THE STATE LOYALTY OATH: HISTORICAL PERSPECTIVE, MODERN REQUIREMENT

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GOALS FOR TODAY’S SESSION:

- Remove the confusion that commonly surrounds the issue of the “loyalty oath”
  - by putting this law into historical context in our State, and
  - by reviewing the case law interpreting it.
- Answer commonly-asked questions about the loyalty oath.
- Discuss best practices for CSU campuses regarding the loyalty oath.
CALIFORNIA WAS ADMITTED TO THE UNITED STATES ON SEPTEMBER 9, 1850. PRIOR TO STATEHOOD, IN 1849, CALIFORNIA ADOPTED A STATE CONSTITUTION WHICH INCLUDED THE FOLLOWING LOYALTY OATH:

"I do solemnly swear (or affirm, as the case may be,) that I will support the Constitution of the United States, and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of ____ ________, according to the best of my ability."
In 1879 the original 1849 constitution was superseded by the current State Constitution. The loyalty oath remained in the State Constitution, unchanged for almost eighty years, until 1952.
On October 3, 1950, our State Legislature enacted emergency legislation, the Levering Act, effective immediately. (California Government Code section 3100-3109.) The Levering Act created a new additional oath that all public employees were required to sign.
The Levering Act made all public employees “civil defense workers.”

As “civil defense workers,” all public employees in the State were required by the Act to take the new additional oath within 30 days of the enactment of the Act.

Failure of an employee to take the oath meant that no compensation could be paid to the employee.

It was the duty of the person certifying the public payroll to ascertain and certify that the oath had been taken.
THE OATH REQUIRED BY THE LEVERING ACT STATED AS FOLLOWS:

‘I, _ _, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

‘And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

'(If no affiliations, write in the words ‘No Exceptions’) and that during such time as I am a member or employee of the _ _ _ (name of public agency) I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means.’ California Government Code section 3103.
An associate professor at San Francisco State College refused to take the new oath (he had taken the prior oath when hired in 1946). He was not paid. He sued. The California Supreme Court found in favor of the university. (See, Pockman v. Leonard, 39 Cal.2d 676, 679 (1952).)
• The Court ruled that “there can be no question that an implied condition of the [employment] agreement is that he will be loyal to the government and that he will not advocate its overthrow by force.” (Pockman, supra, 39 Cal.2d at 687).

• The Court found that “under its police power the state may, as a means of implementing the implied condition [of loyalty], require its employees to make a declaration of loyalty and furnish relevant information.” (Id.).
On November 4, 1952 the State Constitution was amended to make the oath it requires substantially identical to the one passed as part of the Levering Act on October 3, 1950. It also added the following definition of “public officer or employee”:

“Public officer and employee” includes every officer and employee of the State, including the University of California, every county, city, city and county, district, and authority, including any department, division, bureau, board, commission, agency, or instrumentality of any of the foregoing.” California Constitution, Article XX, Section 3.
The law changed again fifteen years later.

The Supreme Court of California reversed its previous decision in Pockman and specifically found that “the oath required by the second paragraph of section 3 of Article XX of the California Constitution is invalid because it bars persons from public employment for a type of association that may not be proscribed consistently with First Amendment rights.” (Vogel v. County of Los Angeles, 68 Cal.2d 18, 22 (1967)).
The overturning of Pockman by Vogel caused some faculty who had been dismissed for refusing to take the oath required by the Levering Act to demand reinstatement and reimbursement of their lost salary and pension contributions. (See, e.g., Monroe v. Trustees of the California State University, 6 Cal.3d 399 (1972)).
Thus, today, after Vogel, the remaining part of the oath continues to be required of CSU employees today:

All public officers and employees shall before they enter upon the duties of their respective offices take and subscribe to the following oath or affirmation:

I, ________, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter. California Constitution, Article XX, Section 3

This is the “loyalty oath” that received so much press attention this last year.
California Government Code sections 3100-3101 have been amended from the original version passed in 1950 as well, and apply to CSU employees. They now refer to public employees not as “civil defense workers” but “disaster service workers.”

California Government Code Section 3100: “all public employees are hereby declared to be disaster service workers subject to such disaster service activities as may be assigned to them by their supervisors or by law.”

California Government Code section 3101: “The term ‘disaster service worker’ includes all persons employed by the state or any county, city, city and county, state agency or public district, excluding aliens legally employed.”
• California Government Code sections 3102-3102: “All disaster service workers shall, before they enter upon the duties of their employment, take and subscribe to the oath or affirmation set forth in Section 3 of Article XX of the Constitution of California.”

• California Government Code section 3108: “Every person who, while taking and subscribing to the oath or affirmation required by this chapter, states as true any material matter which he or she knows to be false, is guilty of perjury, and is punishable by imprisonment in the state prison for two, three or four years.”
FREQUENTLY ASKED QUESTIONS
Isn’t Making a Prospective Employee Take a Loyalty Oath Unconstitutional?

No. State and federal cases law has held that loyalty oaths such as the one set forth in the first paragraph of Section 3, Article XX of the California Constitution are not unconstitutional (Chilton v. Contra Costa Community College District, 55 Cal.App.3d 544, 127 Cal.Rptr. 659 (1976); Cole v. Richardson, 405 U.S. 676, 92 S.Ct. 1332 (1972)). The loyalty oath in the first paragraph is constitutional unlike the second paragraph which was found unconstitutional in Vogel.
No. The terms “support and defend” as used in the State of California oath have been interpreted by the United States Supreme Court not to require the person taking the oath to bear arms in combatant military duty (Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826 (1946)). Thus, a pacifist may take the oath.
WHY DOES THE OATH REQUIREMENT ONLY APPLY TO UNITED STATES CITIZENS?

Government Code section 3101 states as follows:

The term “public employees” includes all persons employed by the state or any county, city, city and county, state agency or public district, excluding aliens legally employed. (Emphasis added).

Thus, a resident alien who is also a public employee may refuse to sign the oath and still retain her position. (See, e.g., Miller v. Trinity County Board of Supervisors, 175 Cal.Rptr. 133 (1981) (citizen of Canada may refuse to take the oath and remain in public employment)).
No. One California case held that no alterations, interlineations or strike-outs can be made to the oath by the prospective employee. (Smith v. County Engineer of San Diego County, 266 Cal.App.2d 645 (1968)). In Smith, the court ruled that the public employer “properly refused to accept the oath encumbered and compromised by appellant’s injection of an unauthorized potential qualification of its meaning and clarity.” (266 Cal.App.2d at 656). The California Attorney General advised the California State University in an advisory letter issued in March 2008 that the oath may not be altered or interlineated.
The Smith decision from 1968 involved an objection to the oath on religious grounds. Smith requested to alter the oath, or alternatively, to supplement it, in order to adhere to the requirements of his church and his personal religious beliefs. The Smith court said “we believe it to be neither reasonable, nor good policy, in the case of public employment, to put upon civil government the burden of measuring religious beliefs against the interest and requirements of that institution. 266 Cal.App.2d at 656.
Since Smith was decided in 1968, however, the law regarding accommodation of sincerely held religious beliefs has evolved. Today, where a prospective employee objects to signing the loyalty oath on grounds of religious objections, the public employer needs to act consistently with federal and state laws prohibiting discrimination in hiring.

Title VII of the Civil Rights Act of 1964 “makes it an unlawful employment practice for an employer to fail to reasonably accommodate the religious practices of a prospective employee, unless the employer demonstrates that accommodation would result in undue hardship in the conduct of its business.” (29 C.F.R. Section 1605.2).
The answers to these questions are necessarily fact-specific, depending on the nature of the objection and what accommodation the person is seeking. The Equal Employment Opportunity Commission, which enforces Title VII, opined in a January 2004 guidance letter that a demand that a public employer forgo entirely having an employee sign the loyalty oath is unreasonable and an “undue hardship.” The employer public agency must “examine on a case-by-case basis any religious objections to the loyalty oath.”
Discuss the loyalty oath requirement with staff involved in hiring process. Ensure that CSU staff understand that signing the loyalty oath is required for all CSU employees.

Consider how materials can be made available ahead of time so that prospective employees know prior to reporting for work on their first day that signing the loyalty oath is a requirement of working for the CSU.

Where a prospective employee objects to the oath, listen carefully to the nature of the objection and discuss it with the employee.
If the prospective employee’s objection is based on conflict with sincerely held religious beliefs, be aware of the protections that are afforded to religious beliefs.

When dealing with an objection based on religious beliefs, ask the prospective employee if she is requesting a specific accommodation. If that accommodation creates an “undue hardship,” engage in the interactive process with the prospective employee to review other possible accommodations so that you may determine if a reasonable accommodation can be made.

Consult with your University Counsel.
Questions?