

COMMONWEALTH OF MASSACHUSETTS  
ETHICS COMMISSION

RECEIVING GIFTS AND GRATUITIES

CHAPTER 268A, SECTION 3

The state's conflict of interest law, G. L. c. 268A, and the financial disclosure law, G. L. c. 268B, restrict gifts and gratuities that public employees may receive. The phrase "public employee" includes all Massachusetts state, county and municipal officials and employees, whether part-time or full-time, paid or unpaid, elected or appointed.

Depending on the amount and source of a gift, issues may be raised under G.L. c. 268A, § 3, § 23 and G.L. c. 268B, § 6. Section 3(b) prohibits a public employee from requesting or receiving anything of substantial value which is given for or because of an official act or act within the public employee's official responsibility. (Similarly, under § 3(a), no one may give or offer such gifts to public employees.)

In addition, G.L. c. 268B, § 6 specifically prohibits public employees or members of their immediate family from soliciting or accepting gifts with an aggregate value of \$100 or more in a calendar year from any legislative agent. (Legislative agents are likewise prohibited from offering or giving such gifts.) Next, under G.L. c. 268A, § 23(b)(2), public employees are prohibited from using or attempting to use their position to obtain for themselves or others unwarranted privileges of substantial value that are not properly available to similarly situated individuals. Finally, even if a gift or gratuity is not of substantial value or does not fall within the prohibitions discussed above, G.L. c. 268A, § 23(b)(3) will, in many situations, require public employees to disclose to their appointing authority, the gift and their relationship with the giver.

- **What are gifts and gratuities?**

G.L. c. 268A does not define the terms gift and gratuity; instead, the law prohibits "anything of substantial value." Gifts may include honoraria and any free or discounted items or services, such as meals, entertainment event tickets, golf and travel expenses, for which payment is normally required.

Anything a public employee accepts is an unlawful gift or gratuity if it is: (a) of substantial value and (b) offered for or because of an official act or an act under the employee's official responsibility.

- **What is substantial value?**

Anything worth \$50 or more is considered to be "of substantial value" for purposes of the conflict of interest law. To determine substantial value, the Commission may consider, for example, the cost per person of entertainment hosted by the giver, what it would cost the public

to purchase an item or the actual cost incurred by the giver in acquiring the gift given to the public employee. In some situations, the value of a gift will not be its retail price. The giver may have paid more, for example, than the face price of a ticket. In such instances, the receipt of such tickets may be an unwarranted privilege. See the discussion below of G.L. c. 268A, § 23(b)(2.) Similarly, the value of a two-year-old computer is likely to be significantly less than its cost while the value of an item purchased many years ago that has become a collector's item may be significantly greater than its cost. Finally, some items, e.g., ordinary and customary plaques or similar items honoring a public employee's dedication or outstanding service, may, due to the inscription honoring the employee, have little value once so inscribed.

There are also other special cases that public employees should keep in mind. For example, where the gift is a meal, the value of the meal will include the tax and gratuity paid as well as the retail (menu) price of the meal itself. In addition, where a public employee is accompanied by a spouse, family member or guest, the value of the meal of the companion of the public employee is included as part of the \$50 "substantial value" threshold. Under some circumstances, the Commission will consider a group or series of gifts from the same source, that are individually less than \$50 in value but add up to \$50 or more, to be in the aggregate a gift of substantial value for G.L. c. 268A purposes. For example, a meal and an entertainment event ticket from the same giver, each valued at less than \$50, together could be valued at more than \$50.

- **What is an "official act?"**

The term "official act" is defined in the conflict of interest law as "any decision or action in a particular matter or in the enactment of legislation." Official acts would include, for example, voting on a matter before a governmental body, preparing a Request For Proposals or RFP for a public agency, serving on a hiring committee or making a policy recommendation to one's supervisor.

- **What is "official responsibility?"**

The term "official responsibility" is defined in the conflict of interest law as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. Official responsibility turns on the authority to act, not on whether that authority is, in fact, exercised. Even if a public employee abstains from all participation, he or she cannot shed his or her "official responsibility" for those matters if such responsibility exists.

- **What makes the gift unlawful?**

The Supreme Judicial Court has stated that there must be a "link" between a gift and a particular official act. Gifts offered and accepted solely as a gesture of goodwill would not violate § 3 (although the acceptance of such gifts raises issues under § 23 for the public employee).

In general, therefore, a gift received as a reward or a thank you for an official act that a public employee has taken or will take, or to influence or induce any such official act or act under the public employee's official responsibility will be considered to be for or because of the official act.

Whether a gift is unlawful depends on the circumstances surrounding the gift. Such circumstances could include the identities and relationship of the giver and the recipient, the intent of the giver and the recipient, the timing of the gift, whether the recipient has acted or will act on matters affecting the giver, and the effect, if any, of the gift on the employee's official acts. Other factors may include whether the gift is "repeated, planned and targeted," whether it is a business expense, whether a personal friendship or reciprocity exists, the nature, amount and quality of the gift or the location of the entertainment and the sophistication of the parties. In summary, the Commission will look at all of the circumstances surrounding the gift.

- **Gifts from Legislative Agents**

In addition to the restriction of § 3, legislative agents may not offer or give gifts to public employees if the gifts have an aggregate value of \$100 or more in a calendar year. In G.L. c. 268B, a gift is defined as a "payment, entertainment, subscription, advance, services or anything of value, unless consideration of equal or greater value is received." The definition excludes a reported political contribution, a commercially reasonable loan made in the ordinary course of business, an inheritance, or gifts from certain family members.

It does not matter why the gifts are given. For example, a gift worth \$100 from a legislative agent violates § 6 even if the agent and the public employee are personal friends and the gift is given solely out of personal friendship. (Note: Most gifts to public employees that violate § 6 are also prohibited by G.L. c. 3, § 43, which applies to executive agents as well as legislative agents and is even more restrictive.)

- **Unwarranted Privileges**

Whenever a public employee accepts a gift of substantial value given not for or because of a specific official act but because of his position, the conflict of interest law's provision prohibiting the use of position to secure unwarranted privileges is implicated. Under the conflict of interest law, a public employee may not "knowingly, or with reason to know . . . use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals." Such gifts are unwarranted because there is no reasonable justification or officially authorized basis for the gifts such as a law, regulation, ordinance or by-law permitting the gifts to be made.

- **Appearances and Disclosures**

Whenever a public employee is offered or receives anything of value, even if not of substantial value, the conflict of interest law is still implicated. Section 23(b)(3), the so-called "appearance" of conflicts of interest section, prohibits a public employee from acting "in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person." If a "reasonable person" could conclude that the public employee would be "improperly influenced" by the giver, or that the giver would "unduly enjoy [the public employee's] favor," or that the public employee would "act or fail to act" as a result

of such undue influence, the public employee must disclose in writing "the facts which would otherwise lead to such a conclusion" prior to acting on the matter of interest to the giver. The intent of this restriction is to let the public employee's appointing authority and/or the public know the relevant circumstances in advance, and, that by "giving it the light of day treatment," cause the public employee and his appointing authority, if any, to recognize the issue and deal with it appropriately. (For more information on making disclosures, see Ethics Commission Primer: The Code of Conduct.)

- **Conclusion**

Gifts to any public employee - whether paid or unpaid, elected or appointed - are not expected or required in order to do business with the government. For additional information, see Advisories 04-01: Free Tickets and Special Access to Event Tickets and 04-02: Gifts and Gratuities.