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School Business Law Update

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GOVERNMENT CODE SECTION 1090/ INDEPENDENT CONTRACTORS

A recent case (*People v. Christiansen*, 2013 DJDAR 6976, May 31, 2013) holds that the criminal penalty provisions of Government Code Section 1090 are inapplicable to a school district's independent contractors. Convictions for violation of Section 1090 were overturned on the basis that the independent contractor was not an "employee" within the meaning of the law.

In that case, after leaving employment with the district, the former employee (whose title during employment was Director of Planning and Facilities) began performing the same duties under a contract designating the former employee as an independent contractor from that point forward. With the consent of the district, the individual subsequently assigned the contract to a company owned by the individual. In this contract, the district agreed that neither the company nor any of its employees was an officer, agent, or employee of the district. In this capacity, the individual then consulted with an outside agency on how to obtain a contract with the district and participated in recommending, and making, a contract between the district and the individual's own company to provide construction management services to the district.

Noting the absence of any definition of "employee" in Section 1090, the Appellate Court cited old cases as requiring use of the common law definition of employee in such cases. Common law distinguishes between employees and independent contractors and this court concluded that the distinction meant no Section 1090 criminal penalty could apply to an independent contractor. Although prior cases had applied Section 1090 to independent contractors, the *Christiansen* court distinguished those prior cases as being "civil" not "criminal" actions. While it expressed no opinion on the wisdom of the prior civil cases, the court made clear that its ruling applied to criminal prosecutions. We continue to recommend application of Section 1090 to consultants.

In the first case distinguished by the *Christiansen* court, *California Housing Finance Agency v. Hanover/California Management and Accounting Center, Inc.*, the suspect employees were an attorney and a director. The attorney left his position as the agency's in-house counsel and became its outside counsel. The employees then formed a corporation to provide various services to the agency pursuant to a contract drafted by the attorney. The Appellate Court found that Section 1090 was applicable, regardless of whether the attorney was considered an independent contractor under common law tort principles. Following a Supreme Court ruling that common law does not always govern a reference to employment in the context of a statute, the *California Housing* court found the employee/independent

contractor common law analysis was not helpful in construing the term "employee" in Section 1090. (*California Housing Finance Agency v. Hanover/California Management and Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 690)

In the second distinguished case, *Hub City Solid Waste Services, Inc., v. City of Compton*, a consultant managed the city's in-house waste division. In that position, the consultant proposed to take over the division on a franchise basis, created a waste management company to become the proposed franchisee, and was awarded a "no-bid" franchise. This was followed by significant losses, but with campaign contributions made to the City Counsel, along with employment contracts for several of the mayor's relatives. This activity was found to be subject to Section 1090 and disgorgement under Section 1092 was found to be the appropriate remedy. (*Hub City Solid Waste Services, Inc., v. City of Compton* (2010) 186 Cal.App.4th 1114, 1120)

In an earlier criminal case, a different Appellate Court found that a private attorney, acting as City Attorney for the City of Waterford, committed criminal violations of Section 1090 by helping the city make contracts in which he had a financial interest. Other cases have done the same, indicating the purpose of the statute is more important than the technical relationship between the parties. (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1290)

For these reasons, it is still our opinion that Section 1090 applies to independent contractors. We recommend that independent contractors, such as architects, accountants, construction managers, and Inspectors of Record, not be involved in making contracts in which they have a financial interest. While criminal penalties may not apply to the independent contractors, such contracts should continue to be deemed void and unenforceable and county District Attorneys will decide whether or not to criminally prosecute. We recommend that you discuss with legal counsel the particular circumstances of such contracts.

Please let us know if you have questions on specific issues related to this topic.

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