

# ELECTION LAW GUIDELINES: LEGAL MEMORANDUM ON POLITICAL ACTIVITY



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DATE July 2014  
TO America's Essential Hospitals member CEOs  
FROM Eyman Associates PC  
RE Federal constraints on election activities

MEMORANDUM

America's Essential Hospitals asked for a summary of the federal legal constraints on member election activities, particularly the conduct of voter registration and education in connection with the upcoming elections. The summary below very briefly outlines the constraints generally applicable to public or tax-exempt hospitals and health systems. The summary is followed by a brief discussion of this issue, as well as summary charts providing general rules governing campaign contributions and congressional gift rules not covered within the main scope of the memorandum.

## I. Summary

Members of America's Essential Hospitals generally may engage in a wide variety of nonpartisan election activities. For example, organizing voter registration and get-out-the-vote drives is a public service, benefiting the health system's client population and the community at large. Providing voter education on health issues and encouraging public debate also can be nonpartisan activities. In each of these situations, however, care must be taken not to favor or oppose any particular candidate or party. Partisan activities are often prohibited, depending on the institution's status and on state and local law. In most cases, members' employees may engage in partisan activities in their individual capacities, as long as it is clear they are not acting on behalf of or utilizing the resources or authority of the hospital or health system.

Briefly, partisan activities are those that support or oppose a particular candidate for office or political party, e.g., endorsing or ranking candidates, or acting to assist or give favorable or preferential treatment to a particular candidate or party. Particularly for members with 501(c)(3) tax exempt status, registration, education, and similar efforts should be conducted in a scrupulously nonpartisan manner, with no hint of bias for or against any candidate or party.

Members should consult local counsel before proceeding. State and local tax law and other regulations may constrain a public or nonprofit health system's activities, and nonprofit health systems must ensure that all activities are consistent with their stated purposes and within their corporate or statutory powers.

## II. Discussion

This discussion provides additional information as to the permissibility under federal law of election activities such as voter registration and candidate education efforts by typical members of America's Essential Hospitals.

### A. Public Health Systems

Except for possible application of federal tax law and the Hatch Act<sup>1</sup> or related provisions<sup>2</sup>, addressed below, there are no generally applicable federal limits on a public health system's right to engage in partisan election activities, although this may be constrained by local law or practical realities. Furthermore, even a public employee subject to these federal constraints may engage in partisan activities in her individual capacity as long as she does not call upon her "official authority or influence."<sup>3</sup>

The federal Hatch Act prohibits federal employees, acting in their official capacities or using their official authority or influence, from engaging in partisan political activities. It seems unlikely that the Hatch Act would apply to most public hospitals, although many states have their own versions of this law. Also, similar federal restrictions can apply to state agencies that are wholly or partially funded by the federal government;<sup>4</sup> this has been held by some courts to include State Medicaid agencies.<sup>5</sup>

Federal law imposes no general restriction on the right of public health systems and their employees to engage in nonpartisan election activities, and the federal Hatch Act and related provisions do not regulate nonpartisan activities.<sup>6</sup>

### B. Tax-Exempt, Nonprofit Health Systems

Under federal tax law, tax-exempt charitable (or "501(c)(3)") organizations are "absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office."<sup>7</sup> Violation of this ban on partisan political activities (often referred to as "political campaign intervention") can result in an IRS warning, imposition of excise taxes, and even permanent revocation of the organization's tax-exempt status. Political campaign intervention includes (but is not limited to), contributions to political campaign funds, explicit candidate endorsements, or public statements of position (verbal or written) made by or on behalf of an organization in favor of or in opposition to any candidate for public office.<sup>8</sup>

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<sup>1</sup> 5 U.S.C. §§ 7321-7326.

<sup>2</sup> In particular, 5 U.S.C. § 1501, *et seq.*

<sup>3</sup> 5 U.S.C. § 1502(a); *see also* *McKechnie v. McDermott*, 595 F. Supp. 672, 674-75 (N.D. Ind. 1984). The U.S. Office of Special Counsel has issued a series of FAQs, including recent FAQs on the use of social media, to assist public employees in distinguishing between activities in their official versus individual capacity. Hatch Act FAQs, available at [www.osc.gov/Pages/HatchAct-FAQs.aspx](http://www.osc.gov/Pages/HatchAct-FAQs.aspx).

<sup>4</sup> 5 U.S.C. § 1501(4).

<sup>5</sup> *Alexander v. Merit Sys. Protection Bd.*, 165 F.3d 474, 481-82 (6<sup>th</sup> Cir. 1999).

<sup>6</sup> E.g., 5 U.S.C. § 1502; compare *Williams v. Merit Sys. Protection Bd.*, 55 F.3d 917, 920 (4<sup>th</sup> Cir. 1995) (partisan activity is a *per se* violation of the Hatch Act) with *Bauers v. Cornett*, 865 F.2d 1517, 1524 (8<sup>th</sup> Cir. 1989) and *Blaylock v. Merit Sys. Protection Bd.*, 851 F.2d 1348, 1354 (11<sup>th</sup> Cir. 1988) (nonpartisan activity is permissible under the Hatch Act).

<sup>7</sup> *Political and Lobbying Activities*, [www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501\(c\)\(3\)-Tax-Exempt-Organizations](http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501(c)(3)-Tax-Exempt-Organizations) (adapted from IRS Pub. 1828 (Feb. 2004), available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>); *see generally* IRS Rev. Rul. 2007-41, available at <http://www.irs.gov/pub/irs-tege/rr2007-41.pdf>.

<sup>8</sup> *See, e.g.*, IRS FS-2006-17, *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations*, February 2006, available at [www.irs.gov/uac/Election-Year-Activities-and-the-Prohibition-on-Political-Campaign-Intervention-for-Section-501\(c\)\(3\)-Organizations](http://www.irs.gov/uac/Election-Year-Activities-and-the-Prohibition-on-Political-Campaign-Intervention-for-Section-501(c)(3)-Organizations) (hereinafter "IRS FS-2006-17").

On the other hand, federal tax law places few restrictions on nonpartisan activities, provided that they are consistent with the organization's exempt purposes and do not constitute a substantial portion of its total activities.<sup>9</sup> In addition, federal tax law does not restrict an exempt organization's employees from engaging in partisan political activity in their individual capacities, although they should make it clear that their actions and views do not represent those of the organization.<sup>10</sup> This includes an organization's leadership; the prohibition on political campaign intervention is not intended to restrict free expression on political matters or important issues of public policy by leaders of organizations speaking for themselves. However, for their organizations to retain their 501(c)(3) tax-exempt status, leaders cannot make partisan comments in official organization publications or at official functions of the organization, cannot use the organization's financial resources or personnel in such efforts, and should disclaim any endorsement of their actions by the organization.<sup>11</sup>

### C. Distinction Between Partisan and Nonpartisan Activities

Partisan activities are those that support or oppose a particular candidate for office or political party. "Activities that constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written statements or the making of oral statements on behalf of or in opposition to such a candidate,"<sup>12</sup> as well as making or soliciting contributions to or for candidates.<sup>13</sup> On the other hand, activities such as voter education, voter registration, get-out-the-vote drives, and candidate education programs are permitted under federal tax law and the Hatch Act, if conducted in a scrupulously nonpartisan manner.<sup>14</sup> But any such activity evidencing bias for or against one candidate or party is prohibited.<sup>15</sup> Thus, the determination of whether activities are nonpartisan or constitute political campaign intervention is highly fact-specific, and members should consult with local counsel as to the permissibility of specific activities. The following descriptions relay general IRS guidance on activities members are most likely to undertake.

*Candidate appearances:* If a tax-exempt hospital invites a candidate to speak in their capacity as a candidate, the organization must take steps to ensure that: it provides an equal opportunity to all political candidates seeking the same office (i.e. the speaking invitations and events must be substantially similar)<sup>16</sup>; it does not indicate any support for or opposition to the candidate (at the event or in communications concerning the candidate's attendance); and, no political fundraising occurs.<sup>17</sup> A 501(c)(3) organization may also organize a candidate forum, in which all the candidates appear together and answer questions posed by a moderator or by members of the audience. In this instance, the hospital must ensure that candidates are treated fairly and impartially, for example, by making efforts to ensure that each candidate is given an equal chance to speak, by using a nonpartisan independent panel to develop questions that cover a broad range

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<sup>9</sup> *Political and Lobbying Activities*; see generally IRS Rev. Rul. 2007-41.

<sup>10</sup> *Id.*

<sup>11</sup> IRS Rev. Rul. 2007-41; see also IRS Presentation, Political Campaigns and Charities: The Ban on Political Campaign Intervention, available at [http://www.stayexempt.irs.gov/Mini-Courses/Political\\_Campaigns\\_and\\_Charities/political-campaigns-and-charities.aspx](http://www.stayexempt.irs.gov/Mini-Courses/Political_Campaigns_and_Charities/political-campaigns-and-charities.aspx) (hereafter "IRS Mini-Course").

<sup>12</sup> IRS Rev. Rul. 2007-41.

<sup>13</sup> IRS Mini-Course.

<sup>14</sup> *Id.*

<sup>15</sup> *Political and Lobbying Activities*.

<sup>16</sup> IRS Mini-Course.

<sup>17</sup> 2007-14; see also *Political and Lobbying Activities*, adapted from IRS Pub. 1828 (Feb. 2004, available at [www.irs.gov/charities/charitable/article/0,,id=120703,00.html](http://www.irs.gov/charities/charitable/article/0,,id=120703,00.html)).

of issues, by using a nonpartisan moderator, etc.<sup>18</sup>

*Voter registration/get out the vote drives:* 501(c)(3) organizations undertaking such efforts must not target particular voting blocs or engage in such activities with an express expectation that they will help a particular candidate.<sup>19</sup> For example, voter registrations should not be based on party affiliation; they should avoid mentioning the candidates or political parties in written or spoken communications about the drive or registration activity; and any services related to these efforts (e.g., transportation) should be offered to all regardless of political persuasion.<sup>20</sup>

*Voter education guides and other educational efforts:* Educational efforts undertaken by tax-exempt hospitals must not endorse, rank, or favor any candidates.<sup>21</sup> If a tax-exempt organization publishes a compilation of candidate positions, a questionnaire used to solicit such positions and the publication itself must not show a bias or preference in content or structure with respect to the views of a particular candidate.<sup>22</sup> Voter guides should cover a broad range of issues and refrain from judging the candidates on their positions.<sup>23</sup> (Note that distributing statements prepared by others that favor or oppose any candidate for public office will violate the prohibition.)

*Issue advocacy:* 501(c)(3) organizations are permitted to engage in issue advocacy related to their charitable mission. However, especially during election years, organizations should be careful not to cross into prohibited political campaign intervention. An organization risks intervening in a political campaign when its message invites the recipient to compare a candidate's position on an issue with the organization's views. The message does not need to expressly urge a vote for or against a candidate or mention a candidate by name, but rather could refer to political party affiliations or other distinctive features of a candidate's platform or biography. Even a statement that does not explicitly urge its audience to vote a certain way might implicitly support or oppose a candidate if the statement mentions an election, expresses approval or disapproval of a candidate's positions or actions, or raises an issue on which the candidates disagree. On the other hand, risk of being viewed by the IRS as partisan may be mitigated if, for example, the organization's statement is part of an ongoing series of communications on the same issue that are made irrespective of the timing of any election or is related to something other than the election—for example, a scheduled vote on specific legislation.<sup>24</sup>

*Postings on a tax-exempt hospital's website:* If an organization posts something on its website that favors or opposes a candidate for public office, the organization will be treated just as if it made those statements orally or through distributed printed material.<sup>25</sup> An organization may be at risk of participating in partisan activities, as well, if it posts links to other websites that advocate for or against a candidate. Posting links to candidate-related material does not necessarily constitute political campaign intervention. The IRS will review the context for the link

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<sup>18</sup> IRS FS-2006-17.

<sup>19</sup> See *American Postal Workers Union v. U.S. Postal Service*, 764 F.2d 858, 863 (D.C. Cir. 1985) (expressing doubt as to whether Postal Service could prohibit employees from participating in nonpartisan voter registration activity under the Hatch Act); see also *AFGE, AFL-CIO v. O'Connor*, 747 F.2d 748, 750 (D.C. Cir. 1984) (discussing opinion by Merit Systems Protection Board counsel that labor organization could conduct nonpartisan voter registration drive at their worksites as long as it had not endorsed a candidate).

<sup>20</sup> IRS Mini-Course.

<sup>21</sup> IRS Rev. Rul. 2007-14; IRS FS-2006-17.

<sup>22</sup> See, e.g., IRS Rev. Rul. 2007-41; IRS FS-2006-17.

<sup>23</sup> IRS Mini-Course.

<sup>24</sup> *Id.*

<sup>25</sup> IRS Memorandum for All EO Revenue Agents, Political Campaign Activity on the Internet, July 28, 2008, available at [www.irs.gov/pub/irs-tege/internetfielddirective072808.pdf](http://www.irs.gov/pub/irs-tege/internetfielddirective072808.pdf); see IRS Rev. Rul. 2007-41.

on the organization's website, whether all candidates are represented, any exempt purpose served by offering the link, and the directness of the links between the organization's website and the web page that contains material favoring or opposing a candidate for public office. An organization may permissibly provide links to official campaign websites of the candidates if: "there is a link to every candidate's official website; the links are presented in an educational context and are for informational purposes only; and the links are presented in a consistent, unbiased manner."<sup>26</sup> Note that an organization could also risk political intervention where it takes a position on an issue and also provides information about candidate positions on that issue, whether done on separate parts of the organization's website, or where one element is on the website and the other is not.<sup>27</sup>

#### D. Important Caveats

These comments are limited to the effect of federal law on a typical member's voter registration and candidate education activities, rather than state or local laws. Many states have their own "Hatch Acts" or other restrictions on election involvement by public entities. State and local tax law or other regulations may also constrain a health system's activities, and in some cases, its status under these laws as a public or private institution may not be clear. Finally, all activities must be consistent with the organization's stated purposes and within its corporate or statutory powers. For these and other reasons, members should consult with local counsel as to the permissibility of specific activities.

Attached below for general reference are basic overviews of federal rules governing campaign contributions and gifts to congressional members and staff. Again, members of America's Essential Hospitals should consult with local counsel as to the scope of their application and the permissibility of specific contributions or activities.

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<sup>26</sup> IRS Mini-Course; see also, IRS FS-2006-17.

<sup>27</sup> IRS Memorandum for All EO Revenue Agents, Political Campaign Activity on the Internet, July 28, 2008.



## Federal Restrictions on Political Activities

Entity	Nonpartisan Political Activity	Partisan Political Activity	Political Contributions to:				Host Fundraiser	Sponsor a PAC
			Candidate	PAC	State/Local Party	National Party		
Individual acting in individual capacity	Yes	Yes	\$2,600 per election*	\$5,000 per year	\$10,000 per year	\$32,400 per year*	Depends on status as public employee. <i>Consult counsel.</i>	Yes
501(c)(3) charitable organization	Yes, but activity must be truly nonpartisan and balanced.	No	No	No	No	No	No	No
State/local public entity	Likely <i>Consult counsel</i>	<i>Consult counsel</i>	Unlikely <i>Consult counsel</i>	Unlikely <i>Consult counsel</i>	Unlikely <i>Consult counsel</i>	Unlikely <i>Consult counsel</i>	Unlikely <i>Consult counsel</i>	<i>Consult counsel</i>
501(c)(6) trade association	Yes	Limited activity, restricted primarily to communications with members <sup>o</sup>	No	No	No	No	Yes	Yes
PAC (not multicandidate)	Yes	Yes	\$2,600 per election*	\$5,000 per year	\$10,000 per year	\$32,400 per year*	Yes	N/A
PAC (multicandidate)	Yes	Yes	\$5,000 per election	\$5,000 per year	\$5,000 per year	\$15,000 per year	Yes	N/A

\* These contribution limits are increased for inflation in odd-numbered years. Note that overall biennial contribution limits on individual political contributions (set at \$48,600 to all candidates and \$74,600 to all PACs and parties) were eliminated by the Supreme Court in the April 2014 *McCutcheon v. FEC* decision.

◊ The Supreme Court decision in *Citizens United v. FEC* overturned the campaign finance law prohibition on independent expenditures of general treasury funds for “express advocacy” for federal candidates and “electioneering communications.” Tax law still requires that partisan activity not be the “primary activity,” and some circumstances could result in a tax on political expenditures. The FEC is still in the process of revising related regulations; consult counsel.

### Sources for FEC Information:

- Contribution Limits for 2013-2014 (<http://www.fec.gov/pages/brochures/contriblimits.shtml>).
- Campaign Guide for Congressional Candidates and Committees, June 2014 (<http://www.fec.gov/pdf/candgui.pdf>).
- Campaign Guide for Corporations and Labor Organizations, 2007 (<http://www.fec.gov/pdf/colagui.pdf>)

## Federal Restrictions on Gifts to Members of Congress and Staff (House and Senate Ethics Rules)

General Gift Limit	Special Rules for Gifts From Registered Lobbyists	Selected Exceptions (do not count towards gift limits/prohibitions*)		
		De Minimis or Outside Scope of Rules:	Based on Source:	Based on Activity:
<ul style="list-style-type: none"> <li>• Less than \$50 per gift (non-cash)</li> <li>• Less than \$100 total per source per year</li> <li>• Includes: <ul style="list-style-type: none"> <li>◦ Tickets</li> <li>◦ Food</li> <li>◦ Travel</li> </ul> </li> <li>• Applies to: <ul style="list-style-type: none"> <li>◦ Member</li> <li>◦ Staff</li> <li>◦ Relative of either (if gift based on relationship to Member or Staff)</li> </ul> </li> </ul>	<p>Registered lobbyists and lobbying organizations are prohibited from making <i>any</i> gifts (unless subject to exemption)*</p> <p>No travel expenses may be paid<sup>+</sup></p> <p>No personal hospitality (unless based on personal friendship)</p> <p>No contributions for congressionally-sponsored retreats or conferences</p> <p>No contributions to legal expense funds</p>	<p>Gifts of a nominal value (under \$10)</p> <p>Refreshments of a nominal value offered other than as part of a meal</p> <p>Informational materials</p> <p>Non-monetary prizes or awards</p> <p>Commemorative items (in-person)</p> <p>Nominal value home-state products for display or free distribution</p> <p>Campaign contribution</p> <p>Contribution to legal expense fund</p> <p>Travel (considered reimbursement under certain conditions)*</p>	<p>Paid for by <i>federal/state/local government entity</i></p> <p>From relative</p> <p>From personal friend (if gift because of friendship and limited to \$250)</p> <p>From fellow member</p> <p>Accredited institutions of higher education and 501(c)(3) organizations <i>may</i> be exempt from certain travel restrictions</p> <p>Pension from former employer</p> <p>Bequest/inheritance</p>	<p>Training session</p> <p>Charity event (not substantially recreational)</p> <p>Widely attended event</p> <p>Opportunities or benefits available to wide group</p> <p>Personal hospitality</p> <p>Benefits from outside activities</p> <p>Campaign or political events</p> <p>In-state constituent event (no lobbyists)</p> <p>Travel to in-state constituent event, if meet other requirements (<i>Senate</i>)</p> <p>Incident to a visit of a business site, meal or local transportation, if meet other requirements (<i>House</i>)</p>

+Travel in connection with duties may be paid by private entities (that do not employ or retain lobbyists) and be considered reimbursement and not a gift, but a lobbyist or foreign agent may not accompany a Senator, officer, or employee “at any point throughout the trip”—including the event. If travel is paid for by a private organization that employs or retains lobbyists, generally it must be limited to a one-day trip, a lobbyist may not accompany a Member, officer, or staff member on “any segment of the trip”—excluding the event—and the lobbyist can have only de minimis involvement in planning.

# 2014 ELECTION ADVOCACY TOOLKIT

*Making Your Voice Heard for  
Essential Hospitals and Patients*



AMERICA'S  
ESSENTIAL  
HOSPITALS



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