

The Hatch Act Explained

By David Tobenkin



Thanks to social media and interactive websites that allow commenting, it's easier than ever to share your political perspectives and opinions. But federal employees need to be wary of doing so: There are some things you just can't do while "on the clock."

The Hatch Act, the federal law that seeks to limit partisan political speech and activities by federal employees, has often been described as nitpicky, confusing and obscure. While still nitpicky and confusing, this year, the Act may have become a good deal less obscure.

In June, the Office of Special Counsel (OSC), which enforces the Act, recommended to President Trump that White House advisor Kellyanne Conway be fired for what the OSC described as repeated and willful violations of the Act. President Trump refused to terminate Conway, and she remains in her position.

Then, in August, the American Federation of Government Employees (AFGE), the largest federal union, sued OSC in federal district court based on OSC's November 28, 2018, written guidance that sought to constrain federal employees from using certain terms—such as “resistance” and “#resist”—during duty hours or otherwise in connection with their employment because OSC deemed them to be related to Trump's 2020 reelection campaign. At press time, the court was expected to entertain oral arguments in October.



Conway enjoyed a reprieve that nearly all other federal employees will not receive if they are found to have violated the Hatch Act. The AFGE lawsuit, even if successful, will not change the requirement that federal employees comply with the law as the 2020 federal elections approach.

In the current politically charged environment, some fear that federal employees could be at a greater risk for enforcement actions based on the Act. **“There is a big danger that federal employees who ‘resist’ President Trump may be subjected to severe discipline in Trump’s ongoing efforts to drain the federal government ‘swamp’ of those employees who resist or oppose him,”** says John P. Mahoney of The Law Firm of John P. Mahoney, Esq., Attorneys at Law, a Washington, DC-based law firm that has defended numerous employees accused of Hatch Act violations.

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Recent enforcement actions by the OSC demonstrate that the law remains very much in effect for federal employees:

- In June 2018, OSC filed a complaint with the Merit Systems Protection Board (MSPB), which adjudicates OSC Hatch Act complaints, requesting disciplinary action against Carmene “Zsa Zsa” DePaolo, an immigration judge employed by the Department of Justice. In the complaint, OSC alleges that DePaolo violated the Act in March 2016 when she promoted then-presidential candidate Hillary Clinton’s plan for immigration

reform during a deportation hearing over which DePaolo was presiding.

- In August 2018, an OSC enforcement action resulted in an Immigration and Customs Enforcement (ICE) employee reaching a settlement under which she agreed to resign and not return to federal service for five years. She committed numerous Act violations, including posting more than 100 social media messages in support of candidate Clinton while on duty or in the workplace.
- Also in August 2018, an OSC enforcement action resulted in a United States Postal Service (USPS) employee being fired for running as a candidate in two 2017 partisan elections.

In fiscal year 2018, OSC responded to 1,394 requests for advice, issued 49 warning letters, and obtained 10 corrective actions and eight disciplinary actions for local, state and federal employees, either by negotiation or through MSPB orders, according to OSC’s Performance and Accountability Report for Fiscal Year 2018.

POLITICAL ACTIVITY THAT MAY BE RESTRICTED

There are two levels of scrutiny and limitations applied by the statute: a general rule for most federal employees, and more restrictive provisions that limit the activities of employees at certain agencies—and offices within agencies—clustered in enforcement, intelligence and elections, as well as certain federal worker categories, such as Senior Executive Service (SES) members and administrative law judges (see 5 U.S.C. § 7323(b)). Unless otherwise indicated, the following advice and analysis refer to the less restricted category of employees.

RUNNING FOR OFFICE

Federal employees who become candidates in partisan political elections are generally in violation of the Act, with a few narrow exceptions in designated localities. Federal employees who live in the District of Columbia, for example, can run for partisan political office in local elections as independents. Federal employees also may be candidates for public office in nonpartisan elections and be appointed, not elected, to partisan political offices. State and local government employees face fewer restrictions as partisan political candidates.



“GIVING MONEY OR SUPPORT TO PARTISAN POLITICAL RACES IS NOT A VIOLATION IF **DONE ON ONE’S OWN TIME, OUTSIDE THE WORKPLACE AND WITHOUT USE OF GOVERNMENT RESOURCES.”**

RAISING MONEY FOR PARTISAN POLITICAL RACES

Raising money for partisan political races, encouraging others to give to partisan political candidates or parties, or inviting others to partisan political fundraisers is another area that generally constitutes an absolute violation. This includes liking or retweeting solicitations or fundraiser invitations from others. Federal employees may not solicit, accept or receive a donation or contribution for a partisan political party, candidate for partisan political office or partisan political group, according to 5 U.S.C. § 7323(a)(2). This rule applies on or off duty, at home or at the office.

Giving money or support to partisan political races is not a violation if done on one’s own time, outside the workplace and without use of government resources. There is a very narrow exception that applies to some forms of solicitations for partisan political contributions between members of federal labor unions. In the statute the “political activity” examined for compliance is defined very broadly. This includes activity directed toward the success or failure of a political party, candidate for partisan political office or partisan political group, even after a particular campaign concludes (see 5 C.F.R. § 734.101).

Off-duty activity that would otherwise be permissible may not be if it involves influencing others at organizations with business before the employee’s agency or that are subjects of an enforcement action, investigation or audit by the agency.

USE OF OFFICIAL AUTHORITY OR INFLUENCE

In a similar vein, federal employees may not use their official authority or influence to interfere with or affect the result of an election, by, for example, using their official title or position while engaged in political activity (5 U.S.C. § 7323(a)(1)). This rule applies on or off duty, in or out of the workplace. Thus, sending an email supporting a candidate in a partisan election and signing it, “Jane Doe, United States Department of Agriculture analyst” would violate the Act, even if done from the employee’s own computer from home after work hours.

SPEECH INSIDE THE WORKPLACE, ON GOVERNMENT EQUIPMENT, AND/OR ON GOVERNMENT TIME

Speech or conduct supporting a political candidate or party while either in the workplace or on government time (such as when teleworking) could constitute a Hatch Act violation.

Ward Morrow, assistant general counsel at AFGE, says employees who wish to engage in political activity in the middle of the day should do so only during a recorded lunch break consistent with designed duty hours, and only if that lunch break takes place off of government property; federal employees should also use their own phone or computer, be off government property, and be outside of a government vehicle. The safer course would be to engage in political activity after duty hours end.

SPEECH OUTSIDE THE WORKPLACE, OFF GOVERNMENT EQUIPMENT, AND OFF GOVERNMENT TIME

Partisan speech outside the workplace, off of government equipment and not on government time faces far fewer restrictions. Employees may, for example, place on their front yards signs or banners supporting a partisan political candidate. There are still some constraints, though. “It is an improper use of official authority for a supervisor to send or forward a partisan political email to subordinates, at any time,” Mahoney states.

SOCIAL MEDIA

The minefield for Hatch Act compliance for many federal employees is social media. Emails are often crafted with little forethought, can easily be widely disseminated and last forever.

In February 2018, OSC issued an exhaustive, nine-page social media guide explaining how federal employees can best navigate this

territory, available at <https://osc.gov/Resources/HA%20Social%20Media%20FINAL%20r.pdf>. The guide contains many examples: “You are teleworking from home and on your lunch break in which you are not in a pay status. You are looking at Facebook on your personal iPad and see that a friend posted a message about an upcoming event supporting a political party. Because you are on your lunch break and not in a federal building, you may like or share that post.”

But changing the facts slightly yields a different result, OSC noted—liking or sharing the same post while physically present in the workplace would be impermissible, even during a lunch break using a personal iPad.

THE 2020 ELECTION CAMPAIGN AND THE GROWING POLITICIZATION OF SPEECH

While navigating the Hatch Act has always been challenging, the difficulty may have intensified of late. On March 5, 2018, OSC issued Updated Guidance Regarding the Hatch Act and President Donald Trump after he officially announced he was a candidate for reelection. “[The Guidance’s] prohibition is broad and encompasses more than displays or communications (including in person and via email or social media) that expressly advocate for or against President Trump’s reelection,” Mahoney notes.

On November 30, 2018, the OSC found that six White House and federal agency employees had violated the Hatch Act by using official federal Twitter accounts to tweet messages in



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support of President Trump and his policies in a manner related to his reelection campaign.

In its lawsuit, AFGE contends that the November 28, 2018, OSC guidance email, which also classifies as political activity advocating for the impeachment of President Trump, runs afoul of employees' rights to protest government actions they believe are unlawful and violate First Amendment rights.

Morrow says that in the current highly partisan environment he worries that politically appointed federal agency heads and pro-Trump employees could target employees who disapprove of the administration's policies. "Many federal agencies have retained communications firms to track how they are reflected in social media," Morrow says. "The firms could track communications by federal employees critical of the administration, which could lead politically appointed agency heads to refer those employees to the OSC for enforcement actions while omitting supporters engaging in similar political activity. And the OSC would not necessarily look at whether the agency was evenhanded or not. They would just look at whether each individual referred case reflected a violation or not."

Still, Mahoney and Morrow say they are unaware of any such discriminatory reporting that has occurred since the guidance email was issued and say OSC seems to be evenhanded in its enforcement of the Act.

An OSC spokesperson says the agency cannot comment on pending litigation.

The OSC is attempting to address questions about the Act and other matters the OSC administers through increased agency training. OSC's Hatch Act Unit closely monitors both a phone hotline (800-85-HATCH), and an email account (hatchact@osc.gov) to answer questions and provide guidance to agencies and federal employees, the OSC spokesperson notes. Information and FAQs about the Hatch Act can be found on OSC's website: <https://osc.gov/Services/Pages/HatchAct-Resources.aspx>.

CAREFUL ADVOCACY IS OK

Importantly, activism on legislative issues, such as that practiced by NARFE and its members, does not violate the Hatch Act. Advocating for or against legislation—rather than for or against candidates or parties—is not limited or prohibited by the Act.

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"Legislative activism by NARFE members, whether writing letters or calling congressional offices to express an opinion, is not prohibited by the Hatch Act," says NARFE Staff Vice President of Policy and Programs Jessica Klement. "The Act deals exclusively with electoral politics, not with legislative advocacy or lobbying activities. However, employees still should not engage in such advocacy activities on government time or while using government equipment or resources.

"Some agency officials maintain that a federal provision against using appropriated funds to influence members of Congress on legislation [at 18 U.S.C. § 1913] prohibits federal employees from participating in grassroots lobbying campaigns on government time or using government resources," Klement continued. "In addition, use of duty time or government equipment or resources for such activities could violate other federal rules. And there also is the danger of unintentionally veering into partisan political activities, which would violate the Act." Klement commented that on the whole, it's better to be safe than sorry, so federal employees should save their legislative activity for their own time and on their own devices. ■ —DAVID TOBENKIN IS A FREELANCE WRITER IN THE GREATER WASHINGTON, DC AREA.