

Inside Political Law

*Updates on developments in campaign finance, lobbying
& government ethics law*

COVINGTON

FROM COVINGTON & BURLING LLP

Coercing Contributions at Work: The FEC's Latest Decision

By Robert Lenhard on June 9, 2016

Posted in Campaign Finance

On Friday, three Federal Election Commission (FEC) Commissioners provided a clear description of their understanding of the facts and law that led them to oppose opening an investigation into whether Murray Energy coerced its employees into making political contributions. Statement of Reasons of Chairman Petersen and Commissioners Hunter and Goodman, FEC MUR 6661. While clarity in the law is always to be commended, the standard they use to define when a contribution is coerced is narrow and will certainly allow conduct that many employers now reject as excessive. As with two earlier decisions in which three Commissioners voted not to pursue enforcement actions against employers who compelled employees to attend a candidate's rally or to waive signs or make calls supporting a candidate, it is clear that the FEC will not be an effective barrier to employers pressuring employees to engage in many kinds of political activity. As Lindsay Burke and I noted in a recent article in *Corporate Counsel Magazine*, there remain state employment law issues to consider, but the signal from this recent FEC case is unmistakable.

The FEC needs the affirmative vote of four Commissioners to proceed with an investigation or enforcement action, so the rules as articulated by these three Commissioners will define enforcement going forward. They are clear on the following points.

- So long as a standard FEC disclaimer (that little box of words at the bottom of the page in a solicitation) is present, only clear evidence of an employer's specific acts or statements constituting a threat of physical force, job discrimination or financial reprisal is prohibited. There must be "demonstrable, objective evidence of threats or reprisals" for a violation to

occur. So in all but the most extreme cases, the presence of a disclaimer can be a “get-out-of-jail-free” card.

- The subjective view of the employee or even of the FEC that a solicitation is potentially coercive is not determinative. The three Commissioners find it “natural” for an employee to feel “uncomfortable” when solicited by a supervisor, so feeling pressure to give is not evidence of coercion. Instead, the employer must make an explicit threat or take retaliatory action.
- The statute only limits coercion in soliciting contributions to the PAC. The three Commissioners appear to adopt the view that the FEC’s rules do not protect an employee from being coerced into giving directly to a candidate or political party.

With this standard in place, the three Commissioners found the following conduct did not meet the test for beginning an investigation into whether there was “demonstrable, objective evidence of a threat or reprisal.”

- An employer asking employees for a show of hands of those who were contributing to the PAC.
- Informing employees that the response to a prior solicitation was “poor” and “if we do not win this election,” the industry will be eliminated “and so will your job.”
- Informing employees that their supervisor or the CEO is “insulted” by every salaried employee who does not contribute.
- Multiple solicitations targeting employees who did not give when asked the first time.
- A general sense among employees that contributions are required for successful advancement at the company.

There is no doubt the standard as articulated, and the application of it to the facts here will be seen as moving the line significantly for those employers who ask: “Will I get in trouble with the FEC for doing this?” Many employers choose to stay far from the line for organizational reasons, as well as because they believe the law requires it. In addition, some state laws protect employees from coerced political activities and the Justice Department retains concurrent jurisdiction to pursue criminal violations of the campaign finance laws. But the statement issued Friday makes clear that, for many companies, a

decision to be far more aggressive in requesting contributions from employees will not be second guessed at the FEC, so long as the appropriate disclaimer appears on the bottom of the solicitation.

COPYRIGHT © 2016, COVINGTON & BURLING LLP. ALL RIGHTS RESERVED.

STRATEGY, DESIGN, MARKETING & SUPPORT BY

LEXBLOG