

Independent Contractors Potentially Subject to Liability Under California Conflict of Interest Laws

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ATTORNEYS

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The California Supreme Court clarified this week that California Government Code Section 1090 may be applied to independent contractors "when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." In addition, a violation of Section 1090 may now subject independent contractors to criminal penalties.

Section 1090 prohibits public "officers and employees" from making contracts in which they have a financial interest when they act in their official capacities. The prohibition contained in Section 1090 involves four elements: (1) the person subject to the prohibition must be regarded as an "officer" or "employee" of the public agency; (2) the decision must involve the making of a contract with a public agency; (3) the contract must be made either (i) by the public official in his official capacity, or (ii) by the body of which he is a member; and (4) the public officer or employee must be financially interested in the contract.

The Court's decision in *People v. Sahlolbei* makes clear that independent contractors are not categorically excluded from the prohibition in Section 1090. Previously, the appellate courts had held that the term "officers and employees" included "independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency." The California Supreme Court declined to follow the "considerable influence" standard in *People v. Sahlolbei*. Instead, the Court held that while Section 1090 does not apply to all independent contractors, it applies to independent contractors "whose actual duties include engaging in or advising on public contracting."

In addition to being potentially subject to Section 1090, independent contractors to California government entities should be aware that they may now be subject to criminal liability. A previous opinion by an appellate court, *People v. Christiansen*, suggested that independent contractors could not be subject to criminal liability under Section 1090. In *People v. Sahlolbei*, however,

the California Supreme Court expressly disapproved the Christiansen case, holding that even criminal liability may extend to independent contractors under Section 1090.

For further information about this decision or other concerns regarding conflict of interest laws, please contact Diana Varat.