9<sup>th</sup> ed. 2009), defining term "regulatory."

Some examples of persons who regulate include an employee of a local public health department who inspects restaurants. At the State level it may be a person who has authority to approve or deny a license or permit, or one who inspects facilities to ensure compliance with State or Federal laws.

The term is broad. If you have any questions concerning whether you exercise regulatory authority, you should contact the Ethics Commission.

### **What does it mean to exercise control over a vendor?**

If you do one or more of the following, you exercise control over a vendor:

- (1) Drafting bid specifications or requests for proposals;
- (2) Recommending selection of the vendor;
- (3) Conducting inspections or investigations;

- (4) Approving the method or manner of payment to the vendor;
- (5) Providing legal or technical guidance on the formation, implementation or execution of the contract; or
- (6) Taking other non-ministerial action which may affect the financial interests of the vendor.

### **Within the meaning of the Ethics Act, what does it mean to seek employment?**

To seek employment means:

- to respond to unsolicited offers of employment; or
- to contact a potential employer, directly or indirectly (including contact through an intermediary) in furtherance of obtaining a new job or a second job.

### **When do I need to obtain an employment exemption?**

You need to obtain an employment exemption before you begin your search for a new job or a second job with a vendor or regulated business. When a public employee has a second job, it is commonly referred to as “moonlighting”.

### **How do I apply for an exemption?**

In accordance with the Ethics Act, W.Va. Code § 6B-2-5(h), and related Legislative Rule, Title 158, Series 11, you may apply to the Ethics Commission for an exemption. The exemption request must be submitted in writing to the Executive Director of the Ethics Commission. The exemption request shall contain:

- (1) The name, address and phone number of the governmental agency by which you are employed;
- (2) Your job title and the name of your immediate supervisor;
- (3) Facts sufficient to support a finding that you would be adversely affected if you are prohibited from seeking employment with regulated persons or vendors over whom you or a subordinate either currently exercise control or have exercised control in the past twelve months; and,
- (4) A statement that, if the temporary exemption is granted, you will provide a copy of the temporary exemption to the head of your agency within two (2) business days of receipt of the same.

### **What happens once I submit an exemption request?**

Within 10 business days of the receipt of the exemption request, either the Executive Director or Ethics Commission Chair shall grant or deny a temporary exemption. If granted, the temporary exemption remains in effect for 30 days. If a temporary

exemption is denied, then you may appeal the denial to the Commission within 10 business days of receipt of the denial.

The Ethics Commission then considers whether to ratify the preliminary decision within 45 days of receipt of the exemption request. Similarly, it will consider any appeal of an adverse decision within 45 days of receipt of an appeal.

The exemption request, which identifies you by name, is placed on the Commission's public meeting agenda and discussed in a public meeting.

### **What is the purpose of an exemption?**

The overriding purpose of seeking and obtaining an exemption is as follows: **First**, to ensure transparency in the governmental process; **Second**, to ensure that the public employee or official seeking the exemption ceases and desists from taking action in regard to persons over whom the public servant exercises regulatory authority or purchasing power; **Third**, to ensure that potential employers are not shown favoritism. Specifically, the exemption mandates that the public employee or official may not make, participate in making, or in any way attempt to influence, a decision of his or her agency affecting persons, businesses or law firms with which the affected person is seeking employment; and, **Fourth**, to put the public, the head of your agency and potential employers on notice that you have complied with the Ethics Act's requirements in regard to moonlighting and seeking employment with regulated persons and vendors.

### **If my exemption is granted, am I required to take further steps? If so, what are they?**

Yes. The additional steps required are:

(1) You must provide a copy of the exemption to your supervisor within 2 business days of receipt; and

(2) You may not take official action in regard to a person or persons with whom you are seeking employment. Specifically, you may not make, participate in making, or in any way attempt to influence, a decision of your agency affecting persons, businesses or law firms with which you are seeking employment.

If this prohibition creates an undue hardship, then your employing agency's director or governing body may authorize you to take action in regard to potential employers. However, such actions are subject to additional review by the head of your agency or his or her designee.

### **How long is the exemption effective?**

One year.

**Do these same rules apply in regard to seeking employment with law firms which may represent parties before my agency or who may contract with my agency to provide legal services?**

Yes. If a law firm is representing a regulated party in a matter pending before your agency, or if a law firm contracts with your agency to provide legal services, and if you or a subordinate have been involved in a regulatory matter involving this firm or had responsibility for overseeing legal services provided by this firm, now or in the last twelve months, then these same rules apply in regard to seeking employment or having outside employment, including contract work, with such law firms. You may also want to consult with the W.Va. State Bar Office of Disciplinary Counsel in regard to the application of the Rules of Professional Conduct to seeking employment with an attorney or law firm who represents an opposing party in a matter before your agency. See West Virginia Rules of Professional Conduct, Rule 1.11.

**In addition to the Ethics Act, are there other limitations regarding my job search and/or having a second job, i.e. moonlighting? If so, what are they?**

Government agencies may impose stricter limitations than those imposed by the Ethics Act. As such, your agency may have stricter rules which limit you from seeking employment or having a second job.

For example, your agency may determine that due to your job position it would be an inherent conflict for you to work for an entity that your agency regulates or does business with, even if you are not involved in those matters. If you are involved in matters involving the exercise of regulatory or purchasing authority concerning a particular person or business, your agency may determine that it would create an undue hardship to screen you from these matters, particularly if you were to moonlight for the person or entity on a long-term basis.

State employees should check with their supervisors regarding the applicability of the Division of Personnel's rules.

**What other sections of the Ethics Act apply if I moonlight or change jobs?**

- (1) You may not use confidential information obtained through your public employment. See W.Va. Code § 6B-2-5(e).
- (2) You may not accept compensation for performing work which you are required to perform as part of your public job responsibilities. See W.Va. Code § 6B-2-5(h)(6).
- (3) If you are employed by a State or local governmental agency and have secondary employment with another public employer, or hold an elected position, then you may be required to file time records with the Ethics Commission if you perform the functions of your secondary public employment or public service during your regular public work hours with your primary employer and are allowed to make-up time. See Title 158, Series 14. These same limitations apply to elected or appointed public officials who also are employed by a government agency.

- (4) You may not have overlapping work hours. In other words, you may not be on two time clocks at the same time. If you have secondary employment, or hold an elected position in addition to your public employment, be sure to perform the duties of this position outside of your regular work hours or take annual leave.
- (5) Elected and appointed public officials, and full-time staff attorneys or accountants may not, for a period of one year following the termination of their employment or public service, appear back before their agency in a representative capacity in certain matters. See W.Va. Code § 6B-2-5(g). The Commission has ruled that an appointed official is one whose position is created by law and/or the person takes an oath of office. A.O. 2010-22.
- (6) Public servants holding the following positions after July 1, 2011, must wait one year before registering as a lobbyist: (a) Members of the Legislature; (b) Elected Members of the Board of Public Works; (c) Members of the Supreme Court of Appeals; (d) Will and pleasure professional employees working under the direct supervision of a Member of the Legislature; (e) Will and pleasure professional employees of Members of the Board of Public Works who: (i) are under their direct supervision; and, (ii) regularly, personally and substantially participate in a decision-making or advisory capacity; (f) Secretaries of Executive Branch Departments; and, (g) Heads of any state departments or agencies. W.Va. Code § 6B-3-2(e).
- (7) For all public servants, a lifetime limitation applies in regard to representing clients in matters involving a specific party or parties in a matter which arose during your public service or employment in which you personally and substantially participated in a decision-making, advisory or staff support capacity. This limitation does not apply if your agency's earlier action affected your private client or clients as a member of a class of five or more similarly situated citizens, persons or businesses. Further, this prohibition does not apply if the government agency consents to your representation. See W.Va. Code § 6B-2-5(f).
- (8) If you have secondary/outside employment, you may not use more than a de minimis amount of public resources, including equipment such as your agency's computers, fax machines or telephones, for purposes related to the secondary employment. This same rule applies to the use of public resources to seek employment. You may use public resources and time to seek an exemption from the Ethics Commission.
- (9) No provision in the Ethics Act specifically prohibits public officials from working for a particular business after they leave government service. Several opinions of the Commission indicate that there may be limits in regard to being employed in positions funded by grant monies that public servants, through their prior public positions, helped secure. See A.O.s 96-43 and 2001-32.