Advocacy and Lobbying: The Rules of the Road for Nonprofits

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Anita S. Lichtblau
Casner & Edwards, LLP
lichtblau@casneredwards.com
617.426.5900 x 362

The Key Points

• 501(c)(3) public charities may engage in any type of advocacy, education, or lobbying that furthers their charitable purpose
  – But they may engage in only a small amount of legislative lobbying and it must be reported to the IRS on Form 990
  – May need to register with state or federal gov’t
• Generally, organizations may not pay for lobbying with government grant funds
More Key Points

• 501(c)(3) rules do not apply to government entities or their employees, but many states have their own rules limiting lobbying

• If rules limit or prohibit lobbying on behalf of employer or with government funds, individuals may lobby on their own time as private citizens

What is: Advocacy? Education? Lobbying?

• Education: Providing unbiased information
  – If education also includes attempt to influence, may be advocacy or lobbying as well

• Advocacy: attempting to influence the public or decision makers
  – If advocacy includes attempt to influence specific government decision, may be lobbying as well

• Lobbying is a type of advocacy

• Definition of lobbying depends on the specific rule
What is: Advocacy? Education? Lobbying?

- Generally, lobbying is an attempt to influence specific government decisions or actions
  - May cover executive and/or legislative branches
  - May cover local, state, and/or federal levels
- Lobbying is distinct from political campaign activity; different rules apply
- Examples of education, advocacy, and lobbying

Types of Federal Lobbying Rules

- Tax
- Appropriations acts
- Grant and contract rules
- Criminal provisions applicable to lobbying with federal funds
- Registration and disclosure
Tax Rules: 501(c)(3) Public Charities

• May do a little, but not a lot, of lobbying
  – May not be a “substantial part” of total activities
  – IRS rules use terms “carrying on of propaganda” and “attempting to influence legislation”
    • Local, state, and federal legislation
    • Attempts to influence adoption, rejection, or content of legislation
    • Includes ballot initiatives, referenda, appropriations

Tax Rules: 501(c)(3) Public Charities

• Alternative tests for whether organization has engaged in too much lobbying
  – “Substantial Part” test
    • Default test
    • Based on “facts and circumstances;” vague
    • Focus on activities, not just expenditures
  – Section 501(h) quantitative test
    • Must elect to be subject to test
    • Substantiality based on dollar thresholds
    • More specific rules and definitions; broader exceptions
Tax Rules: 501(c)(3) Public Charities

- Lobbying definition under “substantial part” test:
  - Contacting, or urging public to contact, members of legislative body for purpose of proposing, supporting, or opposing legislation; OR
  - Advocating adoption or rejection of legislation
  - Doesn’t include:
    - Passive response to legislative committee’s invitation to testify at hearing
    - Nonpartisan analysis, study, and research, if organization doesn’t participate in drafting of or advocate for adoption of any legislation

- Tiered limits for 501(h) test, up to maximum annual lobbying expenditure of $1 million
  - 20% of first $500,000 of exempt purpose expenditures; **plus**
  - 15% of next $500,000; **plus**
  - 10% of next $500,000; **plus**
  - 5% of remaining exempt purpose expenditures
- Separate 25% grassroots lobbying cap
Tax Rules: 501(c)(3) Public Charities
Electing 501(h) Expenditure Test

• “Lobbying” includes direct and grassroots lobbying:
  – Direct lobbying:
    • Attempt to influence legislation through any communication with legislator or staff
    • Communication with executive branch officials who participate in formulation of legislation if principal purpose is to influence legislation
    • Attempt to influence public on ballot initiative
    • Communications by organization encouraging its members to make direct lobbying communication

– Direct lobbying, continued
  • Only counts if communication refers to specific legislation/initiative and reflects view on the legislation

– Grassroots lobbying:
  • Attempt to influence legislation through attempt to affect opinions of general public
  • Three part test:
    – Refers to specific legislation
    – Reflects a view on the legislation
    – “Call to action”
Tax Rules: 501(c)(3) Public Charities

Electing 501(h) Expenditure Test

- Exceptions from lobbying definition:
  - Preparing and making available results of nonpartisan analysis, study, or research, even if it reflects position;
  - Providing technical advice at written request of governmental body;
  - “Self-defense” communications
  - Member communications on legislation of direct interest to organization, if no direct encouragement to lobby
  - Discussion of broad social, economic and similar issues

- Penalties for noncompliance
  - Substantial part test
    - Revocation of tax-exempt status
    - 5% excise tax on organization and its managers
  - Section 501(h) expenditure test
    - 25% tax on lobbying expenditures that exceed cap
    - Revocation of exempt status only if annual lobbying expenditures, on average over 4-year period, exceed 150% of either cap
  - Both: if (c)(3) status revoked, ineligible for (c)(4)
Tax Rules: 501(c)(3) Private Foundations

- Heavily taxed on most legislative lobbying
- Exception is “self-defense” lobbying
  - Matters which might affect:
    - existence of foundation
    - its powers and duties
    - its tax-exempt status, or
    - deduction of contributions to foundation
- Grants from private foundations may not be “earmarked” for lobbying

Tax Rules: 501(c)(4)s and (c)(6)s

- May engage in unlimited amount of legislative or other types of lobbying
- So long as legislation relates to organization’s exempt purposes
- Portion of dues paying for lobbying and political activity not deductible by members as business expense
  - Organization either notifies members annually of non-deductible portion of dues; OR
  - Pays “proxy tax” on these amounts to IRS
Tracking and Reporting Lobbying to IRS

- Form 990, Schedule C
  - Non-501(h) electing (c)(3)s report lobbying expenditures and describe lobbying activities
  - 501(h) electing (c)(3)s only report expenditures
  - Establish system to track info and train staff
  - For staff, use time sheets or other time records
    - Include allocable compensation, overhead, space costs
    - Include time and resources in preparation for lobbying
    - If using “facts and circumstances” test, track volunteers

Tax Rules: Affiliated Organizations

- 501(c)(3)s may set up 501(c)(4)s to carry out more extensive lobbying and/or engage in political campaign activity
- Keep organizations separate
  - May share staff and resources, but allocate expenses in proportion to benefit received
  - Separate boards, bank accounts, financial records
Federal Grant and Contract Funds

- Generally, may not use federal grant or contract funds for state or federal legislative lobbying
  - Annual federal appropriations acts
    - Coverage differs among federal agency bills
    - Very broad coverage for HHS, Education, and Labor
  - Federal cost principles
    - OMB Circular A-122, codified at 2 CFR Part 230 (Nonprofit grantees), Appendix B, pgh. 25
      - Applies to grant-funded employee time, expenses, travel, etc.
      - Limited exceptions

OMB Circular A-122 Exceptions:

- Technical and factual presentations through hearing testimony, statements or letters
  - In response to documented request
  - Travel, lodging and meals costs not allowable unless to offer testimony at Congressional hearing pursuant to written request made by Chairman or Ranking Minority Member of Committee or Subcommittee
  - “Self-defense” lobbying
Federal Grant and Contract Funds

- More OMB Circular A-122 Exceptions
  - Lobbying expressly permitted by statute to be carried out with grant or contract funds
  - New OMB “Supercircular” adds an exception for any activity excepted from IRS definitions of lobbying for 501(c)(3)s
    - Will become effective when federal agencies adopt rule, sometime before end of 2015
    - Adds ban on use of federal grant funds for membership fees for organizations whose primary purpose is lobbying

Federal Grant and Contract Funds

- OMB cost principles for state and local gov’t grantees
  - OMB Circular A-87, codified at 2 CFR Part 225
    - App. B, pghs. 24 and 25
    - Only provision relating to legislative lobbying is ban on membership dues in organizations “substantially engaged in lobbying.”
  - OMB Supercircular
    - Most provisions related to legislative lobbying will not apply to government grantees, except:
      - Ban on use of federal grant funds for membership fees for organizations whose “primary purpose” is lobbying
Federal Grant and Contract Funds

- 501(c)(4)s that lobby may not receive federal grant funds
- If recipients of federal funds lobby, carefully track to establish use of non-federal resources
- May not include time or resources spent on lobbying as direct or indirect cost charged to federal funds

Federal Grant and Contract Funds

- Byrd Amendment
  - Federal funds may not be used to lobby federal executive branch or Congress to influence awarding, modification, or extension of specific grant, contract, or loan, including earmarks
  - Recipients of federal funds must report on lobbying paid with non-federal funds
State Grant/Contract Funds

- State contracts or grants may prohibit use of funds for lobbying, or some types of lobbying
- Check contract language
- Check applicable regulations
- If pass-through of federal funds, may incorporate federal fund rules

State and Local Government Employees

- Check state law and your employer’s policies
- Some states prohibit employees from legislative lobbying, at least on gov’t time
- Even if state law does not prohibit generally, federal and state law restrictions applicable to use of state or federal grant funds by state or local government grantees still apply
- May lobby as private citizens on own time
Lobbying Registration

- Federal Lobbying Disclosure Act
- State lobbying registration rules
  - Differs by state
  - May require registration and/or reporting
  - Many have exceptions for small amounts of lobbying

Federal Lobbying Disclosure Act

- Registration and disclosure of federal lobbying
  - Paid “lobbyists” and organizations that employ “lobbyists” must register and report
    - Applies to paid employees who lobby, not volunteers
  - “Lobbyist” is individual who has more than one lobbying contact and spends more than 20% of time on lobbying activities in a 3-month period
    - Organization is exempted from requirements if total lobbying expenses do not, or are not expected to, exceed $12,500 in a 3-month period
      - The dollar figure is adjusted regularly per CPI
Federal Lobbying Disclosure Act

– Includes influencing covered executive branch officials and Congress
– Includes preparation for lobbying contacts

• If lobbyist or organization is required to register, must make quarterly reports on lobbying activities and expenditures and semi-annual reports on political contributions and Gift Rule compliance

How to Lobby Within the Rules

• Don’t use government funds for lobbying by staff or outside consultants or groups
• Adopt a lobbying policy
• Educate board and staff on lobbying rules
• Consider Section 501(h) election
• Staff and board members track legislative lobbying for Form 990 reporting purposes
  – Report on time cards, memos or other method
  – Monitor to ensure it does not exceed IRS limit
Examples

1. Joanne, an employee of a 501(c)(3) organization, goes on a tour with her local state representative of local hospitals and health centers providing breastfeeding support for new mothers. There is no discussion of any proposed legislation or government funding of any breastfeeding programs.

2. State Breastfeeding Coalition (SBC), a 501(c)(3) that receives no government funding, posts on its website a request to readers to contact their representatives in Congress to urge them to vote in favor of the Breastfeeding Promotion Act.
   - Same as above, but request sent by email only to members of SBC.
   - Same as #2, but request sent only to SBC members and does not ask members to contact Congressional representatives.

3. Sarah, an employee of a 501(c)(3) organization that is a member of SBC and does not receive government grant funds, meets with her Congresswoman in D.C. to talk about the need for increased funding for WIC Peer Counseling.
   - Gene, an employee of another 501(c)(3) organization that is a member of SBC, but receives federal grant funding, also attends the meeting.
   - Prior to the meeting, Judy, who works for Gene, prepares a report summarizing the health and economic benefits of breastfeeding for Gene and Sarah to use at the meeting.
4. Gene has asked his volunteer board members to email their Congressional representatives urging them to vote for a bill in the state legislature that would require paid breastfeeding breaks.