

THE POST-EMPLOYMENT RESTRICTIONS

An overview on the rules that apply to State officers and employees after leaving State service



October 2017



New York State Joint Commission on Public Ethics
www.jcope.ny.gov
education@jcope.ny.gov

Public Officers Law § 73(8)(a) contains two types of post-employment restrictions: a “two-year bar” and a “lifetime bar.”

The purpose of the post-employment restrictions (“revolving door prohibitions”) is to prevent you from using the knowledge, experience, and professional contacts gained throughout your career in State service to benefit either yourself or someone, thereby securing unwarranted privileges, consideration, or action.

The post-employment restrictions may prevent you from accepting a job at a private company that does business with your former agency. For this reason, it is important that you understand the post-employment restrictions prior to leaving State service for retirement or a transition to the private sector.



Two-Year Bar: Appearance/Practice Clause

The two-year bar applies once you leave State service and prohibits you from:

- appearing or practicing before your former agency, and;
- rendering services for compensation, in relation to any case, proceeding, application, or other matter before your former agency.

Who do the post-employment restrictions apply to?

- Statewide elected officials
- Members and employees of the State Legislature
- Officers and employees of New York State departments, boards, bureaus, divisions, commissions, councils, or other State agencies
- Members, directors, and employees of New York State public authorities and public benefit corporations



Unpaid and per diem officers and board members are excluded from Public Officers Law § 73, including the post-employment restrictions.

What the law says:

“No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency.”

Public Officers Law §73(8)(a)(i)

Special Two-Year Bar for Executive Chamber Employees

As part of the 2007 Public Employee Ethics Reform Act, the two-year bar for former Executive Chamber employees was significantly expanded. Any officer or employee of the Executive Chamber is prohibited from “appearing or practicing” before *any* State agency for a period of two years. However, former Executive Chamber employees are permitted to perform backroom services for other State agencies during this time period.

What does it mean to appear or practice before your former agency?

The phrase ‘appearing or practicing’ only reflects efforts to *influence* a decision by your former agency, or to gain information from your agency that is generally not available to the public. It does not, however, ban all contact with your former agency.

The appearance/practice prohibition applies whether you are paid or unpaid.

Examples of activities that JCOPE has determined violate the appearance/practice clause include, but are not limited to:

1. Having your name appear on any document submitted to your former agency (including being copied on any letter or e-mail)
2. Negotiating a contract with your former agency
3. Submitting a grant proposal or application to your former agency
4. Representing a client in an audit before your former agency
5. Engaging in settlement discussions with your former agency
6. Calling your former agency for guidance on how it might apply a future regulation or application, where generally your former agency would not provide such information to the public



7. Making a FOIL request on behalf of a client or contacting key personnel to collect data from your former agency is prohibited; however, you may make a FOIL request on your own behalf.



NOTE: *This is a non-exhaustive list of actions that violate the appearance/practice clause of the two-year bar. You should contact JCOPE for guidance if you are unsure whether your activity may violate the law.*

Examples of permissible activities include, but are not limited to:

1. Renewing a professional license issued by your former agency. The two-year bar is not intended to prevent you from practicing a trade, profession, or occupation.

In contrast, applying for an initial license before your former agency may constitute an appearance and a violation of the two-year bar.
2. Appearing before your former agency in response to a properly issued subpoena.
3. Teaching a legally-mandated course to your former agency is not considered a violation of the appearance/practice clause, as long as a different agency specifies the course content, certifies course instructors, and you are paid from non-agency funds.

4. You may be paid according to the terms of a contract between your former agency and your new employer, as long as your former agency has no role in either approving or hiring you, and your work product is not being submitted to, or approved by, your former agency.



Two-Year Bar: Backroom Services Clause

The backroom services clause prohibits you from being paid to assist someone in developing work product that will be reviewed and submitted to your former agency. You may, however, perform back room services free of charge. You do not need to physically appear before your former agency for this prohibition to apply.



- Directly or indirectly participating in a telephone call with your former agency, where you advise or direct a colleague to mention your name during the conversation
- Assisting in the preparation of a State tax return that will be submitted to your former agency, if your former agency is the Department of Taxation and Finance

When does the clock start for purposes of the two-year bar?

The clock begins when you are officially off your agency payroll. An employee is considered to still be on the payroll during a leave of absence or suspension without pay.

Some examples of prohibited backroom services include, but are not limited to:

- Preparing documents for a company, client, private firm, or person, and omitting your name when it is reasonably foreseeable that the documents will be reviewed by your former agency
- Assisting another person in the creation or development of an application to be submitted to your former agency
- Assisting another person in the creation or development of a plan or strategy intended to influence a decision by your former agency

Former agency

Generally, most State employees only have one former agency. However, depending on the circumstances, there are situations where you may have more than one former agency.

When determining your former agency, JCOPE considers:

1. What entity pays and provides benefits to the employee;
2. Whether the employee has significant responsibilities to that entity; and

3. Whether the employee provides “continuing service” to that entity that is not performed on a temporary basis and is not under the direction of a supervisor.

Example:

Within the Office of Information Technology Services (“ITS”), an ITS employee may be assigned to work on IT functions for several agencies. In these circumstances, generally both ITS **and** the agency to which the employee was assigned are the employee’s former agencies for purposes of the post-employment restrictions.

Things to consider before you contact your former agency on behalf of someone else or a client

1. Has it been two years since you left State service?
2. Are you contacting your former agency on behalf of another?
3. Are you knowingly communicating with your former agency with the intent to influence?
4. Are you seeking an official action such as an approval of a contract?
5. Is it foreseeable that your work product will go before your former agency?



The Lifetime Bar

The lifetime bar is more restrictive than the two-year bar and may prevent you from working on projects you directly participated in for your lifetime after you leave State service to pursue a non-governmental job.

What the law says:

No person who has served as a State officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any State agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was **directly concerned** and in which he or she **personally participated** during the period of his or her service or employment, or which was under his or her **active consideration.**”

Public Officers Law §73(8)(a)(ii)

How is “Directly Concerned/Personally Participated/Active Consideration” measured?

- Personal participation and direct concern in a specific case requires more than an awareness of or informal conversation concerning the circumstances.
- Mere acquaintance with or knowledge of a fact or circumstance is insufficient to trigger the lifetime bar. For example, your presence at a meeting where an issue is discussed and you did not vote on the issue, although other colleagues did, generally does not rise to the level of personal participation.
- When determining how the lifetime bar applies to you, JCOPE will consider whether you had a role in affecting the outcome of the transaction as an “active participant or decision maker.”

- The level of responsibility you had while in State service is suggestive of your active involvement.
- Significant transactions handled by senior staff are imputed to the head of an agency. A former agency head cannot work on the same transaction handled by top level staff.

What factors are considered when determining if a project constitutes the same transaction?

The question as to whether a case, proceeding, application or transaction remains the same hinges upon whether, despite intervening events, the essence of the transaction—its subject and purpose, the parties interested and affected, and the ultimate goal—remains constant. Generally, it is the same transaction if it is dependent on, a continuation of, or is contemplated by, a prior transaction.

Examples:

- A Department of Transportation employee who worked on Stage I of a highway project would be prohibited from working on stages II and III of the same project if those stages were already planned to be built sometime in the future.
- Appraisals of the same real estate parcel conducted at different times will, in most cases, constitute the same transaction, as they are based on the property’s unchanged features.
- State-administered programs that generally affect the same population, provide the same services, and have the same goals are the same transaction, even if the funding sources and procedures are considerably different.



Things to consider

Technological advancements and new standards can render two transactions different, even if the “essence” is the same. The lifetime bar is very fact-specific and can have significant limitations on your ability to secure private sector employment that involves you working on the same projects, cases, and proceedings you worked on while in State service.

Exceptions to the post-employment restrictions

Below are the most common exceptions to the post-employment restrictions.

1. Government-to-Government

If you leave State service and accept a position as an employee of a Federal, State, or local government entity, the post-employment restrictions do not apply. This exception also applies to employment with closely-affiliated entities. Being hired as an independent contractor for another government entity does not exempt you from the post-employment restrictions.

2. Continuity of Care for Health Care Professionals

Former State-employed health care professionals may treat former patients and clients at the State facility which formerly employed the health care professional.

3. Public Officers Law § 73(8-b) Certificate of Exemption

Generally, JCOPE cannot waive the post-employment restrictions. JCOPE is only authorized to grant exemptions to the two-year bar and/or lifetime bar to permit an agency to contract with a former employee on a specific project in limited circumstances.

The head of an agency must certify in writing that the former employee has specific knowledge and skills on a particular project that would be unavailable to the agency at a comparable cost.

If granted, the Certificate of Exemption allows former State employees to work for their former agency for a defined period of time to complete a project.

Do the post-employment restrictions apply when a State agency contacts a former employee for information?

There may be an occasion where a State agency needs historical information and perspective concerning an agency program or operations that can best be provided by a former employee. Separate and apart from a situation triggering either the two-year ban or the lifetime ban against the former employee, the revolving door prohibitions do not preclude a State agency from utilizing a former employee as a “resource person” in a non-paid capacity.

Under this limited circumstance, a State agency may speak with a former employee, within two years of that employee’s separation from State service, on matters within the former employee’s knowledge, so long as that communication is not compensated.

Do the post-employment restrictions bar you from serving as a volunteer?

Service as a “volunteer” on a State board, commission or council by a former employee, at the request of the individual’s former agency, would not violate the two-year bar of lifetime bar. A contrary ruling would be against the State’s interest because the State would lose the valuable services of former State officers and employees with talents and willingness to continue in some aspect of public service.

Are students who work for State agencies subject to the post-employment restrictions?

Depending on the circumstances, students may be excluded from these restrictions. Whether a student can qualify for this exclusion will depend on the Commission’s consideration of specific and relevant factors, *including but not limited to* whether, during the period of their State service, that student:

1. was enrolled full-time in an accredited course of study or on a seasonal recess;

2. worked half-time or more per week during the school year;
3. was limited to a maximum of four months of full-time State service during the summer vacation period and other semester breaks;
4. received any State employee benefits (e.g., medical, retirement, vacation, or right-to-employment);
5. satisfied the minimum course credit requirement of his/her educational program, or used earnings from the State service to finance his/her education;
6. filled a State position specifically designed to be filled by a student; and
7. functioned in a role that was substantially the same as other State employees.

Consequences to violating the post-employment restrictions:

Knowing and intentional violations of the post-employment restrictions may result in a civil penalty of up to \$40,000 and the value of any gift, compensation or benefit received.

JCOPE Advice and Guidance

Please contact your Ethics Officer or JCOPE prior to leaving State service. If you are thinking about working in the private sector, call or e-mail us to discuss how the two-year bar and the lifetime bar may affect future employment.

Informal, confidential advice is available through our Attorney of the Day program. Call 1.800.87-ETHICS (800-873-8442) and *press “2”* to speak to the Attorney of the Day or e-mail at legal@jcope.ny.gov.

