



# Members Brief

An informational brief prepared by the LSC staff for members and staff of the Ohio General Assembly

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## Restrictions on Public Officers Receiving Additional Compensation or Holding Other Offices

Both the Ohio Constitution and the Revised Code restrict public officers from receiving additional compensation for performing their public duties. Officers are likewise restricted from holding additional offices and engaging in private business that conflicts with their public duties.

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### No extra compensation

As discussed in *Members Brief*, "[Restrictions on Changing Public Officer Compensation \(PDF\)](#)," the Ohio Constitution prohibits changes in compensation for public officers during their

terms of office.<sup>1</sup> Additionally, the Ohio Constitution generally prohibits a public officer from receiving additional compensation for performing public work in relation to that office. Article II, Section 29 provides that:

No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly.

Under this provision, a public officer generally cannot later be compensated for prior service by, in effect, retroactively applying a pay increase or bonus. However, an exception to this prohibition applies if a supermajority of the General Assembly ( $\frac{2}{3}$ ) votes to allow the extra compensation.

### **General Assembly**

Further compensation restrictions apply to General Assembly members. While also subject to the prohibition against extra compensation, General Assembly members are specifically prohibited from receiving any “other allowance or perquisites, either in the payment of postage or otherwise.”<sup>2</sup> There is little significant guidance as to what constitutes an impermissible perquisite, although at least one court, in holding that reimbursement for travel expenses was allowed, defined a prohibited perquisite as “something *gained* from a place of employment *over and above the ordinary salary or fixed wages* for services rendered; especially a fee allowed by law to an officer for a specific service” (emphasis in original).<sup>3</sup>

### **Judges**

Judges similarly are prohibited from receiving perquisites. Ohio Constitution, Article IV, Section 6 specifies that “Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States.” Although it appears that courts have not considered what constitutes a prohibited perquisite, the Ohio Attorney General has opined that this provision prohibits a county from paying judicial registration fees on behalf of a county court judge.<sup>4</sup>

### **Honoraria**

Similar to perquisites, the Revised Code also prohibits both public officials and employees who are required to file financial disclosure statements with the appropriate ethics commission

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<sup>1</sup> The *Members Brief* is available on LSC’s website: [lsc.ohio.gov](http://lsc.ohio.gov).

<sup>2</sup> Ohio Constitution, Article II, Section 31.

<sup>3</sup> *State ex rel. Harbage v. Ferguson*, 68 Ohio App. 189 (2<sup>nd</sup> Dist. 1941).

<sup>4</sup> Ohio Attorney General (O.A.G.) Opinion 1983-042.

from soliciting or accepting an honorarium.<sup>5</sup> An honorarium is any payment made in consideration for any speech given, article published, or attendance at any conference, meeting, or similar gathering. It does not include ceremonial gifts with insignificant monetary value or trivial items of informational value. For example, a certificate of appreciation or a pen with the sponsor's name on it is unlikely to constitute a prohibited honorarium.

Earned income from any person, other than a legislative agent, for personal services that are customarily provided in connection with the practice of a bona fide business is also not a prohibited honorarium, if the business started before the public official or employee was elected or appointed to the public office or position.<sup>6</sup>

The prohibition against receiving an honorarium does not apply to the president or other chief administrative officer of a state institution of higher education or a member of its board.<sup>7</sup>

### **No compensation other than from agency served**

R.C. 102.04 generally prohibits public officers and certain state employees from being compensated for their public service from a source other than the agency that person serves.

State officers and state employees are prohibited from:

- Receiving compensation for any service rendered by the state officer or employee in any case, proceeding, application, or other matter that is before the General Assembly or any state department, institution, board, or commission, other than the courts;
- Selling or agreeing to sell, except through competitive bidding, any goods or services to the General Assembly or to any state department, institution, board, or commission, other than the courts.<sup>8</sup>

The law also restricts compensation of persons appointed to an office of a county, township, municipal corporation, or other government entity, other than the courts. The local officers are prohibited from receiving or agreeing to receive, directly or indirectly, any compensation other than from the agency the officer serves for service rendered by the officer in any case, proceeding, application, or other matter that is before any agency, board, or other instrumentality of the entity that the officer serves.<sup>9</sup>

### **Exceptions**

The law establishes two exceptions to these prohibitions. First, it states that it is not to be construed to prohibit the performance of ministerial functions like filing or amending tax returns, applications for permits and licenses, incorporation papers, and other documents.<sup>10</sup> For example,

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<sup>5</sup> R.C. 102.03(H).

<sup>6</sup> R.C. 102.01(H).

<sup>7</sup> R.C. 102.03(H).

<sup>8</sup> R.C. 102.04(A) and (B).

<sup>9</sup> R.C. 102.04(C).

<sup>10</sup> R.C. 102.04(F).

a public official could receive compensation for assisting an individual in filing taxes, which is a ministerial function. But the official presumably could not represent the individual in a tax dispute before the Tax Commissioner, as representation is not a ministerial function.

The second exemption applies to state and local officers who are appointed to a nonelective office and to state employees. They are exempt if both:

- The agency to which the officer or employee wants to sell the goods or services, or before which the matter is pending, is not the agency with which the person serves; and
- Before rendering the services or selling or agreeing to sell the goods or services, the officer or employee files a statement with the appropriate ethics commission, with the agency the person serves, and with the agency before which the matter is pending or that is purchasing the goods or services.

The statement must contain specified information and declare that the officer or employee will self-disqualify from participating as an officer or employee in any matter involving the agency before which the matter is pending or to which the goods or services are to be sold. An employee who files such a statement or is required to file one is prohibited from knowingly failing to self-disqualify as required.<sup>11</sup>

### **Penalty**

A public officer or employee who receives compensation from another agency for service as a public officer or employee, or receives compensation for selling goods or services to a public agency, in violation of the prohibitions is guilty of a first degree misdemeanor. A first degree misdemeanor is punishable by up to 180 days in jail and a fine of up to \$1,000.<sup>12</sup>

Additionally, the public officer or employee forfeits the person's office or employment and a court may prohibit the person from participating in a public contract with any public agency for two years if recommended by the agency with which the public official or employee was employed. A court also may order the public officer or employee to pay an additional fine equal to the amount of anything of value given that was in violation of the prohibitions and for the costs incurred to investigate and prosecute the case.<sup>13</sup>

### **No outside employment for agency directors, certain others**

An additional restriction applies to the directors and certain other officers of executive agencies. Each officer whose office is created by specified sections of law must devote the entire amount of time for which the officer receives compensation from that office to the duties of that office. The officer is prohibited from holding any other office or position of profit.<sup>14</sup> The restrictions apply to all officers whose offices are created by R.C. 121.02, 121.04, and 121.05,

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<sup>11</sup> R.C. 102.04.

<sup>12</sup> R.C. 102.99(B), 2929.24, and 2929.28.

<sup>13</sup> R.C. 102.99(C), (D), and (E).

<sup>14</sup> R.C. 121.12. An explanation of what constitutes an office, for the purpose of this prohibition, is available in *Members Brief*, "[Restrictions on Changing Public Officer Compensation \(PDF\)](#)."

which includes directors and assistant directors of various state agencies, as well as other specified officials. A few examples include the Director of Job and Family Services, the State Fire Marshal, and the assistant directors of the Department of Administrative Services.

These officers are entitled to their actual and necessary expenses incurred in performing their duties and may serve as a member of any board or commission when appointed by the Governor. An officer appointed to a board or commission is entitled to actual and necessary expenses incurred in performing duties as a board member, but may receive no other compensation for that service.<sup>15</sup>

A similar rule applies to the Lieutenant Governor, who may be appointed as a department director or as the Governor's representative on any board or commission in the executive department. When so appointed, the Lieutenant Governor may be reimbursed for necessary expenses incurred conducting the particular authority.<sup>16</sup>

The Chancellor of Higher Education and the Chancellor's staff and employees are prohibited from being a trustee, officer, or employee of any public or private college or university.<sup>17</sup>

## **No additional appointments for General Assembly members**

### **Constitutional restrictions**

The Ohio Constitution prohibits General Assembly members from holding any other federal, state, or local public office during the member's term. (It does not prevent a legislator from holding a political party office, being a notary public, or being an officer in the U.S. armed forces or the Ohio National Guard.) It appears that the purposes of this prohibition are to promote the separation of powers and to prevent conflicts of interest.

Additionally, during the member's term and for one year after, a General Assembly member is prohibited from being appointed to a public office if the office was created, or its compensation was increased, during the member's term. It does not matter whether the member voted for or against the bill that created the public office or increased its compensation, or whether the public office was added to the bill after the member voted on it. The prohibition does not, however, bar a member from being elected to such a public office or from becoming a public employee in a position that was created, or the compensation of which was increased, during the member's term.

The Attorney General has advised that a General Assembly member who serves a term during which pay ranges are increased may constitutionally be appointed as the director of a state department within one year after the end of that term, if the individual does not, as director, receive compensation exceeding the maximum amount authorized immediately before the member's term. It appears that the Attorney General reached this conclusion because the General Assembly only indirectly sets the compensation of department directors; the Director of

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<sup>15</sup> R.C. 121.12.

<sup>16</sup> R.C. 108.05(B) and (C).

<sup>17</sup> R.C. 3333.01(E).

Administrative Services assigns their job classifications to specific pay ranges and the Governor, as the appointing authority, fixes their specific compensation. However, according to that opinion, a former legislator could not hold the position of a director if the General Assembly had designated the director's salary by statute.<sup>18</sup>

### **Statutory restrictions**

The Revised Code further prohibits members of the General Assembly from accepting appointments as officers of certain institutions or to certain commissions, if those positions provide compensation other than for actual and necessary expenses. Specifically, members of the General Assembly are prohibited from knowingly:

- Being appointed as a trustee, officer, or manager of a benevolent, educational, or correction institution that is authorized, created, or regulated by the state and supported wholly or partially from the state treasury;
- Serving on any committee or commission authorized or created by the General Assembly that provides compensation other than actual and necessary expenses; and
- Accepting any appointment, office, or employment from any committee or commission authorized or created by the General Assembly and that provides compensation other than actual and necessary expenses, or accepting any appointment, office, or employment from any executive or administrative branch or department of the state that provides compensation other than actual and necessary expenses.<sup>19</sup>

A General Assembly member who accepts a prohibited appointment, office, or employment must immediately resign from the General Assembly. If the member fails to resign, the General Assembly seat is deemed to be vacant.

This provision does not apply, however, to a General Assembly member serving in an educational institution that is partly or wholly supported by state funds, or to school teachers, employees of boards of education, notaries public, or officers of the militia. Additionally, the educational prohibition does not apply to General Assembly members who are appointed as trustee, officer, or manager of a private institution that receives state funds only for services rendered.<sup>20</sup>

### **No judge may hold another office of profit or trust**

Ohio Constitution, Article IV, Section 6 prohibits judges from holding "any other office of profit or trust, under the authority of this state, or of the United States." Thus a judge cannot hold any other office, as previously described, while serving as a judge.

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<sup>18</sup> Ohio Const., art. II, sec. 4 and O.A.G. 1983-0004.

<sup>19</sup> R.C. 101.26.

<sup>20</sup> R.C. 101.26.

## Conflicts of interest

In addition to the provisions that directly prohibit outside employment, the Ohio Ethics Law prohibits public officials and certain employees from engaging in outside employment if it creates a conflict of interest with their public duties.

### General prohibitions

Under the Ohio Ethics Law, a public official is prohibited from representing a client or acting in a representative capacity for any person on a matter in which the public official or employee personally participated, whether through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.<sup>21</sup> A similar prohibition specifically applies to Ohio Casino Control Commission officials.<sup>22</sup> For example, a public employee involved in investigating an alleged violation of a liquor license could not represent the licensee in a subsequent hearing regarding that investigation, even if the public employee is not otherwise prohibited from outside employment.

Additionally, a public official or employee who becomes an official or employee of a new state agency may not represent or act in a representative capacity for the new agency on any audit or investigation in which the official or employee personally participated at the former agency, whether through decision, approval, disapproval, recommendation, rendering advice, investigation, or other substantial exercise of administrative discretion.<sup>23</sup>

Public officials and employees also are prohibited from engaging in public duties within the scope of their public employment, if those actions create a conflict of interest with their outside business interests. Other than ministerial functions, such as accepting a form for filing, a public official or employee is prohibited from participating within the normal scope of duties in any license or rate-making proceeding that directly affects the license or rates of either:

- Any business of which the public official or employee or the public official or employee's immediate family owns or controls more than 5%; or
- Any person to whom the public official or employee, immediate family, or a business owned or controlled more than 5% by the official, employee, or family has sold goods or services totaling more than \$1,000 in the preceding year, unless the official or employee files a required statement acknowledging that sale.<sup>24</sup>

### General Assembly members

In addition to these general prohibitions, General Assembly members are restricted from voting on legislation that affects their personal business interests. Specifically, a member is prohibited from voting on any legislation that is being actively advocated, if the member is any

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<sup>21</sup> R.C. 102.03(A)(1).

<sup>22</sup> R.C. 102.03(A)(10).

<sup>23</sup> R.C. 102.03(A)(8).

<sup>24</sup> R.C. 102.03(C).

of the following with respect to a legislative agent or the employer of a legislative agent that is actively advocating on that legislation:

- An employee;
- A business associate;
- A person, other than an employee, who is hired under contract to perform services, and that position involves a substantial and material exercise of administrative discretion in formulating public policy.<sup>25</sup>

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<sup>25</sup> R.C. 102.031(B).