

Changes To Florida's New Anti-Corruption Law Take Effect October 1

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Will Florida Soon Consider Your Business Practices Corrupt?

The Florida Legislature recently responded to growing concerns over public corruption in the state of Florida by amending Florida's Anti-Corruption Act (FACA). The changes take effect October 1. This paper outlines considerations for those organizations that do business with Florida government—and wish to avoid becoming the state's first test case under the new law. **A. Notable changes to the FACA that take effect on October 1, 2016.** The FACA amendments expand the applicability of offenses under Chapter 838 to any officer or employee of a public entity created or authorized by law. This includes all government entities, such as counties, municipalities, and special districts. The amendments also expand liability to private organizations for certain conduct through its new definition of "public contractors," which now include: **any person (including corporations and other business entities), or any officer or employee of a person, who has entered into a contract with a governmental entity.** The level of intent for a violation under the new law has been lowered from "corruptly" or "with corrupt intent" to "knowingly and intentionally" following feedback from prosecutors that the prior standard was undermining their ability to secure corruption convictions. Convictions under the FACA carry substantial criminal and civil penalties. But even short of a conviction, a failure to change business practices to reflect Florida's new focus on corruption could lead to costly investigations, cancelled contracts, and reputational damage. **B. Prohibited conduct under the FACA.** Official misconduct (§ 838.022) prohibits both public servants and public contractors from obtaining a benefit by falsifying or causing another person to falsify official documents or records; altering, destroying, or concealing official documents or records (except as authorized by law or contract); and obstructing, preventing, or delaying the communication of information relating to the commission of a felony that involves or affects the government entity served by the public servant or public contractor. Bid tampering (§ 838.22) prohibits public servants and public contractors from influencing or attempting to influence the bidding process of any government entity by disclosing any material information regarding the bidding process that is not publicly disclosed, or altering or amending any bid documents or materials in order to provide a

competitive advantage to any bidder. It also prohibits public servants and public contractors from circumventing the bidding process in order to obtain a benefit for, or cause unlawful harm to, another party. Additionally, the bid tampering provision punishes (1) any person who conspires with a public contractor or a public servant to do any of the above, and (2) any person who knowingly enters into a contract secured by a public contractor or public servant who violated any of the above. Of course, traditional liability for bribery of government officials remains an actionable offense under Florida law, in addition to the liability extended under the new FACA for official misconduct and bid tampering, as discussed above. **C. Simple ways to protect your organization.** Implementing these practices could reduce the likelihood of a FACA violation. Or, at a minimum, better position the business to defend against a claim if one is made:

- Education – A robust educational campaign focused on the most likely offenders in the organization is the first step following a change in the law. As to the changes to the FACA, client relationship managers and sales teams who live or die by their ability to grow the business by gaining more contracts, market share, and business revenues are prime targets of such a campaign. But, the education efforts should not stop there. Those in the C-suite who have front-line contact with customers, or direct and manage policies concerning public bid practices, should be counseled on the do's and don'ts of Florida's new law. Indeed, the expansion is intended to arm prosecutors with the tools to identify, punish, and deter conduct by those in the private sector who have heretofore been able to win business through improper practices.
- Written Protocols – Written protocols go hand-in-hand with the education session referenced above. When done properly, they educate employees, and, should the company ever face an inquiry, protect the company by serving as written evidence of its efforts to prohibit wrongful conduct. Simple examples like written blackout periods for communications and gifting during bid reviews, and guidelines governing communications and handling of official records associated with bids are an obvious starting point.
- Audit / Compliance Review – Any organization seeking to limit exposure to unethical or illegal conduct is only as good as its compliance protocols. Organizations should charge compliance managers with independently undertaking audits to ensure that employees are following the written protocols that control their government business procurement practices.
- Revise Employment Contracts – Organizations should revisit the employment contracts in place with any employees who have the potential to influence any public officials. Contracts should include terms that expressly prohibit conduct such as bid tampering and bribery so the company has the benefit of the employment agreement as a means to defend against liability for employees who act outside of that agreement in violation of the FACA.

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