

The Hatch Act : It's not just for federal employees anymore

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The Hatch Act of 1939¹ (“Hatch Act”) was originally enacted to prevent federal employees from participating in partisan political activity, thereby curtailing corruption in the political process. In 1940, the law was expanded to cover state and local employees whose salaries are paid, in part, by federal funds or whose duties are connected to federally funded activities. In the 1940s and 1970s, the Hatch Act was appealed to the United States Supreme Court on the grounds that it violated free speech but both times, the high court upheld the constitutionality of the prohibitions. In 1993, the law was amended to clarify that federal, state and local employees maintain certain rights to engage in personal, off-duty, voluntary partisan activity, speech and expression. Despite the clarification that off-duty speech is protected, the statutory restrictions of the Hatch Act can have serious implications for federal, state and local government employees as well as those individuals who interact with these covered employees. Because of this, it is useful for all government affairs attorneys to have a basic familiarity with the Hatch Act and its restrictions.

The prohibitions contained in the Hatch Act can be summarized as follows: covered employees may not: (1) be candidates for public office in a partisan election; (2) use official authority or influence to interfere with or affect the results of an election; or (3) directly or indirectly coerce contributions from subordinates in support of a political candidate.² Alleged violations of the Hatch Act are investigated by the United States Office of Special Counsel. If, following an investigation, there is evidence of a violation, a written complaint for disciplinary action may be filed with the U.S. Merit Systems Protection Board (“MSPB”) where a trial-like proceeding will be held. After consideration of the record, the MSPB will determine if discipline is warranted. Importantly, if discipline is warranted, the penalty may be forfeiture of employment.

Partisan Elections

The Hatch Act prohibits individuals being paid with federal funds from running for office in a partisan race. Unfortunately, the determination of whether or not a race is “partisan” is not determined by simply reviewing whether any candidates seek or receive a party endorsement. Instead, the standard is whether there is any evidence that partisan politics played a role in the election. Importantly, a candidate may intend to run for a non-partisan position only to later find out that an opponent’s behavior was enough to characterize the race as partisan for purposes of applying the Hatch Act. Significantly, certain government employees are exempt from the Hatch Act prohibition against running for partisan office. Specifically, there is an exception for individuals already elected to public office.³

¹ 5 U.S.C. §1501 – 1508.

² 5 U.S.C. § 1502(a).

³ See 5 U.S.C. § 1502(c). Other exceptions include the governor of any state and the mayor of any city.

Use of Official Authority

The Hatch Act also prohibits covered employees from using their official authority to influence an election.⁴ A recent investigation by the U.S. Office of Special Counsel involving the Lee County, Florida Sheriff concluded that Sheriff Mike Scott likely violated the Hatch Act when he spoke at an October 2008 event honoring Senator John McCain and Alaska Governor Sarah Palin because he appeared in his uniform and was introduced as “Sheriff Mike Scott.” The investigators concluded that by appearing in uniform and using his official title, Sheriff Scott was “trading on the influence of [his] position as sheriff to encourage members of the public to support Senator John McCain and Governor Palin in the 2008 Presidential election” and therefore, violating the Hatch Act.⁵ In another example, a complaint was filed in August 2009 against an administrative officer with the Department of Veteran Affairs after she disseminated over thirty (30) e-mail messages from her work e-mail account related to the success or failure of potential presidential candidates.⁶

Soliciting Contributions or Coercing Subordinates

In addition to prohibiting participation in partisan elections and using official authority to influence elections, the Hatch Act prohibits covered employees from directly or indirectly coercing contributions from subordinates in support of a political candidate. In 1994, a Securities and Exchange Commission attorney in Denver found himself at the center of a Hatch Act investigation when he agreed to assist the local Hispanic Bar Association with a fundraiser for a district attorney candidate in Southern Colorado. The SEC attorney sent fundraiser invitations to four friends, none of whom were federal employees. Despite the fact that the invitees were not subordinates, or even federal employees, the SEC attorney was suspended for sixty (60) days.

Violations

In considering potential violations, the following factors will be considered: (a) the nature of the offense and the extent of the employee’s participation; (b) the employee’s motive and intent; (c) whether the employee had received advice of counsel regarding the activities at issue; (d) the employee’s past employment record; and (e) the political coloring of the employee’s activity.⁷

Practical Guidelines

All individuals subject to the Hatch Act restrictions should be advised to draw a bright line between their acts as a government employee and their acts as an individual. In addition, government affairs attorneys in the private sector should be aware of the Hatch Act restrictions so that they do not inadvertently create a Hatch Act issue for a government employee. While covered individuals are free to endorse or support candidates for office, such endorsement should always be provided in the individual’s own name, without the use of any official title. In addition, government e-mail and cell phone accounts should never be used to send or receive

⁴ 5 U.S.C. § 1502(a)(1).

⁵ See report of U.S. Office of Special Counsel issued June 15, 2009.

⁶ See Press Release PR09 12 posted at <http://www.osc.gov/press.htm> (last visited October 7, 2009).

⁷ Special Counsel SCV Bernard J. Brondyke and Muskegon County Department of Emergency Services, June 12, 1989 (citing Special Counsel V. Purnell, 37 M.S.P.R. 184, 200 (1988)).

messages promoting the election or defeat of a particular candidate or for fundraising purposes. Finally, employees who are covered by the Hatch Act should be extremely careful when raising funds for political candidates so that there is no appearance of coercion.

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