

CHAPTER 2
PUBLIC OFFICERS AND EMPLOYEES

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CHAPTER 2

PUBLIC OFFICERS AND EMPLOYEES

2.1 Scope of this Chapter. This Chapter discusses the qualifications, duties, and responsibilities of public officers. Selected constitutional and statutory provisions concerning appointment, tenure in office, and civil or criminal liability are also discussed. See *also* Chapter 3 (Personnel).

2.2 Definition. A "public officer" is "the incumbent of any office, member of any board or commission, or his deputy or assistant exercising the powers and duties of the officer, other than clerks or mere employees of the officer." A.R.S. § 38-101(3). The executive heads of all state agencies and the members of all state boards and commissions are considered "public officers." Generally, all others working for the state are "employees."

2.3 Qualifications for Public Office. Persons seeking election to public office must meet Arizona constitutional and statutory requirements. A person is not eligible for elective State office unless he or she is a qualified elector of the political division or municipality in which such person is elected. Ariz. Const. art. VII, § 15. A person who is adjudicated an incapacitated person is not a qualified elector, nor is any person convicted of treason or of a felony, unless restored to civil rights. *Id.* § 2(c).

Public officers, whether elected or appointed, must be at least eighteen years old, United States citizens, and residents of Arizona, and must have registered with the selective service system if required by law to do so. A.R.S. §§ 38-201(A), (D), (E). In addition, constitutional or statutory provisions establish other specific qualifications for certain public officers. See, e.g., Ariz. Const. art. V, §§ 1, 2 (age and residency requirements for the Governor, Secretary of State, State Treasurer, Attorney General, and Superintendent of Public Instruction).

2.4 Duties and Responsibilities of Public Officers. Public officers must impartially execute all laws and rules for which they are responsible. The Arizona Supreme Court stated in *Button v. Nevin*, 44 Ariz. 247, 257, 36 P.2d 568, 571 (1934):

Public officials may not violate the plain terms of a statute because in their opinion better results will be attained by doing so. They have but one duty, and that is to enforce the law as it is written, and, if the effect of their action is disastrous, the responsibility is upon the Legislature and not upon them.

Public officers, therefore, must familiarize themselves with laws and rules relating generally to the duties and responsibilities of public officers as well as those pertaining to their particular offices and agencies. Public officers are obligated to discharge the duties of their offices and may not delegate those duties to subordinates unless authorized by law. See Section 2.12. See Chapter 13 for a discussion of state officer and employee liability, immunity, and indemnity.

2.5 Nomination and Appointment of Appointive Officers. The method for nomination and appointment of appointive officers is usually set forth in the statutes pertaining to the office. Certain public officers are appointed by the Governor with the consent of the Senate, pursuant to A.R.S. § 38-211. Examples of such public officers include the Director of Health Services (A.R.S. § 36-102(C)), the State Land Commissioner (A.R.S. § 37-131(B)), the Director of Insurance (A.R.S. § 20-141(A)), the Real Estate Commissioner (A.R.S. § 32-2106(A)), the Registrar of Contractors (A.R.S. § 32-1103), and the Racing Commissioners, (A.R.S. § 5-102). Some public officers may be appointed by the Governor with the consent of the Senate, but not pursuant to A.R.S. § 38-211. The Director of the Department of Administration (A.R.S. § 41-701(C)) and the Director of Economic Security (A.R.S. § 41-1952(C)) are examples. Other public officers are appointed by the Governor without senate approval. Examples of such officers include the members of the Board of Accountancy (A.R.S. § 32-702(B)), the Board of Barbers (A.R.S. § 32-302(A)), and the Board of Cosmetology (A.R.S. § 32-502(A)). Officers appointed by the Governor, or by the Governor with the consent of the Senate, are entitled to receive a commission of authority from the Governor. A.R.S. § 38-221(A).

2.5.1 Nomination and Appointment of Officers Who Are Appointed Pursuant to A.R.S. § 38-211. When a statute provides that an "officer shall be appointed pursuant to [A.R.S. § 38-211], the [G]overnor shall nominate and with the consent of the [S]enate appoint such officer as prescribed in [that] section." A.R.S. § 38-211(A).

2.5.1.1 Term of Office Begins or Expires or Office Becomes Vacant During Regular Session of the Legislature. When a "term of any state office which is appointive pursuant to [A.R.S. § 38-211] expires, begins or becomes vacant during a regular legislative session, the [G]overnor [must nominate a qualified person during that session] and . . . promptly transmit the nomination to the [P]resident of the [S]enate." A.R.S. § 38-211(B). If an office is occupied by an incumbent who is capable of continuing to serve until the Senate has consented to a nomination, a nominee shall not assume the duties of the office, pending Senate confirmation. *Id.* "If the incumbent is unable to continue to discharge the duties of office, the nominee shall assume and discharge the duties of the office pending [S]enate confirmation." *Id.*

"If the [S]enate consents to the nomination, the [G]overnor shall then appoint the nominee to serve for the term or, in the case of a vacancy, for the unexpired term in which the vacancy occurred." *Id.* If the Senate rejects a nomination, the Governor shall not appoint the rejected nominee and must promptly nominate another qualified person. *Id.*

If the Senate does not act on a nomination made during the regular session, the nominee may discharge the duties of the office subject to confirmation during the next legislative session. *Id.* In addition, if the Governor fails to nominate a person or the Legislature fails to receive a nomination during the session, for an office that becomes vacant or a term that began or ended during a regular session, the Governor shall appoint a nominee after the close of the legislative session to discharge the duties of the office subject to confirmation during the next legislative session. *Id.* This provision was added by the Legislature in 1989 and seems to contradict the earlier provision in A.R.S. § 38-211(B) requiring the Governor to nominate a person during the regular session. 1989 Ariz. Sess. Laws Ch. 250, § 4. This amendment, however, has not yet been construed by the Arizona courts.

2.5.1.2 Term of Office Begins or Expires or Office Becomes Vacant While Legislature is Not in Regular Session. "If the term of any state office . . . expires, begins, or becomes vacant . . . when the Legislature is not in regular session, the [G]overnor shall nominate a [qualified] person . . . for such office." A.R.S. § 38-211(C). The nominee shall assume the duties of the office until the Senate either rejects or fails to act on the nomination. *Id.* The Governor "shall transmit the nomination to the [P]resident of the [S]enate during the first week of the next regular session." *Id.*

2.5.1.3 Tenure of Nominee and Officer. A nominee shall not "serve longer than one year after nomination without [S]enate consent." A.R.S. § 38-211(E). An incumbent who is re-nominated to the same office is also limited to one year from the date of re-nomination without Senate confirmation. Ariz. Att'y Gen. Op. 100-014. "Every officer who is subject to [Senate] confirmation [under A.R.S. § 38-211] and whose term is not fixed by law shall hold office at the pleasure of the appointing power." A.R.S. § 38-211(D).

2.5.2 Nomination and Appointment of Other Officers. As previously noted, a number of officers are to be appointed by the Governor, subject to Senate confirmation, but are not appointed pursuant to A.R.S. § 38-211. A.R.S. § 38-295 provides that these other appointees' offices are also covered by the provisions of A.R.S. § 38-211.

2.6 Loyalty Oath. In Arizona, a loyalty oath is required of officers and employees of all government agencies. A.R.S. § 38-231(E); see Ariz. Att'y Gen. Op. 186-020. "[O]fficer or employee" is defined for this purpose as "any person elected, appointed or employed, either on a part-time or full-time basis, by this state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution or any board, commission or agency of any county, city, town, municipal corporation, school district or public educational institution." A.R.S. § 38-231(F).

The loyalty oath provides as follows:

State of Arizona, County of _____
I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona, that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of _____ (name of office) according to the best of my ability, so help me God (or so I do affirm).

(signature of officer or employee)

Id. § (E). Any person who fails to take and execute the loyalty oath may not receive compensation, A.R.S. § 38-231(B), and is deemed to have vacated the office, A.R.S. § 38-291(9). A person who exercises the duties of public office without first taking the oath is guilty of a class 2 misdemeanor. A.R.S. § 38-442(A).

An officer or member of a board or commission must take, subscribe, and file the loyalty oath "[i]f appointed, at or before commencement of the term of office," or "if elected, at any time after receiving the officer's certificate of election, and at or before commencement of the term of office." A.R.S. § 38-232.

The loyalty oath of an *elected* officer must be filed with the Secretary of State. The oaths of other state officers and employees must be filed with the office of the employing state board, commission or agency to which they have been appointed or for which they work. A.R.S. § 38-233(A).

2.7 Term of Office. Many public officers have terms of office specified by law, most often running from two to five years. When the term of an appointive office has not been established by law, the officer holds the position at the pleasure of the appointing authority. A.R.S. §§ 38-211(D), -295(A).

2.8 Vacancy in Office. A public office is deemed vacant if:

1. The public officer dies, is judicially determined to be insane, resigns and the resignation is accepted, is removed from office, ceases to be a resident of the state or locale for which he was elected, or is convicted of a felony or of an offense involving his official duties. A.R.S. § 38-291(1)-(5), (8).
2. The public officer is absent from the state without legislative permission for more than three consecutive months, ceases to discharge the duties of the office for three consecutive months, fails to file the required oath or bond on

time, or violates the restrictions imposed by A.R.S. § 38-296 (Arizona's "resign-to-run" statute). A.R.S. § 38-291(6), (7), (9), (12).

3. No one is elected or appointed, or a competent tribunal declares the election or appointment void. A.R.S. § 38-291(10), (11).
4. For an office subject to A.R.S. § 38-211, when the Senate rejects the nomination or fails to act on the nomination within one year of its submission to the Senate. See, e.g., A.R.S. § 38-211(E).

The Constitution provides that the Governor shall have the power to fill a vacant public office by appointment, unless otherwise provided in the Constitution or laws. Ariz. Const. art. V, § 8.

2.9 Resignation from Office. An appointive officer seeking to resign from office must deliver a written resignation to the appointing authority. A.R.S. § 38-294(7). The resignation is not effective until accepted by the appointing authority. A.R.S. § 38-291(3). If the appointing authority does not accept the resignation, the officer must continue to discharge the duties of the office until his successor is qualified. See *Cragin v. Frohmler*, 43 Ariz. 251, 256-257, 30 P.2d 247, 249 (1934); cf. *Rogers v. Frohmler*, 59 Ariz. 513, 517, 130 P.2d 271, 273 (1942) (resignation and acceptance would not relieve officer from duty until his successor qualified). "The resignation of the incumbent *elective* officer duly filed in writing . . . shall, if not accepted within ten days, be deemed to have become effective as of the date of filing." A.R.S. § 38-296(C) (emphasis added). If an officer resigns and the resignation is accepted or becomes effective before the expiration of the term, an officer who is appointed to fill the vacancy may serve only for the remainder of the unexpired term. A.R.S. § 38-295(C).

2.10 Expiration of Term. Except as provided in A.R.S. § 38-211 for an officer whose appointment is subject to Senate confirmation, an officer is required to continue to discharge the duties of the office after the expiration of the term of office, until a successor has qualified. A.R.S. § 38-295(B).

2.11 Impeachment of Officers. All officers are "liable to impeachment for high crimes, misdemeanors, or malfeasance in office." Ariz. Const. art. VIII, pt. 2, § 2; A.R.S. § 38-311.

2.12 Deputies and Assistants. Public officers may appoint deputies and assistants only when specifically authorized to do so by law. A.R.S. § 38-461(A). The appointment must be in writing and filed with the Secretary of State. A.R.S. § 38-461(C). "Unless otherwise provided [by law], each deputy . . . possesses the powers and may perform the duties prescribed by law for the office of the principal." A.R.S. § 38-462. Public officers "may appoint clerks and employees for the prompt discharge of the duties of the office." A.R.S. § 38-461(A).

2.13 Compensation and Salaries. Public officers, members of boards and commissions, deputies, and other employees are entitled to receive the salary authorized by law for their respective positions, and are prohibited from receiving any salary or emolument in excess of the legally authorized salary. A.R.S. § 38-601. Also, the compensation of a public officer serving for a fixed term of office may not be increased or decreased during the officer's term of office, except that the compensation for officers serving on boards composed of two or more officers whose terms are not coterminous may be increased. Ariz. Const. art. IV, pt. 2, § 17. When the salary of one member of such a board is adjusted legislatively at the beginning of a term, the other members' salaries are also adjusted so those doing substantially the same work receive the same pay. See *Maricopa County v. Rodgers*, 52 Ariz. 19, 25, 78 P.2d 989, 991-92 (1938).

All state officers and employees subject to the provisions of the state personnel system receive salaries within the range set forth in the Department of Administration salary plan as adopted or modified by the Legislature. A.R.S. § 38-611(B). If exempt from the state personnel system, state officers and employees receive salaries within the range recommended annually by the Department of Administration to the Legislature and the Joint Legislative Budget Committee. A.R.S. § 38-611 (A). Some members of boards, commissions, councils, or advisory committees may receive compensation at a rate not to exceed \$30 for each day they serve. A.R.S. § 38-611(D). Certain state officers and employees are exempt from the foregoing compensation provisions. See A.R.S. § 38-611(C).

2.14 The Sunset Law. In 1978, the Legislature enacted a "Sunset Law," which provides for the automatic termination of certain administrative agencies unless specific justification can be given for continuing their existence. A.R.S. §§ 41-2951 to 41-2958. The Auditor General and committees of the Legislature conduct a "sunset review" of each administrative agency scheduled for termination. The sunset review includes (i) determining whether there is a need for the agency's program, (ii) assessing the degree to which the program objectives have been achieved, and (iii) assessing the situation or problem the agency was intended to address. A.R.S. § 41-2952(5). Unless specific legislation is enacted to continue the agency or modify its structure, the agency ceases to exist on the scheduled termination date. A.R.S. § 41-2955. The scheduled termination dates for agencies may be found in A.R.S. Title 41, chapter 27, article 2. A termination schedule is added by the Legislature each year.

2.15 Selected Criminal and Civil Liability Provisions. Public officers and employees should be familiar with certain criminal and civil liability provisions that may be relevant to their activities. See *generally* Chapters 8 (Conflict of Interest), 13 (Litigation Against State Entities or Employees), and 14 (Detection of Criminal Violations). Selected provisions follow:

<u>OFFENSE</u>	<u>CLASSIFICATION</u>
<p>1. Obstructing governmental operations.</p> <p>Knowingly obstructing, impairing or hindering the performance of a governmental function by threat of violence or physical force. A.R.S. § 13-2402; Section 14.3.5.</p>	<p>Class 1 misdemeanor</p>
<p>2. Impersonating a public servant.</p> <p>Pretending to be a public servant with intent to induce another to submit to the actor's pretended official authority or to rely on his or her pretended official acts. A.R.S. § 13-2406; Section 14.3.5.</p>	<p>Class 1 misdemeanor</p>
<p>3. Tampering with a public record.</p> <p>Knowingly, with intent to defraud or deceive, preparing, altering, using, or filing a false written instrument as a public record; destroying, removing, mutilating, or concealing public records; or refusing to deliver a public record after a proper request has been made. A.R.S. § 13-2407; Section 14.3.5.</p>	<p>Class 6 felony</p>
<p>4. Bribery.</p> <p>Conferring a benefit on a public servant, with corrupt intent, "to influence the public servant's . . . vote, opinion, judgment, exercise of discretion or other action in his official capacity;" or the solicitation or acceptance by a public servant, with corrupt intent, of any benefit with the "understanding that his vote, opinion, judgment, exercise of</p>	<p>Class 4 felony</p>

discretion or other action . . . may thereby be influenced." A.R.S. § 13-2602; Section 14.3.6.

5. Trading in public office.

Class 6 felony

Offering, conferring or agreeing to confer, with corrupt intent, a benefit upon a public servant in exchange for appointment, or nomination as a candidate to a public office, or soliciting or agreeing, with corrupt intent, to accept any benefit in exchange for appointing or nominating another to a public office. A.R.S. § 13-2603; Section 14.3.6.

6. Perjury.

Class 4 felony

Making a false sworn statement or false unsworn declaration, certificate, verification or statement subscribed to be true under penalty of perjury, believing it to be false, in regard to an issue that could have affected the course or outcome of any proceeding or transaction. A.R.S. § 13-2702; Section 14.3.7.

7. False swearing.

Class 6 felony

"Making a false sworn statement, believing it to be false." A.R.S. § 13-2703; Section 14.3.7.

8. Unsworn falsification.

Class 2 misdemeanor
(false application)

OR

Class 1 misdemeanor
(false statement in connection with official proceeding)

Knowingly making a "statement which he believes to be false, in regard to [an issue that could have affected the course or outcome of any proceeding or transaction], to a public servant in connection with an

application for any benefit, privilege, or license;" or knowingly "making any statement which he believes to be false in regard to a material issue to a public servant in connection with any official proceeding." A.R.S. § 13-2704; Section 14.3.7.

9. Tampering with a witness.

Class 6 felony

Knowingly inducing a witness or person who may be called as a witness to unlawfully withhold testimony, testify falsely, or be absent from an official proceeding to which the witness has been legally summoned. A.R.S. § 13-2804.

10. Liability for failure to collect fees.

Civil liability

Neglecting or failing to collect fees for licenses, permits, certificates, or other monies due a budget unit at the time such licenses, permits, and certificates are issued, or services rendered. A.R.S. § 35-143.

11. Liability for unauthorized obligations.

Civil liability

Incurring, ordering, or voting for "the incurrence of any obligation against the state or for any expenditure not authorized by an appropriation and an allotment." A.R.S. § 35-154.

12. Illegal withholding or expenditure of state monies.

Civil liability, plus 20% penalty

Illegally withholding, expending, or otherwise converting any state money to an unauthorized purpose. A.R.S. § 35-196.

13. Violation of fiscal provisions.

Class 1 misdemeanor

Knowingly failing or refusing to comply with any provision contained in Title 35, Chapter 1 (relating to budgeting, accounting, and control of public finances). A.R.S. § 35-197.

14. Liability for approval, allowance, or payment of unauthorized claim.

Civil liability, 20% penalty, interest and attorneys fees

Approving, auditing, allowing, or paying a claim or demand against the state that is not authorized by law. A.R.S. §§ 35-211, -212.

15. Influencing, obstructing, or impairing an audit.

Class 5 felony

"[W]ith intent to defraud or deceive, improperly influenc[ing], obstruct[ing], or impair[ing] an audit being conducted or about to be conducted . . . in relation to any contract or subcontract with the state." A.R.S. § 35-215; Section 14.3.3.

16. Violation of duties of custodian of public monies.

Class 4 felony

Misappropriating public monies for loans or personal use, or otherwise misusing public monies in the custodian's safekeeping. A.R.S. § 35-301.

17. Violation of loyalty oath.

Class 4 felony

Knowingly acting to overthrow, or advocating the overthrow by force or violence or terrorism of state or local governments or becoming or remaining a member of the

Communist party or other subversive organization (and with knowledge of its goals) during term of office. A.R.S. § 38-231(C). See also Ariz. Att'y Gen. Ops. 179-156, 76-126.

18. Usurpation of office.

Class 2 misdemeanor

Knowingly intruding "into a public office to which [one] has not been elected or appointed" or knowingly exercising "the functions of [the] office after [the] term has expired and a successor has been elected or appointed and has qualified." A.R.S. § 38-234.

19. Withholding or destroying public records or property.

Class 4 felony

Knowingly withholding, detaining, mutilating, destroying or taking away property of an office from the lawful successor or other person entitled to the property. A.R.S. § 38-363.

20. Charging excessive fees.

Class 5 felony
(Civil liability, four times fee)

Demanding and receiving a higher fee than prescribed by law or any fee not established by law. A.R.S. § 38-413; Section 14.3.8(2).

21. Failing to report amount collected.

Class 2 misdemeanor
(Removal from office)

Knowingly failing to report fees or other monies collected or to file required statement. A.R.S. § 38-414; Section 14.3.8(3).

22. Stealing, destroying, altering, or secreting public records.

Class 4 felony
(Public officers)

Stealing, or knowingly and without lawful authority destroying, mutilating, defacing, altering, falsifying, removing, or secreting all or part of any public record, or permitting any other person to do so. A.R.S. § 38-421; Section 14.3.5.

Class 6 felony
(Persons other than public officers)

23. Making or giving a false certificate.

Class 6 felony

Making or giving as true a certificate or writing containing a statement known by the maker to be false. A.R.S. § 38-423.

24. Acting as a public officer without qualifying.

Class 2 misdemeanor

"Exercis[ing] a function of a public office without taking the oath of office, or without giving the required bond." A.R.S. § 38-442.

25. Nonfeasance in public office.

Class 2 misdemeanor, unless special provision for punishment has been made

Knowingly omitting to perform any duty required of one's office by law. A.R.S. § 38-443; Section 14.3.8(1).

26. Asking or receiving illegal gratuity or reward.

Class 6 felony

Knowingly asking or receiving "any emolument, gratuity or reward, or any promise thereof . . . for doing any official act." A.R.S. § 38-444.

27. Violation of conflict of interest prohibition.

Class 5 felony, plus permanent bar from state office

Making or having an interest in contracts, or becoming a vendor or purchaser at sales, or purchasing evidences of indebtedness when prohibited by law. A.R.S. § 38-447; see Sections 8.2, 8.16.1 - 8.16.3.

28. Purchase of appointment.

Class 6 felony

"[K]nowingly giv[ing] or offer[ing] any gratuity or reward in consideration that he, or any other person, be appointed to a public office, or permitted to exercise or discharge the duties [of such office]." A.R.S. § 38-465.

29. Sale of appointment to office.

Class 6 felony, plus forfeiture of office and permanent bar from holding state office

Appointing or permitting another to exercise or discharge any duties of the public office in exchange for a gratuity or reward. A.R.S. § 38-466.

30. Unlawful employment of relatives.

Class 2 misdemeanor

Appointing or voting for the appointment of relatives related by affinity or consanguinity within the third degree to any office or position in an agency of which the appointing officer is a member. A.R.S. § 38-481(A).

31. Violating conflict of interest provisions. See Chapter 8 Sections 3.9.2, 14.3.8(5).

Class 6 felony, plus forfeiture of office or employment

Intentionally or knowingly violating conflict of interest provisions, A.R.S. §§ 38-503 to -505. A.R.S. § 38-510(A), (B).

Recklessly or negligently violating such provisions. *Id.*

Class 1 misdemeanor

32. Liability for payment to disqualified persons.

Civil liability for twice the amount paid

"[A]llow[ing], audit[ing], or pay[ing] any warrant or other certificate of indebtedness for services performed to any person not qualified as provided in A.R.S. § 38-201." A.R.S. § 38-607.

33. Retention of subordinate's salary.

Class 5 felony

Accepting, retaining, or diverting for one's own use or the use of another any part of the salary or fees allowed by law to be paid to one's deputy or other employees. A.R.S. § 38-609.

34. Violating personnel provisions.

Class 2 misdemeanor, plus suspension and five-year ban from state employment

Violating laws or rules relating to the appointment, hiring, demotion, promotion, or firing of any person with respect to employment in state service. A.R.S. § 41-775.

35. Violating lobbying provisions.

Class 1 Misdemeanor

Knowingly violating laws relating to lobbying, registration of public lobbyists, lobbying expenditure reports, and gifts to state officers and employees as provided for in A.R.S. § 41-1231 to -1239. A.R.S. § 41-1237(A). See Chapter 16 for a discussion of the lobbying provisions.

A public officer or employee convicted of a felony may be fined up to \$150,000 for each violation, A.R.S. § 13-801(A), and may be incarcerated in the state penitentiary, A.R.S. § 13-701(A). Conviction of a misdemeanor may result in a fine up to \$2,500 for each violation, A.R.S. § 13-802(A), and a jail sentence of not more than six months, A.R.S. § 13-707. The amount of any fine and the term of any imprisonment will depend on the classification of the offense, the number of violations, whether previous convictions exist, and other factors.

In addition to the above-mentioned criminal provisions, public officers and employees should carefully examine the laws and rules governing the operation of their agency to determine what conduct may be subject to civil or criminal liability.