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INSIGHT: A General Counsel's Guide to Election Year Issues for Exempt Health-Care Organizations

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Introduction

With election season upon us once again, General Counsel at nonprofit hospitals and health systems will want to remind their leadership of the prohibition on political campaign activity by section 501(c)(3) organizations. Although the prohibition is not new, every election cycle there seem to be multiple reports of alleged violations in the press, flagged by watchdog groups or investigative reporters. Other potential violations likely fly under the public radar but may be picked up by the IRS or a whistleblower.

The so-called ''Johnson Amendment,'' enacted in 1954, amended the Internal Revenue Code to prohibit section 501(c)(3) organizations from intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. Penalties for violating this prohibition can be severe and may include excise taxes on the organization and individuals, as well as possible loss of tax-exempt status. Recent efforts to repeal or restrict the reach of the Johnson amendment have been limited to churches. To date, even these limited efforts have been unsuccessful.

Although the prohibition on political campaign intervention does not deprive directors, officers and employees of their First Amendment rights to participate in political activity, they must do so on their own time, and on their own dime. What follows are ten tips on what General Counsel should watch out for in order to avoid running afoul of the political campaign intervention prohibition. Our goal is to sensitize General Counsel to these issues; however, determining whether the prohibition has been violated can be quite nuanced and fact-specific. Accordingly, more detailed analysis may be required in particular circumstances.

1. Medical Staff donations from a hospital account to a PAC may be attributed to the hospital. Most hospital medical staffs are not separately incorporated. Consequently, medical staff dues are often collected by the hospital rather than a separate legal entity and are held in a financial account under the hospital's taxpayer identification number. As far as the IRS is concerned, those funds belong to the hospital, regardless of the provisions of the medical staff bylaws. *See, e.g.*, Rev. Rul. 77-260, 1977-2 CB 466; CCA 200444001 (July 8, 2004). Using funds in a hospital account to make political contributions, such as contributions to a medical society political action committee (''PAC''), may constitute prohibited political campaign intervention by the hospital. Physicians, remain free to contribute individually or collectively to a PAC or candidate of their choosing, but involving the nonprofit hospital in routing those contributions to a PAC or candidate may put the hospital at risk of violating the prohibition on political campaign activity. Putting the accounts used to collect medical staff dues and make PAC contributions under a separate taxpayer identification number obtained by the medical staff, either as part of incorporating the medical staff or claiming status as an unincorporated association, may solve the tax problem. It also, however, could strengthen arguments that the medical staff is a separate entity capable of conspiring with the hospital for antitrust and other legal purposes, a point on which the courts are split. For example, in *Medical Staff of Avera Marshall Regional Medical Center v. Avera Marshall Regional*, 857 N.W.2d 695 (Minn. 2014), the medical staff was treated as an unincorporated association and separate entity. In *Oksanen v. Page Memorial*

Hosp., 945 F.2d 696 (4th Cir. 1991), the medical staff was found not to be a separate entity.

2. Photo Opportunities with candidates at the hospital can be problematic. Candidate visits can be tricky. A candidate photographed or videoed while touring a hospital may create the appearance that the hospital is tacitly endorsing the candidate. Extending comparable invitations to all the candidates in a given race and allowing similar attention and publicity will be important in countering the implication of an endorsement. If the candidate is also a current officeholder with responsibility for law or policy that affects the hospital, a visit to the hospital may be an appropriate part of learning about issues and their impact on constituents. If a candidate who is an officeholder makes such a visit, the hospital will benefit from having a plan for the visit that corresponds to the issues the candidate is exploring. Sensitivity to events involving officeholders who are candidates also should increase as the election draws nearer in time. Rev. Rul. 2007-41, 2007-1 CB 1421, *Situations 7-13*. Candidates choosing to hold press events in locations where the hospital is in view in photographs or on videotape, may also create the impression of an implicit endorsement, but the hospital should not be held responsible when the candidate is holding the event off the hospital's property and therefore beyond the hospital's control. Rev. Rul. 2007-41, 2007-1 CB 1421, *Situations 7-13*.

3. Payroll deductions for contributions going only to one party or PAC may be campaign intervention. There is no outright prohibition on offering employees the opportunity to make contributions to PACs through payroll deduction. However, offering a payroll deduction plan for contributions only to certain PACs may create an appearance of favoritism for those PACs and the candidate or candidates they support. To avoid the risk of political campaign intervention, a section 501(c)(3) organization should either allow employees to make contributions by payroll deduction to any PAC the employee may choose, or not offer any payroll deduction option. Allowing payroll deductions for contributions limited to state hospital association and medical society PACs is problematic. TAM 200446033 (undated). The IRS, however, has not objected to payroll deduction plans required by a collective bargaining agreement where the 501(c)(3) organization remits the amounts deducted to the union and the union uses those funds for political contributions. PLR 200151060 (Sept. 27, 2001).

4. Work email is for work purposes. Following the ''own time, own dime'' standard means that employees may not use work facilities and resources for communications or activities that support or oppose candidates. Even with a disclaimer, use of a work email account or work social media account, which leaves a permanent record, means that the employee is using a resource provided by the hospital to communicate the message. If the employee is sending the campaign-related message during work hours when the employee is supposed to be engaged in work-related activities, the employee may give the impression that distribution of the message is both subsidized by and being sent on behalf of the hospital. Employees participating in political activity through email, or through social media, should do so only during non-work hours or work breaks (own time) from their personal devices using their personal email addresses or social media accounts (own dime). *See* Rev. Rul. 2007-41, *Situations 3-6*; Prop. Reg. § 1.501(c)(4)-1(a)(2)(B)(3), Notice of Proposed Rulemaking, REG-134417-13, 2013-52 I.R.B. 856, 863 (on Congressional funding hold).

Email traffic can be particularly challenging for section 501(c)(3) health care organizations as their executives often interact with trade associations that are typically exempt under section 501(c)(6). Because a section 501(c)(6) organization is not subject to the political campaign intervention prohibition, its advocacy staff may contact leadership of member 501(c)(3) organizations at their work email addresses to solicit their personal contributions for the association's PAC. Although receipt of those emails alone should not cause a tax problem for the 501(c)(3) organization, the hospital's leaders should not use their work email to pass along the solicitation to other colleagues (even to their colleagues' home email addresses). Rather, any solicitation for any PAC or candidate should be made in the leader's individual capacity and should come from the leader's personal email to the colleagues' personal email. *See* TAM 200446033.

5. Using a related section 501(c)(4) organization for lobbying and political activity requires vigilance. The political campaign intervention prohibition does not necessarily apply to separate corporate entities related to a 501(c)(3) organization. For example, a section 501(c)(4) organization, including one that is related through overlapping boards, is not subject to the same absolute prohibition on political campaign activity that applies to a section 501(c)(3) organization. Rather, a section 501(c)(4) social welfare organization may conduct political activity as long as such activity is not the primary activity of the organization. The IRS interprets the term ''primary'' to mean greater than 50% of overall activity; however, most 501(c)(4) organizations try to limit their political activity to no more than 40% of total activity in order to allow a margin for error. Issue advocacy, however, is a permitted social welfare activity. Rev. Rul. 2004-6, 2004-4 I.R.B. 328. Accordingly, a section 501(c)(4) organization could house a health system's legislative advocacy activities and also engage in some political activity. The section 501(c)(4) organization, however, cannot be used as a mere conduit in order to siphon off cash from the 501(c)(3) organization to political activities, rather the funds used for political activity must come from contributions permitted to be used for that purpose, such as from individual citizens (subject to applicable election laws), and the funding for advocacy must be closely accounted for on the books of the organizations. The section 501(c)(3) organization also should not control, direct or participate in the political activity in any way, the section 501(c)(4) organization should bear its costs for any shared space, personnel or resources, and corporate formalities must be observed. *See* PLR 201127013 (April 15, 2011) (healthcare system subsidiary organized for lobbying and political activities).

6. Issue advocacy can become political campaign intervention. Section 501(c)(3) organizations are permitted to educate the public about issues, and they may advocate positions on those issues provided that any advocacy on legislation (i.e., lobbying) does not constitute a substantial part of their activity or constitute a sub-

stantial purpose of the organization. On the other hand, Section 501(c)(4) organizations are permitted to engage in an unlimited amount of issue advocacy and lobbying as part of their social welfare activity. Engaging in issue advocacy may also constitute political campaign intervention if a particular issue is known to distinguish candidates in a race, and the organization is advocating a position on the issue that is known to align with one of the candidates. Accordingly, once election season starts, staff who work on public affairs and community relations should apply an extra layer of scrutiny to any issue advocacy effort to ensure it will not be perceived as indirect support for, or opposition to, a particular candidate closely identified with that issue. Rev. Rul. 2007-41, *Situations 14-16*.

7. Shares and retweets of political content may be viewed as an implicit endorsement. Whether intended or not, and as we have seen reported so many times in recent years, a share or retweet of a post on social media may imply that the person doing the sharing endorses the writer of the original post or that writer's positions. The perceived endorsement may give the appearance of political campaign intervention if the writer of the original post is a candidate or the content of the post refers to a candidate. To avoid this potential issue, exempt organizations should instruct their directors, officers and employees to refrain from sharing posts authored by any political candidate or committee or making reference to any political candidate or party on the organization's social media pages or its website. Directors, officers and employees should also be instructed to keep their professional and personal social media accounts entirely separate and not use their personal accounts, which may contain communications of their personal political views, for communications that they are in fact or may appear to be making in their capacity as directors, officers or employees of the organization. In addition, anyone with access to create or post content under the social media accounts or website of the 501(c)(3) organization should receive specific training regarding the scope of the political activity campaign intervention prohibition. Rev. Rul. 2007-41, *Situations 19-21*; Prop. Reg. § 1.501(c)(4)-1(a)(2)(C).

8. If you can't pay an expense directly, you cannot reimburse an employee for that expense. The political campaign activity prohibition applies to not only direct contributions by a 501(c) (3) organization but also reimbursement of contributions made by employees. There is no exception even when the employee believes he must make political contributions in order to be more effective in his work for the organization. Allowing employees to solicit individual contributions from other employees on premises during work hours may also violate the prohibition. TAM 200446033; Prop. Reg. § 1.501(c)(4)-1(a)(2)(C).

9. Participation in LLCs and partnerships that engage in political activity put the hospital's exemption at risk. For many purposes, the IRS applies a look through rule to partnerships and limited liability companies that are treated as partnerships for federal tax purposes. *See, e.g.*, Code § 512(c)(1); PLR 9609012. The activities conducted by the partnership or LLC are attributed to a tax-exempt organization that is a partner in the partnership or member of the LLC as if the organization had conducted them directly. Likewise, the activities of any LLC that is a disregarded entity because it has only one member, are attributed directly to that member. Treas. Reg. § 301.7701-2(c)(2)(i). Accordingly, if a 501(c)(3) organization is a member or partner, in a joint venture, any political campaign contributions or other political campaign activities engaged in by the joint venture would be attributed to the 501(c)(3) organization and potentially jeopardize its tax-exempt status. This is true whether or not the 501(c)(3) organization has control over the joint venture generally or the specific decision to engage in political activity. Instructions for Form 990 (2017), App. F, pp. 82-84.

10. Know your payees–payments to PACs and payments earmarked for PACs are both problematic. Many organizations with which a 501(c)(3) organization does business may have a political arm that makes political contributions. For example, many local chambers of commerce have a PAC that solicits contributions from chamber members and donates to political campaigns. Likewise, medical societies typically have an associated PAC. A hospital may pay dues for employed physicians or others and it may not be attuned to the PAC contribution listed on the dues invoice. In other circumstances, hospitals may be paying political organizations for what appeared to be run-of-the-mill nonpolitical expenses, such as purchasing advertising in calendars or fundraising brochures to distribute at its clinics or paying to staff a blood pressure screening booth at a campaign event. Those payments also may be viewed as political contributions. Installing screens in the accounts payable system to check the identity of payees with certain key words in their names (e.g., ''committee,'' ''vote,'' ''Democratic'' or ''Republican'') may weed out any inappropriate requests when they are presented for payment. Rev. Rul. 2007-41, *Situations 17-18*; Prop. Reg. § 1.501(c)(4)-1(a)(2)(A)(4) & (C).

Conclusion

Attentiveness to these ten areas now can save the organization significant aggravation, bad press and tax exposure in the future. There are no formal disclosures or safe harbors for *de minimis* or unintended political activity, so preventive action also can avoid difficult decisions about how to disclose and correct problems later. Although politics may be a ''blood sport,'' reinforcing these basic rules can help to keep the exempt organization above the fray.

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