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Compliance Connections

Helping You Avoid Ethics, Lobbying & Campaign Finance Pitfalls

FALL 2014

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Employer Guidelines for Election Day Activity

By Marjorie J. Yano

As Election Day approaches, employers should be aware of laws that affect the campaign and voting activity of their employees. State law permits and restricts certain campaign and Election Day activities, and employers should ensure that corporate policies do not run afoul of campaign finance laws.

In the days and weeks leading up to Election Day, employees should not be allowed to participate in partisan or candidate campaigns on company time. This prohibition includes allowing employees to distribute candidate literature on company property.

Companies are permitted to participate in ballot issue or levy campaigns, if they choose. In this case, employees may campaign on company time, but efforts must be nonpartisan. Employees may also use corporate resources to support these campaigns, as long as that use is in accordance with the company's issue campaign policy.

Additionally, employers may place literature or posters promoting a state or ballot issue in public space for customers and clients to see. Any literature that is posted must be truthful and must contain a disclaimer clearly identifying the campaign committee.

With respect to contributions, employees should be permitted to make voluntary contributions to a political cause, but employers should be careful to not require or reward political giving, as well as to not coerce employees to make a contribution.

On Election Day, state law prohibits any employer from interfering with an employee's efforts to vote. This means that employers need to give employees a reasonable amount of time to vote.

While the law does prohibit employer interference with Election Day voting, this does not necessarily mean that every employee must be given time off of work to vote. Some employees are not "electors," and most employees have an opportunity to vote before or after work. Considerations may need to be given for employees who work extended shifts or for those whose polling location is far from work.

Similarly, employers should allow employees to serve as an election official. There is no requirement for employers to pay employees while they are away from work for this service, but employers may grant leave or pay employees if they choose. Whatever policy they choose, employers should ensure it is applied equally to all employees, regardless of political party affiliation.

The policies of individual companies may vary depending on nuances of each workplace. To ensure policies are in compliance with state laws, additional legal review may be necessary.

What Went Wrong? A Timeline of Failure to Report Gifts and Meals

By Katie Reardon

Ohio law prohibits lobbyists from providing legislators more than $75 in gifts and $75 in meals/beverages during a calendar year. Lobbyists and legislators are both required to disclose gifts and meals provided and accepted.

In recent years, federal, state and local governments have worked together to crack down on parties that fail to appropriately report meals and gifts. As shown in the following timeline, failure to abide by these regulations can result in fines, probation, jail time and a tarnished reputation.

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- December 2009: John Rabenold and George Glover provide Cincinnati Bengals vs. Detroit Lions football tickets to legislators.
- March 2014: John Rabenold, a former lobbyist with Axcess Financial, pleads guilty to two misdemeanor charges for two counts of filing false legislative lobbying activity and expenditure reports.
- May 2014: As part of an agreement, John Rabenold is fined $2,000 and given up to three years of probation. Rabenold also agrees to cooperate with the FBI and Legislative Inspector General on investigations into legislators who accepted illegal gifts and/or meals.
- September 2014: George Glover, a registered lobbyist, pleads guilty to two misdemeanor charges for failure to maintain proper lobbying expenditure records. When Rabenold's case came to light, Glover voluntarily amended his lobbying report. Glover is fined $500 for being unable to provide requested records.
- October 2014: The Joint Legislative Ethics Committee meets and recommends that Rep. Dale Mallory be charged with knowingly accepting prohibited gifts from lobbyists and knowingly filing a false financial disclosure statement. According to *The Columbus Dispatch*, Rep. Mallory is currently negotiating with Franklin County Prosecutor Ron O'Brien.

As in the cases outlined above, lawmakers and lobbyists are treated equally under the law. In fact, cooperating lobbyists can often lessen their charges by exposing lawmakers, creating a zero-tolerance environment for today's legislators. One can infer that in the examples presented, the meals and entertainment were enjoyed by both parties, but the consequences were most likely not worth the experience.

Five Things You Should Never Say When the Government Comes Knocking

By **Maria J. Armstrong**

1. "You're kidding, right? This whole investigation is just a political witch hunt. Go away!"
2. "Subpoena? Oh yeah, it's around here somewhere. Why don't you call me back later, and I'll hunt for it."
3. "Why are you picking on us? Everyone does it!"
4. "Sure! Whatever you need. We're an open book!"
5. "Oh, is that all? I thought you were here about that bribery thing."

Whether it's a subpoena, a request for an interview, a civil enforcement action or an arrest warrant, when a government regulator comes knocking, your company needs to take it seriously. Professionalism and cooperation are important, as well as knowing what you are facing and understanding your exposure. A reasoned, methodical approach will almost always result in a better outcome for your company. Here are five steps for successfully handling government inquiries:

1. Be prepared. Designate key employees in the organization to handle government visitors, and educate all employees on how to "answer the door."
2. Assess the situation. Determine your role and exposure. Is there really an issue? If so, is it administrative, civil, criminal or a combination? Are you a target, witness or victim?
3. Conduct an internal review. Now that you know something went wrong, an internal review can help your company understand what happened and plan the next steps. Be sure to understand what privileges may apply and be careful with your record retention obligations.
4. Be responsive, thorough and professional. Avoidance, delay or, worst of all, deception can hurt your company's chances for a favorable result. Few things will irritate a government investigator more than deception or delay, and those tactics can lead to criminal charges.
5. Clean up and move on. So long as you do not interfere with or obstruct the ongoing investigation, there is seldom a good reason to wait to take action. Be responsive to the strain an investigation puts on affected personnel and the damage it causes to the corporate reputation, especially if media attention or adverse personnel actions are involved. Assess what went wrong, address the situation, and put policies and safeguards in place to avoid a recurrence.

Big Changes in Ohio's Laws on False Campaign Statements

By **Marjorie J. Yano**

Just in time for election season, several recent developments in Ohio law have changed the playing field for campaign advertisements.

On September 11, 2014, Judge Timothy Black of the U.S. District Court for the Southern District of Ohio held that Ohio's political false statements laws are unconstitutional, and he enjoined the Ohio Elections Commission from enforcing them. *Susan B. Anthony List, et al., v. Ohio Elections Comm'n,* Case No. 1:10-CV-720, 2014 U.S. Dist. LEXIS 127382.

Ohio's false statement laws are contained in Ohio Revised Code sections 3517.21(B)(9) and (10). Section (9) prohibits making "a false statement concerning the voting record of a candidate or public official." Section (10) provides that a person may not "post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate."

The challenge to these false statement laws was brought by plaintiffs *Susan B. Anthony List* and the Coalition Opposed to Additional Spending and Taxes. The plaintiffs challenged the false-statement laws during the 2014 election cycle, arguing that the laws are a burden on their First Amendment right to free speech.

Defendants, including the Ohio Elections Commission (OEC), argued that Ohio has a compelling interest in protecting the integrity of its elections and that laws prohibiting false statements in campaigns protect a public interest in this integrity.

Judge Black applied strict scrutiny of the Ohio law and determined that the law was not "narrowly tailored to achieve a compelling government interest." Based on previous decisions from the U.S. Supreme Court, Judge Black concluded that the interest in preventing false speech in campaigns is not a compelling or substantial state interest and constituted an impermissible restriction on free speech.

In addition, because there is no mechanism for identifying and immediately dismissing frivolous complaints brought under Ohio's false statements laws, Judge Black concluded that the burden created was also imposed on truthful speakers, thus was not "narrowly tailored." Because the law can be used against truthful speakers, it has the effect of "chilling" speech and preventing important dialogue in the campaign and election process.

Judge Black criticized governmental regulations of the truth or falsity of political speech and suggested that the voters are the proper panel for distinguishing between true and false campaign statements. The OEC publicly announced that it plans to appeal Judge Black's decision; however, as of this writing, no appeal has been filed.

Susan B. Anthony List applies to R.C. 3517.21 and political statements by non-judicial candidates. However, Ohio law contains two other provisions that regulate false statements in other contexts, one of which was addressed in a recent Ohio Supreme Court ruling.

Judicial candidates are required to abide by the Rules of Judicial Conduct. On September 24, 2014, the Court issued a ruling finding that a portion of these rules are unconstitutional and thus unenforceable. Rule 4.3(A) prohibits a judicial candidate from "knowingly or with reckless disregard" disseminating false information about the candidate or an opponent or true information that would be "deceiving or misleading to a reasonable person." The Court found the rule to be unconstitutional because of the regulation of true but misleading speech. The Court declined to extend its ruling to include campaign speech that is knowingly false.

While *Susan B. Anthony List* may still be appealed, these recent cases demonstrate a move by courts to embrace more political speech — even speech that may be misleading — and the notion that political debate is best fostered by open dialogue, rather than false statement legislation.

How Does Dark Money Stay Dark?

By Jerry O. Allen and Maria J. Armstrong

After the U.S. Supreme Court *Citizens United* case invalidated certain prohibitions in the Federal Election Campaign Act (FECA), the campaign finance world saw an influx of "dark money" groups. Following the *Citizens United* decision, these groups were permitted to use corporate funds and could spend an unlimited amount of money on electioneering communications and independent expenditures without the disclosure requirements imposed on candidates, PACs and political parties. The ability to "anonymously" influence the political process has proved to be very attractive, and the number of dark money groups — and their expenditures — have blossomed.

In the 2012 presidential election, dark money groups reported $300 million in independent expenditures. Many of these groups are Internal Revenue Code section 501(c)(4) organizations and are often established and highly respected trade associations, like the U.S. Chamber of Commerce.

A 501(c)(4) organization is a tax-exempt, nonprofit entity operating to promote social welfare. Because 501(c)(4) social welfare organizations operate to promote "the common good and general welfare of the community," they can be useful tools for influencing public policy. They are permitted to engage in lobbying and campaign intervention, as long as such activities are not the primary purpose of the organization. Most significantly, 501(c)(4) organizations can raise money without publicly disclosing their donors. However, in order to effectively maintain donor anonymity, 501(c)(4) organizations must adhere to complex and ever-changing tax and election laws and follow strict filing and reporting guidelines.

Since their primary purpose is social welfare, 501(c)(4) organizations do not fall under the Federal Election Commission's (FEC) standard definition of a political committee. Provided they avoid political activity, as interpreted by the FEC, they are not required to comply with the reporting requirements of political committees and only have to disclose donors that contribute funds earmarked for political advertisements. 501(c)(4) organizations can also create electioneering communications, deemed "issue ads," and are not required to disclose their donors when engaging in this activity.

Social welfare organizations must identify their donors to the Internal Revenue Service (IRS) when filing annual tax returns. However, names and addresses of contributors are not public information and must not be disclosed by the IRS.

With the rapid influx of this new money into the political process, it is not surprising that various regulators are looking for ways to shine the spotlight on dark money. The IRS attempted to issue new rules governing the political activity of 501(c)(4) organizations in 2013. After a record number of comments were filed opposing the proposed rules, the IRS withdrew and is currently working on a new version of the rules.

The FEC has also wrestled with this issue, but it has failed to resolve several complaints that have been filed since *Citizens United* was announced. Lawsuits against the FEC about this issue were filed and remain pending. Congress has also tried, and failed, to regulate the arena. In the absence of federal regulation of dark money, a growing number of states have entered the fray and are introducing legislation to address the issue. And in the corporate world, more and more publicly traded companies are responding to investor demands for transparency by voluntarily disclosing at least some details about corporate political expenditures.

Federal, state and local election and tax laws pose complicated reporting and disclosure requirements for 501(c)(4) organizations. And as outlined above, the requirements are under tremendous scrutiny and pressure. Whether they are motivated to keep dark money dark or simply want to exercise their political rights, it is imperative for organizations to understand these ever-changing rules to avoid adverse legal consequences.

Please contact Jerry O. Allen or Maria J. Armstrong if your 501(c)(4) organization needs help complying with the tax-related obligations, campaign regulations and reporting requirements imposed.