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Hatch Act: Candidacy for Office by Federal Employees in the Executive Branch

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Legislative Attorney

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Summary

The federal law commonly known as the “Hatch Act” applies to all federal officers and employees—other than the President and Vice President—in the agencies, departments, bureaus, and offices of the executive branch of the federal government. Under the significant amendments made to the law in 1993, the Hatch Act now generally permits most federal employees to engage in a wide range of voluntary, partisan political activities on their own off-duty time and away from the federal workplace. Some employees in specified agencies and positions, including those dealing with law enforcement and national security matters, it should be noted, may be subject to further restrictions on their off-duty partisan political activities, and may not take any active part in political management or political campaigns.

Although most officers and employees in the executive branch of the federal government are now free to engage in most voluntary, partisan political activities on their own free time, employees in the executive branch may still not be candidates “for election to a partisan political office” (5 U.S.C. § 7323(a)(3)), that is, federal employees may generally not be candidates for elective office in a partisan election. Most civilian employees in the executive branch may, however, (1) run for office in a “nonpartisan” election (that is, an election in which none of the candidates represents a political party); (2) run as an “independent” in partisan elections in certain specified, exempt communities in which a number of federal employees reside; and (3) be candidates for and hold positions in political parties and their affiliated organizations.

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This report provides information on the permissibility, under federal law, of a federal employee in an agency or department of the executive branch of government being a candidate for elective office.

Under the provisions of federal law commonly known as the “Hatch Act,” civilian employees in the executive branch of the federal government (other than the President and Vice President) have, since 1939, been prohibited from running as candidates in partisan elections.¹ Amended in 1993, the Hatch Act now permits federal employees to engage in a wide range of voluntary, partisan political activities on their own, off-duty time, but still prohibits employees from being candidates “for election to a partisan political office.”² Such employees, it may be noted, may run for office in a “nonpartisan” election (that is, an election in which none of the candidates represents a political party); may run as an “independent” in partisan elections in certain specified, exempt localities in which a number of federal employees reside; and may generally be candidates for and hold positions in political parties and their affiliated organizations.

Who Is Covered by the Hatch Act

The provisions of the “Hatch Act” apply (in one degree or another) to *all* federal employees, other than the President and Vice President, in the executive branch of the federal government.³ Although the Hatch Act was significantly amended in 1993 to allow the vast majority of federal employees to engage in voluntary, off-the-job partisan political activities, certain employees in the executive branch, including those in law enforcement or national security agencies or offices, remain under much more restrictive provisions regarding political activities, even on their own free time.⁴ These “further restricted” employees are prohibited from taking an active part in political campaigns or political management in a similar manner as under the old Hatch Act.

¹ See original provisions of the “Hatch Act,” Public Law 76-252, 53 Stat. 1157 (August 2, 1939). Prior to the enactment of the Hatch Act, federal employees were restricted in their political activities by Civil Service Rules.

² 5 U.S.C. §7323(a)(3).

³ The Hatch Act, as amended by the “Hatch Act Reform Amendments of 1993,” P.L. 103-94, 107 Stat. 1001 (1993), generally applies to an “employee,” meaning “any individual, other than the President and the Vice President, employed or holding office in—(A) an Executive agency other than the Government Accountability Office; or (B) a position within the competitive service which is not in an Executive agency....” 5 U.S.C. §7322(1). An “Executive agency” is defined generally to include an “Executive department, a Government corporation, and an independent establishment” in the executive branch. 5 U.S.C. §105.

⁴ Employees of the executive branch remaining under more restrictive provisions regarding political activities include those in such agencies as the Federal Election Commission; Election Assistance Commission; FBI; Secret Service; CIA; National Security Council; National Security Agency; Defense Intelligence Agency; Merit Systems Protection Board; Office of Special Counsel; Office of Criminal Investigation of the IRS; Office of Law Enforcement of the Bureau of Alcohol, Tobacco, Firearms and Explosives; National Geospatial-Intelligence Agency; Office of the Director of National Intelligence; Administrative Law Judges; career Senior Executive Service officials; Criminal Division or National Security Division of the Department of Justice; when such officials are not appointed by the President with the advice and consent of the Senate. See 5 U.S.C. §7323(b)(2)-(4) for the complete list of the agencies and employees.

Prohibition on Candidacy in Hatch Act Amendments of 1993

Even for the majority of federal employees in the executive branch—who are under the less restrictive rules on off-duty political activities adopted in 1993—there are still certain prohibitions on political activities applicable to them. In addition to prohibitions regarding the solicitation of campaign contributions from the public,⁵ the use of one’s official authority to influence an election,⁶ on-the-job politics,⁷ and the solicitation of political participation from anyone doing or seeking business with one’s agency,⁸ federal employees continue to be prohibited by the Hatch Act from running as candidates in a partisan election.⁹ The statutory prohibition on candidacy states expressly as follows in Title 5 of the United States Code:

§ 7323. Political activity authorized; prohibitions

(a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not—

(3) run for the nomination or as a candidate for election to a partisan political office....

A “partisan political office” is expressly defined in the law to mean “any office for which any candidate is nominated or elected as representing” a political party whose candidates received votes for presidential elector in the preceding presidential election.¹⁰ The restrictions on being a candidate for office, therefore, bar a federal executive branch employee from running for any elective public office—including a federal, state, local, or county office—which is filled in an election where *any* of the candidates in the election runs as a Democrat, Republican, or as representing any political party whose presidential electors received votes in the last presidential election.

When One Becomes a “Candidate”

There may be definitional and factual questions about when one becomes a “candidate” for purposes of the Hatch Act prohibition. “Candidacy” under the Hatch Act is not merely when one formally “announces,” “declares,” or files for office, but could include preliminary activities and conduct leading up to a formal declaration of candidacy, including activities commonly referred to as “testing the waters.”

In an Advisory Opinion, the United States Office of Special Counsel (OSC)—the federal agency tasked with Hatch Act interpretation and enforcement—explained that the prohibition in the Hatch Act against candidacy “extends not merely to the formal announcement of candidacy but

⁵ 5 U.S.C. §7323(2).

⁶ 5 U.S.C. §7323(1).

⁷ 5 U.S.C. §7324(1),(2).

⁸ 5 U.S.C. §7323(4).

⁹ 5 U.S.C. §7323(a)(3). *See* 5 U.S.C. §7323(a)(1),(2),(4), and §7324, for other restrictions.

¹⁰ 5 U.S.C. §7322(2); 5 C.F.R. §734.101.

also the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy.”¹¹ The OSC described the types of activities which would be prohibited by a federal employee as constituting “candidacy” by such employee:

Because the Hatch Act has been interpreted to prohibit preliminary activities regarding candidacy, any action that can reasonably be construed as evidence that an individual is seeking support for or undertaking an initial “campaign” to secure a nomination or election to office would be viewed as candidacy for purposes of the Hatch Act. The following are examples of preliminary activities directed toward candidacy that would violate the Hatch Act: taking the action necessary under the law of a state to qualify for nomination or election; soliciting or receiving contributions or making expenditures; canvassing for voter support; conducting polls for name recognition; meeting with individuals to plan the logistics and strategy of a campaign; circulating nominating petitions, or; giving consent to or acquiescing in such activities by others on the employee’s behalf.¹²

Activities which are preliminary to any filing for or declaration of candidacy may be prohibited under the Hatch Act when they can “reasonably be construed as evidence that the individual is seeking support for or undertaking an initial ‘campaign’ to secure nomination or election to office....”¹³ For example, the OSC found Hatch Act violations when a covered employee submitted his “qualifications” to a party screening committee in contemplation of candidacy, even before filing or declaring as a candidate.¹⁴

Nonpartisan Elections

Although candidacy in an election for a “partisan” office is expressly prohibited for executive branch employees, the “Hatch Act” is interpreted to allow a federal employee to run as a candidate in “a nonpartisan election.”¹⁵ The regulations make it clear, however, that the *election* itself must be “nonpartisan”—that is, an election where “*none* of the candidates is to be nominated or elected as representing” a national political party.¹⁶ The statute would, therefore, continue to generally bar even an “independent” candidacy by a federal employee in an otherwise “partisan” election.

With respect to state and local elections, the laws of the state or locality will often designate that the election is to be “nonpartisan,” such that candidates are not to run as representing political parties, and such laws will provide a presumption that the election is nonpartisan.¹⁷ Merely because the names of candidates are listed on an election ballot without party designation does

¹¹ OSC File AD-09-xxxx, June 17, 2009, <http://www.osc.gov/documents/hatchact/federal/HAFederalAdvOpinion10-21-09.pdf> (redactions by OSC), *citing* to 86 CONG. REC. 2938-2040 (September 1939), *quoting* Civil Service Commission Form 1236 “Political Activities and Assessments”; ... *C.S.C. v. Letter Carriers*, 413 U.S. 548, 573, 581 (1973) ...; *see also* *In re Parker*, 3 P.A.R. 7, 12 (1969).

¹² OSC File No. AD-09-xxxx, June 17, 2009, *supra* at 2.

¹³ U.S. Office of Special Counsel, January 10, 2001. <http://www.osc.gov/documents/hatchact/federal/fha-25.pdf>.

¹⁴ *Id.*

¹⁵ 5 C.F.R. §734.207(b).

¹⁶ 5 C.F.R. §734.101 (definition of “*Nonpartisan election*”). Emphasis added.

¹⁷ *See, e.g.*, U.S. Office of Special Counsel, OSC File No. AD-01-0064 (January 16, 2002), and OSC File No. AD-08-XXXX (December 12, 2007). Copies of the OSC advisory letters may be viewed on their website, <http://www.osc.gov>.

not necessarily indicate that the election is “nonpartisan,” however, as such candidates could still be nominated by, or otherwise “represent” political parties, or could seek or accept party endorsements or resources making the election a “partisan” election.¹⁸

One of the problems that could arise for a federal employee who legitimately and in good faith runs for office in an election that has been designated “nonpartisan” is the fact that the *other* candidate or candidates may seek, accept, or advertise the endorsement of a political party. In the view of the Office of Special Counsel this could “indicate that the election is a partisan one,” and bring into question the propriety of an employee’s candidacy. The Office of Special Counsel has explained:

[P]lease be advised that usually a nonpartisan election is so designated by state or local laws. Such state and local laws, however, create only a rebuttable presumption that an election is nonpartisan. See *Special Counsel v. Yoho*, 15 M.S.P.R. 409, 413 (1983), overruled on other grounds, *Special Counsel v. Purnell*, 37 M.S.P.R. 184 (1988). Evidence showing that partisan politics actually enter the campaigns of the candidates may rebut this presumption. See *McEntee v. M.S.P.B.*, 404 F.3d 1320 (Fed. Cir. 2005); *In re Broering*, 1 P.A.R. 778, 779 (1955). For example, if a candidate solicits or advertises the endorsement of a political party or uses a political party’s resources to further his or her campaign, these actions may rebut the presumption that an election is nonpartisan, and thus, indicate that the election is a partisan one. As such, if *any candidate* for Municipal Judge becomes associated with a political party, you should immediately contact our office for further guidance.¹⁹

Exemptions for Those in Certain Localities

In addition to the general exceptions for candidacies in nonpartisan elections, the Hatch Act also provides that regulations issued by the Office of Personnel Management may establish that employees in certain communities in and around the Washington, DC, metropolitan area, or in other communities where the majority of voters residing there are federal employees, may participate in certain local political activities which might otherwise be prohibited.²⁰ These regulations allow federal employees in such exempted localities to run as independent candidates even in *partisan* elections in that locality or municipality.²¹ The Office of Personnel Management has issued regulations specifying those communities in which federal employees may be independent candidates in partisan elections.²² Such employees may also solicit, receive, and accept political contributions in connection with that local or municipal election, but would still be prohibited from soliciting contributions from subordinates or engaging in political activities while on duty or in federal workspace.²³ The Office of Personnel Management regulations note that a candidacy for or service in the particular office in question will be permitted only if such

¹⁸ OSC File No. AD-01-0064 (January 16, 2002), and OSC File No. AD-08-XXXX (December 12, 2007), *supra*.

¹⁹ OSC File No. AD-08-XXXX (December 12, 2007), at 2. Emphasis added. Such an interpretation if enforced strictly and indiscriminately could, of course, put a valuable weapon in the hands of an opponent who could force the federal employee/candidate from the race merely by the *opponent* accepting the endorsement from a political party.

²⁰ 5 U.S.C. §7325, as amended by P.L. 112-230, 126 Stat. 1617 (2012), adding Washington, DC, as an exempt community.

²¹ 5 U.S.C. §7325. See 5 C.F.R. Part 733 and 5 C.F.R. §734.207(a).

²² 5 C.F.R. §733.107.

²³ 5 C.F.R. §§733.103, 104.

candidacy and service will not “result in neglect of, or interference with, the performance of the duties of the employee or create a conflict, or an apparent conflict, of interest.”²⁴

Political Party Positions

Most federal employees in the executive branch²⁵ are allowed to hold and campaign for positions and offices in political parties and other partisan political organizations. In prohibiting candidacy in an election for “partisan political office,” the Hatch Act expressly excludes from the prohibition “any office or position within a political party or affiliated organization”:

“Partisan political office” means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, *but shall exclude any office or position within a political party or affiliated organization.*²⁶

Specifically as to the permissibility of a federal employee to run for and to hold a “political party position,” the Hatch Act regulations permit the following:

§ 734.204 Participation in political organizations.

An employee may:

(b) Serve as an officer of a political party or other political group, a member of a national, State, or local committee of a political party, an officer or member of a committee of a political group, or be a candidate for any of these positions....²⁷

The U.S. Office of Special Counsel has noted, for example, that a United States Postal Service employee may be a candidate for what appears to be a county elected position representing the political party in the county, and for which only members of that same political party would vote in a primary election:

Specifically, you ask whether the Act would prohibit you, as a United States Postal Service employee, from being a candidate for Committeeman of xxxx, New Jersey. We understand that each political party has a Committeeman and Committeewoman who represent xxxx County. You further explain that only members of the same political party may vote in the election for Committeeman and Committeewoman.

* * *

While the Act prohibits candidacy for public office in a partisan election, it does not prohibit a covered employee from running for office within a political party.² Consequently, you would not be prohibited by the Hatch Act from being a candidate for Committeeman of xxxx County because it is an office within the Republican Party. However, as a covered employee,

²⁴ 5 C.F.R. §733.104(e).

²⁵ This includes employees who are not subject to the more restrictive provisions of 5 U.S.C. §7323(b)(1) and (2), applicable to law enforcement and some national security positions. See, footnote 2, *infra*, for a list of agencies with more restrictions.

²⁶ 5 U.S.C. §7322(2). Emphasis added. See also 5 C.F.R. §734.101.

²⁷ 5 C.F.R. §734.204.

you are prohibited from soliciting, accepting or receiving political contributions. 5 U.S.C. § 7323(a)(2). Therefore, in addition to other restrictions concerning your political activity, you would have to refrain from listing your name on any fundraising letters or invitations sent out on behalf of the Republican Party or any partisan candidate.²⁸

Other Restrictions Relative to Running for Office

If a federal employee in the executive branch is allowed to run for political office in an election because of one or more of the exemptions and exclusions in the Hatch Act, there remain other restrictions and limitations in federal law and regulation which may be relevant to such employee's activities. Employees are expressly forbidden by the Hatch Act to engage in any political activities while on duty or in any building in which federal employees are performing official duties.²⁹

Furthermore, in addition to Hatch Act restrictions on campaigning in one's office or while on duty, it should be noted that there are general ethical rules and standards of conduct which prohibit executive branch employees from using any government property "for other than authorized purposes,"³⁰ and thus employees may not use office supplies such as paper, or office equipment such as printers, copiers, or computers for or on *any* political campaign, including their own. In this regard, employees are specifically prohibited by the Hatch Act from engaging in political activities while "wearing a uniform or official insignia identifying the office or position" of the employee, and are prohibited from campaigning using any vehicle owned or lease by the government.³¹

The general restrictions of the Hatch Act also prohibit executive branch employees from using their official authority to influence an election (which would include prohibiting the solicitation of support or requests for support or activity from one's subordinates in the office or agency)³²; restrict the solicitation of campaign contributions from the public or from subordinates³³; and prohibit the solicitation of support or political participation of any person who is seeking action from one's agency or is subject to an ongoing audit or investigation by one's agency.³⁴

Holding Other Public Office

The Hatch Act addresses the permissibility of a federal employee *running* for or campaigning for a public office, but does not address, regulate, or restrict the *holding* of a state, local, or county public office by a person who is also a federal employee in the executive branch of the federal government.³⁵ A federal government employee may have obtained a public office in the state or

²⁸ OSC Advisory Letter, June 4, 2002 (redactions by OSC).

²⁹ 5 U.S.C. § 7324(1),(2).

³⁰ 5 C.F.R. § 2635.704.

³¹ 5 U.S.C. § 7324(a)(3),(4).

³² 5 U.S.C. § 7323(1).

³³ 5 U.S.C. § 7323(2).

³⁴ 5 U.S.C. § 7323(4).

³⁵ The United States Constitution expressly prohibits anyone holding a *federal* office from being a Member of Congress at the same time, thus restricting "dual office holding" at the federal level. U.S. CONST., art. I, §6, cl. 2: "... no Person (continued...)

locality by being appointed to that public office, or may have been an incumbent in the office at the time of entering federal employment. Although the Hatch Act does not address the holding of an office, a federal employee who is an incumbent in a state or local position, or who was appointed to fill a vacancy in such position may be restricted and prohibited from running for re-election (or election) to such position if the position is filled in a partisan election. The Office of Special Counsel has explained that the Hatch Act does not bar outside office holding, nor does it require an incoming federal employee to give up his or her outside elective office:

[W]hile the Hatch Act prohibits candidacy for public office in partisan elections, it does not prohibit a federal employee from being appointed to or holding public office. Additionally, when an individual holds elective office at the time that the employee begins federal employment, he or she may continue to serve in the elected position. However, the employee may not be a candidate for re-election if the election is partisan and the employee continues to be employed by a federal agency.³⁶

The permissibility of holding outside positions in state, local, or county governments by federal employees is generally addressed under federal provisions by conflict of interest and standard of conduct regulations promulgated by the Office of Government Ethics,³⁷ which are primarily enforced by each agency or department with respect to their own employees.³⁸ These standards of ethical conduct expressly restrict outside compensation and positions in two specific instances: (1) where holding the outside position would create conflicts of interest with one's federal governmental duties such that an employee would be required to regularly disqualify (or "recuse") himself or herself on official federal governmental matters "so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired";³⁹ or (2) which are expressly restricted by federal law or regulation, including the regulations of one's agency.⁴⁰ Although the ethics regulations in the executive branch are centralized and promulgated by the Office of Government Ethics (OGE), each agency may, in consultation with and approval by OGE, promulgate supplemental ethics regulations limiting or restricting certain types of outside employment, or requiring an employee to receive prior approval before engaging in certain compensated outside, non-federal employment.⁴¹ These supplemental agency regulations should also be examined for any further limitations, restrictions, or requirements for outside activities.

(...continued)

holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

³⁶ U.S. Office of Special Counsel, "Political Activity and the Federal Employee," at 5 (December 2005).

³⁷ 5 C.F.R. §2635.801 *et seq.* Such "dual office holding" with respect to state and local offices must also be analyzed with regard to any state statutory or local ordinance prohibitions.

³⁸ 5 C.F.R. §2635.106; 5 C.F.R. §2638.101 *et seq.*

³⁹ 5 C.F.R. §2635.802(b). An employee must disqualify himself from working on any "particular" official federal matter which will have a "direct and predictable effect" on the financial interests of that employee, his or her spouse or dependents, or on entities with which the employee is affiliated as an officer, employee, or agent. 18 U.S.C. §208; 5 C.F.R. §2635.402. An employee must also disqualify himself from working on a "particular matter involving specific parties" when it may affect the interests of those within his household, or when organizations or persons with which the employee has a "covered relationship" are parties to or represent parties to that matter. 5 C.F.R. §2635.502.

⁴⁰ 5 C.F.R. §2635.802(a).

⁴¹ 5 C.F.R. §2635.105; 5 C.F.R. §2635.803.

United States Office of Special Counsel

Questions concerning the specific application and interpretations of the provisions regarding the permissible political activity and candidacy of a particular federal officer or employee may be directed to the United States Office of Special Counsel, which has jurisdiction over the enforcement and interpretations of the Hatch Act provisions. That office may be reached by telephone at (1-800) 854-2824 or [redacted]; by fax on [redacted]; by e-mail at Hatchact@osc.gov; or by mail at Office of Special Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

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