

Legal Sidebar

Friended, but not Friends: Federal Ethics Authorities Address Role of Social Media in Politics

04/12/2016

Since the rise of social media over the past decade, new platforms of technology have reinforced the adage that the law lags behind developments in technology. Government agencies, officials, and employees regularly use a number of social media options – e.g., Twitter, Facebook, etc. – that have led agencies to update existing ethics rules to reflect the unique issues that they may present. Two areas of ethics regulation affected by the increased role of social media are the ethical standards governing gifts to federal employees and the restrictions on employees’ political activities. These rules apply to employees in the executive branch, though separate ethics rules and guidance on similar topics apply to the [House](#) and [Senate](#).

OGE Proposed Gift Rules Clarify “Personal Friendships”

The [Office of Government Ethics](#) (OGE) has [proposed regulations](#) that clarify the limits on federal employees’ receipt of gifts from outside sources. Federal law [prohibits](#) federal employees from soliciting or receiving a gift from a person (1) who seeks action from, does business with, or conducts activities regulated by the person’s employing agency or (2) who has interests that may be substantially affected by the employee’s official duties. The [existing Standards of Ethical Conduct for Employees of the Executive Branch](#), which have been in effect since 1993, generally prohibit gifts from “prohibited sources” (i.e., a person or entity seeking official action from, doing business with, conducting activities regulated by the employee’s agency or having interests substantially affected by the employee’s official duties) and gifts given because of the employee’s official position. There are a number of exceptions to this general prohibition, including – relevant to this discussion – an [exception for gifts received on the basis of personal friendship](#).

OGE has [proposed new regulations](#) that clarify recommendations for employees to consider when determining whether an exception should apply, noting its observation that employees “sometimes focus on whether a regulatory exception permits the acceptance of an otherwise impermissible gift, and not on whether acceptance of the gift could affect the perceived integrity of the employee or the credibility and legitimacy of the agency’s programs.” In particular, OGE clarified the personal friendship exemption, which allows employees to accept gifts in circumstances that are clearly motivated by a family or other personal relationship. Such relationships depend on the history and nature of the relationship and whether the family member or friend personally paid for the gift. The proposed rules specifically offer an example indicating that a gift to a government employee from a government contractor doing business with the employee’s agency, when those individuals do not communicate in their personal capacities but have joined each other’s social media networks, would be improper.

For additional analysis related to the acceptance of gifts by federal employees, please see [CRS Report 43660, *The Receipt of Gifts by Federal Employees in the Executive Branch*](#).

OSC Issues Guidance on Technology and the Evolution of the Federal Workplace

Additionally, [the U.S. Office of Special Counsel](#) (OSC), the agency which administers the [Hatch Act](#), [has issued guidance](#) on how employees can comply with restrictions on engaging in partisan political activities while using social media. The Hatch Act is the common name for a set of provisions that restrict federal employees’ partisan political

activities. Originally enacted in 1939 to ban voluntary, off-duty participation, Congress enacted amendments in 1993 to permit most employees to engage in voluntary, partisan political activity in off-duty hours, away from their federal workplace. Given the impact of technological developments on the workplace, including the ubiquity of mobile devices (e.g., smartphones, tablets, laptops) and the pervasive use of social media by individuals in both their personal and professional capacities, OSC has provided new interpretations of the scope of restrictions on [employees'](#) (as well as [agencies'](#)) use of social media which apply when employees are "on duty" or in the workplace.

[Federal regulations](#) explain that employees are on duty when they are "in a pay status other than paid leave, compensatory time off, credit hours, time off as an incentive award, or excused or authorized absence..." or are representing a government agency in an official capacity. The federal workplace [is defined](#) to include federally owned or leased space, public areas controlled by the General Services Administration, and "[a] room or building occupied in the discharge of official duties" Without current technology, employees seeking to distribute information to a network of contacts would need to use means not available to them while on duty in the traditional workplace. Before smartphones provided the opportunity to send a mass message within a matter of seconds regardless of the location, employees likely had to wait until they had gone home to spread a partisan message, rather than doing so quickly from a smartphone while at lunch or on a break. Furthermore, new trends in telecommuting have blurred the lines of the federal workplace, with some individuals working from their homes or even on personal computer equipment, [illustrating the breadth of questions](#) raised by various advances in technology used in the federal workforce.

In the context of the upcoming election, [new guidance](#) from OSC identifies a number of restrictions on social media activity while on duty or in the workplace. For example, it clarifies that federal employees may post photos of a preferred candidate to a social media profile. However, by doing so, the employee becomes limited in what action may be taken on that account during on-duty hours at his or her workplace. OSC has reasoned that "because a profile picture accompanies most actions on social media, [posting, sharing, tweeting and retweeting] while on duty or in the workplace ... would show [the employee's] support for a partisan group or candidate in a partisan race, even if the content of the action is not about those entities."

Posted at 04/12/2016 11:27 AM