



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 151, 733, and 734

RIN 3206-AM87

Political Activity – State or Local Officers or Employees; Federal Employees Residing in Designated Localities; Federal Employees

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: OPM is issuing a final rule to incorporate in its political activity regulations the amendments to the Hatch Act added by the Hatch Act Modernization Act of 2012. The final rule also updates the contact information for the United States Office of Special Counsel, the Federal agency authorized by statute to investigate and prosecute allegations of Hatch Act violations, and to issue advisory opinions concerning permitted and prohibited political activities under the Hatch Act. Finally, the final rule updates our regulations to conform to current Federal employee political activity provisions.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jo-Ann Chabot, Office of the General Counsel, United States Office of Personnel Management, (202) 606-1700.

SUPPLEMENTARY INFORMATION: The Hatch Act Modernization Act of 2012, Pub. L. 112-230, 126 Stat. 1616 – 1618 (Dec. 28, 2012), amended provisions of the Hatch Act governing the political activities of State and local employees, Federal employees, and employees of the Government of the District of Columbia. On July 24, 2013, OPM issued proposed regulations

incorporating these amendments in its existing regulations at 5 CFR parts 151, 733, and 734.

OPM received, and has addressed in this Summary of Information, one comment from a Federal employee labor organization concerning the proposed rule.

The Hatch Act, codified at 5 U.S.C. 1501-1508, concerns the political activities of State and local employees. Before Congress enacted Pub. L. 112-230, 5 U.S.C. 1502 prohibited from candidacy for elective office certain State and local employees whose principal employment was connected with an activity financed in whole or in part with loans or grants from the United States or a Federal agency. Section 2 of Pub. L. 112-230 amended 5 U.S.C. 1502 by applying the prohibition against candidacy for elective office only to certain State or local employees whose salaries are paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency. OPM is revising 5 CFR 151.101 to reflect this change.

Section 3 of Pub. L. 112-230 amended 5 U.S.C. 1501, 1502, and 1506 by treating employees of the Government of the District of Columbia as State and local employees, rather than as Federal employees. OPM is revising 5 CFR 151.101 and 151.122 to reflect these changes.

In addition, section 3 of Pub. L. 112-230 amended 5 U.S.C. 7322 by excluding employees of the Government of the District of Columbia from coverage under 5 U.S.C. 7323-7326, the Hatch Act provisions also governing the political activities of Federal employees. Consequently, OPM is removing references to the Government of the District of Columbia or its employees from 5 CFR 733.101, 734.101, 734.102, 734.203, 734.305, and 734.502.

Section 7325 of title 5, U.S.C., authorizes OPM to permit the Federally employed residents of certain localities to participate in some political activities that the Hatch Act otherwise would prohibit when OPM determines that, in view of special or unusual circumstances, it would be in

the employees' domestic interest to permit such participation . Section 7325 specifies that these Federal employees must reside in: (1) a municipality or political subdivision in Maryland or Virginia and in the immediate vicinity of the District of Columbia, or (2) a municipality in which the majority of voters are employed by the Government of the United States. Section 3 of Pub. L. 112-230 amended section 7325 by including the District of Columbia as a third category. Consequently, OPM is amending 5 CFR 733.107(a) to reflect this change in the statute.

Under 5 U.S.C. 7326, the previous penalty for violating the political activity prohibitions in 5 U.S.C. 7323 and 7324 was removal, unless the Merit Systems Protection Board by a unanimous vote imposed a penalty of not less than a 30-day suspension without pay. Section 3 of Pub. L. 112-230 amended section 7326 by adding a variety of lesser penalties to the existing penalty of removal, and abolishing the requirement that the Merit Systems Protection Board must vote unanimously to impose a lesser penalty than removal. OPM is revising 5 CFR 734.102(b) to add these lesser penalties and remove the requirement for a unanimous vote in cases involving penalties other than removal. OPM also is revising paragraph (a) of section 734.102 to update the contact information for the U.S. Office of Special Counsel, the Federal agency that investigates and prosecutes alleged Hatch Act violations, and provides advice concerning permissible and prohibited political activities.

Under 5 U.S.C. 7323(a), the majority of Federal employees may participate actively in most partisan political activities, except for using their official authority or influence to interfere with, or affect the result of an election; running for public office in a partisan campaign; soliciting, accepting, or receiving political contributions; and, participating in political activities while on duty, on Federal premises, in uniform, or using a Government owned or leased vehicle.

Employees in the positions or agencies identified in section 7323(b)(2) and (3), however,

are more restricted and may not participate actively in partisan political activities. OPM regulations at 5 CFR 733.102, 733.105, and 734.401 no longer conform with section 7323(b)(2) and (3) because Congress has enacted various amendments to section 7323(b)(2) and (3). OPM is updating sections 733.102, 733.105, and 734.401 to conform to the current provisions in 5 U.S.C. 7323.

A Federal employee labor organization commented on the proposed revision of OPM regulatory provisions concerning individuals employed in the positions and agencies listed in 5 U.S.C. 7323(b)(2) and (3). The labor organization noted that 5 CFR 733.102 specifically excludes from 5 CFR part 733 employees (except individuals appointed by the President by and with the advice and consent of the Senate) in the Criminal Division and the National Security Division of the U.S. Department of Justice. The labor organization further noted, however, that 5 CFR 734.401 (14) and (15) includes the Criminal Division and the National Security Division, respectively, within 5 CFR part 734, subpart D. The labor organization wanted to know whether or not this was an oversight and whether the employees excluded from part 733 may run for nonpartisan office.

Excluding employees of the Criminal and National Security Divisions from 5 CFR part 733, while including them in 5 CFR part 734, is not an oversight. After Congress enacted the Hatch Act Reform Amendments of 1993, OPM published interim regulations, 59 FR 5313 (February 4, 1994), excluding from 5 CFR part 733 employees in the sensitive agencies and positions listed in 5 U.S.C. 7323(b)(2), as well as employees in the Criminal Division of the Department of Justice covered under 5 U.S.C. 7323(b)(3).

On January 6, 1996, Congress amended 5 U.S.C. 7325, the statutory provision concerning the political activity of federal employees residing in designated localities. The amendment

authorized OPM to permit employees covered under 5 U.S.C. 7323(b)(2) to participate in the local partisan elections of the designated localities specified in 5 CFR 733. Pub. L. 104-93, § 308, 109 Stat. 961, 966. The amendment, however, did not provide for employees covered under 5 U.S.C. 7323(b)(3), i.e. the Criminal Division of the Department of Justice. In addition, the legislative history of this amendment did not include anything establishing that Congress intended to extend the coverage of the amendment to Criminal Division employees. Consequently, OPM issued regulations permitting employees covered under 5 U.S.C. 7323(b)(2) and residing in a designated locality to participate as independent candidates in the local elections of that locality (63 FR 4555, January 30, 1998). Except for employees appointed by the President, by and with the advice and consent of the Senate, as specified in 5 U.S.C. 7323(b)(3), OPM regulations continued to exclude employees in the Criminal Division of the Department of Justice from 5 CFR part 733 (63 FR 4559).

On March 9, 2006, Congress established the National Security Division in the Department of Justice, Pub. L. 109-77, § 506(b)(1), 120 Stat. 192, 248-49, and included the National Security Division under 5 U.S.C. 7323(b)(3), rather than under section 7323(b)(2). Pub. L. 109-77, § 506(b)(2), 120 Stat. 192, 249. The legislative history of section 506(b)(2) is silent concerning the political participation of employees in the National Security Division. However, it is clear from the history of 5 U.S.C. 7323(b)(3) and the accompanying regulatory provisions that Congress had several opportunities to permit the employees described in 5 U.S.C. 7323(b)(3) to engage in the same level of political participation as employees covered under section 7323(b)(2), but Congress did not do so. Therefore, except for employees appointed by the President by and with the advice and consent of the Senate, OPM has excluded from 5 CFR part

733 employees in the National Security Division of the Department of Justice and continues to exclude employees in the Criminal Division.

The labor organization also wanted to know whether the employees excluded from part 733 may run for nonpartisan office. Employees of the Criminal Division and National Security Division of the Department of Justice may run for public office in a nonpartisan election as defined in 5 CFR 734.101, i.e., an election where none of the candidates represents a political party whose electors for the office of President of the United States received votes in the preceding presidential election.

E.O. 12866, Federal Regulation

This regulation has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the changes will affect only employees of the Federal Government.

List of Subjects

5 CFR Part 151

Political activity – State or local officers or employees.

5 CFR Part 733

Political activity – Federal employees residing in designated localities.

5 CFR Part 734

Political activity – Federal employees.

Katherine Archuleta,
Director.

Accordingly, the Office of Personnel Management amends 5 CFR Parts 151, 733, and 734 to read as follows:

PART 151 – POLITICAL ACTIVITY – STATE OR LOCAL OFFICERS OR EMPLOYEES

1. The authority citation for part 151 is revised to read as follows:

Authority: 5 U.S.C. 1302, 1501-1508, as amended, Reorganization Plan No. 2 of 1978, section 102, 92 Stat. 3783, 3 CFR 1978 Comp. p. 323; and E.O. 12107, section 1-102, 3 CFR 1978 Comp. p. 264..

2. In 151.101, paragraphs (b) and (d) are revised to read as follows:

§ 151.101 Definitions.

In this part:

* * * * *

(b) State or local agency means:

(1) The executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof; or

(2) The executive branch of the District of Columbia, or an agency or department thereof.

* * * * *

(d) State or local officer or employee means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency but does not include—

(1) An individual who exercises no functions in connection with that activity.

(2) An individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by –

(i) A State or political subdivision thereof;

(ii) The District of Columbia; or

(iii) A recognized religious, philanthropic, or cultural organization.

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3. In 151.121, paragraph (c) is revised to read as follows:

§ 151.121 Use of official authority; coercion; candidacy; prohibitions.

* * * * *

(c) Be a candidate for elective office if the salary of the employee is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency.

4. In 151.122, paragraph (c) is revised to read as follows:

§ 151.122 Candidacy; exceptions.

* * * * *

(c) A duly elected head of an executive department of a State, municipality, or the District of Columbia, who is not classified under a merit or civil service system of a State, municipality, or the District of Columbia;

**PART 733 – POLITICAL ACTIVITY -- FEDERAL EMPLOYEES RESIDING IN
DESIGNATED LOCALITIES**

1. The authority citation for part 733 is revised to read as follows:

Authority: 5 U.S.C. 7325.d

2. In 733.101, the definitions of Employee and On duty are revised to read as follows:

§ 733.101 Definitions.

* * * * *

Employee means:

Any individual (other than the President, the Vice President, or a member of the uniformed services) employed or holding office in—

- (1) An Executive agency other than the General Accounting Office;
- (2) A position within the competitive service which is not in an Executive agency; or
- (3) The United States Postal Service or the Postal Rate Commission.

On Duty means the period when an employee is:

- (1) In a pay status other than paid leave, compensatory time off, credit hours, time off as an incentive award, or excused or authorized absence (including leave without pay); or
- (2) Representing any agency or instrumentality of the United States Government in an official capacity.

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3. Section 733.102 is revised to read as follows:

**§ 733.102 Exclusion of employees in the Criminal Division and National Security Division
of the United States Department of Justice.**

Employees in the Criminal Division and National Security Division in the Department of Justice (except employees appointed by the President by and with the advice and consent of the Senate) specifically are excluded from coverage under the provisions of this part.

4. In 733.105, paragraph (a) is revised to read as follows:

§ 733.105 Permitted Political Activities—employees who reside in designated localities and are employed in certain agencies and positions.

(a) This section applied to employees who reside in designated localities and are employed in the following agencies or positions:

- (1) The Federal Election Commission;
- (2) The Election Assistance Commission;
- (3) The Federal Bureau of Investigation;
- (4) The Secret Service;
- (5) The Central Intelligence Agency;
- (6) The National Security Council;
- (7) The National Security Agency;
- (8) The Defense Intelligence Agency;
- (9) The Merit Systems Protection Board;
- (10) The Office of Special Counsel;
- (11) The Office of Criminal Investigation of the Internal Revenue Service.
- (12) The Office of Investigative Programs of the United States Customs Service;
- (13) The Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms;
- (14) The National Geospatial-Intelligence Agency;
- (15) The Office of the Director of National Intelligence;

(16) Career Senior Executive Service positions described in 5 U.S.C. 3132(a)(4);

(17) Administrative Law Judge positions described in 5 U.S.C. 5372;

(18) Contract Appeals Board Member positions described in 5 U.S.C. 5372a; or

(19) Administrative Appeals Judge positions described in 5 U.S.C. 5732b.

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5. In 733.107, paragraph (a) is revised to read as follows:

§ 733.107 Designated localities.

(a) When OPM determines that, because of special or unusual circumstances, it is in the domestic interest of employees to participate in local elections, OPM may specify as a designated locality:

(1) The District of Columbia,

(2) A municipality or political subdivision in Maryland or Virginia and in the immediate vicinity of the District of Columbia, or

(3) A municipality in which the majority of voters are employed by the Government of the United States.

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PART 734—POLITICAL ACTIVITIES OF FEDERAL EMPLOYEES

1. The authority citation for part 733 continues to read as follows:

Authority: 5 U.S.C. 1103, 1104, 7325; Reorganization Plan No. 2 of 1978, 92 Stat. 3783, 3 CFR 1978 Comp. p. 323; and E.O. 12107, 3 CFR 1978 Comp. p. 264.

2. In 734.101, the definitions of Employee, Employing office, and On duty are revised to read as follows:

§ 734.101 Definitions.

* * * * *

Employee means any individual (other than the President, Vice President, or a member of the uniformed services) employed or holding office in—

- (1) An Executive agency other than the General Accounting Office;
- (2) A position within the competitive service which is not in an Executive agency; or
- (3) The United States Postal Service or the Postal Rate Commission.

Employing office shall have the meaning given by the head of each agency or instrumentality of the United States Government covered by this part. Each agency or instrumentality shall provide notice identifying the appropriate employing offices within it through internal agency notice procedures.

* * * * *

On Duty means the time period when an employee is:

- (1) In a pay status other than paid leave, compensatory time off, credit hours, time off as an incentive award, or excused or authorized absence (including leave without pay); or
- (2) Representing any agency or instrumentality of the United States Government in an official capacity.

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3. In 734.102, paragraphs (a) and (b) are revised to read as follows:

§ 734.102 Jurisdiction.

(a) The United States Office of Special Counsel has exclusive authority to investigate allegations of political activity prohibited by the Hatch Act Reform Amendments of 1993, as implemented by 5 CFR part 734, prosecute alleged violations before the United States Merit Systems Protection Board, and render advisory opinions concerning the applicability of 5 CFR part 734 to

the political activity of Federal employees. (5 U.S.C. 1212 and 1216). Advice concerning the Hatch Act Reform Amendments may be requested from the Office of Special Counsel:

- (1) By letter addressed to the Office of Special Counsel at 1730 M Street NW., Suite 218, Washington, DC 20036-4505;
- (2) By telephone on (202) 254-3650, or (1-800) 854-2824;
- (3) By fax on (202) 254-3700; or
- (4) By e-mail at Hatchact@osc.gov.

(b) The Merit Systems Protection Board has exclusive authority to determine whether a violation of the Hatch Act Reform Amendments of 1993, as implemented by 5 CFR part 734, has occurred and to impose a penalty of removal, reduction-in-grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000, for violation of the political activity restrictions regulated by this part. (5 U.S.C. 1204 and 7326).

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4. In 734.203, paragraph (d) is revised to read as follows:

§ 734.203 Participation in nonpartisan activities.

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(d) Participate fully in public affairs, except as prohibited by other Federal law, in a manner which does not compromise his or her efficiency or integrity as an employee or the neutrality, efficiency, or integrity of the agency or instrumentality of the United States Government in which he or she is employed.

5. In 734.305, paragraph (c) is revised to read as follows:

§ 734.305 Soliciting or discouraging the political participation of certain persons.

* * * * *

(c) Each agency or instrumentality of the United States shall determine when a matter is pending and ongoing within employing offices of the agency or instrumentality for the purposes of this part.

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6. In 734.401, paragraph (a) is revised to read as follows:

§ 734.401 Coverage.

(a) This subpart applies to employees in the following agencies and positions:

- (1) The Federal Election Commission;
- (2) The Election Assistance Commission;
- (3) The Federal Bureau of Investigation;
- (4) The Secret Service;
- (5) The Central Intelligence Agency;
- (6) The National Security Council;
- (7) The National Security Agency;
- (8) The Defense Intelligence Agency;
- (9) The Merit Systems Protection Board;
- (10) The Office of Special Counsel;
- (11) The Office of Criminal Investigation of the Internal Revenue Service.
- (12) The Office of Investigative Programs of the United States Customs Service;
- (13) The Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms;
- (14) The Criminal Division of the Department of Justice;
- (15) The National Security Division of the Department of Justice;

- (16) The National Geospatial-Intelligence Agency;
- (17) The Office of the Director of National Intelligence;
- (18) Career Senior Executive Service positions described in 5 U.S.C. 3132(a)(4);
- (19) Administrative Law Judge positions described in 5 U.S.C. 5372;
- (20) Contract Appeals Board Member positions described in 5 U.S.C. 5372a; or
- (21) Administrative Appeals Judge positions described in 5 U.S.C. 5732b.

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7. In 734.502, paragraph (b) is revised to read as follows:

§ 734.502 Participation in political activity while on duty, in uniform, in any room or building occupied in the discharge of official duties, or using a Federal vehicle.

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(b) For the purposes of this subpart, normal duty hours and normal duty post will be determined by the head of each agency or instrumentality of the United States.

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[FR Doc. 2014-09628 Filed 05/02/2014 at 8:45 am; Publication Date: 05/05/2014]