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ARTICLES

The Ethics of Political Participation for Federal Employees
By Siri Thanasombat

Although election season is behind us, the political campaigns have made some lawyers and law school students more committed than before to engaging in the political process. The same impact can be seen on government employees.

When it comes to political activities, however, government employees are statutorily limited. What are federal government employees allowed to do, and more importantly, what are they prohibited from doing? Below are some tips for federal government employees who want to get more involved in the political process.

The Hatch Act

The Hatch Act, a federal law passed in 1939, limits certain political activities of federal employees, as well as some states, D.C., and local government employees who work in connection with federally funded programs. The purpose of the Act is to maintain a federal workforce that is free from partisan political influence or coercion. Specifically, the Hatch Act works to ensure that federal programs are administered in a nonpartisan fashion, to protect federal employees from political coercion in the workplace, and to ensure that federal employees are advanced based on merit and not based on political affiliation.

The Hatch Act is enforced by the U.S. Office of Special Counsel (OSC). The OSC is an independent federal investigative and prosecutorial agency. The Act, its implementing regulations, and guidance issued by the OSC can be viewed at the OSC’s website at www.osc.gov.

What Can a Federal Employee Do?

A Covered Employee MAY:

- Be a candidate in a nonpartisan election.
- Participate in nonpartisan campaigns.
- Contribute money to political campaigns, political parties, or partisan political groups.
- Attend political fundraising functions.
- Attend political rallies and meetings.
- Join political clubs or parties.
- Campaign for or against referendum questions, constitutional amendments, or municipal ordinances.
- Sign nominating petitions.
- Circulate nominating petitions.*
- Campaign for or against candidates in partisan elections.*

- Make campaign speeches for candidates in partisan elections.*
- Distribute campaign literature in partisan elections.*
- Volunteer to work on a partisan political campaign.*
- Express opinions about candidates and issues. However, if the expression is political activity (i.e., activity directed at the success or failure of a political party, candidate for partisan political office, or partisan political group), then the expression is not permitted while the employee is on duty, in any federal room or building, while wearing a uniform or official insignia, or using any federally owned or leased vehicle.

* Further restricted employees, as described herein, may not engage in these activities.

**What Can't a Federal Employee Do?**

A Covered Employee MAY NOT:

- Be a candidate for nomination or election to public office in a partisan election.
- Use his or her official authority or influence to interfere with or affect the result of an election. For example:
  - Use his or her official title or position while engaged in political activity; or
  - Invite subordinate employees to political events or otherwise suggest to subordinates that they attend political events or undertake any partisan political activity.
- Knowingly solicit or discourage the participation in any political activity of anyone who has business with their employing office.
- Solicit, accept, or receive a donation or contribution for a partisan political party, candidate for partisan political office, or partisan political group. For example:
  - Host a political fundraiser;
  - Invite others to a political fundraiser; or
  - Sell tickets to a political fundraiser.
- Use any e-mail account or social media to distribute, send, or forward content that solicits political contributions.
- Engage in political activity while the employee is on duty, in any federal room or building, while wearing a uniform or official insignia, or using any federally owned or leased vehicle. For example:
  - Distribute campaign materials;
  - Display campaign materials or items;
  - Perform campaign related chores;
  - Wear or display partisan political buttons, t-shirts, signs, or other items;
  - Make political contributions to a partisan political party, candidate for partisan political office, or partisan political group;
  - Post a comment to a blog or a social media site that advocates for or against a partisan political party, candidate for partisan political office, or partisan political group; or
  - Use any e-mail account or social media to distribute, send, or forward content that advocates for or against a partisan political party, candidate for partisan political office, or partisan political group.²

A couple of clarifications are helpful in discerning these rules, which are as follows:

- “Political activity” refers to any activity directed at the success or failure of a political party or partisan political group, or candidate in a partisan race.
- Federal employees are “on duty” when they are in a pay status, other than paid leave, or are representing the government in an official capacity.
- Federal employees are considered “on duty” during telecommuting hours.

Sample Scenarios

To illustrate some of the rules of the Hatch Act, below are some scenarios.

**Scenario 1:** Judy, a federal public defender, wants to write a letter to the editor or post a comment on a blog about her support for a partisan political candidate. Will she violate the Hatch Act by doing so?

**Answer:** Generally, federal employees are permitted to express their opinions privately and publicly on political subjects and participate in political activities to the extent not expressly prohibited by the Hatch Act. The Act expressly prohibits federal employees from engaging in political activity while on duty, in a federal building, or in a government vehicle. In addition, federal employees may not use their official authority or influence to interfere with the result of an election or solicit, accept, or receive political contributions at any time.

Accordingly, Judy may write a letter to the editor or post a comment on a blog endorsing a candidate, provided she does not do so while on duty or in a federal building or vehicle. Furthermore, she must endorse the candidate in her personal capacity and may not identify her federal position or office. Finally, the endorsement may not contain a request for political contributions or information about where voters may contribute, even if Judy makes the endorsement anonymously.

**Scenario 2:** Pedro, a federal government trial attorney, receives a partisan political email on his work computer while at work. The email is about a political event that is planned for the weekend. Pedro forwards the email to his personal email account. He also believes some of his co-workers would be interested in attending. Has the Hatch Act been violated? Can he forward the email to his work colleagues?

**Answer:** Social media and email—and the ease of accessing those accounts at work, either on computers or smartphones—have made it easier for federal employees to violate the Hatch Act. Yet, there are many activities employees can do on social media and email that do not violate the law.

In general, all federal employees may use social media and email and comply with the Hatch Act if they remember the following guidelines:

1. Do not engage in political activity while on duty or in the workplace.
2. Do not engage in political activity in an official capacity at any time.
3. Do not solicit or receive political contributions at any time.
Here, Pedro’s receiving a partisan political email while at work, whether to a personal or government email account, without more, does not violate the Hatch Act. Also, Pedro may send that email to his personal email account while at work. Simply forwarding such an email to one’s personal email account, without more, does not violate the Hatch Act. However, Pedro must not send or forward partisan political emails to others while on duty or in the workplace.

Scenario 3: Malia, a federal prosecutor, has listed her official title or position on Facebook and completed the “political views” field. She also is active on Facebook and Twitter through her personal accounts and likes to forward emails about current events to others. Did she violate the Hatch Act by identifying her political affiliation on Facebook? Can she engage in political activity on her social media accounts or on email?

Answer: No, simply identifying one’s political party affiliation on a social media profile, which also contains one’s official title or position, without more, is not an improper use of official authority.

Also, the Hatch Act does not prohibit federal employees from engaging in non-partisan political activities. Accordingly, employees may express their opinions about current events and matters of public interest at work so long as their actions are not considered political activity. For example, Malia is free to express her views and take action as an individual citizen on such questions as referendum matters, changes in municipal ordinances, constitutional amendments, pending legislation or other matters of public interest, like issues involving highways, schools, housing, and taxes. Of course, she should be mindful of her agencies’ computer use policies prior to sending or forwarding any non-work related emails.

Furthermore, federal employees may express their opinions about a partisan group or candidate in a partisan race (e.g., post, “like,” “share,” “tweet,” “retweet”), but there are a few limitations. Specifically, the Hatch Act prohibits employees from:

- engaging in any political activity via Facebook or Twitter while on duty or in the workplace;
- referring to their official titles or positions while engaged in political activity at any time; and
- suggesting or asking anyone to make political contributions at any time.

Thus, even when Malia is off duty and away from the workplace, she may not fundraise for a political party, candidate for partisan political office, or partisan political group. Therefore, Malia should not provide links to the political contribution page of any partisan group or candidate in a partisan race nor “like,” “share,” or “retweet” a solicitation from one of those entities, including an invitation to a political fundraising event, even when she is at home and off duty. Malia, however, may accept an invitation to a political fundraising event from such entities via Facebook or Twitter.³

Hopefully, these guidelines will assist those interested in getting more politically involved to be able to jump in with both feet.

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### State Bar of California Adopts Ethics Rule Banning Attorney-Client Sexual Relationships

**By Matthew Biggers**

On March 10, 2017, the State Bar of California approved an ethics rule banning attorneys from engaging in sexual relations with a client. California’s rule is substantially similar to ABA Model Rule of Professional Conduct 1.8(j).

#### Model Rule 1.8(j)

A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

#### Rule approved by State Bar of California

A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

California’s previous rule governing attorney-client sexual relationships prohibited relationships in which the attorney coerced the client into sex or demanded sex as a quid pro quo for legal representation. In adopting a blanket ban on sexual relationships between attorneys and their clients, California joins a majority of states that have done so. As of May 2015, 24 states had adopted the Model Rule or its equivalent, four states applied the Model Rule only to clients, and 3 states required an additional violation of their respective rules of professional conduct before the conduct was actionable.

Opponents claim a blanket ban is an unconstitutional invasion of privacy, the existing rules are effective, and that attorneys should not be disciplined for consensual relationships where there is no harm. Proponents of the ban claim that the existing rule did not work and that the ban protects vulnerable clients from exploitation, coercion, and undue influence, treats lawyers like most other licensed professionals, and establishes a clear bright-line rule.

As with any rule of professional conduct, the effectiveness of a blanket ban on sexual relationships between attorneys and clients will depend on enforcement, but California has joined the growing trend toward protecting clients from situations which have even the potential of developing into a coercive or exploitative relationship.

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4 Cal. R. Prof. Conduct 3-120.
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