



Government Relations Bulletin



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Appellate Court Strikes Ohio's New Pay-to-Play Laws

Two and a half years after the Ohio General Assembly approved sweeping restrictions on the award of public contracts to political contributors, the revisions to Ohio's pay-to-play laws have been voided by an appeals court decision issued April 14, 2009. In *United Auto Workers v. Brunner*, the Franklin County Court of Appeals affirmed a lower court determination that procedural flaws in House Bills 694 ("H.B. 694") and 119 ("H.B. 119"), the pay-to-play legislation, prevented the regulations from becoming law. This latest decision in the extensive litigation of H.B. 694 and H.B. 119 puts the pre-2006 laws, not their more stringent enhancements, back into effect.

Law in Flux for Two Years

The 2006 revisions to Ohio pay-to-play laws have faced numerous legal challenges. In December 2007, procedural defects became the central issue in the dispute, when the Franklin County Court of Common Pleas ruled that procedural flaws rendered H.B. 694 void. The Franklin County Court of Common Pleas ruled that the constitutional process for voting on, signing, and filing the law had not been followed, and it declared H.B. 694 void and unenforceable.

Shortly after the lower court's ruling, the Ohio Attorney General asked the Court to reconsider the case in light of H.B. 119, which re-passed much of H.B. 694 and added several additional revisions to the pay-to-play laws. The lower court rejected that possibility, ruling that H.B. 119 could not have amended H.B. 694 or cured any procedural defects in that law because H.B. 694 never took effect. Moreover, the Court found that including pay-to-play law revisions in H.B. 119, the comprehensive budget bill, violated Ohio's single-subject rule. Accordingly, the Court sev-

ered H.B. 119's pay-to-play aspects. The lower court's invalidation of H.B. 694 and portions of H.B. 119 left Ohio's pre-2006 pay-to-play restrictions as the prevailing law on the subject, but only temporarily.

The Ohio Attorney General requested and received a stay from the Court, which put Ohio's newer laws back into effect during the appeal.

The Decision

With the recent decision, the Franklin County Court of Appeals put the older version of the law back in to effect. The Appellate Court upheld the trial court's decision on two grounds. First, the Court held that the procedural irregularities in which H.B. 694 was enrolled, signed, and filed, resulted in the Bill never being lawfully enacted. "No one disputes the innocence of the clerical error that led to the present controversy; however, the innocence of that error merely underscores the dangers we face if we open the door to a breach of the strict constitutional procedures for enacting legislation in Ohio." (¶26).

Second, the Court rejected the argument that any defects in the enactment of H.B. 694 were cured by the re-enactment of some of the language in H.B. 119, which also amended parts of the H.B. 694 language. Rejecting the theory of "implied validation," the Court held that H.B. 119 could neither amend nor re-enact provisions of H.B. 694, which never became law. In light of its findings, the Court found that an assignment of error challenging H.B. 119 on the grounds of the single-subject rule were moot. As of this writing, it is unclear whether the Ohio Attorney General will appeal to the Ohio Supreme Court to potentially seek another stay.

Moving Forward: Ohio Pay-to-Play in a Nutshell

Following the appeals court's decision in *United Auto Workers v. Brunner*, R.C. 3517.13, the law remains in effect as it existed before 2006. The amendments enacted in H.B. 694 and H.B. 119 are not effective. The main features of the current law include the following:

- **Persons covered:** Partners of a partnership, shareholders of an association or professional association, administrators or executors of estates, trustees of associations or trusts, owners of 20 percent or more of a corporation, and spouses of the above-named individuals.
- **Contributions covered:** Contributions by any of the above-named individuals totaling \$1,000 or more to the campaign of the holder of the public office that will have ultimate responsibility for the public contract during two calendar years before being awarded the contract can trigger the pay-to-play ban. Contributions are not included when directed to campaigns for an office other than the one from which the officeholder or appointee will award the contract at issue. Provisions regarding cumulative contributions or contributions by PACs are no longer effective.
- **Contribution period:** Two periods of January 1 through December 31 before the year in which the contract is awarded are reviewed. For example, if a contract is awarded in March of 2009, the public official must aggregate all contributions made to

him, or to the officeholder who appointed him, by a potential contractor during the calendar years of 2007 and 2008 to ensure that they do not exceed \$1000. The law no longer applies to contributions made during the term of the contract.

- **Officeholders covered:** The governor, chief elected officers of municipalities and county alternative forms of government, and public officials and employees appointed by those individuals. Counties, townships, school boards and other legislative bodies are not included.
- **Contracts covered:** Unbid contracts for goods and services costing more than \$500. Competitively bid contracts are exempt. There is no longer a requirement to certify compliance in public contracts.

The Somewhat Uncertain Future

United Auto Workers v. Brunner clarified the status of pay-to-play law, but additional changes may still take place. The General Assembly might propose new pay-to-play restrictions or the decision could be appealed. Accordingly, businesses and political candidates should carefully develop strategies that take into consideration the existing law and be poised to monitor for future laws or legal developments.

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