

2019 | THE ACADEMY
Legal & Regulatory
Conference





Politics at the Watercooler

Presented to APPA: Legal & Regulatory
Conference

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Presented by William A. Powers, *Partner*

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MAKING IT HAPPEN.

Agenda

- First, Identify the Legal Nature of Your Organization
- What Type of Political Speech and Activities Can Your Organization Engage In?
- What Political Activity Can Employees Engage in During Work (and Non-Work) Hours? Can Employers Limit It?

What to Watch Out for as a GC

- How may your organization permissibly engage in political speech and other activities?
 - Tax Law
 - Political Law
 - State Enacting Statute
- What type of speech may your employees engage in on the job, and what limits may your organization permissibly impose?
 - Employment/Human Resource Law
 - Internal Policies and Codes of Conduct

But Before We Get Too Far:

- What do we mean by “political speech?”
 - Activities that involve elections, the legislative process, or even public policy debates
 - Can be made to the public or internally within your organization
 - As simple as an email and all the way to a concerted media campaign
 - May or may not mention candidates, parties, or elections

Overview of Political Speech Issues

- Political speech determined by tax-exempt status

	501(c)(3)	501(c)(4)/(6)	Agency
Direct Campaign	NO	Not Primary Purpose	It Depends
Lobbying – Direct or Grassroots	Permitted – but limited	Permitted – and unlimited	It Depends
Ballot Measures	Permitted – but subject to IRS limits	Permitted – and unlimited	It Depends (Sensing a theme?)

Examples of Direct Campaign Intervention (Nonprofits)

- These should be familiar from the 2016 & 2018 campaign
 - Endorsing candidates
 - Running television, radio, print, or digital ads
 - Hosting a candidate or political party fundraiser
- What is not campaign intervention
 - A non-partisan candidate forum
 - A non-partisan voter registration or Get-Out-The Vote efforts
 - State ballot initiative and measure activities

Similar State Rules: *e.g.*, California Government Code § 8314

Basic Rule: It is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law.

- Campaign activity
- Personal purpose
- Use

Communications Sent Using Public Funds (California)

- **General Rule: Mass Mailings are prohibited, if:**
 - ✓ Delivered - residence, employment, P.O. Box
 - ✓ Features an Elected Officer
 - ✓ Public money spent
 - ✓ Mass Mail – 200+ sent in calendar month

Lobbying (Direct)

- Covered by federal, state, and local law
- Also covered by IRS (especially important to 501(c)(3)s that are limited in the amount of lobbying they do)
- Generally covers direct contact with legislators and other public officials
- Typically includes preparation and overhead costs related to lobbying
- Contract v. In-House Lobbyists – Both Reported

Lobbying (Direct) – State and Local

State and local rules vary greatly

- State or local laws may cover activity not covered by IRS
 - Example: Lobbying state agency – not lobbying under IRS rules because not “legislative,” but may be covered under state laws, such as California
- Pay attention to state and local thresholds
 - Lobbyist registration is required in some states for a single contact
 - Some jurisdictions require registration before contact is made
 - State law may cover activity not covered by IRS (lobbying an administrative agency)

Lobbying (Grassroots)

- Communications that request constituents or others to contact legislators or other public officials to change vote or policy stance
- Under IRS rules, grassroots lobbying counts as lobbying
- Under federal rules (Lobbying Disclosure Act), grassroots activity is not lobbying
- States and municipalities – the rules vary greatly

State and Local Ballot Measures (Nonprofits)

- Spending on state and local ballot initiatives counts as “lobbying” under the IRS test, not campaign intervention
 - Organizations may contribute funds to ballot measures
 - Organizations may sponsor their own advertisements
- Depending on state law, spending on state and local ballot initiatives may trigger disclosures
 - Disclosure of donations
 - Some states, such as California, have strict rules related to the disclosure of underlying donors

State Agencies and Ballot Measures: *e.g.*, California Agencies

Basic Rule: An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.

Local Agency Board Involvement in Ballot Measures (California)

- Members in individual capacity may endorse or oppose ballot measures.
- The Board may host informational forums. Both sides must receive equal time.
- The Board may provide neutral and objective factual material about ballot measures.

PACs and Super PACs

- According to Federal Election Commission rules, your organization may be able to:
- Establish a PAC (also known as a separate segregated fund)
 - Organization may pay expenses to establish and administer PAC
 - May solicit certain executives, officers, or members
 - May give directly to federal candidates or political parties
- Give directly to a Super PAC

Pitfalls to Avoid with Political Activities

- Corporate facilitation
- Coercion
- Reimbursed political contributions
- Member backlash – transparency
- Pay-to-play laws

May Employees Talk Politics at the Watercooler?

- This is a function of law and internal policies
 - Employment and HR Law
 - Internal Codes of Conduct, policies, etc.
 - State mini - “Hatch” Acts, if public agency

What about the First Amendment?

- What type of organization are you?
- Public Agencies' actions constitute government action, so First Amendment Applies
 - Example: Blocking on social media – *Knight Foundation v. Trump* (2d. Cir.)
- Private employers: First Amendment right to free speech and association does not apply to private employers
- Quasi-Public Agencies – Will depend on state statute classifying agency.

Can you Fire me for Saying That? State Law Matters

State laws determine whether speech made outside the workplace can be moderated or restricted by employers:

- Virginia – employers may ask employees to refrain from engaging in problematic political activity, even in their off-hours
- Louisiana – expressly prohibits employers from restricting employees' lawful off-duty political activity, even if such activity conflicts with employer's mission/core values
- Other states fall somewhere in between

A Note About Social Media

- Legal Issues – “Similar Issues, New Platforms”
 - (1) Participation; Community; Interaction
 - (2) Entity Use of Online Social Media Platforms
 - Defamation, IP, Privacy, Agency
 - (3) Entity Online Programs and Efforts
 - Promotions, Tax-Exempt Status
 - (4) Employee Use of Online Social Media
 - Workplace Environment, Recruiting/Hiring, Privacy, Developing Policy



Questions?

William A. Powers
Partner

wpowers@nossaman.com

(202) 887-1414

nossaman.com

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