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NEWSLETTER

Communications with Employees about Legislation and Politics: Managing Three Layers of Risk after the Wal-Mart Case

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A recent deadlock at the Federal Election Commission (FEC) in a case about corporate communications to employees highlights the risks involved with corporate communications of this type. The risk to employee communications, however, varies among three types of communications-legislative lobbying, express advocacy and mixed political/legislative communications. Understanding the applicable rules and making strategic legal choices about content and audience will help your corporation navigate the regulatory thicket, mitigate risk and get an effective message out.

Authors

D. Mark Renaud
Partner
202.719.7405
mrenaud@wiley.law

Caleb P. Burns
Partner
202.719.7451
cburns@wiley.law

Wal-Mart Case

The FEC deadlocked 3-3 in Matters under Review (MURs) 6051 and 6052. In these cases, the Republican Commissioners agreed with the FEC's Office of General Counsel (OCG) that there was no reason to believe that Wal-Mart Stores, Inc. violated the federal campaign finance rules through its legislative communications with employees. The Democratic Commissioners disagreed, and, in a Statement of Reasons filed by Commissioners Bauerly and Weintraub, the two Commissions indicated that they would have found reason to believe and investigated the allegation that Wal-Mart "coerce[d] its employees into voting against Democratic candidates in the November 2008 election."

This case was based on an article in the *Wall Street Journal* that outlined Wal-Mart's legislative campaign to inform its employees about the problems with the Employee Free Choice Act (EFCA), or card-check legislation. According to the article, Wal-Mart held

mandatory meetings about EFCA for many employees, including hourly employees. At these meetings, the human resource managers articulated policy and business reasons why EFCA was bad and, according to the article, "I am not telling you how to vote, but if the Democrats win, this bill will pass and you won't have a vote on whether you want a union."

It was the reporting of this election-related content that prompted the FEC complaints by, among others, American Rights at Work.

Legislative Lobbying of Employees

Communications to employees about legislative matters are not prohibited by federal campaign finance laws. There is no election law risk to this type of speech as long as the focus remains on legislation and any reference to legislators omits a discussion of their re-election, opponents and candidacies. Expenses for such communications are nondeductible for tax purposes and may be reportable on LDA quarterly reports depending on certain circumstances, but neither law affects the content of, or outright prohibits, this type of corporate speech.

Express Advocacy to Employees

On the other hand, corporations are specifically limited in their ability to expressly advocate to employees the election or defeat of clearly identified candidates. Corporations may only make such communications-like "vote for," "vote against" and "Smith for Congress"-to their restricted class. A corporation's restricted class includes its salaried officers, managers and professionals but does not include hourly employees or members of labor unions. The restricted class also includes stockholders, which, depending on the circumstances of a given case, could include hourly employees.

Corporations then may not expressly advocate a candidate's election or defeat to labor union members, hourly employees and other low-level employees. The only legal way for a corporation to place an electoral message in front of such employees is for the corporation to follow the detailed FEC regulations and invite a candidate or party representative to appear in front of employees. At such an event, the corporation still may not engage in express advocacy, but the candidate and party representative may do so.

Mixed Legislative/Political Messages

As discussed above, a corporation may make legislative communications to employees at all levels. The risks are more pronounced, however, when the discussion of legislation with hourly employees, labor union members and other low-level employees includes a discussion of the effect the outcome of an election might have on the legislative issue. According to the article behind the complaints, this was the accusation faced by Wal-Mart: Wal-Mart advocated the defeat of candidates by focusing on the effect of the candidates' election on the passage of a bill opposed by the company.

Wal-Mart effectively "won" at the FEC because the Commissioners deadlocked on how to proceed. A slightly different set of facts or a change in the make-up of the FEC, however, could have produced a different result,

for the Democratic Commissioners were ready to investigate Wal-Mart's activities. The Republican Commissioners, on the other hand, agreed with the OGC's analysis of the matters. OGC said it was a close call given the content of Wal-Mart's communications, but relied on a detailed script and guide for and about the communication plan provided by Wal-Mart to the presenters in order to find more than one reasonable meaning to the mixed communications. The communications, according to the OGC, were not, "on balance" and "when taken as a whole," express directives to vote for or against federal candidates.

If a corporation does not want to rely on the mercy of government officials with respect to future communications to hourly employees, it will delete references to elections and candidates from such communications. References to elections and candidates, however, provide context and background about corporate positions on particular pieces of legislation. For this reason, many corporations may not want to edit all such references out of their employee lobbying efforts. If the contextual election references are kept in, then the corporation should, at the least, ensure that it has adopted the following compliance/mitigation measures:

- The references to elections and candidates cannot be such that they expressly advocate the election or defeat of federal candidates in plain language such as "vote for," "vote against" and "Smith for Congress."
- The company should instruct its employees through corporate policies and otherwise that the company and its managers are not to engage in express advocacy to hourly employees, members of labor unions and other low-level employees.
- The company should provide managers implementing the lobbying strategy with a detailed guide as to the educational nature of the legislative communications and reiterate the policy against express advocacy.
- The company should script out all messaging and explicitly warn presenters not to stray from the prepared materials.