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Privileged and Confidential

TO: All Professional Staff and Associate Staff

FROM: Mitchell Roth
General Counsel

DATE: September 26, 2014

RE: **Distribution of Campaign Information at School/College/University**

A number of questions have been asked regarding the legality of distributing various types of information about IEA-recommended candidates to association members through school district/college/university (“employer”) email systems, internal building-to-building “snail mail” systems, staff mailboxes, association bulletin boards or at association meetings held on employer property. The state and federal Constitutions, several Illinois statutes (State Ethics Act¹, Local Governmental Employees Political Rights Act² and the Election Code³), employer policies, collective bargaining agreements (“CBA”) and past practice all impact the answers to these questions. **The legally safest approach is to distribute such information through other means (mailing information to members at their home addresses, emailing information to members at their home email addresses, sending messages from personal social network sites, calling information**

¹ **5 ILCS 430/1 et seq.**, prohibits public employee political activity promotional of a candidate/proposition on work time or through use of public employer’s resources. Every school district, public college and university is required to have adopted an ethics policy based on the States Ethics Act.

² **50 ILCS 135/10(b)**, prohibits school district employees from engaging in political activities, which include campaigning for/against any candidate or proposition, while at work or on duty.

³ **10 ILCS 5/9-25.1**, prohibits public funds from being used to urge anyone to vote for/against any candidate or proposition.

from home/cell phones to members at their home/cell phones). However, we understand that sometimes these approaches are not possible or practical. We hope that the following guidance, identified from safest to riskiest, will assist you and your locals when you consider using employer property, facilities or other resources. An overarching condition for all of the following methods is that **distribution and posting needs to occur on non-work time.**

Association Meetings

Distributing information about IEA-recommended candidates to members at association meetings held on employer property is safest⁴. However, there is nothing that legally (constitutionally or statutorily) requires an employer to permit a local association to use its property for meetings, as long as the employer doesn't discriminate against the association by allowing other similarly-situated groups to meet on its property. Typically such access is provided to the association as the exclusive bargaining representative either through employer policy or the CBA. To the extent that the distributed information promotes the election of IEA-recommended candidates as opposed to just factually informing members of IEA's recommendation and/or the candidates' positions on issues, the argument against its distribution would be that public employer property/resources/funds are being used to promote certain candidates.⁵ At best, these arguments are weak. If such distribution of promotional information is prohibited/challenged, check for language regarding/relating to association meetings in the CBA, employer policies, including ethics policies, past practice and employer restrictions on the activities of other groups that also meet on school property.

Association Bulletin Boards

Posting information about IEA-recommended candidates on an association bulletin board is most likely safe, provided the bulletin board is in the staff lounge or another area not frequented by students or members of the public. However, there is nothing that legally (constitutionally or statutorily) requires an employer to provide a local association access to a bulletin board, as long as the employer doesn't discriminate against the association by allowing bulletin board access to other similarly-situated groups. Typically such access is provided to the association as the exclusive bargaining representative either through employer policy or the CBA. To the extent that the posted information promotes the election of IEA-recommended candidates as opposed to just factually informing members of IEA's recommendation and/or the candidates' positions on issues, the arguments against it would likely be the same as above, but are a little stronger here as use of the bulletin board is a tangible, visible and continuing use of an employer resource. If such posting of promotional information is prohibited or challenged, check for language regarding association use of employer bulletin boards in the CBA, employer policies, including ethics policies, past practice and employer permissions or restrictions on posting information by others on employer-provided bulletin boards.

⁴ Even though this may be the safest of the discussed approaches, a risk that it and most of the others pose is the possibility that members may take the distributed information and attempt to pass it out to others at school, which might not be permitted by the employer's distribution policy/practice. Furthermore, some members might discuss the materials in front of students or use them for classroom discussions, which might violate employer policy/practice, lead to complaints by parents and peers and possibly result in disciplinary action.

⁵ This argument would also apply to inviting a candidate to a meeting and promoting his/her candidacy. Furthermore, securing the employer's permission to bring a candidate in would be extremely prudent, as inviting a candidate may go beyond the scope of the employer's permission to use its facilities.

If the bulletin board is in a public area, particularly one frequented by students, and the information promotes the election of IEA-recommended candidates as opposed to just factually informing members of IEA's recommendation or the candidates' positions on issues, the arguments against posting would be that 1) the materials might be reasonably perceived as associating the employer with the message⁶ and 2) public employer property/resources/funds are being used to promote certain candidates. The first argument makes any prohibition of or challenge to such public posting stronger than where the bulletin board is in the staff lounge. If such public posting of promotional information is prohibited or challenged, check for language regarding association use of employer bulletin board in the CBA, employer policies, including ethics policies, past practice and employer permissions or restrictions on posting information by others on employer-provided bulletin boards.

Internal (Building-to-Building) "Snail Mail" Systems & Staff Mailboxes

Distributing information about IEA-recommended candidates to members through the employer's internal mail system (building-to-building) or staff mailboxes is riskier, unless the information just factually informs members of IEA's recommendation or the candidates' positions on issues. There is nothing that legally (constitutionally or statutorily) requires an employer to provide district staff or local association access to its internal mail system or staff mailboxes, as long as the employer doesn't discriminate against the association by allowing access to other similarly-situated groups. Typically such access is provided to staff and the association as the exclusive bargaining representative either through employer policy or the CBA, which may also specify the type of information that can be distributed. To the extent the information promotes the election of IEA-recommended candidates, the argument against it would be that public employer property/resources/funds are being used to promote certain candidates. This would be a stronger argument in this situation due to the tangible, visible, multiple and potentially regular use of employer resources. If such distribution of promotional information is prohibited or challenged, check for language regarding/relating to association/staff use of the employer's internal email system or staff mailboxes in the CBA, employer policies, including ethics policies, past practice and employer permissions or restrictions on distributing information through the mail system or staff mailboxes by others.

Furthermore, if the distribution from building-to-building of information about IEA-recommended candidates through the employer's internal mail system, whether promotional or not, were done at no cost or a cost below normal postage to the association, the federal Private Express Statutes (which prohibit private postage service) would be violated, as the distribution of such political information would likely be found not to be closely-related to the employer's business, in order to be excepted from the federal law.⁷

⁶ It is possible that information posted on IEA-recommended candidates that is clearly identifiable as being created by IEA might be less objectionable to an employer, as there would conceivably be less chance that others might associate the employer with the message. A visible sticker disclaiming employer endorsement of the message might also help.

⁷ **Ft. Wayne Community Schools v. Ft. Wayne Education Association, 977 F.2d 358 (7th Cir. 1992).**

Email Systems

Distributing information about IEA-recommended candidates to members through the employer's email system is riskiest. Even if the information just factually informs members of IEA's recommendation and/or the candidates' positions on issues, the employer's acceptable use policy ("AUP") may prohibit such information, so it must be carefully reviewed. Once again, there is nothing that legally (constitutionally or statutorily) requires an employer to provide local association access to its email system, as long as it doesn't discriminate against the association by allowing access to other similarly-situated groups. There is also no legal requirement that an employer permit those who have access to its email system to distribute political information/engage in political activity. Typically access to employer email is provided to the association as the exclusive bargaining representative either through employer policy or the CBA which, like the employer's AUP, may also specify the type of information which can be distributed. To the extent the information promotes the election of IEA-recommended candidates, the argument against it would be that public employer property/resources/funds are being used to promote certain candidates. This would be a stronger argument in this situation, due to the additional employer resources which support an employer's email system and the distinct likelihood that senders or recipients would use their employer-provided computers to send or access the emailed information and then potentially respond to or forward it. If email distribution of information on IEA-recommended candidates is prohibited or challenged, check for language regarding association use of the employer's email system in the CBA, employer policies, including AUP and ethics policies, past practice and employer permissions or restrictions on distribution of information through the email system by others.

Several other practical consequences regarding use of the employer's email system may exist. First, depending on the employer's AUP, such emails may possibly be subject to review by the employer. Second, a member of the public may make a Freedom of Information Act request and the employer may be required to disclose the emails. Third, email messages are extremely easy to forward to outside individuals and the press and a member who objects to the recommended candidate may forward the message to the opposing candidate or the press. The opposition or the press may then make a campaign issue that public resources are being used to defeat the opposing candidate.⁸

In conclusion, we recommend that means other than the approaches discussed in this memorandum be used to distribute information that promotes the election of IEA-recommended candidates to members. If you have questions, please don't hesitate to call the Deputy/Associate General Counsel covering your area or me.

⁸ If the email were sent by someone other than a district employee, i.e., IEA employee, the sender would not be violating any law by emailing the information to school email addresses. However, the same risks would exist for the recipients. In addition, the FOIA and risk of publicity concerns would remain.