

COMMISSION ADVISORY NO. 86-01**PUBLIC EMPLOYEE STOCK OWNERSHIP**

The purpose of this advisory⁽¹⁾ is to review the principles of G.L. c. 268A, the conflict of interest law, that apply to public employees who own stock in corporations that contract with public agencies at the same government level. Many public employees own such stock. Public employees are frequently uncertain about:

- whether their stock ownership is permissible, and
- if so, what limitations their stock ownership will place on their official actions as public employees.

Note: Although the remainder of this Advisory refers to state employees, the same advice (except the special exemption for state legislators) generally applies to county and municipal employees unless otherwise noted. In Part I, the sections of G.L. c. 268A that correspond to §7 (state) are §14 (county) and §20 (municipal). In Part II, corresponding to §6 (state) are §13 (county) and §19 (municipal). Section 23 applies to all public employees. All public employees should consult the Legal Division of the Ethics Commission for additional information about their specific circumstances.

In general, most state employees may own stock in corporations that contract with the Commonwealth or a state agency. The starting point is G.L. c. 268A, §7, which prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency. By owning stock in a corporation that contracts with the state, a state employee necessarily has a financial interest in the corporation's contract with the state, and is therefore subject to G.L. c. 268A, §7. The prohibition is not absolute, however, and is tempered by several exceptions.

I. EXCEPTIONS

One such exception is based upon the percentage of the corporation's stock the state employee owns. If a state employee owns less than one percent of the stock of a corporation that contracts with the state, the prohibition of G.L. c. 268A, §7 does not apply. For example, a state employee who owns ten shares of IBM stock will not be in violation of §7 because of IBM's contracts with the state, because the ten shares represent less than one percent of IBM stock.

By contrast, if the state employee's stock ownership represents one percent or more of the corporation's stock and the corporation has contracts with the Commonwealth, then the state employee will be subject to the prohibition of §7. In such circumstances, the employee must exercise one of the following four options (within thirty days):

1. The employee may reduce his or her ownership interest in the corporation to less than one percent. The divestiture must be made in good faith. For example, an employee would not satisfy §7 by engaging in a transaction that would retain his or her control over the stock.⁽²⁾
2. The corporation may terminate its contract with the state, thereby eliminating the prohibited financial interest in a state contract.
3. The employee may resign from his or her position as a state employee, thereby removing himself or herself from the contractual financial interest restrictions of §7.
4. The employee may qualify for an exception⁽³⁾ to §7. For a full-time state employee⁽³⁾ who is not a legislator, the

most likely exception, §7(b), would apply if the following conditions are satisfied:

- a. the employee does not work for or have any official responsibility over the state agency that contracts with the corporation, or work for any state agency that regulates the contracting agency's activities;
- b. the contract is made after public notice or competitive bidding, and
- c. the employee files with the Commission a disclosure of the financial interests of the employee and of the employee's family in the contract by virtue of their stock ownership.⁽⁴⁾

An additional exception applies only to state legislators. If a legislator owns more than one percent of the stock of a corporation that contracts with the state, the legislator is eligible for a separate exemption, G.L. c. 268A, §7(c). As long as the contract was made through competitive bidding⁽⁵⁾ and the ownership interest does not exceed ten percent of the corporation, legislators will be exempt from §7 following the filing with the Commission of a disclosure of their and their family's interests in the contract.

II. LIMITATION OF DUTIES

If §7 allows a state employee to own stock (see part I), the ownership interest will place certain limitations on an employee's ability to exercise certain official duties. The principal limitation appears in G.L. c. 268A, §6 and requires abstention from certain actions. Specifically, a state employee who owns any amount of stock in a corporation must refrain from participating as a state employee in a particular matter if its effect on the corporation is such that a reasonable investor would consider it material in deciding whether to buy, sell or hold the corporation's stock. For example, §6 would apply to a state environmental regulator's decision concerning whether or not a company in which the regulator owns stock could develop the only real property it owns because the ability to develop the company's major asset will affect the value of the company's stock.

In addition to abstaining, a state employee must submit to both his or her appointing official and the Commission a written disclosure of the employee's and his or her family's financial interests in the matter. The employee must continue to refrain from further participation in the matter unless and until the appointing official makes a written determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services that are expected from the employee. This determination must be made in writing and filed with the Ethics Commission in order to be effective.⁽⁶⁾ It is often helpful for this determination to address general classes of matters in which the employee may or may not participate (or may participate to a limited extent, such as by making a recommendation subject to a superior's approval).

All public employees are also subject to the requirements that appear in G.L. c. 268A, §23. These requirements are intended to prevent situations that may create the appearance of conflicts of interests. Therefore, even when §6 allows a state employee to participate in a matter affecting a business in which the employee owns stock, the employee must make a written disclosure to his or her appointing authority.

Furthermore, public employees may not use or attempt to use their official position to secure unwarranted privileges or exemptions of substantial value for themselves or others, or improperly use any confidential information acquired in the course of their official duties as a public employee. Potential violations of these provisions would arise, for example, if a public employee purchased stock based on confidential information about the company which they acquired as a public employee. On the other hand, a stock purchase based on information available to the public would involve no such misuse of confidential or inside information and therefore would not implicate G.L. c. 268A, §23.

CONCLUSION

As the previous discussion suggests, stock ownership in companies that contract with the various levels of Massachusetts government will not ordinarily pose problems for public employees under the conflict of interest law. Compliance with the law does require public employees to monitor the extent of their ownership interest in corporations that contract with the level of government for which they work. Employees should also monitor their

workload as public employees to avoid handling matters that could affect the stock's value in the eyes of a reasonable investor. [\(7\)](#)

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FOOTNOTES

1. The Commission issues Advisories periodically to interpret various provision of the conflict of interest law. Advisories respond to issues that may arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their agency counsel or the Legal Division of the State Ethics Commission at (617) 371-9500. Copies of all Advisories are available from the Commission office or online at www.mass.gov/ethics.
2. The Commission has ruled that a state employee may dispose of his financial interest in a state contract by placing all of the stock in the affected company in an irrevocable trust for the benefit of his wife. EC-COI-95-8.
3. Other exemptions are available to part-time employees who qualify as "special" employees. See §7(d), (e) for state employees; §14(c) for county employees; §20(c), (d) for municipal employees. The Commission's Legal Division can provide further information.
4. Municipal and county employees may qualify for similar exemptions. County employees do not need to file disclosures, but their families interests' in the contracting company may not exceed 10% (§14(b)). Municipal employees who meet conditions (a) and (b) above should file the disclosure described in condition (c) above with the City or Town Clerk.
5. Note that "public notice" of the contract is not sufficient to meet the requirement that the contract is made through competitive bidding.
6. The requirements that the employee's disclosure and the appointing authority's determination be filed with the Commission also apply to county employees, but not to municipal employees.
7. Finally, we note that G.L. c. 268B requires elected and certain major appointed officials at the state and county levels to file with the Commission annual Statements of Financial Interests that must also disclose their ownership of stock.

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