

Let's Get Political

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What applies?

- Workplace Privacy Act
- Nebraska Political Accountability and Disclosure Act and Regulations
- NPADC Opinions
- First Amendment
- Board Policy
- Possibly the State Auditor
- Possibly the Secretary of State

Political Activities, Generally

20-160. Employees of state or political subdivisions; prohibited from political activities during office hours, while performing official duties, or while wearing a uniform.

Unless specifically restricted by a federal law or any other state law, no employee of the state or any political subdivision thereof, as defined in subdivision (2) of section 13-702, shall be prohibited from participating in political activities except during office hours or when otherwise engaged in the performance of his or her official duties. No such employee shall engage in any political activity while wearing a uniform required by the state or any political subdivision thereof.

Workplace Privacy Act

- Passed by LB 821, codified at NEB. REV. STAT. 48-3501 *et seq.*
- Restricts employers from
 - Requesting username and password for “personal internet account”
 - Requiring employee to “add” anyone, including the employer
 - Taking adverse action or discriminating if an employee refused to disclose account information

Workplace Privacy Act

- “Personal Internet Account”
 - An individual’s online account that requires login information in order to access or control the account
- Does not include
 - An online account that an...educational institution supplies or pays for, except when the employer or educational institution pays only for additional features or enhancements to the online account
 - An online account that is used **exclusively for a business purpose of the employer**

Workplace Privacy Act

- Does not prevent employers from
 - Creating policies regarding use of their equipment
 - Requiring disclosure of UN/PW to an employer account
 - Limiting access to certain sites/apps during permissible times
 - Monitoring traffic, even if you discover personal internet account information
 - Conducting investigations of wrongdoing
 - Prohibiting misuse of proprietary information

NPADA: The High Points

- Must understand the (very broad) definitions, especially "ballot question" and "candidate"
- Not every "political" issue is governed by the Act
- Public officials and employees are charged with knowing the rules, including classified staff, certificated staff, and board members
- There isn't an overwhelming number statutes to consider, so we recommend training for staff and boards

"Ballot Question"

49-1405. Ballot question, defined.

(1) Ballot question shall mean any question which is submitted or which is intended to be submitted to a popular vote at an election, including, but not limited to, a question submitted or intended to be submitted by way of initiative, referendum, recall, or judicial retention, whether or not it qualifies for the ballot.

(2) Ballot question shall also mean any question which has been submitted to a popular vote at an election as a result of legislative action or adoption of a resolution by a political subdivision to place an issue or issues on the ballot.

"Candidate"

49-1409. Candidate, defined.

(1) Candidate shall mean an individual: (a) Who files, or on behalf of whom is filed, a fee, affidavit, nomination papers, or nominating petition for an elective office; (b) whose nomination as a candidate for elective office by a political party caucus, committee, or convention is certified to the appropriate filing official; (c) who is an officeholder who is the subject of a recall vote; or (d) who receives a contribution, makes an expenditure, or gives consent for another person to receive a contribution or make an expenditure with a view to bringing about the individual's nomination or election to an elective office, whether or not the specific elective office for which the individual will seek nomination or election is known at the time the contribution is received or the expenditure is made. An elected officeholder shall, if eligible under law, be considered to be a candidate for reelection to that same office for the purposes of the Nebraska Political Accountability and Disclosure Act only.

"Political Newsletter and Mass Mailing"

49-1474. Political newsletter or mass mailing; not to be sent at public expense; violation; penalty.

No political newsletter or other campaign mass mailing shall be sent at public expense by or on behalf of any elected official after that person has announced his or her candidacy for any office. An elected official violating the provisions of this section shall be guilty of a Class III misdemeanor.

"Gifts" by Political Subdivisions

- 49-1492.01
- Unclear and confusing
- If you have a "public official" or "candidate" ask to use your facilities for their political purposes, we recommend charging them like you charge others
- If you're not going to charge, discuss with your school attorney whether you must report the fee waiver as a "gift" under the statute

"Use of Public Resources or Funds"

49-14,101.02. Public official or public employee; use of public resources or funds; prohibited acts; exceptions.

(1) For purposes of this section, public resources means personnel, property, resources, or funds under the official care and control of a public official or public employee.

(2) Except as otherwise provided in this section, a public official or public employee shall not use or authorize the use of public resources for the purpose of campaigning for or against the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.

(3) This section does not prohibit a public official or public employee from making government facilities available to a person for campaign purposes if the identity of the candidate or the support for or opposition to the ballot question is not a factor in making the government facility available or a factor in determining the cost or conditions of use.

"Use of Public Resources or Funds"

(4) This section does not prohibit a governing body from discussing and voting upon a resolution supporting or opposing a ballot question or a public corporation organized under Chapter 70 from otherwise supporting or opposing a ballot question concerning the sale or purchase of its assets.

(5) This section does not prohibit a public official or a public employee under the direct supervision of a public official from responding to specific inquiries by the press or the public as to his or her opinion regarding a ballot question or from providing information in response to a request for information.

(6) This section does not prohibit a member of the Legislature from making use of public resources in expressing his or her opinion regarding a candidate or a ballot question or from communicating that opinion. A member is not authorized by this section to utilize mass mailings or other mass communications at public expense for the purpose of campaigning for or against the nomination or election of a candidate. A member is not authorized by this section to utilize mass mailings at public expense for the purpose of qualifying, supporting, or opposing a ballot question.

"Use of Public Resources or Funds"

(7) This subsection applies to public officials other than members of the Legislature provided for in subsection (6) of this section. This section does not prohibit, in the normal course of his or her duties, a public official or a public employee under the direct supervision of a public official from using public resources to research and prepare materials to assist the government body for which the individual is a public official or public employee in determining the effect of the ballot question on the government body. This section does not authorize mass mailings, mass duplication, or other mass communications at public expense for the purpose of qualifying, supporting, or opposing a ballot question. Mass communications shall not include placing public records demonstrating the consequences of the passage or defeat of a ballot question affecting the government body for which the individual is a public official or public employee on existing web sites of such government body.

"Use of Public Resources or Funds"

(8) Nothing in this section prohibits a public official from campaigning for or against the qualification, passage, or defeat of a ballot question or the nomination or election of a candidate when no public resources are used.

(9) Nothing in this section prohibits a public employee from campaigning for or against the qualification, passage, or defeat of a ballot question or the nomination or election of a candidate when no public resources are used. Except as otherwise provided in this section, a public employee shall not engage in campaign activity for or against the qualification, passage, or defeat of a ballot question or the nomination or election of a candidate while on government work time or when otherwise engaged in his or her official duties.

"Use of Public Resources or Funds"

(10) This section does not prohibit an employee of the Legislature from using public resources consistent with this section for the purpose of researching or campaigning for or against the qualification, passage, or defeat of a ballot question if the employee is under the direction and supervision of a member of the Legislature.

(11) Nothing in this section prohibits a public official or public employee from identifying himself or herself by his or her official title.

"De Minimis"

49-14,101.03. Public official or public employee; incidental or de minimis use of public resources; permissible activities and uses.

(1) Any use of public resources by a public official or public employee which is incidental or de minimis shall not constitute a violation of section 49-14,101.01 or 49-14,101.02.

(2) For purposes of sections 49-14,101.01 and 49-14,101.02, a resource of government, including a vehicle, shall not be considered a public resource and personal use shall not be prohibited if (a) the use of the resource for personal purposes is part of the public official's or public employee's compensation provided in an employment contract or a written policy approved by a government body and (b) the personal use of the resource as compensation is reported in accordance with the Internal Revenue Code of 1986, as amended, and taxes, if any, are paid. If authorized by the contract or policy, the resource may be used whether or not the public official or public employee is engaged in the duties of his or her public office or public employment.

"De Minimis"

(3) Use of a government vehicle by a public official or public employee to travel to a designated location or the home of the public official or public employee is permissible when the primary purpose of the travel serves a government purpose and the use is pursuant to a written policy approved by a government body.

(4) Pursuant to a collective-bargaining agreement, a public facility may be used by a bargaining unit to meet regarding activities of the union or bargaining unit. This section shall not authorize the use of public resources for the purpose of campaigning for or against the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.

(5) Nothing in the Nebraska Political Accountability and Disclosure Act prohibits a public official or public employee from using his or her personal cellular telephone, electronic handheld device, or computer to access a wireless network to which access is provided to the public by a government body.

NPADC Opinion No. 68

"A public official or public employee may express his or her position with regard to a ballot question and may even urge voters to vote for or against the ballot question, provided that government personnel, resources, property or funds under that official's care and control are not used for that purpose, and provided further in the case of a public employee that he or she does not engage in such political activity during office hours or when otherwise engaged in the performance of his or her official duties."

NPADC Opinion No. 68

"[A] public official or public employee may express his or her personal opinion on a ballot question in response to being questioned on the subject or otherwise so long as public resources and facilities are used only incidentally. Government personnel, resources and property may be used to make public factual information with respect to a ballot question but not to advocate a vote."

NPADC Opinion No. 85

Question A:

If the Commissioner of Education receives phone calls in his office or at his home regarding LB662, is he free to comment at any time?

Answer:

Yes.

Question B:

If the Commissioner has a press conference for other matters, is he free to state his opinions regarding LB662 matters?

Answer:

Yes.

NPADC Opinion No. 85

Question C:

Does the Commissioner have to wait until after 5 p.m. when the Department (of Education) is closed to comment about LB662 matters?

Answer:

No. It is the nature of the act and not the time it takes place which will be subject to investigation.

Question D:

If the Department of Education has department conferences with speakers regarding school consolidation, is the Commissioner free to

Answer:

Yes. You are free to express your opinions about LB662 at such a gathering.

Question E:

Is the Commissioner free at any time to simply state his opinion regarding a 'yes or no' vote on the proposed referendum on LB662?

Answer:

Yes.

NPADC Opinion No. 85

Question F:

May the Department of Education print a discussion of LB662 and the referendum in department newsletters, giving both sides?

Answer:

Yes.

Question G:

If so, may the Commissioner also outline his views in the department newsletter?

Answer:

No. The newsletter would be published with state funds. We find the warning of Justice Spiegel in *Stern v. Kramarsky*, 375 NYS 2d 235 at 239.

"Public funds are trust funds and as such are sacred and are to be used for the operation of government. For government agencies to attempt to influence improper expenditure of funds, whether directly through promotional and advertising activities, or indirectly through the use of government employees' funds from one source or another. No agency may misuse any such funds for promoting its own opinions, whims or beliefs irrespective of the high ideal."

Question H:

May the Commissioner make speeches in the day or in evening regarding LB662 issues, stating his opinion to private groups and/or department staff?

Answer:

Yes, however you may not use any state resource in preparing your speech or in attending the gathering.

NPADC Opinion No. 85

Question I:

May the Commissioner use state cars to attend meetings in which he is certain LB662 matters or the referendum are to be discussed and in which he will be asked his opinion?

Answer:

If the principal purpose of the meeting is to discuss LB662 matters in a non-partisan atmosphere, then our answer is yes. We again refer to the reasoning of Justice Spiegel when he stated, "to educate, to inform, to advocate to promote voting on any issue may be undertaken provided it is not to persuade not to convey favoritism, partiality, approval, or disapproval by state agency of any issue worthy as it may be." If you are attending the meeting with every intent of taking a partisan position, then the use of a state car to attend such a meeting would be improper.

Question J:

May the Commissioner use office stationery and equipment and his department secretary, administrative assistant, or other staff to prepare correspondence responding to questions about LB662 in which he states his opinion? May he use staff to initiate correspondence in which his opinion regarding LB662 is stated?

Answer:

You may use Department resources to reply to questions about LB662 and the response may include your opinions of LB662, if sought. Otherwise, the response should be objective and factual.

NPADC Opinion No. 95

- Can a board pass a resolution in support of a ballot question?

"[U]nder the Nebraska Political Accountability and Disclosure Act, a public official or employee may express his or her position regarding a ballot question, and may even urge voters to vote for or against the ballot question, provided that governmental personnel, resources, property, or funds are not used for that purpose, or are used only incidentally, and provided that, in the case of a public employee, he or she does not engage in political activities during office hours or while performing his or her official duties."

NPADC Opinion Nos. 128 and 143

- Can the PSD use public funds to provide information regarding a ballot question?

"Public funds may not be used to urge the voters to vote one way or another on a ballot question." However, public funds may be used to inform the electorate, as long as "fairmindedness and neutrality are maintained."

NPADC Opinion Nos. 128 and 143

- Can the PSD use public funds to provide information regarding a ballot question?

Because the government may be the best source of information about a question on the ballot, information may be supplied as long as it does not advocate a yes or no vote. However, "advocacy may be implicit, subtle and presented under the guise of 'information.'" Negative and positive words must be avoided, and an actual determination of whether "information" is really "advocacy" must be made "in light of the surrounding circumstances."

First Amendment

First Amendment

Pickering, 391 U.S. 563 (1968)

"If a employee speaks as a citizen on a matter of public concern the district must show it had an adequate justification for treating the employee differently from any other member of the public."

First Amendment

Garcetti, 547 U.S. 410 (2006)

"When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline."

Hypothetical #1



Platte Institute @PlatteInstitute · Apr 20

Public schools aren't good enough for Nebraska. Consequently, we are proposing a fairly unpopular constitutional amendment, led by the Platte Institute, which might possibly be worded in such a way that it could potentially be understood for the most part by average citizens, but srsly we want charter schools! #PlatteChat



Fake Bo Pelini @FauxPelini · Apr 21

YOU ARE WRONG ABOUT PUBLIC SCHOOLS AND EVERYONE SHOULD VOTE AGAINST YOUR STUPID LEGISLATION BECAUSE IT IS STUPID AND YOU ARE STUPID AND PUNCTUATION IS STUPID



Hypothetical #1 Issues

- May be a ballot question because it is "intended to be submitted" for a popular vote
- Who's account is it?
- What if it's an account accessed using a district-owned cell phone?
- When was the tweet sent, and does it matter?
- Is it "de minimis"? What if the exchange goes on for several tweets?
- First Amendment rights of Faux?

Hypothetical #2

- The Donald wants to visit school to lecture students on the importance of civil service and building YUGE walls
- He asks for the district to waive its normal fee for rental of the gym "because people love my words, believe me"
- The #alwaysstrumper on staff sends an "all staff" email and tweet from the @GoBulldogWrestling account letting the other staff members and the account's followers know that they should attend because they'll be in the presence of greatness and asks, "Why **wouldn't** you vote for him?!"
- Another staff member emails back with a "Reply All" saying: "Because he's an incompetent, authoritarian bigot with small hands..."



Hypothetical #2 Considerations

- Possible "gift" of district resources
- Is the waived fee because of the "identity" of the requester?
- Impermissible "indoctrination" of students by Trump?
- Does the first email violate the NPADA? The second?
- Does the tweet violate the NPADA?
- More than "de minimis" when considered together?
- If Hillz calls and wants to use the gym the next day, can you say no?

Hypothetical #3

- Bond issue to build a new wing on the school, which will include a new library, new classrooms, and a new wrestling room
 - **@GoBulldogWrestling**: get out and cast a ballot Bulldog Nation! Let's "takedown" this vote!
 - **@BulldogBball**: it costs too much (\$2 million!) to support a bunch of cauliflower ears...
 - **@CoachHaase**: a "yes" vote is a vote for better wrestlers (and more classrooms and books, I guess)
- All tweets are sent between 9 AM and 10 AM at school

Hypothetical #3 Considerations

- Who owns the account?
- Are all 3 tweets "informational"?
- Are the uses "incidental" or "de minimis"?
- Should the employees be punished?

Hypothetical #4

- A school administrator is attending a conference in Cleveland and skips the last session of the day to head over to the RNC Convention, holding a #NeverTrump sign she made out of her conference materials, which were paid for by the district
- She asks Anderson Cooper to take a picture of her holding the sign, wearing a KSB High School t-shirt, and tweets the picture with the following caption:

@KSBPrincipalKaren: to all my tweeples, please don't vote for this guy...he's worse than Steve and terrible for my school and others!

Hypothetical #4 Considerations

- Account blends personal with district—probably have to check policy
- Tweet was sent at a district-paid conference, but is a pretty clear deviation from the conference
- What if the board had told Karen that they expected her to be active in stating the board's opinion on hot-button issues?
- Should Karen be disciplined for skipping the conference?
- Was Karen speaking as a citizen on a matter of public concern, or an employee?

Hypothetical #5

- The ACLU circulates a "gender equality" referendum petition which would permit students to use the facilities and participate in activities consistent with their "gender identity"
- During the weekly#nebedchat" math teacher @MrsSmith4Math tweets the following: *"We should be inclusive of ALL students, and that means voting YES on LB 666 #nebedchat"*
- @SenatorGroeneYo! responds back: *"What would your Superintendent think of that...? CC: @KarenKSBSupt"*
- @KarenKSBSupt sees the exchange the next day and says, *"Heck no I'm not voting for that, LB 666 is a clear violation of Leviticus and an example of gov overreach...this should be a local issue..."*

Hypothetical #5 Considerations

- Who owns the accounts?
- Is #nebedchat considered an activity within the employee's official capacity?
- What if it counts for PLN and continuing education credit at KSB Public School?
- Difference between stating opinion and being asked about the official's opinion?
- What about the Supt's "sincerely held" religious belief?

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