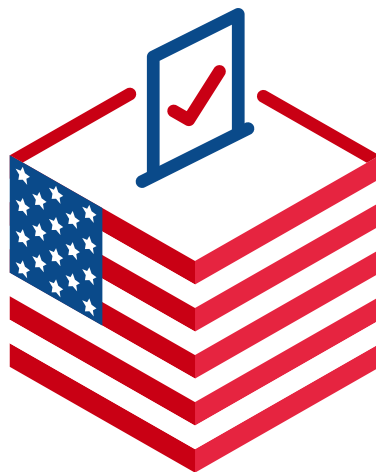




Advancing Health in America

LEGAL GUIDELINES FOR ELECTION-RELATED ACTIVITY

PERKINScoie



August 2022

Prepared for the American Hospital Association by PerkinsCoie.

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THIS MEMORANDUM IS NOT INTENDED TO BE LEGAL ADVICE AND SHOULD NOT BE RELIED UPON AS LEGAL ADVICE.

August 31, 2022

TO: American Hospital Association

FROM: Perkins Coie LLP

RE: Legal Guidelines for Election-Related Activity

Section 501(c)(3) hospitals are permitted to conduct nonpartisan voter education and registration activities, which provide valuable contributions to public understanding of and debate about key issues, as long as they are not coordinated with a candidate or political party. However, federal tax law *strictly prohibits* any hospital that is a section 501(c)(3) organization from engaging in any election-related activity. In addition, federal election law, with few exceptions, prohibits all corporations, whether for-profits or nonprofits, from making political contributions (cash or in-kind support) to federal candidates or political party committees. Therefore, it is important for hospitals to distinguish between permissible voter education and registration activities and prohibited election-related activities. The information below is intended to assist hospitals in distinguishing permissible from prohibited activities.

The election-related activity that is prohibited by federal tax law includes direct or indirect participation or intervention in any election campaign in support of or in opposition to a candidate for local, state, or national public office. This prohibition is enforced by the Internal Revenue Service (IRS). Violation of this prohibition by a 501(c)(3) tax-exempt hospital may result in revocation of tax-exempt status and imposition of an excise tax on both the organization and the organization's managers. The federal election law prohibition on corporations making political contributions extends to any public communications by the hospital that may be "coordinated" with a candidate or party committee. This prohibition is enforced by the Federal Election Commission (FEC).

The descriptions of permissible activities provided below on all issues are guidelines only. Any specific program or initiative should be addressed with your local counsel on its particular facts. The guidance found below includes mention of rules applicable to candidates for federal office; any program that includes or references candidates for state or local office should consider state or local election and lobbying regulations as well.

It also is important to note that as any election day draws closer, there will likely be more scrutiny on the kinds of events and activities discussed here. Be aware that even events that are intended to be wholly issues-based could be construed as campaign events simply because of their timing.

Question: My hospital would like to participate in voter **education and/or voter registration** in our community. What guidelines should the hospital follow in planning and conducting these activities to ensure that they are permissible activities?

Hospitals may utilize resources and staff time to support and encourage voter education and registration under certain circumstances. In planning and conducting any voter education and registration activities, a hospital should follow these guidelines:

- All voter registration activities must be conducted in a nonpartisan manner.
- Voter education projects should not be designed, targeted, or timed to influence voter acceptance or rejection of a particular candidate or political party, or targeted towards voters who take a particular position on a public policy issue that divides candidates in an election.
- A voter education or registration project cannot make any written or oral statements which support or oppose a candidate or political party.
- Voter registration and education materials must be made available without regard to a voter's political preferences.
- All materials and publications associated with voter education activities should *include a disclaimer* stating that the information or activity is not intended to reflect an endorsement for, or opposition to, any candidate or political party.
- If one candidate is mentioned by name, all candidates for that office should be mentioned.
- Activities cannot be coordinated with a candidate's campaign, a political party, or any political organization.
- Hospitals should not publicize campaign, political party, or political organization events or events that are political in nature.
- Campaign or political literature should not be distributed or made available on hospital premises.

Question: My hospital is considering **distribution of a voter guide** that prints answers to candidate questionnaires. Is this a permissible activity?

Yes. However, voter guides present a particular risk for hospitals and other section 501(c)(3) organizations. If your hospital is considering distributing a voter guide, you should first consult with local counsel.

Your hospital also should be careful to follow the guidelines below for candidate questionnaires:

- The number of questions, and the subjects covered, must be selected solely on the basis of their importance and interest to the entire electorate. The questions may not merely focus on a subset of issues of interest to the hospital (such as health care).
- The questions and the descriptions of the issues must be neutral and unbiased in their structure and content.
- Candidates must have sufficient time to respond.
- The questions listed on the voter guide must be identical to the questions in the questionnaire, and each response should be adjacent to the question. The candidates' answers must be unedited, and you should inform the candidates that you will not edit their answers. Candidates must be given a reasonable amount of space to respond to questions in their own words, such as 25 words (without requiring yes/no answers).
- The IRS has on at least one occasion suggested that six is an appropriate minimum number of questions.
- Candidates cannot be rated on their qualifications for office or their agreement with the organization's positions.
- The voter guide may display the websites of the candidates.
- All candidates for a particular office should receive the questionnaire. If a candidate does not respond, the hospital should note that no response was received. If multiple candidates do not respond, the hospital should consult with local counsel prior to publishing the voter guide.
- Candidates should not be asked to pledge their support for or against particular issues.

Question: *My hospital would like to **hold a meeting, special forum, or debate** to give the candidates an opportunity to discuss their views and answer questions on issues of interest to the hospital. Can the hospital do this?*

Yes. A section 501(c)(3) organization such as a hospital may invite candidates to present their views, but the law that applies depends on whether they are addressing only hospital executives or have the opportunity to speak to a broader public audience. In the case of a public event, such as a candidate debate, there are strict rules to follow.

As a general rule, the hospital may not expend its funds to provide candidates with a public forum to promote their candidacies. An exception exists for nonpartisan candidate debates sponsored by section 501(c)(3) and 501(c)(4) organizations that neither support nor oppose any candidate or party. This exception does not extend to sponsoring or financing campaign-related public appearances by individual candidates.

Therefore, a hospital or another section 501(c)(3) organization may hold a candidate debate that is open to the public as well as to employees, so long as the hospital follows the guidelines below.

- It does not structure the debate to promote or advance one candidate over another.
- All legally qualified candidates for the race on which a debate is focused should be invited to participate. The same invitation should be sent to all candidates at the same time.
- Candidates who are not “viable” or “significant” candidates need not be invited if:
 - » inviting all legally qualified candidates is impractical;
 - » the organization adopted reasonable, pre-established objective criteria for determining which candidates to invite, which is not biased toward the selection of particular participants. The criteria should be reviewed by counsel;
 - » the criteria were applied consistently and not arbitrarily; and
 - » other factors suggest that the debate was conducted in a neutral, nonpartisan manner, such as those factors identified in this section below (e.g., each candidate should be given an equal opportunity to present his or her view on each of the issues discussed).
 - » Of note: The IRS approved a debate that used as an objective criterion whether a candidate had reached a 15% share of support in a credible and independent poll.
- If the debate is held during a primary election, a sponsoring group is not required to invite candidates of both parties to the debate. Separate Democratic and Republican Party debates may be organized.
- Hospitals should not provide travel expenses to visiting candidates if those candidates will be conducting campaign activities at other locations in the city during the same trip.
- At least two candidates must appear at the debate.
- The debate must address a broad range of issues that the candidates would address if elected to the office sought and that are of interest to the public.
- Questions should be prepared and presented by a nonpartisan, independent individual, or panel of individuals, knowledgeable about the issues covered (e.g., representatives of the media, educational organizations, community leaders, and other interested persons).

- The candidates should not be asked to agree or disagree with the positions, agendas, platforms, or statements of the hospital.
- A moderator should be designated to ensure that the ground rules are observed, to make clear that the views expressed are those of the candidate and not of the sponsoring organization, and to disavow any preference or endorsement by the sponsoring organization. The moderator should not comment on the questions or answers in any way that would imply approval or disapproval of any of the candidates.
- Each candidate should be allowed an equal opportunity to speak and answer questions on his or her views.
- No campaign literature may be distributed at the event.
- The candidates should not be permitted to collect contributions at the event.
- The organization may publish questions posed to the candidates and their replies, so long as the replies are not edited or rated.

Question: Can our hospital invite one candidate at a time to discuss his or her views with hospital employees, in his or her capacity as a candidate (rather than an officeholder)?

Yes. However, inviting one candidate at a time to address hospital employees carries a higher risk of being deemed participation or intervention in a political campaign. Further, single visits by federal candidates may include only the organization’s employees and their families, members of the press, and other guests who are participating in the event. Unlike candidate debates, these events *may not* be open to the public.

A hospital should understand the risks involved in a single candidate visit and follow the guidelines below to guard against any indication of support for or opposition to any particular candidate.

- All legally qualified candidates (see the immediately preceding question for specific caveats about candidates to invite) should be invited, and each event should be structured as similarly as possible. Each candidate should be provided an equal opportunity to participate, and the nature of each event is taken into account when evaluating whether the candidates are provided equal opportunity.
- A hospital wishing to provide travel expenses to a visiting candidate will need to check with local counsel for advice on campaign finance, ethics, and tax rules. Hospitals should not provide travel expenses to visiting candidates at all if those candidates will be conducting campaign activities at other locations in the area during the same trip.
- The hospital should explicitly state, in every communication concerning the event and when the candidate is introduced, that the hospital does not support or oppose this or any candidate.

- This forum, just like in the debate context, should address a broad range of issues.
- If the hospital prepares questions in advance, the questions should be prepared and presented by a nonpartisan, independent individual, or panel of individuals, knowledgeable about the issues covered (e.g., representatives of the media, educational organizations, community leaders, and other interested persons). Each candidate should be separately presented with the same questions, and if possible, the same panel. Alternatively, the hospital may choose to have the candidates field unscripted questions from members of the audience.
- A moderator should be designated to ensure that the ground rules are observed, to make clear that the views expressed are those of the candidate and not of the sponsoring organization, and to disavow any preference or endorsement by the sponsoring organization. The moderator should not comment on the questions or answers in any way that might imply approval or disapproval of any of the candidates.
- Each candidate should be allowed an equal opportunity to speak and answer questions on his or her views. The events at which the different candidates speak should be as similar as possible, particularly in terms of the number of expected attendees. One event should not be scheduled at a less convenient time of day or of year than another. If one candidate is invited to speak at an organization's main annual banquet, inviting another to speak at a sparsely attended general meeting would not be considered an equal opportunity.
- If the hospital permits news media to cover the appearance of one candidate, it must permit the media to cover the appearance of any other candidate for that office. Moreover, if the hospital allows any media coverage, it must provide all representatives of the media with equal access to cover each candidate appearance.
- No fundraising may be conducted at the event.
- The candidates should not be permitted to collect contributions at the event.

Question: *My hospital is thinking about **conducting issue briefings for candidates** to inform them about the hospital's position on issues of concern and to encourage the candidates to take a position. Is this permissible?*

Yes. A section 501(c)(3) organization, such as a hospital, may conduct issue briefings to inform candidates running for public office of its position on issues and to encourage them to adopt a position. Such an issue briefing might be coupled with a tour of the hospital's facilities. The focus here is on educating the candidate, rather than on providing the candidate with an opportunity to take his or her message to hospital employees. Generally, this would not involve a large number of hospital staff.

Note: If the candidate is an officeholder, an issue briefing, if it addresses specific legislation, may constitute direct lobbying, which may be conducted by a section 501(c)(3) organization only to a limited degree. Hospitals should observe the following guidelines applicable to issue briefings:

- If the issue briefing is extended to one campaign, an invitation for a briefing must be extended to all candidates running for a particular office and may not favor one candidate over another. If, instead, it is extended to an incumbent officeholder and organized through his or her official staff, candidates running against that officeholder need not be invited.
- No materials should be specifically prepared for a particular candidate's use. Only the use of materials prepared on a nonpartisan basis is permissible, and these materials should be made available to all candidates.
- A candidate who publishes a statement or position paper on an issue as a result of an issue briefing may distribute it to the media and general public. A section 501(c)(3) organization, including a hospital, may not, however, circulate the candidate's statement.

Question: *A candidate for public office contacted our hospital to ask to speak at the hospital. What should we do?*

If a candidate asks to speak at your hospital, you should:

- Explain to the candidate that the hospital as a section 501(c)(3) organization may not endorse or oppose any candidate, allow campaign literature to be distributed on hospital premises, or be involved in any campaign fundraising.
- Explore with the candidate what type of event he or she has in mind (debate, speech, or issues briefing) and explain the restrictions for each.
- Share this memorandum with any hospital staff working on the event; make sure they understand the rules they must follow.
- Ensure that all hospital materials produced in connection with the appearance of the candidate include a disclaimer stating that the activity is not intended to reflect an endorsement for, or opposition to, any candidate or political party.
- Consult with your local counsel before making any commitments.

Question: *Is it permissible to invite a candidate to speak at the hospital in a capacity unrelated to his or her candidacy for public office?*

Yes. Under both IRS and FEC regulations, a public figure who also happens to be a candidate may be invited to speak at a hospital event in another capacity, without the hospital having to

provide equal opportunities to opposing candidates or incurring an impermissible corporate contribution. However, the hospital must exercise care to distinguish this appearance from a campaign event.

At a minimum, when inviting a candidate to speak, the hospital should observe the following precautions:

- The candidate must have been chosen to speak solely for reasons unrelated to his or her candidacy. For example, a candidate who is a sitting officeholder must be invited to speak in his or her capacity as an officeholder.
- All hospital communications regarding the event must clearly indicate the capacity in which the individual is appearing.
- The hospital should maintain a nonpartisan atmosphere at the event.
- The candidate may address health care legislation and other issues of concern to the hospital community.
- Neither hospital personnel nor the candidate may mention the candidacy at the event or in promotional materials about the event. Even questions posed from the audience about the candidacy may turn the appearance into a prohibited campaign-related event.
- Neither the hospital nor the candidate may advocate the election or defeat of any candidate or raise funds for any candidate's election.
- No campaign activity (such as fundraising) may take place in connection with the candidate's appearance.

Question: A *sitting Member of Congress* contacted our hospital to ask to speak at the hospital. What should we do?

First, confirm with the Member and/or staff representing him or her that the Member will be making the appearance in his or her official capacity, not as a candidate for office. Then take care to ensure that neither the hospital nor the Member discusses, promotes, or treats the event as a campaign event, even if the Member is currently running for re-election.

- The hospital should tell the Member and his or her staff that the hospital is a charitable organization and may not host a political speech. The hospital should ask the Member not to discuss his or her re-election if he or she is running, or any other campaign-related matters.
- All hospital communications regarding the event must indicate that the Member is appearing in his or her official capacity. No reference should be made to his or her candidacy if he or she is running again, or to any upcoming election.

- The hospital should maintain a nonpartisan atmosphere at the event.
- The Member may address health care legislation and other issues of concern to the hospital community.
- Neither hospital personnel nor the Member may mention at the event any upcoming election, or his or her candidacy if he or she is running. Even questions posed from the audience about the candidacy may turn the appearance into a prohibited campaign-related event.
- Neither the hospital nor the Member may advocate the election or defeat of any candidate or raise funds for any candidate's election.
- No campaign activity may take place in connection with the Member's appearance.

Note: In addition to the tax implications of federal officeholder appearances, Members of Congress and many state and local officeholders are subject to ethics rules that restrict their ability to accept complimentary items such as food and souvenirs from the hospital.

Question: *A candidate has asked our hospital to **publicly support his or her official activities** (e.g., by writing an editorial or letter to the editor). What should we do?*

If a candidate asks your hospital to publicly support his or her official activities by, for example, writing an editorial or letter to the editor, you should:

- Ensure that whatever you write or publish has a bona fide non-electoral purpose. The content of the piece should focus on an issue, not on the officeholder. The issue should be one in which the hospital clearly has an interest, or on which the hospital has taken a public position.
- Avoid identifying the officeholder as a candidate or referring to the upcoming election in any way.
- Be attentive to any "appearance" issues that may arise if the relevant issue is a particularly partisan one, the relevant issue is closely identified with a particular candidate or one that distinguishes the candidates in the election, or the request is made in close proximity to a competitive election.
- When the candidate has suggested something other than a letter to the editor, evaluate carefully whether a public communication could result in a prohibited corporate contribution from the hospital if it mentions a federal candidate or a political party, depending on when it is published.
- Consult with your local counsel before making any commitments.

Note: If the candidate is a sitting officeholder, public communications that take a position on specific legislation and include a call to action could qualify as grassroots lobbying, which may be conducted by a section 501(c)(3) organization only to a limited degree.

Question: How can a hospital determine if a ***proposed activity is a prohibited election-related activity?***

Determining whether a proposed activity is an election-related activity is often difficult. As a general rule, the IRS is principally concerned with the use of an organization's resources, and the use of its name. A section 501(c)(3) organization is prohibited from employing any resources including funds, facilities, lists, and staff to influence voter preference or the outcome of an election; it is also prohibited from lending its name to such efforts.

While the following is by no means a comprehensive list, certain activities are clearly prohibited:

- Endorsements – *formal or informal* – of a candidate for public office.
- Publication or distribution by a section 501(c)(3) organization of statements favoring or opposing a candidate.
- Rating candidates for their qualification for a particular office.
- Direct financial contributions or other support from the institution to a candidate, political party, or political action committee (PAC).
- In-kind contributions from the institution to a candidate, political party, or PAC, including but not limited to:
 - » Mailing, membership, or donor lists, or other resources for fundraising;
 - » Donation of facilities or office space;
 - » Donation of staff time;
 - » Organizing volunteers for a campaign; and
 - » Opposition research.

The Internal Revenue Service has identified the following factors in determining whether a communication results in political campaign intervention:

- Whether the statement identifies one or more candidates for a given public office.
- Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions.

- Whether the statement is delivered close in time to the election.
- Whether the statement makes reference to voting or an election.
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office.
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election.
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

Hospitals also should be aware that under separate rules enforced by the FEC, incorporated entities, including hospitals, are prohibited from using their funds to pay for public communications during certain time periods that are coordinated with federal candidates or political party committees and that mention federal candidates or parties. This applies even if the ads are intended to influence public opinion on an issue rather than influence an election.

Hospitals may not pay for these ads directly nor provide funds to other entities for their use in running such ads. The blackout period begins **120 days before a primary election** for coordinated ads that mention presidential candidates (or party committees, if coordinated with a presidential candidate), if the ads are run in the jurisdiction where the candidate's election is taking place, and continue through the date of the general election. The blackout period begins **90 days before a primary or general election** for coordinated ads that mention federal candidates for House or Senate (or party committees, if coordinated with a House or Senate candidate), if those ads are run in the candidate's state or district.

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