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The Hatch Act: A Primer

The Hatch Act (the Act) is a federal law that regulates the partisan political activities of most executive branch employees as well as certain state and local employees. The statute seeks to balance the government's interest in an efficient and impartial workforce with employees' rights to participate in the political process. This In Focus provides an overview of the law, including its origins, its current scope, and what activities are prohibited under the Act.

Background

Congress has regulated the political activities of federal executive branch employees since the passage of the Pendleton Civil Service Act in 1883. The Pendleton Act, which sought to create a merit-based federal workforce, also established the Civil Service Commission (CSC)—a predecessor to the modern-day Merit Systems Protection Board (MSPB). In 1883, the CSC issued Rule 1, prohibiting employees in the classified civil service from using their authority or influence to coerce any other person or interfere with an election. In 1907, Rule 1 was amended to prohibit employees from taking an active part in political management or campaigns.

In 1939, Congress passed "An Act to Prevent Pernicious Political Activities," more commonly known as the Hatch Act. The Act codified Rule 1's ban on active participation in political management or political campaigns and extended its coverage to include nearly all federal employees, rather than just those in the classified civil service. In 1940, the Act was extended to cover state and local employees who work on federally financed projects.

As the civil service became more independent and merit-based, Congress further altered the Act because the original rationale for the statute no longer justified broad restrictions on employee political activity. The Hatch Act Reform Amendments of 1993 significantly amended the Act, notably allowing most covered federal employees to engage in off-duty political activity. The Act was most recently amended through the Hatch Act Modernization Act of 2012. The amendments expanded the available penalties for violations of the Act and allowed for covered state or local employees to run for partisan elective office so long as the federal government did not fund the entirety of their salary.

The Supreme Court has largely rejected facial constitutional challenges to the statute. Twice—once in 1947 and once in 1973—the Court rejected First Amendment challenges to the Act, employing a balancing test to hold that the Act's restrictions were a reasonable means of ensuring integrity and competency within the government workforce, relying on the government's unique interests as an employer in regulating the speech and conduct of its own employees. And in 1947, the Court also rejected a Tenth Amendment challenge to the statute's provisions on state and local employees, holding that while Congress may not directly regulate local political activities, it does have the power to attach conditions on the funds it grants to states.

The Hatch Act

In its current form, the Act generally regulates the political activities of certain government employees. The statute and corresponding regulations define what employees are covered under the Act, what activities are permitted and prohibited, and what entities have the authority to remedy violations of the Act.

Who Is Covered

The Act generally defines "employee" as any individual employed or holding office in (A) an "executive agency" or (B) a position within the competitive service that is not in an "executive agency." This definition broadly extends to nearly all federal civilian executive branch employees, including postal service employees. Legislative and judicial branch employees who serve in positions specifically made subject to civil service rules requiring open competition in the application process are also covered under the Act.

Nonetheless, there are certain exceptions and limitations to the Act's scope. The President, Vice President, members of the uniformed services, and Government Accountability Office employees are expressly excluded from coverage. Also, because the definition includes only executive branch employees, the Act does not apply to the judicial or legislative branch, unless such employees are expressly included in the competitive service. Employees of all three branches, however, are still subject to various provisions of federal law relating to political corruption or campaign finance. Judicial and legislative branch employees also have their own ethics codes that govern political activities.

The Act also extends to state or local officers or employees "whose principal employment is in connection with an activity which is financed in whole or in part" by the federal government. This definition does not include individuals employed by educational or research institutions that a state or recognized religious, philanthropic, or cultural organization supports. For example, school teachers are not covered under the Act.

Prohibitions on Federal Employees

The Act expressly states that covered employees "retain the right to vote" and "express opinion[s] on political subjects and candidates." Most federal employees may also actively participate in partisan political activities (i.e., activities directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group) so long as the employee is not on duty or in the workplace. For example, these employees—who are also referred to as "less restricted employees"—may, while off duty, campaign for or against candidates in partisan

elections, make campaign speeches or distribute campaign literature, and hold office in partisan groups.

However, employees who are considered "further restricted" under the Act are prohibited at all times from participating in political activity on behalf of a political party, partisan political group, or candidate in a partisan election. While further restricted employees may still join partisan groups, contribute money to partisan groups or candidates, and attend political rallies, meetings, and fundraisers, they may not take an active role in any political activity, even while off duty. These further restricted employees are identified in 5 U.S.C. § 7323(b)(2)(B) and generally include employees of agencies that are responsible for law enforcement or national security matters, such as the Federal Bureau of Investigation and the Central Intelligence Agency, as well as agencies that regulate elections, such as the Federal Election Commission.

In its current form, the Act prohibits all covered federal employees from

- using their "official authority or influence for the purpose of interfering with or affecting the result of an election";
- generally soliciting, accepting, or receiving political campaign contributions from any person, including hosting fundraisers;
- running for nomination or as a candidate in a partisan election;
- soliciting or discouraging participation in political activity of any person who either has an application for any grant, contract, license, or permit before the employing agency, or is the subject of or participant in an audit, investigation, or enforcement action by the employing agency; or
- engaging in political activity while on duty; on federal property; while wearing a uniform or official insignia; or in a government vehicle. This restriction covers, for example, distributing campaign materials, displaying campaign materials, wearing partisan political buttons, T-shirts, or signs, posting comments to social media sites that advocate for or against partisan political parties, candidates, or groups, or using any email account to distribute content that advocates for or against partisan political parties, candidates, or groups while on duty.

Additionally, further restricted employees (both while on and off duty) are prohibited from

- partisan political management (e.g., holding office in political parties, organizing political rallies or meetings, assisting in partisan voter registration drives); or
- actively participating in political campaigns (e.g., speaking/campaigning for or against candidates, sending campaign materials, circulating nominating petitions).

Prohibitions on State and Local Employees

The Act's restrictions on state and local employees are narrower than those for federal employees. Covered state and local employees may not coerce political donations from other covered employees or use their official authority to interfere with an election. And state and local employees may not run for partisan political office if the federal government funds their entire salary. The Act's prohibitions on participation in political activities do not apply to state and local employees.

Entities Responsible for Enforcing the Act

Multiple agencies are responsible for interpreting, implementing, and imposing penalties under the Act. The Office of Personnel Management issues regulations describing permitted and prohibited activities. A separate and independent agency, the U.S. Office of Special Counsel (OSC), renders advisory opinions concerning the law and is authorized to investigate and prosecute alleged violations before the MSPB, an independent, quasi-judicial 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. For state/local violations, the MSPB can recommend removal from employment. If the employee is not removed as recommended, the federal government can withhold federal funds from the employing agency.

Considerations for Congress

As the 2020 election season is under way, Congress may consider whether the Act continues to balance properly employees' statutory and constitutional rights to express their political opinions while still protecting the integrity and proper functioning of the government. The OSC has described the statute as a "bulwark against undue partisan influence in the operations of the executive branch." And during the 116th Congress, oversight hearings have examined executive branch compliance with the statute. Some critics, however, have argued that the Act's broad prohibitions chill political speech that would otherwise not harm the proper functioning of government. In this vein, the exact contours of what the statute permits and prohibits remain open to legal debate. For example, while employees retain the statutory right "to express [their] opinion on political subjects and candidates," the Act also prohibits employees from participating in political activities while on duty. Some have asked the OSC to provide guidance on when political opinion becomes prohibited political activity, and have sought clarity, for example, on matters such as whether employees may, while on duty, forward an email that expresses negative information about a presidential candidate. Congress may consider providing further guidance as to what activities the statute prohibits.

The evolving digital era has also presented new considerations. Employee reliance on modern workplace platforms such as social media, mobile devices, email, and telework may create a higher risk of inadvertent Hatch Act violations. Although the OSC continues to issue advisory opinions on the use of modern technology, these rules lack any binding legal force. Congress may choose to codify clear rules addressing, specifically, how the Act applies to employees' use of modern technology.

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