

# You, Too, Could Be a Lobbyist (Even If You Don't Want to Be)

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# Significant Changes to Massachusetts' Lobbying Law Go into Effect January 1, 2010

You may have heard that in mid-2009, responding to the highly public federal indictments of a sitting state senator and the recently re-elected speaker of the Massachusetts House, the Massachusetts Legislature quickly passed a sweeping overhaul of the Commonwealth's campaign finance, lobbying and government ethics laws.

You may have heard that the new lobbying law was slated to go into effect on October 1, 2009, but implementation was delayed for three months, to January 1, 2010, because, well, nobody seemed to know just what the revisions meant.

You may have let all of this news pass you by, assuming that because you or your business interact with state government infrequently—or not at all—the state's lobbying law could not possibly apply to you.

You may be wrong.

## Overview

Captioned “An Act to Improve the Laws Relating to Campaign Finance, Ethics and Lobbying” (the Act),<sup>1</sup> the changes to the Commonwealth's existing lobbying law expand the definition of “lobbying” to include a much broader spectrum of interactions with government officials (legislative, executive and municipal); significantly enhance the penalties for violations of the law; and expand the enforcement authority granted to both the secretary of state and the attorney general. The most significant change, and the one that has the potential to significantly affect a wide range of professionals who would never before have considered themselves “lobbyists,” is the expanded definition of executive and legislative lobbying.

Prior to the recent changes, regulated “lobbying” was limited to direct contact with elected officials or other government employees. Under the revised law, however, the definitions of “executive lobbying” and “legislative lobbying” have been expanded to include “strategizing, planning, and research if performed in connection with, or for use in, an actual communication with a government employee.”<sup>2</sup> Simply stated, anyone involved at any level with the formulation of lobbying strategy, the preparation of materials to be used in a lobbying effort, or even the gathering of information to be incorporated into such materials or integrated into such a strategy could be considered a lobbyist and required to register with the secretary of the Commonwealth.

It would be tempting to read the definition above and assume that the Massachusetts Legislature could not possibly have intended such a broad reach as their words might suggest. This temptation should be resisted. The regulatory intent of those charged with implementation and enforcement of the new law is made starkly clear in the following excerpt from a “Frequently Asked Questions” publication made available online by the secretary of the Commonwealth:<sup>3</sup>

**Q: An executive officer of a company is interested in pending legislation and assorted regulatory matters concerning the business of the company. He attends several meetings with in-house and external lobbyists to discuss strategy. Is it necessary for him/her to register as a legislative and/or executive agent?**

A: The new definitions of executive and legislative lobbying now include strategizing, planning, and research, *if performed in connection with, or for use in, an actual communication with a government employee.* (Emphasis added). Thus, the CEO's strategizing, to the extent it is done in connection with or for use in an actual communication with a government employee, and *regardless of whether or not the CEO himself partakes in that actual communication,* meets the definition of lobbying.

<sup>1</sup> <http://www.mass.gov/legis/laws/seslaw09/sl090028.htm>

<sup>2</sup> Ch. 28, Acts of 2009, § 2.

<sup>3</sup> <http://www.sec.state.ma.us/pre/prelob/lobfaq.htm>

If this CEO meets the definition of lobbying, as well as the criteria for being an executive agent, a legislative agent, or both set forth in M.G.L. Chapter 3, Section 39, he must register with the Lobbyist Section.

As indicated by the answer to this hypothetical inquiry, an executive who meets on occasion with lobbyists to discuss public policy and strategy would be covered by the new definition of “lobbying,” as would a communications consultant or public relations professional who participates in a meeting that includes lobbyists or whose work product is used in such a meeting or provided to a lobbyist for his or her use, or a lawyer who conducts research for a client on legislative issues, or provides legal advice related to public policy, agency action or legislative activity. Any or all of these people could be required to register as lobbyists, which is no minor proposition given the burdensome filing and disclosure requirements imposed upon registration, and the law’s enhanced penalties for failing to register when required to do so.

## The Wrinkle

There is, of course, an additional wrinkle, indicated in the last paragraph of the “Answer” above. In the hypothetical presented, the executive in question would meet “the definition of lobbying” merely by participating in a strategy session with lobbyists. The executive’s obligation to register, then, depends on whether he or she also meets “the criteria for being an executive agent, a legislative agent, or both...”

The definitions of “executive agent” and “legislative agent” are set forth in Section 2 of the Act, and are functionally identical (the two definitions are combined here):

“[Executive/Legislative] agent,” a person who for compensation or reward engages in [executive or legislative] lobbying, which includes at least one (1) lobbying communication with a government employee made by said person. The term “[executive/legislative] agent” shall include a person who, as part of his regular and usual business or professional activities and not simply incidental thereto, engages in [executive/legislative] lobbying, whether or not any compensation in addition to the salary for such activities is received for such services. For purposes of this definition a person shall be presumed to be engaged in [executive/legislative] lobbying that is simply incidental to his regular and usual business or professional activities if he: (i) engages in [executive/legislative] lobbying for not more than 25 hours during any reporting period; and (ii) receives less than \$2,500 during any reporting period for [executive/legislative] lobbying.

Broken down, these definitions establish four criteria that must all be met in order for an individual to be legally considered an executive or legislative agent (and therefore required to register as such with the secretary of the Commonwealth):

- The individual must engage in executive or legislative lobbying, as defined by the statute.
- The individual must receive compensation for lobbying in excess of \$2,500 in a six-month reporting period.<sup>4</sup> This compensation may come in the form of regular salary or payments specifically for lobbying.
- The individual must spend 25 hours or more engaged in lobbying activities in the six-month reporting period (including such activities as strategizing, planning and/or research in furtherance of direct lobbying, as explained above).
- The individual must personally make at least one direct lobbying communication with a government employee.

The definitions of “executive lobbying” and “legislative lobbying” are, as previously discussed, very broad. “Executive lobbying” is defined as follows:

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<sup>4</sup> Reporting periods are the six-month spans from January 1 through June 30, and from July 1 through December 31 of each year. M.G.L. c. 3, § 43.

... any act to promote, oppose, influence or attempt to influence the decision of any officer or employee of the executive branch or an authority, including but not limited to, statewide constitutional officers and employees thereof, where such decision concerns legislation or the adoption, defeat or postponement of a standard rate, rule or regulation promulgated pursuant to any general or special law, or any act to communicate directly with a covered official to influence a decision concerning policy or procurement; provided, further, that executive lobbying shall include acts to influence or attempts to influence the decision of any officer or employee of a city or town when those acts are intended to carry out a common purpose with executive lobbying at the state level; and provided further that executive lobbying shall include strategizing, planning, and research if performed in connection with, or for use in, an actual communication with a government employee... (M.G.L. c. 3, §39.<sup>5</sup>)

The fourth prong above will likely serve as the all-important “out” clause for many professionals who work at the intersection of the public and private sectors, but do not directly engage with government employees at any level. Returning to the hypothetical executive posited above: if he or she participates in lobbying strategy sessions, but never personally makes a direct “lobbying communication,” he or she will not meet the definition of an executive or a legislative agent and will not be required to register as such, despite arguably engaging in “lobbying” under the expanded definition. It should be carefully noted, however, that the Act requires only one such direct communication per six-month reporting period in order to trigger the definition and, therefore, the obligation to register.<sup>6</sup>

## Conclusion

The confusion created by the vastly increased scope of the Commonwealth’s lobbying law is perhaps best illustrated by another document published by the secretary of the Commonwealth. Titled “Are You Lobbying?”, the document is a 16-page flow-chart, intended assist those who might wonder whether their activities are covered by the new law in determining whether they are now obligated to register as lobbyists.<sup>7</sup> Diligent and conscientious citizens, determined to comply with the law, will wind their way through page after page of questions concerning their activities, moving from one field to the next as they progress through the chart toward, they expect, a final determination as to whether they are obligated to register. In the end, at the bottom of page 16, they will land in one of two final boxes: “May have to register” or “May not have to register.”

As of January 1, 2010, violations of the Commonwealth’s lobbying law will carry penalties of up to \$10,000 and as many as five years imprisonment. Given these stakes, and the persistent uncertainty concerning the reach of the new law that lingers even as the law goes into effect, businesses that are active in Massachusetts will be well advised to seek counsel regarding the potential applicability of the new law to their operations and employees.

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<sup>5</sup> The definition of “legislative lobbying” is functionally identical, with distinct language referring to legislative action substituted for the language above referring to executive/agency/authority action. Two additional aspects of these definitions should be noted in addition to their expanded coverage to include strategy, planning and research: their breadth arguably encompasses virtually any advocacy efforts targeted at state government, and advocacy before municipal officials may be considered state level lobbying, if such efforts are “intended to carry out a common purpose” with related state level lobbying.

<sup>6</sup> The relevant statutory text reads: “...at least one (1) lobbying communication with a government employee made by said person.” The term “lobbying communication” is not defined in the statute. The use of the term “with a government employee made by said person,” however, strongly suggests that a “lobbying communication” is a direct, personal interaction between the individual in question and a “government employee.”

<sup>7</sup> <http://www.sec.state.ma.us/pre/prepdf/areyoulobbying.pdf>

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