

# An Election Year Guide To The Hatch Act

By Diana J. Veilleux



Another election season is upon us. From volunteering on campaigns to making financial contributions to candidates, or running for office themselves, federal

employees play many roles during election season. As a result, it is important for all federal employees to be aware of the guidelines and restrictions placed on their political activity by the Hatch Act, 5 U.S.C. §7323 et seq.

## What is the Hatch Act?

Enacted in 1939, the Hatch Act, 5 U.S.C. §7321 et seq. (enacting regulations at 5 CFR §733), restricts the political activity of executive branch employees of the federal government, District of Columbia, and some state and local employees who work with federally funded programs. The Hatch Act arose out of an era of electoral reform and sought to eliminate the last vestiges of political patronage. In 1993, the Hatch Act was amended to allow most federal employees to actively participate in partisan campaigns for political office. Despite this extension of freedom to participate in political campaigns, a number of federal agencies remain under the more stringent guidelines of the original 1939 statute.

## Who is Covered by the Hatch Act?

All civilian employees in the Executive Branch except the President and Vice

President are covered by the Hatch Act.<sup>1</sup> Employees of the U.S. Postal Service and the District of Columbia government are also covered by the Act, including political appointees. However, under special provisions, employees appointed by the President with the advice and consent of the Senate, and employees paid from an appropriation for the Executive Office of the President can participate in various forms of political activity, depending upon the class of appointee.<sup>2</sup>

For example, political appointees can engage in political activity, including while on duty or in a government building or vehicle, so long as any costs associated with the political activity are not paid for by money from the Treasury of the United States.<sup>3</sup>

## In What Kind of Political Activities Can Federal Employees Engage?

As a result of the amendments made to the Hatch Act in 1993, most federal employees can engage in some types of political activities. For example, most employees are free to work, while off duty, on the partisan campaigns of the candidates of their choice.

Listed below are examples of political activities that federal employees who are not subject to additional restrictions (discussed below) can participate in:

- be candidates for public office in nonpartisan elections
- register and vote as they choose
- assist in voter registration drives
- express opinions about candidates and issues

- contribute money to political organizations
- attend political fundraising functions
- attend and be active at political rallies and meetings
- join and be an active member of a political party or club
- sign nominating petitions
- campaign for or against referendum questions, constitutional amendments, municipal ordinances
- campaign for or against candidates in partisan elections
- make campaign speeches for candidates in partisan elections
- distribute campaign literature in partisan elections
- hold office in political clubs or parties

These federal employees may not:

- use official authority or influence to interfere with an election
- solicit or discourage political activity of anyone with business before their agency
- solicit or receive political contributions (may be done in certain limited situations by federal labor or other employee organizations)
- be candidates for public office in partisan elections
- engage in political activity while:
  - o on duty
  - o in a government office
  - o wearing an official uniform
  - o using a government vehicle
- wear partisan political buttons on duty

<sup>1</sup> 5 U.S.C. §7322.

<sup>2</sup> 5 U.S.C. §7324(b).

<sup>3</sup> *Ibid.*

## Expanded Rights for Employees Residing in Designated Communities

The Hatch Act also provides greater leeway to employees who reside in certain communities in Maryland and Virginia near Washington, D.C., and in a few other designated areas around the country.<sup>4</sup> In communities identified by the U.S. Office of Personnel Management (OPM), federal employee residents (including those subject to additional restrictions listed above) may run as independent candidates in local elections where they reside.<sup>5</sup> The communities identified by OPM normally have large numbers of voters employed by the federal government. This exemption recognizes that in such communities the interest of the community and the federal employee may allow such direct participation in local government. Of note, though areas in and around Washington, D.C. are covered by this exemption, residents of D.C. itself are not.

## Which Agencies are Covered by the 1939 Hatch Act and are Subject to Additional Restrictions?

As noted above, while the 1993 amendments to the Hatch Act granted expanded rights to participate in political campaigns, federal employees in some agencies are prohibited from engaging in any partisan political campaigns or partisan political activities.

- Administrative Law Judges (positions described at 5 U.S.C. §5372)
- Central Imagery Office
- Central Intelligence Agency
- Contract Appeals Boards (positions described at 5 U.S.C. §5372a)
- Criminal Division (Department of Justice)
- Defense Intelligence Agency
- Federal Bureau of Investigation
- Federal Elections Commission
- Merit Systems Protection Board
- National Security Agency

- National Security Council
- Office of Criminal Investigation (Internal Revenue Service)
- Office of Investigative Programs (Customs and Border Protection)
- Office of Law Enforcement (Bureau of Alcohol, Tobacco and Firearms)
- Office of Special Counsel (OSC)
- Secret Service
- Senior Executive Service (career positions described at 5 U.S.C. §3132(a)(4))

These federal employees are prohibited from engaging in any of the following activities:

- be candidates for public office in partisan elections
- campaign for or against a candidate or slate of candidates in partisan elections
- make campaign speeches
- collect contributions or sell tickets to political fund raising functions
- distribute campaign material in partisan elections
- organize or manage political rallies or meetings
- hold office in political clubs or parties
- circulate nominating petitions
- work to register voters for one party only
- wear political buttons at work

Despite these restrictions, there are many ways these employees can take part in the electoral process. The primary intent of these restrictions is to minimize the prominence of identified agency employees in partisan campaigns by prohibiting activities such as making campaign speeches or organizing political rallies or meetings.

Employees covered by the 1939 Hatch Act but subject to these greater restrictions may:

- register and vote as they choose
- assist in voter registration drives
- express opinions about candidates and issues
- participate in campaigns where none of the candidates represent a political party

- contribute money to political organizations or attend political fund-raising functions
- attend political rallies and meetings
- join political clubs or parties
- sign nominating petitions
- campaign for or against referendum questions, constitutional amendments, municipal ordinances

## How is the Hatch Act Enforced?

The Office of Special Counsel is responsible for investigating reports or complaints of Hatch Act violations committed by federal employees. If an OSC investigation reveals evidence of a violation of the Hatch Act and OSC determines that the violation warrants prosecution, a written complaint for disciplinary action is filed with the Merit Systems Protection Board (MSPB). A copy of the complaint is served on the employee and a full opportunity is provided to contest the charges, including a right to answer the complaint, to be represented, to a hearing and to a written decision.

The penalties for violation of the Hatch Act can be severe. The penalty for a Hatch Act violation is automatic removal from federal service for a single offense. The only exception is when the three member panel of the MSPB unanimously rules to allow a federal agency to suspend, rather than remove a federal employee. The minimum suspension in this circumstance is for 30 days. There is no applicable statute of limitations for Hatch Act violations.

## The Hatch Act and the Internet

The now ubiquitous use of the Internet and e-mail in particular as a form of communication between federal employees has created some unique challenges in interpreting and enforcing the Hatch Act. In sum, e-mail has facilitated the dissemination of political material and commentary in offices throughout the federal government.

In three recent cases before the MSPB,

<sup>4</sup> 5 U.S.C. §7325.

<sup>5</sup> *Ibid.*

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the Board determined that federal employees had engaged in political activity on duty in violation of the Hatch Act through the use of e-mail and other Internet based communication:

- A civilian employee with the Naval Inventory Control Point sent an e-mail to over 300 agency employees and other individuals directing recipients to take specific action in support of a partisan candidate for a local legislature. The employee received a 60 day suspension.
- An employee of the Small Business Administration made several telephone calls and used his government computer to draft documents and send over 100 e-mails directed towards the success of the Green Party while on duty. The MSPB upheld the removal of the employee.
- An employee of the Environmental Protection Agency forwarded a letter from the Democratic National Committee (DNC) that was signed by the DNC Chairman to 31 fellow employees by e-mail using his government computer while on duty. The e-mail encouraged readers to work to elect John Kerry President. The full MSPB Board vacated the initial decision that no Hatch Act violation occurred and remanded the case for a determination as to the appropriate penalty.

## E-mail and the Water Cooler

In 2002, the previous Special Counsel issued a Hatch Act Advisory concluding that the "Hatch Act does not prohibit 'water cooler' type discussions and exchanges of opinion concerning the events of the day (including political campaigns)." Further the advisory stated that because employees often use e-mail instead of face-to-face communication, this fact alone should not transform such a protected exchange of opinion into a political activity banned by the Hatch Act. Many employees had interpreted this advisory to mean that they could use e-mail to exchange messages that comment on or parody political candidates or parties which may in turn suggest how

one should vote. It is important to remember, however, that such messages can take a life of their own because they often are forwarded by the original recipients to a much wider audience beyond what may have been expected by the sender.

The current Special Counsel rescinded the "water cooler" advisory in March 2007, stating "no political activity means no political activity, regardless of the specific technology used." Despite this reversal in policy which was intended to provide a "clear message to the federal community," the line between "water cooler" type conversation and political activity that is prohibited by the Act remains unclear.

During an October 2007 Hatch Act hearing before a Senate federal workforce subcommittee, OSC officials testified that they make determinations of Hatch Act violations on a case by case basis, reviewing the content of the e-mail message, who sent the e-mail and how many people received the e-mail from a government computer.

Importantly, the MSPB has not decided whether an employee's on-duty expressions of his or her opinion on political subjects and candidates constitute "political activity" prohibited by the Hatch Act. Federal employee unions have advocated that Congress should codify the "water cooler" exception into the statute.

As a general rule, review all e-mails with political content of any kind before you send them to friends and colleagues in the federal workforce, and be aware of exactly who you are sending it to, and to whom they might eventually forward your e-mail. If you are unsure about whether the political content of an e-mail you are sending violates the Hatch Act, it is better to err on the side of caution and not send it. This also applies to using your personal e-mail account from a government computer because you are still sending the e-mail from your government computer while on duty.

As Election Day nears, politics will become an increasing part of conversations with colleagues and more

people will actively participate in the political process. Though the Hatch Act provides some latitude for most employees to participate in partisan political campaigns, you should treat prohibited forms of political activity in connection with your federal position as the proverbial "hot potato."

## Where Can Federal Employees Learn More About the Hatch Act?

Though these lists provide a good thumbnail sketch of the types of activities that are permissible and those that are prohibited by the Hatch Act, there remain a number of grey areas. If an employee is uncertain about whether an activity violates the act, they can contact the Office of Special Counsel to obtain an advisory opinion either by phone at 800-85-HATCH or by sending an e-mail to [hatchact@osc.gov](mailto:hatchact@osc.gov). OSC attorneys are available to brief groups of federal employees on the Hatch Act and the provisions regulating political activity. ■

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