



# THE HATCH ACT

By David Tobenkin

**It's confusing and can end a career. Email and social media make it easier than ever to violate the law that limits feds' partisan political activities.**



ll-advised political communications in the workplace can cost a federal employee dearly, as Theresa Taddeo found out the hard way.

In January 2008, Taddeo was a New York-based Department of Homeland Security senior intelligence research specialist. She says she had received a variety of disparaging emails about President Barack Obama sent to her personal email account and that she mistakenly forwarded, rather than deleted, one such email, captioned “Fwd: What Oprah forgot to tell you ... about Obama,” to about 85 people, including a few coworkers, on a personal email account but using a government computer during work hours.

The result was an investigation leading to a settlement between Taddeo and the Office of Special Counsel (OSC), the federal agency that polices impermissible partisan speech and activities by federal employees, in which Taddeo admitted that she had violated the Hatch Act. That federal statute limits certain partisan political activities of federal executive branch employees in order to protect the federal workforce from partisan political influence and ensure the nonpartisan administration of laws. The consequences for Taddeo were stiff: a six-week suspension without pay, which she says amounted to \$10,000, not to mention the \$3,500 she paid to retain

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an attorney. The attorney helped Taddeo negotiate a settlement with the OSC, which she said was initially pursuing a four-month suspension.

“The monetary aspect didn’t hit me so hard as the fact that I was just hurt,” says Taddeo, who retired in 2012. “I was in reputable positions, and I hadn’t done anything in my 37 years in federal government that merited this. This was a first-time, accidental offense.”

## A PERFECT STORM

With no raises for three years, the federal government shutdown, sequester days and ongoing denigration of federal workers in many quarters, many federal employees are steaming mad. And, conveniently, the 2014 political season is upon them, promising outraged federal workers an opportunity to vent their frustrations.

But active federal employees – the Hatch Act does not apply to retirees – had best do so with caution, because a single ill-advised partisan political email at work or solicitation of money for a partisan election campaign could result in severe penalties. While some recent Hatch Act-related developments will allow expanded political activities by some federal workers and will give the Merit Systems Protection Board (MSPB), which hears and decides OSC Hatch Act prosecutions, discretion to impose less severe Hatch Act penalties than in the past, the basic, considerable challenges of complying with the complicated Act remain.

The Hatch Act limits federal employee partisan political activities and communications in two primary ways:

First, it limits many partisan political activities to outside the workplace, outside duty hours, out of uniform and outside of government vehicles. Second, it places absolute bars against certain forms of partisan political activities, whether an employee is on duty or off duty, at the workplace or away from it.

The communications revolution of the past two decades has ensured that it is easier than ever to engage in actionable violations of the Act.

Two decades of email communications have greatly expanded the scope of potential violations by providing, first, tangible, long-lived and irrefutable evidence of violations and, second, easy dissemination to multiple message recipients, any

one of whom can report violations to agency ethics officers or the OSC, leading to enforcement action.

The past decade’s development of social media vehicles such as Facebook, MySpace and Twitter have continued the trend by increasing the number and extent of communications and blurring the distinction between federal employees’ private and public lives. The increasing prevalence of federal employee teleworking, where employees are “on duty” while they are working electronically from home, further blurs the line.

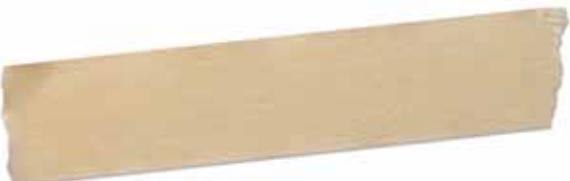
“Because the Internet and social media have made solicitations [to make partisan political financial contributions] easier to effectuate, we are likely to see an increase in the number of cases involving solicitation of political contributions, such as taking an email that includes a solicitation and forwarding it to others,” says Ana Galindo-Marrone, chief of the OSC’s Hatch Act Unit. “Also, because there is so much discussion of federal benefits and salaries and furloughs, we expect there is likely to be some confusion between activities directed at legislative efforts, which are acceptable, versus activity directed at electing a specific partisan candidate or candidates [which, during duty hours, at the government workplace and in some other circumstances, violate the Act].”

New Hatch Act complaints received by the OSC increased in fiscal year 2012 by 11 percent compared to fiscal year 2011, from 451 to 502, while total advisory opinions issued in fiscal year 2012 increased 10.8 percent, from 3,110 to 3,448 compared to fiscal year 2011, according to the OSC’s fiscal year 2012 annual report to Congress. Still, disciplinary actions like Taddeo’s, whether obtained by negotiation or ordered by the MSPB, remain fairly rare, with only four in fiscal year 2012.

## THE DEVIL IN THE DETAILS

The Hatch Act was designed to carefully balance federal employees’ First Amendment right to free speech and participation in political life with their interest, and that of the public, in a depoliticized federal work environment. But finding the right balance, clearly explaining what is and is not permissible under the Act, and administering the appropriate level of penalties have not proven easy.

Speech and actions relating to certain political activities are restricted under the Hatch Act.



**D**etermining what is permissible under the Act and what is a violation can be maddeningly detail-specific.

The definition of political activity may be wider than anticipated, as it includes activity directed toward the success or failure of a political party, candidate for partisan political office or partisan political group, even after a particular campaign concludes. (See 5 C.F.R. § 734.101.) An OSC advisory document notes that, therefore, even after Election Day, the Hatch Act still prohibits federal employees, while they are on duty or in the federal workplace, from wearing or displaying items that show support for, or opposition to, a political party or a partisan political group.

Another complicating factor is that, pursuant to the Hatch Act, there are two levels of scrutiny and limitations applied by the statute: a general rule for most federal employees; and more restrictive provisions that limit the activities of employees at certain agencies, and offices within agencies, clustered in enforcement, intelligence, elections, as well as certain federal worker categories, such as Senior Executive Service members and administrative law judges. (See 5 U.S.C. § 7323(b).) Unless otherwise indicated, advice and analysis below refer to the less restricted category of employees.

Finally, determining what is permissible under the Act and what is a violation can be maddeningly detail-specific. It took a lengthy OSC notice to federal employees in April 2011 to communicate which types of photos of President Obama

they could display in the workplace while he was a candidate for re-election and which would constitute Hatch Act violations.

Can federal employees be blamed for their confusion when even a cabinet-level department secretary runs afoul of the statute? In 2012, the OSC concluded that Department of Health and Human Services Secretary Kathleen Sebelius violated the Hatch Act when she made extemporaneous partisan remarks in a speech delivered in her official capacity on February 25, 2012.

### **HOW TO COMPLY WITH THE ACT**

Many federal agencies include Hatch Act components in their regular ethics training. The statute's provisions concerning federal employees are found at 5 U.S.C. § 7321-7326, and implementing regulations can be found at 5 C.F.R. § 733 through § 734.

In addition, the OSC has a wealth of information on its website regarding how to comply with the Act, including a helpful summary of do's and don'ts. To access this information, go to [www.osc.gov](http://www.osc.gov), click on "Political Activity (Hatch Act)," then on "Other Helpful Information," then select "The Hatch Act and Federal Employee (poster)."

Five major prohibitions for less-restricted federal employees are detailed in that summary and capture the breadth of the law:

- 1** Federal employees may not use their official authority or influence to interfere with or affect the result of an election, by, for example, using their official titles or positions while engaged in political activity. (5 U.S.C. § 7323(a)(1)) This rule applies on or off duty, at home or at the office.
- 2** Federal employees may not solicit, accept or receive a donation or contribution for a partisan political party, candidate for partisan political office or partisan political group. (5 U.S.C. § 7323(a)(2)) This rule applies on or off duty, at home or at the office. For example, they may not host a political fundraiser. While they may not collect or solicit money, they may contribute money to political campaigns, parties and groups provided they are not on duty or in the workplace. There is a narrow exception to the no-solicitation rule: when the person solicited for a political contribution belongs to the same federal labor organiza-

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tion, or federal employee organization, as the employee who solicits, accepts or receives the contribution; *and* the person solicited is not a subordinate employee; *and* the request is for a contribution to the multicandidate political committee of a federal labor organization or federal employee organization.

- 3** Federal employees may not be candidates for public office in partisan political elections, though they may be candidates for public office in nonpartisan elections. (5 U.S.C. § 7323(a)(3)) There have been some new developments in this area. In December 2012, Congress passed legislation amending the Hatch Act, the Hatch Act Modernization Act of 2012, which contains the most significant changes to the law in nearly two decades.

For public employees at the state and local levels, but not the federal level, the changes were dramatic: The Hatch Act Modernization Act allows most state and local government employees to run for partisan political office by eliminating a previous Hatch Act prohibition on state and local government employees from running for partisan office if they worked in connection with programs financed in whole or in part by federal loans or grants, so long as an employee's salary is not paid for completely by federal loans or grants.

In November, the Office of Personnel Management amended its regulations to grant federal employees residing in the District of Columbia a partial exemption from the Hatch Act's political activity restrictions by making the District of Columbia a designated locality under the Hatch Act. The ruling permits federal employees who live in the District of Columbia to run for partisan political office in local elections as independents. Federal employees in 75 Maryland and Virginia cities and towns near Washington, DC, already had this right. The purpose of the regulations is to avoid limiting citizen participation in local governments in jurisdictions with large numbers of federal employees. The final rule became effective December 9, 2013.

- 4** Federal employees may not knowingly solicit or discourage the participation in any political

**L**egislative activism by NARFE members, whether writing letters or attending fundraisers, is not prohibited by the Act.

activity of anyone who has business pending before their employing office. (5 U.S.C. § 7323(a)(4)) This rule applies on or off duty, at home or at the office.

- 5** Federal employees may not engage in political activity – that is, activity directed at the success or failure of a political party, candidate for partisan political office or partisan political group – while the employee is on duty, in any federal room or building, while wearing a uniform or official insignia, or using any federally owned or leased vehicle, by, for example, distributing campaign materials or items. (5 U.S.C. § 7324(a))

Elsewhere on the OSC's website ([www.osc.gov/haFederalfaq.htm](http://www.osc.gov/haFederalfaq.htm)), an OSC Hatch Act Q&A document provides answers to some of the most frequently asked questions that the OSC receives from federal employees concerning political activity. It provides case-specific examples that can better help employees understand exactly what conduct is and is not permitted.

Still, John Mahoney, a lawyer who represents federal employees facing agency enforcement actions, including Hatch Act violations, notes that federal employees may wish to consult agency ethics officers and possibly outside counsel if they intend to engage in certain activities. "For example, a federal employee in DC wanting to run for

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local office would be tricky under the new amendments to the Hatch Act, and such an employee should consult with an attorney before launching any campaign,” says Mahoney, a partner at the law firm Tully Rinckey PLLC.

## A KINDER, GENTLER HATCH ACT?

The Hatch Act Modernization Act also resulted in some significant changes for federal employees concerning penalties by giving the MSPB discretion to mete out less severe penalties for violations than in the past. While the OSC had discretion to resolve cases with warning letters or settlements, for cases that the OSC determined were serious enough to prosecute and that the MSPB determined were violations, the Hatch Act allowed the MSPB only a handful of disciplinary options. The presumed penalty was removal from federal service for a violation of the Act, unless the MSPB found, by unanimous vote, that the violation did not warrant removal, in which case the MSPB could impose a penalty of not less than a 30-day suspension without pay.

Under the modified penalty structure, an employee the MSPB finds violated the Hatch Act is subject to a range of disciplinary actions. This includes removal from federal service, reduction in grade, debarment from federal employment for a period not to exceed five years, suspension, reprimand or a civil penalty not to exceed \$1,000. The modified penalty structure applies to violations that occurred before, on or after January 27, 2013, except in some circumstances.

## ENFORCEMENT

Certain patterns of conduct are more likely to result in OSC enforcement action. “In terms of what cases would cause us to pursue enforcement action, they are usually more serious,” Galindo-Marrone says. “In many cases where we investigate and find a violation, we issue a warning letter. More serious cases [that may warrant prosecution] involve officials using their authority to interfere with an election, such as a supervisor advising subordinates to vote a certain way, solicitation of other federal employees, or continued violations after an employee has been warned.”

With respect to Taddeo’s penalty, “prior to the Hatch Act Modernization Act of 2012, the

presumptive penalty for Hatch Act violations was termination,” says OSC Press and Public Affairs Liaison Ann O’Hanlon. “In light of this, OSC typically asked for stiffer penalties than we do today. More typical cases in recent years include an Army Corps of Engineers employee who sent an email to 76 recipients, advocating for the success of a political party, while she was on duty and in the federal workplace. The majority of the recipients were federal employees. The employee who sent the email received a one-day suspension.”

“The current Special Counsel has been very fair trying to handle complaints in an appropriate way based on what the law says,” observes J. Ward Morrow, assistant general counsel-legislation for the American Federation of Government Employees.

## NARFE ACTIVISM DOES NOT VIOLATE THE ACT

In response to a *narfe* magazine survey, several NARFE members asked whether activism on legislative issues violates the Act. It does not. As noted previously, advocating for or against *legislation*, rather than for or against candidates or parties, is not limited or prohibited by the Act.

“Legislative activism by NARFE members, whether writing letters or calling congressional offices to express an opinion, is not prohibited by the Hatch Act,” says NARFE Legislative Director Jessica Klement. “The Act deals exclusively with electoral politics, not with legislative advocacy or lobbying activities. However, employees still should not engage in such advocacy activities on government time or using government equipment or resources.

“Some agency officials maintain that a federal provision against using appropriated funds to influence members of Congress on legislation, at 18 U.S.C. § 1913, prohibits federal employees from participating in grass-roots lobbying campaigns on government time or using government resources.

“In addition, use of duty time or government equipment or resources for such activities could violate other federal rules. And there also is the danger of unintentionally veering into partisan political activities, which would violate the Act.” **n**

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