

# the Ethical Times

## Waivers Part II: Rarer Waivers

Welcome back!

In [the previous Ethical Times](#), we explored the “why” and “how” of public servants seeking permission for an outside job. Long story short: the moonlighting and appearance prohibitions of Chapter 68 are very broad; because of this, a lot of jobs are technically prohibited even though in practice there’s no actual overlap between a City employee’s public and private positions. The Board is therefore empowered to *waive* one or both of the prohibitions on a case-by-case basis, issuing a waiver (or a Board Order, depending on the situation) that allows the public servant to work that otherwise-prohibited job or side gig. Starting the waiver process is easy – just visit COIB’s website ([nyc.gov/ethics](http://nyc.gov/ethics)) and fill out the [“Get a Waiver” webform](#). Last year, the Board issued about 660 moonlighting waivers and orders.

Other waivers, however, are much rarer and issued only under very particular circumstances. In this article, we’ll be exploring two of these less common situations: waivers of the one-year post-employment appearances ban and the ban on getting paid by someone else for doing your City job (the “gratuities ban”).

### Post-Employment Waivers

For one year after leaving City service, former public servants are prohibited from communicating with their former City agency on behalf of their new employer, client, or

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business. That’s a simple rule and a good one: an extra layer of protection that disinfers the transition from public service to private enterprise. It avoids the potential unfairness – real or perceived – of former public servants representing private interests before an agency they only recently departed, where it might reasonably appear that they may have an “inside track” not available to competitors.

But maybe there are former public servants out there who have *completely justifiable* reasons for representing a private concern



before their former agency. For instance, let's imagine a top-level analyst has just left her City position for a job as a researcher at a private university. This university frequently conducts studies on behalf of the City. Now the university asks her to conduct one of those studies, which will require that she request records from, interview current City workers at, and send the findings to her former agency. Both the university and her former agency believe that given her experience in the field, she's uniquely qualified to run the study, and they think that its results could really help the City, but all of these are communications that are prohibited within the first year of the end of her City employment. Can the study go forward with her in charge?

Once again, we turn to the waiver process. When evaluating a request for a post-employment waiver, the Board considers a number of factors:

- whether the City and the public servant's new employer share an "identity of interest" (that is, are they working on the same thing, with the same goals, and sometimes the same leadership on both sides?);
- whether the former public servant is uniquely suited to perform work that benefits the City (either because she has unique skills or because she is the only one at her private employer who is able to do the work);
- if the public servant only served for a short period of time (because it's hard to build up connections to milk if you only worked at a place for 2 weeks); and
- the likelihood of harm to other organizations similar to, or in competition with, a public servant's prospective employer if the waiver were granted.

Not all of these factors have to be present in every situation. Instead the Board looks at the totality of the circumstances in every set of facts to confirm that the potential for



harm is minimal and that the benefit of the waiver *goes to the City* – as opposed to the individual. Because of this higher standard, post-employment waivers are more difficult to obtain than moonlighting waivers.

In our example, it seems like at least two of the factors (the shared "identity of interest" and the view that she's "uniquely qualified") line up in the former public servant's favor, so it's likely that this waiver would be granted because the interests of the City will be served.

### Gratuities

Let's say I'm a public liaison for FDNY. My job is educating City residents on fire safety, and I'm really good at it. So good, in fact, that occasionally, an impressed member of the public offers me a gift card after a speaking engagement. In other words, a "tip" for performing my public duties.

If you've read this far, you're probably invested enough in municipal ethics to know that I must decline. It doesn't matter if the gift card is for \$10 or \$50 or \$500 – I cannot accept *any* payment above and beyond my City salary for doing my City job.

But now let's imagine there's a fire safety convention out of state, and because of FDNY's status as the largest municipal fire department in the country and my reputation as an amazing speaker, the organizers want me to deliver the keynote address. My agency has decided not to send anybody this

time around, but they're fine with me taking personal time to travel there on my own dime. And that's fine with me, because the organizers have agreed to pay for my travel and give me a stipend for speaking.

Here's the problem: delivering the keynote at this conference is exactly the kind of thing my agency could reasonably assign me to do, as it has in the past. And, according to the Gratuities Ban, I'm not allowed to accept compensation for doing my City duties from anyone except the City. Here, my agency doesn't want to assign this duty to me, so it won't pay me to speak. But the rule won't let me accept payment from anyone else!

In such a case, *even something as basic as the Gratuities Ban can be waived*. As before, I would contact COIB before the convention and explain the situation – this isn't going to affect the job I do in the City, and in any case helping other fire departments better educate their public advances the broader purpose of promoting fire safety. In all likelihood (if my agency supports it – all waiver requests must first be approved by the head of the public servant's agency), I'd receive a waiver that would allow me to accept the stipend and the travel. Again, the letter of the law is waived so that the spirit of the law – ethical and effective public service – can prevail.

## Conclusion

These are just two examples of circumstances which might prompt the Board to issue a waiver. Technically, *any* provision of Chapter 68 could be waived, so if you have a question about when you need a waiver, or what types of waivers are available, or even just a question about the Conflicts of Interest Law more broadly, we hope you'll call our Attorney of the Day hotline at (212) 442-1400 for expert legal advice.

The hotline is available weekdays from 9:00 to 5:00, all calls are confidential, and you can even call anonymously. You can also

reach out [online](#) any time. As always, our goal is to help you resolve potential ethics issues *before* they become a problem.

And remember: needing a waiver is a good thing – often, it means you're just one or two disclosures away from being able to take advantage of a great new opportunity. So don't be afraid to give us a call – you might be able to do a lot more than you think!



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## THE PUBLIC SERVICE PUZZLER

Congratulations to the winner of our recent Public Service Puzzler, **Shawnora Gulley** of DOB, who's into art auctions and risk management.



This month's [contest](#) is a search for a hidden word. Entries are due Friday, April 10<sup>th</sup>.

## COIB and COVID-19

COIB remains operational and is here for you. The Attorney of the Day is still available to answer your ethics questions at (212) 442-1400 or via the [legal advice request form](#).

We encourage New Yorkers to follow [@nycHealthy](#) and/or text COVID to 692-692 to receive updates as news develops.

And [wash your hands](#).



[nyc.gov/ethics](https://nyc.gov/ethics)

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