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The Hatch Act and Activities after Election Day

Each presidential election year, the U.S. Office of Special Counsel (OSC) receives questions from federal employees about permissible and prohibited activities after Election Day. This advisory opinion addresses common questions about wearing or displaying campaign items in the workplace after Election Day and participating in certain post-Election Day activities. Please note that this opinion addresses only the Hatch Act, and employees should consult with their agency ethics officials about any other laws, rules, or regulations that may apply.

*Wearing or Displaying Items about Presidential Candidates*

With a few exceptions, after Election Day the Hatch Act does not prohibit employees from wearing campaign items, like t-shirts or hats, and displaying candidate photographs while they are on duty, in the federal workplace, wearing an official uniform or insignia, or using a government vehicle.

This activity primarily implicates the Hatch Act's prohibition against engaging in political activity while on duty, in a government room or building, wearing an official uniform or insignia, or using a government vehicle.<sup>1</sup> Political activity is defined as activity directed toward the success or failure of a political party, partisan political group, or candidate for partisan political office.<sup>2</sup>

For purposes of the Hatch Act, an individual is no longer considered a candidate when the outcome of the election is determined by vote of the Electoral College on the sixth day of January after the election.<sup>3</sup> But while presidential candidates may retain their status as candidates well past Election Day, OSC has consistently advised that, with rare exception,<sup>4</sup> post-Election Day activities showing support for or opposition to a presidential candidate will not affect the result of the election for that office. Therefore, wearing campaign items, like t-shirts or hats, and displaying candidate photographs in the workplace after Election Day no longer constitute political activity for purposes of the Hatch Act. Similarly, expressing views about the election results or the presidential candidates is no longer considered political activity.<sup>5</sup> As a

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<sup>1</sup> 5 U.S.C. § 7324(a).

<sup>2</sup> 5 C.F.R. § 734.101.

<sup>3</sup> See U.S. Const. art. II, § 1; *id.* amend. XII; 3 U.S.C. § 15.

<sup>4</sup> Such exceptions include, but are not limited to, influencing or attempting to influence the results of the popular election, such as through a recount effort, and swaying or attempting to sway the allocation of electoral votes.

<sup>5</sup> For the same reason, use or display of "#resist" or "the Resistance," or advocating or opposing impeachment of the president, while on duty or in the workplace (as discussed in OSC's November 27, 2018 advisory and November 30,

result, the Hatch Act does not prohibit employees from engaging in such activity after the election while they are on duty, in the federal workplace, wearing an official uniform or insignia, or using a government vehicle.<sup>6</sup>

*Wearing or Displaying Items about Political Parties or Partisan Political Groups*

After Election Day, the Hatch Act continues to prohibit employees from engaging in activity that shows support for or opposition to political parties or partisan political groups while they are on duty, in a government room or building, wearing an official uniform or insignia, or using a government vehicle. As explained above, political activity is not limited to candidates but also includes activity related to political parties and partisan political groups. But unlike candidacies that, with rare exception, cease to exist after an election, political parties and partisan political groups do not similarly disappear. Thus, activity directed at the success or failure of political parties or partisan political groups is prohibited by the Hatch Act even after Election Day. Examples of activities that could violate this prohibition include wearing or displaying political party items, forwarding emails from a political party, texting about a partisan political group event, or sharing a post from a political party on social media while on duty, in a government room or building, wearing an official uniform or insignia, or using a government vehicle.

*Participating in Other Post-Election Day Activities Concerning the Election*

The Hatch Act prohibits all federal employees from using their official authority or influence or agency resources for the purpose of interfering with or affecting the result of an election.<sup>7</sup> Accordingly, after Election Day, the Hatch Act continues to prohibit employees from using their official authority or agency resources to affect the outcome of the presidential election.

In addition, unlike wearing a campaign button or hat, engaging in certain post-Election Day activity on behalf of a political party, partisan political group, or candidate for partisan political office is still political activity because it has the potential to affect the outcome of the election. Examples of such activity include taking part in legal challenges, a recount, or other ballot-related efforts, or attempting to influence electors' votes. As explained below, whether an employee may participate in these activities depends on an employee's status under the Hatch Act.<sup>8</sup>

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2018 clarification, available at <https://tinyurl.com/yxeny8c>, is no longer political activity under the Hatch Act after Election Day.

<sup>6</sup> However, should any former presidential candidates announce their candidacy for future election, displaying or wearing items that show support for or opposition to that candidate will again be prohibited by the Hatch Act.

<sup>7</sup> See 5 U.S.C. § 7323(a)(1).

<sup>8</sup> See OSC's website, <https://osc.gov/Services/Pages/HatchAct-Federal.aspx>, for a description of which employees are "less restricted" and which are "further restricted."

*“Less Restricted” Employees*

Employees who are considered “less restricted” under the Hatch Act are permitted to take an active part in partisan political management and campaigning, which can include taking part in a wide variety of activities on behalf of a candidate or political party. Thus, the Hatch Act does not prohibit “less restricted” employees from engaging in the abovementioned post-Election Day activities on behalf of a political party, partisan political group, or candidate for partisan political office. However, “less restricted” employees may not perform any tasks related to these activities while they are on duty, in the federal workplace, wearing an official uniform or insignia, or using a government vehicle. In addition, employees may not solicit political contributions to support these efforts.<sup>9</sup>

*“Further Restricted” Employees*

Employees in certain agencies and positions are considered “further restricted” under the Hatch Act and are prohibited from actively participating in partisan political management and campaigning, even while they are off duty and away from the federal workplace.<sup>10</sup> Therefore, at all times, the Hatch Act prohibits “further restricted” employees from engaging in post-Election Day activities with the potential to affect the outcome of an election, such as legal challenges or recount efforts, if these activities are done on behalf of a political party, partisan political group, or candidate for partisan political office.

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<sup>9</sup> Although “less restricted” employees may engage in these activities while off duty and away from work, they remain subject to all other Hatch Act prohibitions, including the prohibition against soliciting, accepting, or receiving political contributions. See 5 U.S.C. § 7323(a).

<sup>10</sup> See 5 U.S.C. § 7323(b)(2); 5 C.F.R. § 734.401(a).