

PERKINScoie

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TO: American Hospital Association

FROM: Perkins Coie LLP

RE: **Solicitations for AHA Political Committee at 501(c)(3) Hospitals**

This memorandum will review the legal issues surrounding the solicitation of employees of an American Hospital Association member hospital that has qualified for charitable status under section 501(c)(3) of the Internal Revenue Code. Because of their tax status, such hospitals are subject to strict rules governing participation in "any political campaign on behalf of or in opposition to any candidate for public office." The Internal Revenue Service ("IRS") has provided guidance on what types of activities would constitute participation in a political campaign. In a non-precedential ruling, the IRS has also approved a hospital's use of payroll deduction for the PAC of an affiliated lobbying organization under certain conditions. From this guidance and other IRS rulings, it would appear that a nonprofit hospital and its employees may participate in AHA's PAC solicitation process in the following two ways:

- Individual employees of the hospital may participate more actively in the solicitation of funds for AHA's PAC in their individual capacity (such as by holding meetings to promote the PAC or communicating with co-workers about the PAC); and
- The hospital may approve the solicitation of its eligible employees by AHA's PAC and may provide limited administrative support in this effort (such as by providing a list of employees' names and addresses).

Each of these activities is discussed in more detail below.

Individual Employee Participation

Individual employees of a 501(c)(3) hospital may participate in AHA's solicitation efforts. It is the position of the IRS that "the prohibition on political campaign activities applies only to [the (c)(3)], not the activities of individuals in their private capacity."

Individual employees are, in their individual capacity, free to conduct activities to assist in the solicitation, including encouraging other employees to contribute to the PAC

through oral or written communications. To avoid inappropriate involvement by the hospital in these activities, some precautions should be observed:

- An employee should avoid the use of hospital facilities, equipment and supplies (such as stationery or other materials), except to the extent that similar uses are available to other private organizations or activities.
- An employee should avoid any suggestion that he or she is acting on behalf of the hospital or that the hospital is encouraging support of the PAC.
- Solicitation or education efforts should be done during after-work hours or during other personal time such as over the lunch hour or during breaks. These efforts should not be conducted during official staff meetings or other hospital functions.
- Other employees assisting with the solicitation efforts by any individual should be doing so voluntarily and not as part of their job responsibilities with the hospital.

In general, a rule of reason should apply. While the hospital itself should avoid appearing to or actually encouraging participation in the PAC, it should not act to disfavor private individual political activity if it allows other private activity that meets the needs or addresses the interests of employees of the hospital acting in their individual capacities.

Hospital Participation

In a 2011 private letter ruling, the IRS permitted a hospital system to conduct a payroll deduction program that allowed employees to make voluntary contributions to any political organization of their choosing; that ruling also allowed the system to participate in an affiliated lobbying organization that created two PACs (presumably a state and a federal PAC). The clear implication of this ruling was that the hospital system could offer its employees a payroll deduction option for its affiliated organization's PACs as well. This was a non-precedential ruling; and the IRS did not state affirmatively that all of the precautions taken by the requester were strictly necessary to reach the positive result.

This ruling is in line with other IRS rulings permitting hospital systems and other section 501(c)(3) organizations to offer payroll deduction for their employees so long as such efforts are meant to encourage employees' participation in the political process. In an unpublished Private Letter Ruling dated March 22, 1989, the IRS allowed the Texas Hospital Association to establish a payroll deduction program for member employees who had chosen to make contributions to a political action committee, noting that the activity did not involve any "preference or bias" for any candidate; while it resulted in some

minimal cost to the participating hospitals, it was related only to an impartial effort to encourage employees to participate in the political process. In 2001, the IRS allowed a similar payroll deduction plan to be administered by a health care system on behalf of union PACs. The IRS cited the facts that the system, in administering the payroll deduction plan, would not render any material financial assistance to the PACs, and was merely "conducting an employee benefit program that involved political activity by the employees, not attributable to the employer."

However, the IRS has also ruled against a hospital system that unduly encouraged participation in a hospital-approved PAC. In 2004, the IRS found that a hospital system had indirectly participated in political activity by, among other activities, administering a payroll deduction program for a hospital industry PAC. In making this determination, the IRS pointed primarily to action by the CEO and other managers of the system. They noted, for example, that the CEO and other managers had promoted participation in the PAC during regularly scheduled employee meetings or through informal conversations with employees at the workplace. The IRS also found the system had spent system resources by producing a video of the CEO encouraging participation in the PAC and by publicizing the PAC in its employee newsletter. The IRS found that these facts led to the conclusion that the activities of the CEO and other managers had to be attributed to the hospital system.

The 2004 adverse ruling is distinguishable due to two factors: first, the heavy involvement of hospital managers through work-related activities and through the use of system resources to promote the PAC, far beyond the minimal administrative support noted in the other rulings; and second, the fact that the hospital system only offered its employees participation in a PAC that shared its "vision and priorities," and did not offer employees other ways of participating in the political process.

More generally, when analyzing whether a particular activity -- even those with some tangential relationship or potential impact on a political campaign -- constituted prohibited political activity, the IRS looks at several factors:

1. Were the activities educational in nature and did they have the effect of neutrally encouraging public participation in the political process?
2. Did the organization express any opinion with regard to political issues?
3. Did the organization exercise control or direction with regard to political issues?
4. Was the activity required by another statutory provision?

5. Was the activity de minimis?
6. Did the organization offer a range of options to its employees to participate in the political process?

The approval of solicitation of a hospital's employees by AHA, or a state hospital association on its behalf, would be a similarly neutral activity, designed to promote political participation without advocating a particular bias or preference. In granting such permission, in line with the rulings on payroll deduction, the hospital also could provide certain minimal administrative support, without running afoul of the IRS prohibition on political activity. For example, if the hospital provided a list of eligible employees to AHA (or a state association on its behalf) for solicitation, it could make clear its neutral intentions by including, with the list, a cover letter that states:

We are providing you with this information so that we can make available to our individual eligible employees the opportunity to make a voluntary decision to participate in your program. As an organization we do not favor any political program or endorse, support or oppose any candidates for public office.

Those names and addresses should also be made available to other political organizations on an equal basis. The mailing of a solicitation to those employees would be conducted by AHA or a state hospital association on behalf of AHA, and would not require the participation of the hospital in the actual solicitation of funds. To better fit within the most recent IRS ruling, the hospital might consider adopting a policy permitting employees to use the payroll deduction system for contributions to any other political organization of their choosing, with the limits of applicable campaign finance restrictions.

In addition, the hospital may be able to facilitate the individual efforts of employees (see discussion above) to the extent that such activities are permitted in other circumstances. For example, the hospital may permit PAC representatives to host a PAC information meeting on hospital property on the same basis as it allows other private activities, like charitable or social club activities. The hospital must avoid discriminating in favor of the PAC or otherwise appearing to give it benefits not available on the same terms to other employees pursuing private actions. If the hospital maintains a community room for use for "private" purposes for activities of employees or outside groups, that room can be made available to employees who are involved with the PAC so long as they are required to follow the same procedures in reserving the room and meet all other conditions including, if generally charged, the payment of a fee for the use of that room.

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AUTHORITIES

Rev. Rul. 74-574: Tax exempt broadcasting station which provides air time equally to a legally qualified candidates running for elective public office in order meet Federal Communications Commission requirement is not in violation of the political participation prohibition.

Rev. Rul. 72-512: University is not participating in political campaigns by offering a political science course that requires the students to volunteer in the political campaign of a candidate of their choice.

Rev. Rul. 72-513: University is not participating in political campaigns by providing facilities and faculty advisors to a campus newspaper that publishes student editorials on political subjects.

Unpublished Private Letter Ruling (March 22, 1989): Hospital members of trade association may provide payroll deduction to employees who chose to contribute to trade association PAC where hospitals do not express any preference or bias and was related to an impartial effort to encourage employees to participate in political process.

2001 TNT 247-38: Tax-exempt health plan's administration of payroll deduction arrangement for labor union PACs will not violate the prohibition against political campaign intervention.

TAM 20044 6033: IRS found hospital system had indirectly participated in political activities by, among other activities, administering a payroll deduction program for a hospital industry PAC, based largely on the involvement of hospital employees in their official capacity on behalf of the PAC.

Priv. L. Rul. 2011-27013: IRS permitted a hospital system to administer a payroll deduction arrangement for any political organization of its employees' choosing, including the PAC of an affiliated lobbying organization.

Rev. Ruls. 78-248, 86-95: Tax exempt organizations may produce and distribute to the public voter guides containing candidate views on specific issues and may sponsor candidate debates, where such activities are designed to educate the public rather than to affect the outcome of a partisan political campaign.

GCM 33682: IRS has "recognized that situations might arise in which an organization or representative thereof engaged in political activity but on such a small scale that it would not be feasible from an administrative standpoint to withhold or revoke the group's 501(c)(3) status because of it." See also Rev. Rule 80-282; GCMs 39441, 39414, 38444.