

Local Government Employee “Lobbyists” 2010 Legislative Update

Norma Houston
UNC School of Government
July 2010

INTRODUCTION

North Carolina’s State Government Ethics Act and lobbying laws¹ establish standards of ethical conduct for certain officials and employees in the executive, legislative, and judicial branches of state government. These laws also regulate the communications and activities of entities and individuals who seek to influence the decisions and actions of these public officials and employees.

Local government officials and employees are generally exempt from these laws, including the requirements and prohibitions imposed on lobbyists and their clients (referred to as “lobbyist principals”). However, if a local government retains an individual or firm on an independent contractor basis to lobby on its behalf, the local government *is* a lobbyist principal and *is* subject to all applicable requirements and restrictions of the state’s lobbying laws. Some local governments have designated one or more of their own employees (as opposed to independent contract lobbyists) to lobby on their behalf. Up until now, local government employees who lobbied on behalf of their unit of government were generally exempt from the state’s lobbying laws. As of January 1, 2011, some local government employees may be covered under new requirements imposed on local government employee lobbyists.

SUMMARY OF NEW “LOCAL GOVERNMENT LIAISON” LAW

During the 2010 Short Session, the General Assembly created new requirements for local government employees whose principal duties – either in practice or as set out in their job description – include lobbying members of the General Assembly and/or legislative staff.² These employees are referred to as “local government liaison equivalents” because the new requirements that apply to them mirror those already imposed on state agency lobbyists (referred to as “liaison personnel.”)³

¹ N.C. Gen. Stat. Chapters 138A and 120C, respectively.

² S.L. 2010-169, Sec. 5.(a) (HB961).

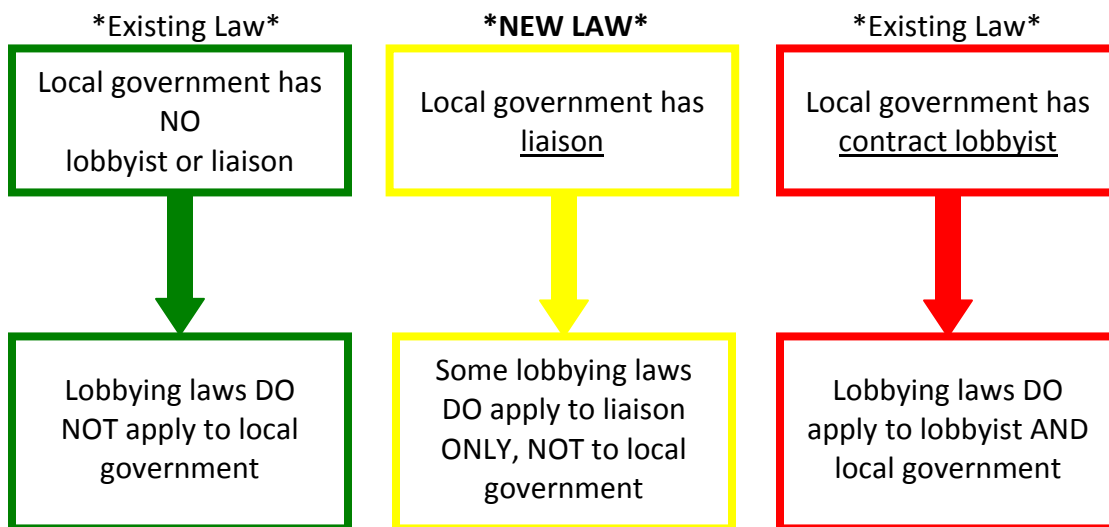
³ Liaison personnel are state employees who lobby legislators and legislative staff on behalf of state government agencies – hence the phrase “local government *liaison equivalents*.”

Under the new law⁴, local government liaisons are required to:

- Register with the Secretary of State’s Office,
- Report expenses related to lobbying state legislators and/or legislative employees, and
- Comply with the prohibition against giving gifts to legislators and/or legislative employees (the “gift ban”).

It is important to note that these requirements are imposed on the individual local government liaison, *not* on the unit of government itself or on any elected or appointed officials or other employees of that local government. *Consequently, the new law will have little to no impact on interactions between local government officials and their legislators or legislative staff, even if the local government employs a legislative liaison. Local governments will continue to remain generally exempt from the state’s lobbying laws, even if the local government employs a local government liaison (unless a local government has retained a contract lobbyist).*

When the new law goes into effect on January 1, 2011, local governments will fall into one of three categories when interacting with legislators and legislative staff:



What the requirements of the new law do – and do *not* – mean for local governments and their employees are discussed below in two main parts: Part I outlines the scope of the new law’s application to local governments, and Part II describes the new requirements for those who are subject to them.

⁴ S.L. 2010-169, Sec. 5.(a) is codified as G.S. 120C-502 and is effective January 1, 2011.

PART I. SCOPE AND APPLICATION OF THE NEW LOCAL GOVERNMENT LIAISON LAW

WHO DOES THE NEW LAW APPLY TO?

Local government employees are subject to the new law if their principal job duties – in practice or as set out in their job description – include lobbying legislators and/or legislative staff. Although the term “principal” is not defined in the new law, it is commonly understood to mean “primary,” or “most important, consequential, or influential.”⁵ Merely engaging in lobbying legislators and/or legislative employees from time to time or on an occasional basis will not likely trigger the requirements of the new law. A local government employee’s lobbying activities will trigger the requirements of the new law *only* if:

- The employee’s *job description* includes lobbying among his or her principal job duties, or
- The level of the employee’s lobbying activity occurs on such a frequent or regular basis that is *in practice* among the employee’s principal job duties.

The new law applies to *any* local government liaison who is any employee of *any* political subdivision of the State and any other entity or organization created by a political subdivision of the State (referred to as a “governmental unit”⁶). This includes counties, municipalities, local boards of education, and local ABC boards.

Local governments are not required to designate or employ local government liaisons to lobby on their behalf.

“Appointed” employees: A number of local government employees are appointed to their positions, ranging from the Manager to the Clerk to the Board to the DSS and Health Directors to Tax Collectors and Assessors. For purposes of the state’s lobbying laws, these individuals are likely considered “employees” and not “appointed officials” of their unit of government. Thus, these individuals may become subject to the new law if their principal job duties include lobbying legislators and/or legislative employees.

WHO DOES THE NEW LAW NOT APPLY TO?

The new law is *not* applicable to:

- Units of local government themselves,
- Elected and appointed local government officials, and
- Local government employees whose principal job duties do *not* include lobbying legislators and/or legislative employees.

⁵ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 987 (11TH ed. 2005).

⁶ G.S. 138A-3(15d).

As stated above in the Introduction, local government officials (both elected and appointed) and local government employees are generally exempt from the state's lobbying laws,⁷ and this exemption is not affected by the new law *even if* the unit of local government employs a local government liaison. The requirements of the new law are applicable *only* to the individual local government liaison, not to the unit of local government itself or any of its elected or appointed officials or other employees.

Similarly, if a unit of local government employs a local government liaison, that local government is not considered a "lobbyist principal" (i.e., the "client" of the local government liaison), and is not subject to the requirements and restrictions imposed on lobbyist principals.

Because the new does not apply to the unit of local government itself, local government elected and appointed officials, and employees whose principal job duties do not include lobbying legislators and legislative employees, it will have little to no impact on interactions between local government officials and their legislators or legislative staff, *even if* the local government employs a legislative liaison.⁸

For example:

- Local governments may still host legislative breakfasts in Raleigh for members of their legislative delegation.
- Local elected officials may still lobby legislators on behalf of their unit of local government without having to register as lobbyists.
- Local government employees may speak with legislators and even lobby on behalf of their unit of government without having to registering as a lobbyist (unless that lobbying is among the employee's principal job duties, then the employee must comply with the new law).
- A local government may still invite a legislator to local events, functions, festivals, and conferences, and provide food and beverage and a gift in appreciation for the legislator's participation.
- Local officials may participate in legislative events organized by the NC Association of County Commissioners, the NC League of Municipalities, the NC School Boards Association, and other similar associations without having to register as lobbyists or without their local government having to register as a lobbyist principal.

⁷ G.S. 120C-700(3).

⁸ It is important to remember that, if the local government has retained a lobbyist, the local government is a lobbyist principal and is subject to all applicable provisions of the state's lobbying laws, including the gift ban.

Retained City and County Attorneys – The local government exemption to the state’s lobbying laws applies to elected and appointed officials and employees of units of local government. It does *not* cover individuals who may be working with or for the local government in a non-employee capacity, such as independent contractors or private firms. Some local governments engage their city or county attorney under a retainer agreement or similar independent contract arrangement. Even though city and county attorneys in this situation generally are not considered employees of the unit of government they represent, they *are* considered employees of their local government client specifically for purposes of the local government exemption to the state’s lobbying laws, and thus are covered under this exemption.⁹ Because retained city and county attorneys are considered employees of their local government client *specifically* for the purpose of the local government exemption, they are otherwise *not* considered employees of their local government client under any other provisions of the state’s lobbying laws, including the new local government liaison equivalent requirement. Thus, they are *not* subject to the requirements of the new law and remain covered under the local government exemption.

Other retained attorneys: It is important to note that the inclusion of retained city and county attorneys under the general local government exemption to the state’s lobbying laws is *specific* to a retained attorney appointed as a county or city attorney under Part 7 of Article 5 of Chapter 153A of the General Statutes or Part 6 of Article 7 of Chapter 160A of the General Statutes, respectively. This exemption does *not* apply to attorneys retained to represent other units of local government, such as local school boards, or to attorneys retained by a unit of local government in any capacity other than as the appointed city or county attorney. Since these attorneys are not covered under the local government exemption to the state’s lobbying laws, if the attorney lobbies on behalf of the unit of government he or she represents and is compensated for that lobbying activity, the attorney may be considered a lobbyist and the unit of government he or she represents would then be considered a lobbyist principal. In this instance, *both* the attorney *and* the unit of government would be subject to all applicable provisions of the state’s lobbying laws including the gift ban, registration, and reporting requirements.

WHAT IS “LOBBYING”?

Lobbying is generally thought of as communicating with public officials, such as members of the General Assembly, to advocate for or against a particular issue or legislative action, such as a piece of legislation or funding in the state budget. However, not all communications with legislators and/or legislative staff are considered “lobbying” that is regulated by the state’s lobbying laws. In assessing whether the provisions of the new law apply to a local government employee who engages in lobbying on behalf of his or her unit of local government, it is helpful to understand

⁹ G.S. 120C-700(3).

what communications and activities constitute “lobbying” under the state’s lobbying laws.

Definition of “Lobbying” – Communications and activities that are considered “lobbying” fall into two categories:

- Influencing or attempting to influence legislative action through *direct* communications or activities with a member of the North Carolina General Assembly, a legislative employee, or a member of their immediate families; or
- *Developing goodwill* through communications or activities, including the building of relationships, with a member of the North Carolina General Assembly, a legislative employee, or a member of their immediate families with the intention of influencing current or future legislative action.¹⁰

For example:

- County Commissioner Jones contacts Senator Smith and asks him to vote for a bill that would authorize the County to levy a land transfer tax – this is *direct* lobbying.
Since Commissioner Jones is lobbying on behalf of his local government, he is covered under the local government exemption and is not required to register as a lobbyist.
- Mayor Johnson invites newly-elected Senator Allen to lunch to get to know each other better since they will be working together on City-related issues in the future; Mayor Johnson anticipates asking Senator Allen to support funding for the City’s industrial park once the General Assembly convenes in January – this is *indirect* lobbying.
As with Commissioner Jones, since Mayor Johnson is lobbying on behalf of his local government, he is covered under the local government exemption and is not required to register as a lobbyist; similarly, Senator Allen is not prohibited from accepting the free lunch.

Communications or activities that occur as part of a business, civic, religious, fraternal, personal, or commercial relationship that are not connected to the legislator’s or legislative employee’s official duties is not considered “lobbying.”

Definition of “Legislative Action” – The legislative action that the local government liaison equivalent would be attempting to influence (either directly or by developing

¹⁰ G.S. 120C-100(a)(9). The definition of “lobbying” also includes seeking to influence the actions of certain executive branch officials; this is not applicable to local government liaisons as they are only regulated when lobbying legislators and/or legislative employees.

goodwill) includes a wide array of activities that take place in the legislative process, including the preparation, research, drafting, introduction, consideration, modification, amendment, approval, passage, enactment, tabling, postponement, defeat, or rejection of a bill (including the budget bill), resolution, amendment, motion, report, nomination, appointment, or other matter including the consideration of any bill by the Governor for the Governor's approval or veto.¹¹

Unregulated Lobbying Activities – There are some communications and activities that may be commonly thought of as lobbying but which are not regulated under the state's lobbying laws. These activities include:¹²

- Expressing one's own personal opinion, stating facts, or offering personal recommendations in one's individual capacity (i.e., not as a part of one's job duties or in an official capacity),
- Appearing before a committee, commission, or other similar entity when invited or requested to do so, and not otherwise engaging in lobbying,
- Performing professional services such as bill drafting or advising others on the impact of proposed actions such as legislation or rules, and
- Responding to inquiries such as requests for information, and not otherwise engaging in lobbying.

It will be helpful for local government officials and employees to keep in mind what constitutes – and what does *not* constitute – lobbying that is regulated under the state's lobbying laws in determining whether a particular local government employee's lobbying activities rise to the level of a "principal" job duty.

IS LOBBYING ANY PUBLIC OFFICIAL COVERED UNDER THE NEW LAW?

No. The new law applies *only* to lobbying members of the North Carolina General Assembly, including candidates for legislative office,¹³ and legislative employees.

It does *not* apply to lobbying:

- State government officials and employees in the judicial or executive branches, such as the Governor, Cabinet Secretaries, employees of state agencies, and members of state boards and commissions;¹⁴

¹¹ G.S. 120C-100(a)(5).

¹² See G.S. 120C-700.

¹³ G.S. 120C-104. A "candidate" is an individual who has filed a notice of candidacy for the elected office in compliance with state law.

¹⁴ It is important to keep in mind that state executive and judicial branch officials and employees are subject to a number of ethics rules and laws (some of which are specific to the particular office or position that the official or employee holds), as well as prohibitions against bribery, accepting gifts and favors from contractors, and financial self-benefiting. These rules and laws continue to apply even though the new local government liaison law does not cover lobbying executive and judicial branch officials.

- Federal officials and employees of federal agencies; or
- Other local government officials and employees.

PART I CONCLUSION - ARE YOU COVERED UNDER THE NEW LAW?

You are likely to be considered a local government liaison and thus covered under the new law if:

- You are an *employee* of a unit of local government (not an elected or appointed official or independent contractor)
- Whose *principal* job duties – either in practice or set out in your job description
- Include *lobbying* (as defined by state law)
- *State legislators and/or legislative employees* (not other state, federal, or local officials or employees).

You are *not* covered under the new law if:

- You are an elected or appointed local government official, or an independent contractor working with a local government (the unit of local government itself is also not covered under the new law).
- You are a local government employee who does some lobbying of legislators and/or legislative staff from time to time on behalf of your local government, but those lobby activities are not included among your *principal* job duties.
- You are a local government employee and engage in communications and activities with legislators and/or legislative staff that are not considered regulated lobbying under state law (for example, you are responding to requests for information).
- You are a local government employee and lobby state executive branch, federal, or other local government officials and employees.

While the new law is not applicable to local elected and appointed officials, most local government employees, and units of local government themselves, local government employees whose principal job duties (in practice or as set out in their job descriptions) include lobbying legislators and/or legislative staff *are* subject the new law and must become familiar with the registration and reporting requirements and the gift ban. Part II below describes these requirements in more detail.

PART II. REQUIREMENTS FOR LOCAL GOVERNMENT LIAISONS

WHAT ARE THE REGISTRATION REQUIREMENTS?¹⁵

Local government liaisons are required to register with the Secretary of State's Office – in fact, it is *unlawful* for local government liaisons to lobby legislators and/or legislative employees without registering. The local government liaison must register within one business day of engaging in lobbying activities, and the registration is nontransferable.

Registration Fees – Local government liaisons are not required to pay the registration fee normally charged lobbyists. Since the local government for whom the employee lobbies is not considered a “lobbyist principal,” the local government is not required to pay the lobbyist principal registration fee.

Registration Forms – Registration forms are provided by the Secretary of State's office. Once filed, the registration remains in effect until January 1st of the following year, at which time the registration must be renewed. If the local government liaison's status changes during the course of the year (the employee no longer lobbies, or retires or changes jobs), or if any of the information on the initial registration form changes, an amended registration form must be filed with the Secretary of State's Office within 10 business days after the change in status or information. For purposes of the lobbyist registry maintained by the Secretary of State, local government employees will be listed under “liaison personnel.”

Identification as a liaison – As part of the registration requirement, the local government liaison must identify himself or herself as being a local government liaison prior to engaging in lobbying communications or activities with legislators or legislative staff. The local government liaison must also disclose what unit of government he or she is lobbying for. Local government liaisons should consult with the Secretary of State's office for more information about the registration and identification requirements.

WHAT ARE THE EXPENSE REPORTING REQUIREMENTS?¹⁶

Local government liaisons are required to file quarterly reports with the Secretary of State's Office detailing all expenses (referred to as “reportable expenditures”) related to lobbying legislators and/or legislative employees. If lobbying expenses are incurred while the General Assembly is in session, additional reports detailing these expenditures must be filed on a monthly basis. These reports must be filed on forms provided by the Secretary of State's Office and must be filed under oath (notarized).

¹⁵ See G.S. 120C-200.

¹⁶ See G.S. 120C-402.

Definition of “reportable expenditure” – A “reportable expenditure” made by a local government liaison includes any of the following that directly or indirectly is made to, at the request of, for the benefit of, or on the behalf of a legislator, legislative employee or a member of their immediate families for lobbying:

- Any advance, contribution, conveyance, deposit, distribution, payment, gift, retainer, fee, salary, honorarium, reimbursement, loan, pledge, or thing of value greater than ten dollars (\$10.00) per legislator or legislative employee per single calendar day, or
- A contract, agreement, promise, or other obligation whether or not legally enforceable.

Reportable expenditures tend to fall into 6 main categories: transportation and lodging, entertainment, food and beverage, meetings and gifts, and other expenses. These categories are reflected on the reporting forms provided by the Secretary of State’s Office. *Because these reporting requirements are very specific, local government liaisons should contact the Secretary of State’s Office for more information and to obtain expenditure reporting forms.*

Reporting other expenses – In addition to “reportable expenditures,” local government liaison equivalents are also required to report expenses related to solicitation of others when the aggregate cost exceeds three thousand dollars (\$3,000), reportable expenditures for which the local government liaison is reimbursed, and gifts over ten dollars (\$10.00) in value given to legislators and/or legislative employees that are not prohibited under the gift ban.

Local Government not required to report – Only the local government liaison must comply with the expense reporting requirement. Since the unit of government on whose behalf the local government liaison lobbies is not considered a lobbyist principal, the unit of government itself is not subject to these reporting requirements.

WHAT ARE THE “GIFT BAN” PROHIBITIONS?¹⁷

Local government liaisons are prohibited from giving a gift directly or indirectly to a legislator or legislative employee.

Definition of “gift” – For purposes of the state’s lobbying law, a “gift” is anything of monetary value given or received without valuable consideration either directly or indirectly by a lobbyist, lobbyist principal, or liaison. There is no general exception for gifts of minimum or nominal value (i.e., no “free cup of coffee”) – *all* gifts from local government liaisons to legislators or legislative employees are prohibited unless the gift

¹⁷ See G.S. 120C-303.

is allowed under one of the specific exemptions to the gift ban under the State Government Ethics Act.¹⁸

Items that are not “gifts” – There are some items that are not considered “gifts” which the local government liaison would be allowed to give to legislators and legislative employees. These items include anything for which the legislator or legislative employee pays fair market value, expressions of condolence at the death of an individual, and lawful campaign contributions. These items do *not* have to be reported on the local government liaison’s lobbying expense reports.

Exemptions for gifts from lobbyists and liaisons – As mentioned above, there are specific exemptions to the gift ban for lobbyists, lobbyist principals, and liaisons. These exemptions include food and beverage at certain kinds of events; travel, lodging, entertainment and meals at certain kinds of meetings and conferences; plaques recognizing special achievements; and gifts based on a pre-existing family, personal, business, fraternal, religious, or civic relationship. *Because these exemptions are very specifically defined in the State Government Ethics Act, local government liaisons should consult the law and seek guidance from the State Ethics Commission to ensure compliance with these laws.* Gifts allowed under this category of exemptions *must* be reported on the local government liaison’s lobbying expense reports.

Gifts from local governments – The gift ban *only* applies to gifts given to legislators and/or legislative employees by the local government liaison himself or herself. The gift ban does *not* apply to gifts given by the unit of local government for whom the local government liaison works, nor does it apply to gifts given by any elected or appointed officials or other employees of that local government.

For example: If members of a county board of commissioners and their local government liaison take their legislative delegation out to lunch, the local government liaison *could not* pay for the lunch with his or her own personal funds but the lunch *could* be paid for with county funds.

It is unclear whether local government liaisons can deliver the gift or pay for the gift with government funds if other representatives of the unit of government are not present. For example, a county local government liaison takes a member of the county’s legislative delegation to lunch and pays for the lunch with county funds, but no other representatives from the county are present. The State Ethics Commission is authorized to render advisory opinions on the State Government Ethics Act. Local government liaisons should consult directly with the Commission about specific questions related to the gift ban.

¹⁸ G.S. 138A-32(e).

WHAT ARE THE PENALTIES FOR VIOLATING THE NEW LAW?

The state's lobbying laws are enforced by both the Secretary of State and the North Carolina State Ethics Commission. The Secretary of State has jurisdiction over registration and expense reporting. The North Carolina State Ethics Commission has jurisdiction over all other matters, including the gift ban.

There are specific criminal and civil penalties for violations of these laws:

- Registration requirements – A willful violation of the liaison registration requirement is punishable as a Class 1 misdemeanor; the Secretary of State may level a civil fine of up to \$5,000 per violation.
- Expense reporting requirements – Violations of the lobbying expense reporting requirement may result in a civil fine of up to \$5,000 per violation levied by the Secretary of State; because the expense reports must be filed under oath (notarized), a willful falsification of information contained in the expense report may constitute perjury which is punishable as a Class F felony.¹⁹
- Gift Ban – A willful violation of the gift ban is punishable as a Class 1 misdemeanor; the State Ethics Commission may levy a civil fine of up to \$5,000 per violation.

WHERE CAN YOU GET MORE INFORMATION AND ADVICE?

The State Ethics Commission is authorized to issue advisory opinions on specific questions about the State Government Ethics Act and the state's lobbying laws, and can provide informal advice and opinions to persons who are subject to these laws. The Secretary of State is authorized to adopt the rules and forms necessary for compliance with the registration and expense reporting requirements. Individuals who are or think they may be covered under the new local government liaison law are encouraged to contact these offices for more information:

North Carolina State Ethics Commission (919) 715-2071
www.ethicscommission.nc.gov

Secretary of State, Lobbying Compliance Division (919) 807-2170
www.secretary.state.nc.us/lobbyists/

Additional information on the State Government Ethics Act and lobbying laws can be found in the UNC School of Government's Local Government Law Bulletin #122, *2006-2009 State Ethics and Lobbying Reform Statutes (November 2009)*, which is available at no charge through the School of Government's online bookstore at www.sog.unc.edu.

¹⁹ G.S. 14-209.