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IN FOCUS

The Hatch Act: Special Considerations for High-Level Administration Officials

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The Hatch Act is a federal law that regulates the partisan political activities of most executive-branch employees, excluding the President and Vice President. As amended in 1993, the Hatch Act exempts some high-level administration officials from some of its prohibitions, allowing them to engage in certain political activities while on duty. This exemption applies to certain officials appointed by the President with Senate confirmation (PAS), and some high-level political officials who are paid from an appropriation for the Executive Office of the President (EOP). Other Hatch Act provisions, however, continue to limit the political activities of these officials. This In Focus provides an overview of the law as it applies to certain high-level administration officials, including Cabinet Secretaries.

The Hatch Act: Background

The Hatch Act, enacted in 1939, was designed to address concerns regarding political patronage in the civil service. The underlying rationale for the law is that "efficiency in Government service requires a lack of partisanship in administration." In its current form, the law regulates the partisan political activity of covered employees, which includes nearly all federal civilian executive-branch employees, but exempts from its coverage the President and Vice President. The U.S. Office of Special Counsel (OSC) renders advisory opinions concerning the Hatch Act and is authorized to investigate and pursue sanctions for alleged violations of the law.

More information about the Hatch Act and its coverage is available in another In Focus. Two key provisions are relevant when discussing the Hatch Act's application to high-level administration officials. First, the Hatch Act prohibits a covered employee from engaging in political activity while the employee is on duty, in a federal building, wearing an official uniform, or using any government vehicle. Certain high-level officials, however, are exempt from this prohibition. Second, the Hatch Act prohibits all covered employees from using their "official authority or influence for the purpose of interfering with or affecting the result of an election."

On-Duty Prohibition

Among other things, the Hatch Act prohibits covered employees from engaging in political activity while on duty, in the federal workplace, in uniform, or in a vehicle owned or leased by the federal government. Political activity is defined in regulation as "an activity directed toward the success or failure of a political party, candidates for partisan political office, or partisan political group."

The Hatch Act, however, exempts from this prohibition certain employees who are deemed to be on duty at all times, and who are either paid from an EOP appropriation or are PAS employees. The exemption for PAS employees applies only to one "whose position is located within the United States and who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws." Legislative history suggests that this exemption was intended to apply to "high-level political officials" who are continuously on duty and otherwise could never engage in political activity. OSC has referred to exemptions in the Annual and Sick Leave Act to help determine which employees are considered on duty at all times.

Employees exempted from the Hatch Act's on-duty prohibitions may engage in political activity, but costs associated with that activity may not be paid for with money derived from the Treasury. The Treasury must be reimbursed for costs associated with political activity "within a reasonable period of time," and Hatch Act regulations provide guidance on how officials must apportion costs of travel that includes both official and political events. OSC recommends that agencies seek reimbursement for political activity within 30 days of the event. Reimbursement may be sought from a campaign or from officials themselves.

Official-Authority Prohibition

High-level administration officials who are allowed to engage in political activity on duty must abide by another Hatch Act provision prohibiting all covered employees from using their "official authority or influence for the purpose of interfering with or affecting the result of an election." OSC has explained that this prohibition exists because "using an official title in connection with one's political activity . . . risks implying that the government itself has a preference for one political party or candidate over another."

Issues regarding the official-authority prohibition may arise when high-level administration officials mix political activities with official work, such as by using an official title when participating in political activity. OSC has indicated that it can be challenging to distinguish permissible official activity from prohibited political activity, as political activity may encompass more than just "express advocacy for the electoral success or failure of a candidate." OSC has offered some examples of comments that employees are "unquestionably" prohibited from making while engaged in official duties. These include

- attacking the campaign of a candidate for partisan political office,
- explaining why voters should support a particular candidate,
- comparing campaign proposals, or
- forecasting what would happen if certain candidates were elected.

As one example of improper use of official authority, OSC found a high-level official violated the Hatch Act when he participated in an interview in his official capacity and suggested that one candidate's proposals would negatively affect the federal program the official oversaw.

The official-authority prohibition may also be implicated if a high-level administration official attends an event in his or her official authority while engaging in campaign-related activity. OSC has advised that when officials speak in a personal capacity for a political purpose, they must "avoid talking about the work of their agencies to ensure that they do not mix their official work with their personal political activity." For example, OSC concluded that a Cabinet Secretary violated the Hatch Act when she attended an event to speak about administration policies, but endorsed a candidate for partisan political office at the event. While the Secretary was permitted to attend the political event and engage in political activity, she was prohibited from doing so in her official capacity.

In the same vein, covered employees, including high-level administration officials, are prohibited from organizing official events for the purpose of promoting or supporting a candidate, a partisan political group, or a political party. In one instance, OSC determined that an Acting Secretary violated the Hatch Act when he presided over an official event that was held for the purpose of creating content for a political party convention.

The official-authority provision of the Hatch Act also prohibits all covered employees, including high-level officials, from taking official actions for the purpose of promoting a candidate's campaign for partisan political office. For example, OSC determined that a Cabinet Secretary violated the Hatch Act when he authorized a change to agency rules to allow himself to address a political convention to promote a candidate's reelection campaign. OSC also found a Hatch Act violation when a high-level administration official released nonpublic official information to help a candidate's campaign.

Official Versus Political Events

While some high-level officials may engage in on-duty political activity—such as attending political events—in their personal capacity, it is not always clear when an event is considered official versus political for purposes of determining Treasury reimbursement.

As a hypothetical example, a Cabinet Secretary may be invited to attend an event to promote agency work hosted by a sitting Member of Congress who is up for reelection. If the event is considered political or is part of a trip that involves both official and political events, the Hatch Act requires that the Cabinet Secretary reimburse the Treasury for any time spent on political activity. The Cabinet Secretary is also prohibited from using their official title while engaging in the activity.

OSC has identified multiple, non-exclusive factors to consider when determining whether an event is political for purposes of the Hatch Act. The factors outlined in an OSC advisory opinion include inquiries into

- the type of event,
- the speakers at the event and the intended audience,
- the organizers of the event,
- the relationship between the event and official agency business,
- whether candidates (including incumbents seeking reelection) will be present at the event,
- the proximity of the event to the date of an election,
- the frequency of similar types of events during non-election years,
- who invited the official to speak,
- the official's motivation for attending the event,
- whether the event was scheduled prior to any candidate involvement,
- whether the event is open or closed to the media, and
- the content of the event speakers' remarks.

OSC advises that these factors "are intended to help determine whether the official aspect of an event is bona fide or merely a pretext for helping a candidate or political party."

Enforcement and Remedies

Multiple agencies are responsible for interpreting, implementing, and imposing penalties under the Act. As mentioned, OSC renders advisory opinions concerning the law and is authorized to investigate and pursue sanctions for alleged violations before the Merit Systems Protection Board (MSPB), a body that oversees disputes arising from the federal workforce. The MSPB then determines whether a violation has occurred and imposes available penalties, which, for federal employees, can include disciplinary action such as removal; a reduction in grade; debarment from federal employment for a period not to exceed five years; suspension; reprimand; or civil fines not exceeding $1,000.

Some unique challenges may arise when high-level administration officials violate the Hatch Act. For example, if an alleged violation involves an "employee in a confidential, policymaking, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate," a complaint must be presented to the President for "appropriate action" in lieu of being presented to the MSPB. OSC also refers complaints involving White House commissioned officers to the President and has no role in disciplining PAS employees or White House commissioned officers beyond issuing a report. Thus, for example, if a high-level official participates in political activity on duty and fails to reimburse the Treasury, OSC lacks authority to pursue corrective action and cannot recover costs unless the employee voluntarily agrees to facilitate reimbursement.

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