



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
428 J Street • Suite 620 • Sacramento, CA 95814-2329  
(916) 322-5660 • Fax (916) 322-0886

September 2, 2015

Christine Baker, Director  
Department of Industrial Relations  
Office of the Director  
1515 Cay Street, 17th Floor  
Oakland, CA 91612

Re: Your Request for Informal Assistance  
**Our File No. I-15-153**

Dear Ms. Baker:

This letter responds to your request for advice on behalf of the Labor Commissioner, Chief of the Division of Labor Standards Enforcement (DLSE), and on behalf of Deputy Labor Commissioners (DLC's) employed by DLSE regarding the revolving door provisions of the Political Reform Act (the "Act").<sup>1</sup> Because your inquiry is general in nature and you do not name specific officials, we are treating it as a request for informal advice. For purposes of the Act, informal assistance does not provide the requestor with the immunity set forth in Sections 83114(a) or (b). (See Regulation 18329(b).)

### FACTS

Your questions concern "Berman hearings" conducted by DLC's on behalf of the Labor Commissioner pursuant to Labor Code section 98. These hearings are conducted in cases in which an employee or former employee of a business entity seeks assistance to recover unpaid wages, wage penalties, or other forms of compensation for work performed.

Berman hearings are conducted pursuant to rules and regulations that have been adopted by the Labor Commissioner [see Labor Code section 98, paragraphs (d) and (g)]. Those rules are included in California Code of Regulations, title 8, sections 13500 et. seq. (within Division 1, Chapter 6, subchapter 5). The person conducting a Berman hearing is a DLC, who is a hearing officer, not an administrative law judge. Occasionally, the DLC conducting a hearing is an attorney, but neither State Bar membership nor a law degree is a requirement of the position. Testimony at Berman hearings is presented under oath; the proceedings are recorded; each party may present the testimony of witnesses; and each party may cross-examine the other party's witnesses. Following the conclusion of each Berman hearing, the DLC issues an order, decision or award. The order, decision or award may include a requirement that the employer or former employer make payments

---

<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

to the employee or former employee. (Lab. Code, § 98.1.) The order is filed by the Labor Commissioner. If no appeal is filed, the Labor Commissioner's order may be filed in Superior Court, and has "the same force and effect" as any other judgment of the court." (Lab. Code, § 98.2, subds. (d) and (e).)

In several recent instances, questions have arisen about whether a former DLC may represent claimants in Berman hearings during the 12 months after leaving office. Two former DLC's have, separately, advised the current Labor Commissioner staff that they wish to represent wage claimants in Berman hearings, and that each wishes to do so for compensation, as an element of a business. In each instance, the former DLC disclosed his plan shortly after resigning his position.

## ANALYSIS

### Revolving Door Law, Generally

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, the one-year ban and the permanent ban. In addition, Section 87407 and 87100 prohibits officials from making, participating in making, or using their position to influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment. These provisions are commonly referred to as the "revolving door" prohibitions.

*One-Year Ban:* The "one-year ban" prohibits a former state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).) The ban applies for twelve months from the date the employee permanently leaves state office or employment. While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to certain matters involving specific parties such as "judicial or quasi-judicial" proceedings, the one-year ban applies to "any appearance or communication made for the purpose of influencing administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property." (Regulation 18746.1(b)(5).)

An appearance or communication is for the “purpose of influencing” if it is made for the “principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (Ibid.)

Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented, (2) before a state agency “which budget, personnel, and other operations” are subject to the control of a state agency the public official worked for or represented, or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

Your question centers on whether the Berman hearings are considered administrative or legislative actions or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. In the *Corum* Advice Letter, No. A-02-258, we analyzed the definition and concluded:

“The one-year ban applies to appearances and communications to influence any administrative action, legislative action and any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale of goods or property. (Section 87406.) Administrative or legislative action is statutorily defined and refers to actions that are legislative or quasi-legislative in nature, but not judicial or quasi-judicial. [footnote 3: “ ‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding. (Section 82002.) “ ‘Legislative action’ means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature. . .” and includes “the action of the Governor in approving or vetoing a bill.” (Section 82037.)] A “judicial, quasi-judicial or other proceeding” includes “any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).) The key distinction under these statutory definitions is that administrative, legislative and quasi-legislative actions have general applicability, while judicial and quasi-judicial actions affect specific parties.”

The Berman hearings as you describe them, adjudicate the rights of specific parties and therefore are judicial and quasi-judicial actions and not administrative, legislative and quasi-legislative actions, or any of the specific proceedings identified in Section 87406(d)(1). Consequently, Section 87406 would not apply.

You note that Section 87406(d)(1) states that the statute exempts appearances in courts, before administrative law judges, or before the Workers' Compensation Appeals Board ("WCAB"). These provisions are necessary because Section 87406 does apply to some quasi-judicial proceedings by its express terms -- "permits, licenses, grants, contracts, sales or purchases." These proceedings may become the subject of controversy before a court of administrative law judge and result in application of the statute but for the exception.

The inclusion of the exemption for the WCAB is more difficult to reconcile with the express language of the prohibition. However, reference to the WCAB in the exception, in itself, would not support interpreting the statutory prohibition differently than the plain language.

*Permanent Ban:* The "permanent ban" prohibits a former state employee from "switching sides" and participating, for compensation, in certain proceeding involving the State of California and other specific parties, or assisting in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication – or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication – made with the intent to influence any judicial, quasi-judicial, or other proceeding in which the official participated while serving as a state administrative official. "Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . ." (Section 87400(c).)

Additionally, an official is considered to have "participated" in a proceeding if he or she took part in the proceeding "personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . ." (Section 87400(d).) Thus, the permanent ban does not apply to a former DLC who did not "participate" in a particular investigation of alleged violations of wage and hour laws by a specific employer merely because the DLC worked in the office investigating the claims and potentially had access to case files.<sup>2</sup>

---

<sup>2</sup> There is a different rule for former supervisors that would not appear to apply to DLCs. In addition, as noted above, we are not opining on any prohibitions outside the Act, such as the state bar rules for attorneys.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner  
General Counsel

/s/

By: John W. Wallace  
Assistant General Counsel  
Legal Division

JWW:jgl