

State of Colorado



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Position Statement No. 09-07 (Definition of “independent contractor”)

I. Introduction

The Colorado Constitution authorizes the Independent Ethics Commission (“IEC” or “Commission”) to give advice and guidance on ethics issues arising under Article XXIX of the Colorado Constitution and on any other standards of conduct and reporting requirements as provided by law. The IEC issues this Position Statement to clarify the meaning of the term “independent contractor” as that term is used in Section 2(1) of Article XXIX of the Colorado Constitution (“Section 2(1)”).

The Commission has received several inquiries asking who is covered under Article XXIX as an “independent contractor.” The Commission encourages requests for advisory opinions if further clarification is needed.

II. Applicable Law

The gift ban contained in Article XXIX Section 3 applies to all “government employees.” Section 2(1) of Article XXIX defines “government employee” as “any employee, including independent contractors, of the state executive branch, the state legislative branch, a state agency, a public institution of higher education, or any local government, except a member of the general assembly or a public officer.”

The Commission has received several requests to clarify who is an “independent contractor” subject to the gift ban. “Independent contractor” is defined neither in Article XXIX nor in C.R.S. section 24-18.5-101 (2009). Similarly, there is no discussion of this issue in the Review and Comment Hearing of Article XXIX or in the corresponding “Blue Book.”

Cases in Colorado discussing the definition of “independent contractor” do so in the context of distinguishing an independent contractor from an employee. See, Norton v. Gilman, 949 P. 2d 565 (Co. 1997). Accordingly and because Section (2)(1) of Article XXIX defines a “government employee” to include both an employee and an independent contractor, these cases are not helpful to the Commission.

As there is no helpful specific authority to the issue before the Commission, the Commission will look to the intent of the drafters of Article XXIX.

III. Discussion

The State of Colorado and the local governments under the jurisdiction of the IEC contract with a vast number of persons and entities . For example, the State and local governments contract with third parties to provide services and/or expertise as attorneys, engineers, custodians, bus drivers, sanitation workers, social service providers, medical providers and for computer support. State and local governments also contract out for services such as electricity, heating, telephone service, such as any private business would.

Article XXIX was enacted to regulate ethics in government. Under Article XXIX, a “government employee”, as opposed to a private employee, is subject to the gift ban.

As a result, the drafters of Article XXIX did not intend for every private person who contracts with the State, or every employee of every private company which has a contract with the government, to be subject to Article XXIX.

However, the Commission believes that the drafters of Article XXIX intended to cover those independent contractors who perform a function which might otherwise be performed by a government employee, such as those covered under C.R.S. §§ 24-50-503, 504. In Position Statement 08-01, the Commission stated that it “believes that the voters of Colorado approved Amendment 41 in order to improve and promote honesty and integrity in government and to assure the public that those in government are held to standards that place the public interest above their private interests.” See, page 3. The IEC determines that this concern applies equally to independent contractors who are doing work which might otherwise be done by state or local government employees.

To this end, C.R.S. section 24-5-501 *et seq.* addresses under what circumstances a state agency may employ an independent contractor to perform personal services, rather than hiring or utilizing a state employee. This statutory scheme distinguishes between “purchased services” and “personal services.” “Personal services” are defined as “services acquired for the state’s direct benefit in its operations.” C.R.S. § 24-50-502(2). In contrast, “purchased services” means “the acquisition of services which directly benefit specified groups or individuals in the public at large as defined by law, from public or private entities licensed, certified, or otherwise authorized by statute to provide such services.” C.R.S. §24-50-502(3).

Before a state agency may hire an independent contractor under a personal services contract, it must meet certain criteria¹, and specific elements must be contained in any contract under that section. C.R.S. §24-50-503. In addition, pursuant to statute, any personal services contracts entered into by the State are subject to a separate conflict of interest provision. See C.R.S. §24-50-507.

The Commission therefore finds that independent contractors, who enter into “personal services” contracts, as that term is defined by Colorado statute, including their employees and members of their immediate families, are subject to the provisions of Article XXIX, as if they were public employees and officials. This means while they are under contract with the state or other government entity, they are subject to the gift ban provisions of Article XXIX sections 3, and 4. The Commission recognizes that an independent contractor may receive gifts from his or her own company, which would generally be permissible, unless the gift is made by their employers to influence an official act by the employee on a government contract.

The Commission determines, furthermore, that it is the employees covered under the contracts that are covered, not the entity which retains them. A nonprofit organization which has a contract with a public entity, for example, is not prohibited from soliciting donations from individuals or foundations to further its charitable work. The employees who manage that contract, however, may not accept gifts in violation of Article XXIX. See, Position Statement 09-01 (Lobbyists), in which the Commission drew

¹ §24-50-504 requires that the state personnel director determine that the use of an independent contractor is appropriate. The criteria to be considered include whether the “services...are not available within the state personnel system, cannot be performed satisfactorily by employees in the state personnel system, or are such of a highly specialized or technical nature that the necessary expert knowledge, experience and ability are not available through the state personnel system,” Other criteria are also listed.

a distinction between the professional lobbyist and the organization he or she represented.

IV. Conclusion

The Independent Ethics Commission holds that an independent contractor within the meaning of Article XXIX is someone who is the subject of a personal services contract pursuant to C.R.S. §24-50-501 *et seq.* and is therefore covered under the laws pertaining thereto.

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The Independent Ethics Commission

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