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POLITICS

In today's highly regulated environment, many employers create and administer political action committees to publicly voice their business concerns, four Littler Mendelson attorneys say in this BNA Insights article. But the authors warn that companies administering PACs trigger a host of regulations that may provide solicitation and access opportunities for any labor organization representing its employees, as well as concomitant obligations for the corporate entity itself.

As the number of corporate PACs increases, the Littler attorneys observe, companies continue to walk a fine line. They say it is critical to exercise the proper care in communications regarding any corporate PAC and to ensure that government affairs, labor relations, and human resources departments are coordinating appropriately.

The Hidden Union Access and Solicitation Pitfalls Associated With Employer Corporate PACs




BY JOSHUA WAXMAN, ILYSE SCHUMAN, MICHAEL LOTITO, AND WILLIAM TRACHMAN*

In today's highly regulated environment, many employers create and administer political action committees (PACs) in order to publicly voice their business concerns, particularly to government regulators and policy makers.[1] But companies that administer PACs trigger a host of regulations that may provide solicita-

* Joshua Waxman and Ilyse Schuman are shareholders in Littler's Washington office. Waxman's primary focus is on complex labor and employment litigation and strategic labor advice. Schuman leads the firm's legislative and regulatory practice. Michael Lotito is a shareholder in Littler's San Francisco office, where he provides advocacy services for clients, associations, and policy leaders on all workplace concerns. William Trachman is an associate in the firm's Denver office, advising and representing employers in a wide range of employment and labor law matters.

[1] Under the Code of Federal Regulations, the entities commonly known as PACs or connected PACs are referred to as Separate Segregated Funds or "SSFs." *See* 2 U.S.C. § 431(4)(B); 11 C.F.R. § 114.5, et seq.

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tion and access opportunities for any labor organization that represents its employees, and similarly trigger concomitant obligations for the corporate entity itself.

Simply referring to a company's PAC in the wrong way in an employee handbook could have the potential of allowing a union to solicit all of its employees for union PAC contributions.

If companies are not careful, they can unwittingly trigger broad union solicitation and access rights, while also subjecting themselves to investigations and fines for improperly soliciting contributions to the PAC.

Solicitations and the Scope of Reciprocal Obligations

A corporate PAC is generally free to solicit its stockholders, as well as its executive or administrative personnel and their families (along with the same personnel within its subsidiaries, branches and affiliates). These individuals are known as the ''restricted class.'' 11 C.F.R. § 114.1(j).

One category of these individuals—those that constitute ''executive or administrative personnel''—is limited to salaried employees and employees who have policymaking, managerial, professional or supervisory responsibilities, 11 C.F.R. § 114.1(c), and federal election law provides that the Fair Labor Standards Act may serve as a guideline as to whether an employee meets these qualifications. 11 C.F.R. § 114.1(c)(4). As a result, members of the restricted class are not represented by unions, and generally would be considered ''supervisors'' under the National Labor Relations Act, and not subject to being organized.

A company is also allowed to solicit all of its employees for PAC contributions, including those outside the restricted class, twice a year. 11 C.F.R. § 114.6(a). These solicitations must be made in writing and mailed to the homes of the employees, and must contain a series of informational statements regarding contributions to the PAC. 11 C.F.R. § 114.6(c).[2]

However, choosing to solicit PAC contributions from employees outside the restricted class can create unique issues because, if a company makes a general solicitation to employees outside of the restricted class, it must permit *any* union representing *any* of the employees or the company, or of *any* of its subsidiaries, branches, divisions or affiliates, to also solicit *all* of the employees at any of those entities for contributions to the union's PAC. Moreover, the company must ''make available'' to the union the method by which it solicited those individuals. 11 C.F.R. § 114.6(e)(3)-(e)(3)(i). This is the case even if a branch or subsidiary is not subject to a union contract. *See* FEC Advisory Opinion 1990-5 (Staines).

Companies that nevertheless opt to make an employee-wide solicitation beyond the restricted class (subject to the twice-yearly allowance) must give advance notice to any union that represents the employees. The notice must: (1) be made within a reasonable time prior to the solicitation; (2) state the company's intention to make a solicitation; and (3) disclose the method by which the solicitation will be made. *See* 11 C.F.R. § 114.6(e)(3)(4).

Generally, this means that a company must give the relevant union(s) the employee contact information that it possesses for all its employees, as well as those of its subsidiaries, branches, divisions and affiliates.[3] 11 C.F.R. § 114.6(e)(3). And notably, if more than one union represents employees for the company, those unions collectively are limited to two solicitations per year, and may combine their solicitations into one written communication for these purposes. *See* FEC Campaign Guide, Corporations and Labor Unions, p. 106 (2007) (''[T]he unions share a limit of two solicitations of nonmembers per year.'').

Some Union Rights Triggered Merely for Soliciting the Restricted Class

Even if an employer never solicits outside its restricted class, other provisions of the federal campaign regulations provide that unions must be granted similar types of access and solicitation rights, and shall reimburse the company merely for the cost of providing that access. *See* 11 C.F.R. § 114.5. As with the twice-yearly solicitations, *any* method that an employer uses to solicit contributions to its PAC must be made available to *any* union representing any of its employees to solicit for its PAC. 11 C.F.R. § 114.5(k).

For instance, if a company uses a computer system or program for addressing envelopes or labels for a solicitation, it must, at cost, program the computer so that the union may solicit its members in the same manner. *See* 11 C.F.R. § 114.5(k)(2). This likely also includes any type of e-mail or other mass mailing capabilities that the company possesses. Separately, if a company uses corporate facilities, such as a company conference room, dining room, or cafeteria, for meetings of the restricted class at which PAC solicitations are made, the company must also, at the request of the union, allow it access to the same corporate facilities to solicit their members. 11 C.F.R. § 114.5(k)(3).

If a company uses a payroll deduction system for its PAC contributions, it must similarly offer to establish a payroll deduction system to the union's members for the union's PAC.

Moreover, if a company uses a payroll deduction system for its PAC contributions, it must similarly offer to establish a payroll deduction system to the union's members for the union's PAC. 11 C.F.R. § 114.5(k)(1). However, a company cannot negotiate the cost of these items with a union during collective bargaining in a manner that would allow a labor union to establish a

[2] The Federal Election Commission (FEC) has ruled that an entity may also send a solicitation in other media, such as a recorded video solicitation, if it is sent along with a written solicitation, and if it meets the other requirements of the relevant regulation. *See* FEC Advisory Opinion 1991-28 (Garrett).

[3] However, if the company wishes to withhold this information, it may route both its own solicitations and the relevant labor union's solicitations through a third-party administrator. 11 C.F.R. § 114.5(e)(3)(ii).

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payroll deduction system at less than the cost to the company. Such an arrangement could raise potential concerns under Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, which prohibits employers from providing labor organizations with any ''thing of value,''[4] and also potentially could be a violation of Section 8(a)(2) of the NLRA, which prohibits employer contributions of ''financial or other support to a labor organization.''

While perhaps a minor expenditure on the part of the company, such an arrangement would also be contrary to the ''prohibition on the use of corporate and union treasury funds in connection with Federal elections.'' FEC Advisory Opinion 1979-21 (Watts) (''[P]ayment by a corporation of costs incident to maintaining a payroll deduction system for facilitating the making of voluntary contributions by employee-union members to a union's separate segregated fund would be prohibited by 441b.'')[5]

What Communications Constitute a Solicitation?

Because a ''solicitation''—either in the context of the restricted class or a twice-yearly communication to employees outside that group—triggers both the company's duties and a labor union's rights, the issue of whether a communication is a ''solicitation'' is an important one. Companies must be careful to avoid using language that informs employees outside of the restricted class that the company's PAC may accept contributions from such individuals, unless that language is specifically contained in a communication complying with the twice-yearly provisions. *See* MUR 6100R (Covanta Energy Corporation) (Sept. 9, 2009). Otherwise, not only will the company likely face a complaint and possibly a fine, but it could also trigger a union demand to solicit *all* of the company's employees, even outside of the union's restricted class. *See* 2 U.S.C. § 441b(b)(6); *Utility Workers Union of Am., Local 369 v. FEC*, 691 F. Supp. 2d 101, 103, 187 LRRM 3586 (D.D.C. 2010) (45 DLR A-10, 3/10/10) (''[I]f a company makes such a 'solicitation' without following the FEC's regulations, § 441b(b) requires it to afford a labor union representing its employees a similar opportunity to make a solicitation.'').

In *Covanta*, the FEC ruled, after a remand from the U.S. District Court of the District of Columbia, *Utility Workers Union of America v. FEC*, 691 F. Supp. 2d 101 (D.D.C. 2010), that a company's inclusion of the following language in its employee handbook did not constitute a solicitation:

''Primarily in order to make contributions to federal political candidates or committees, we have established a federal political action committee (or 'PAC'). *Contributions to the PAC by eligible employees are voluntary*. Whether an employee contributes or not results in no favor, disfavor or reprisal from Covanta. The PAC will comply with all federal and state laws.'' (emphasis added).

In a previous Explanation and Justification (E&J), the FEC had noted that a company's informational statement that it could accept contributions from outside of the restricted class did indeed constitute a solicitation. *See* E&J, H.R. Doc. No. 95-44,10921 (Jan. 12, 1977). But in *Covanta*, the FEC noted, the employee handbook stated merely that contributions to the company's PAC by ''eligible employees'' are voluntary, and therefore stopped short of informing non-eligible employees that their contributions could be accepted.

Thus, the fact that a company mentions the existence of its PAC—even in a communication that is circulated outside of the restricted class—does not entail that it has made a solicitation, much less a solicitation to all of its employees. *See also* FEC Advisory Opinion 1983-38 (Pleasants) (announcement in company newsletter that a PAC was being formed did not constitute a solicitation). However, the *Covanta* case aptly illustrates why a company must exercise certain precautions when communicating to all of its employees about its PAC.

Indeed, the FEC has held that some communications constitute solicitations even when the company's PAC is not mentioned. These are communications that ''encourage'' or ''facilitate'' contributions to the PAC. A sale of raffle tickets, for instance, to company employees, if the proceeds are to go to the PAC, is a solicitation and may not be conducted outside of the restricted class. *See* FEC Advisory Opinion 1992-9 (Voigt). And even communications where no request for contributions is made can nevertheless still be solicitations. *See* FEC Advisory Opinion 1979-13 (Godley) (article in company newsletter describing PAC activity and commending employees for participating in PAC activity constituted a solicitation). Such communications may not be made other than in compliance with the twice-yearly allowance described above. Moreover, if a company is found to solicit outside of its restricted class, it could also open the door to a union solicitation of *all* of its employees, including those of its subsidiaries and affiliates.

If the proper care is taken, for the most part, companies can generally refer to, or describe their connected PACs in neutral terms without making a solicitation. *See* FEC Advisory Opinion 1988-2 (Claassen) (act of posting an FEC report of contributions and expenditures on office bulletin board was not a solicitation); FEC Advisory Opinion 1982-65 (Suhr) (statement in annual report that shareholders could request information about company PAC was not solicitation even though 70 percent of recipients were not shareholders). And such PACs can generally invite employees to determine their status with regard to whether they are members of the restricted class. *See id.*; FEC Advisory Opinion 2000-7 (Newton). Thus, the risk of liability for improper statements may be reduced if employers exercise appropriate and due care to avoid using the wrong language in their communications.

[4] Because such a system is, arguably, for the sole and exclusive benefit of the employer's employees—as opposed, for instance, to union officials—it could be deemed to fall under the exception contained in 29 U.S.C. § 186(c)(5), although an argument could be made that the union also benefits by the facilitation of PAC contributions from its members. *See id.* (Allowing employer contributions of ''money or other thing[s] of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer.'')

[5] FEC regulations do not preclude a union from prepaying the expenses related to these solicitations, as opposed to reimbursing them. Nor do they preclude an employer that does not have a payroll deduction program in place from agreeing to establish one for a union PAC, if it so chooses, or conversely, from objecting to providing one to the union.

Conclusion

As the number of corporate PACs increases, companies continue to walk a careful line required by relevant federal regulations. Companies ought to be aware that solicitations outside of the restricted class and subject to the twice-yearly allowance trigger rights for labor unions to use similar methods for solicitations to all employees of any part of the company.

Moreover, even if companies do not solicit outside the restricted class, they still could be required to open their facilities and share their solicitation methods with a union, depending on how the solicitation is made. This is to say nothing of potential campaign finance investigations or fines levied by the FEC.

Appropriate compliance steps, therefore, should be taken in order to avoid inadvertently making a statement that could be construed as a solicitation, such as an incorrect reference to a PAC in an employee handbook. As a result, it is important for companies to exercise the proper care in communications regarding the corporate PAC and to ensure that their government affairs, labor relations, and human resources departments are coordinating appropriately.

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