HV IN COMPLIANCE

HOLTZMAN VOGEL'S MONTHLY ROUND-UP

Eighth Circuit Invalidates Missouri's Two-Year Lobbying Ban for Former Legislators and Staffers

The Eighth Circuit Court of Appeals **invalidated a Missouri state constitutional amendment** that imposed a two-year lobbying ban on former legislators and other General Assembly employees. The case was brought by a former legislator, a company that wished to hire him as a lobbyist, and a legislative employee seeking to join the private sector, all of whom claimed the law violated their free speech rights. The Eighth Circuit held that Missouri's lobbying prohibition was invalid as it applied to the plaintiffs. As a result, the law will remain on the books and may lawfully be applied against other individuals, although the court's analysis leaves little doubt that future challengers will obtain the same result.

The court concluded that Missouri's lobbying ban burdened political speech because "it cuts off the speech of would-be lobbyists" and the act of lobbying the government is "core political speech." As a result, the law was subject to strict scrutiny review and Missouri was unable to make the required showings necessary to uphold the law. Drawing on the Supreme Court's recent campaign finance decisions, the court explained that regulating *quid pro quo* corruption is a valid governmental interest, but that limiting "access and influence" is not. However, during trial, Missouri admitted it did not have any evidence of actual corruption (*i.e.*, trading favors for money) in the context of former legislators and staffers lobbying. In the absence of

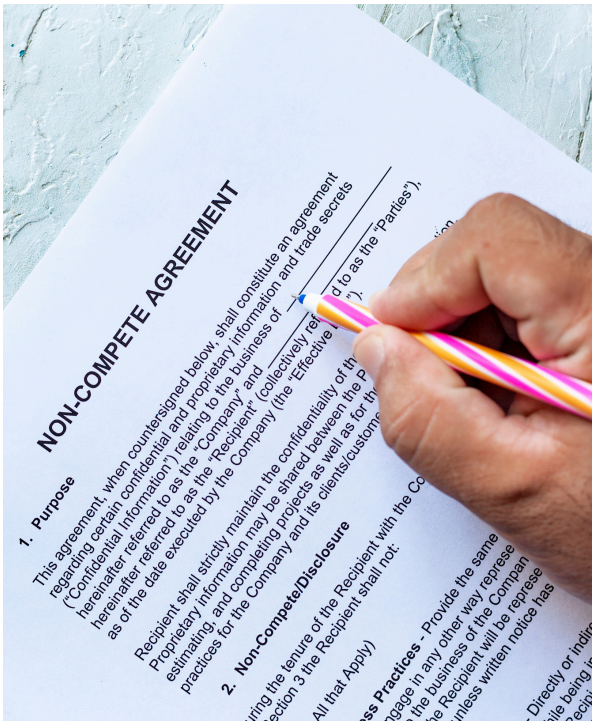
any "real-world examples of former legislators or legislative staff whose transition to lobbying led to corruption," the court found that Missouri had not demonstrated its required compelling interest. The court also found the blanket two-year lobbying ban was not "narrowly tailored" to address the state's anti-corruption interest because it does not apply to only "occasional" lobbying that does not require registration, executive branch officials are not covered, and many states have shorter bans.

The Eighth Circuit's decision poses a challenge to post-employment lobbying restrictions for former government officials, which are also known as "revolving door" laws. A complex federal law prohibits former Senators from lobbying Congress for two years after leaving office, while former Representatives are subject to a one-year ban. Most Federal executive branch officers and employees are prohibited from lobbying their former agencies for one or two years, depending on the subject matter, while many of the highest-level appointed positions are subject to a general two-year ban. Nearly all states and many cities have their own "revolving door" laws. If the Eighth Circuit's approach spreads, revolving door laws will be vulnerable to challenge in the absence of actual evidence of *quid pro quo* corruption.

Federal District Court in Texas Bars FTC from Enforcing Non-Compete Rule

In July, we noted that federal district courts in Texas and Pennsylvania reached opposite conclusions on the validity of the Federal Trade Commission's **new regulation** prohibiting nearly all non-compete clauses in employment contracts. On July 3, the U.S. District Court for the Northern District of Texas issued a preliminary injunction that blocked enforcement of the FTC's rule against the plaintiffs in the case. The court promised a full ruling on the merits before the FTC's regulation was scheduled to go into effect on September 4. That ruling came on August 20 when **the court held the FTC's regulation invalid** and blocked it from taking effect on September 4 on a nationwide basis. In her opinion and order, Judge Ada Brown wrote, "The Court sets aside the Non-Compete Rule. Consequently, the Rule shall not be enforced or otherwise take effect on its effective date of September 4, 2024 or thereafter."

An appeal is expected, but the FTC is barred from enforcing the non-compete rule unless a higher court acts. An FTC spokesperson told media outlets that "we are seriously considering a potential appeal, and today's decision does not prevent the FTC from addressing noncompetes through case-by-case enforcement actions."



A final ruling from the U.S. District of Court for the Eastern District of Pennsylvania, which rejected a motion for preliminary injunction and found the FTC's regulation permissible in a July 23 decision, remains pending.

Meanwhile, in a similar case in the U.S. District Court for the Middle District of Florida, the court granted a motion for preliminary injunction and blocked the FTC's rule with respect to the plaintiffs. The Florida court applied the "major questions doctrine" and found the FTC's regulation invalid. The court determined that the FTC's regulation was a "rule[] of extraordinary economic and political significance" but that no "clear congressional authorization" for such a rule exists. The Florida case is *Properties of the Villages, Inc. v. FTC*.

We will continue to monitor developments in these cases.

SEC Imposes $95,000 Fine for Pay-to-Play Violation

On August 19, the Security Exchange Commission ("SEC") issued a **cease-and-desist order** in an administrative proceeding against Texas-based investment advisor Obra Capital Management, LLC ("Obra") for violations of the pay-to-play provisions of the Investment Advisors Act. This matter involved an Obra covered associate's $7,150 campaign contribution to an incumbent Michigan official in December 2019, prior to the associate's employment with Obra. After being hired by Obra roughly six months later, the employee sought and received a refund of the contribution. Nevertheless, the SEC slapped Obra with a cease-and-desist order, censure, and a $95,000 fine for violating the SEC's pay-to-play rule.

The Investment Advisors Act Section 206(4) and SEC Rule 206(4)-5 impose a "pay-to-play" rule that prohibits covered investment advisors from providing paid investment adviser services to a government entity for two years after the advisor or any of its covered associates (employees) makes a contribution to a covered government official whose office has the authority to influence the hiring of advisers to manage the government's assets, such as pension funds. In other words, a covered associate who makes a campaign contribution to a covered government official must wait two years before soliciting the government official to provide investment advisory services – with some minor exceptions.

In the Obra matter, the firm's investment advisor employee made a campaign contribution to a Michigan official who exercised influence over the hiring of investment advisors for the Michigan Public Employees' Retirement Fund, which was managed by and generated revenue for Obra. Even though the employee's contribution was made before becoming an Obra employee, for Obra's purposes the contribution was made within the applicable two-year "look back" window and triggered the SEC's pay-to-play prohibitions. Obra continued providing investment advisory services to the Michigan Public Employees' Retirement Fund. As the SEC explained, "Obra Capital continued to provide investment advisory services for compensation to the Fund, and therefore, to the Michigan Public Employees' Retirement Fund, after the individual became a covered associate and before the two-year prohibition on receiving compensation for the provision of investment advisory services expired."

The SEC Order acknowledges that Obra attempted to avail itself of an exception to the "time-out" period due to the newly hired investment advisor's successful request for a refund of the campaign contribution, but the SEC determined that this did not satisfy the exception's requirements because the contribution was not refunded within 60 days of Obra learning of the contribution, and the contribution exceeded the exception's $350 limit.

The SEC's Enforcement Order highlights the seriousness of penalties that can accompany violations of the pay-to-play laws and reinforces the importance of strong compliance programs for investment advisors that extend to vetting the past contribution activity of new hires.

Corporate Regulation and Deregulation After the 2024 Presidential Election

Holtzman Vogel attorneys Phillip Gordon and Caleb Acker authored "**Corporate Regulation and Deregulation After the 2024 Presidential Election**" in *Corporate Counsel.* They explain why people should be focused on the next President's administrative state policies.

FEC UPDATE

FEC Poised to End AI Rulemaking Efforts

As the Federal Communications Commission (FCC) **moved ahead with its AI rulemaking**, the Federal Election Commission (FEC) **signaled in early August** that it would not propose or adopt any new rules for political ads featuring AI-generated content. On August 8, the FEC's three Republican Commissioners released a draft Notice of Disposition that declines to proceed with a rulemaking sought by Public Citizen that would have banned the use of certain AI-generated material in campaign ads. The three Commissioners concluded that Public Citizen's proposal exceeded the agency's statutory authority. FEC Chairman Sean Cooksey **authored an op-ed in the *Wall Street Journal,*** explaining that "Congress hasn't given [the FEC] the power to draft regulations specifically for AI or any other technology." He also noted that "despite apocalyptic predictions about AI's potential to sow chaos and upend elections in the U.S. and abroad, its salience in political campaigns has so far been limited" and warned against the temptation to "regulate for the sake of regulating."

The FEC is scheduled to consider the draft Notice of Disposition at its August 29 meeting.

Electioneering Communication Window Opens on Sept. 6 for All Federal Candidates on November General Election Ballot

The electioneering communication period for the November general election begins September 6 and runs through election day, November 5. During this period, any broadcast, radio, or satellite advertisement aired by a person or organization that is not an FEC-registered political committee that refers to a clearly identified federal candidate on the general election ballot, and is targeted to that candidate's voting electorate, will trigger electioneering communication disclaimer and **24-hour reporting requirements**.

The electioneering communication rules apply only to TV and radio ads that are aired or distributed through broadcast, cable, or satellite systems. This includes regular broadcast television and radio ads, ads placed on cable television channels, and satellite systems such as DirecTV and SiriusXM. Print ads, direct mail, and online communications do not qualify as electioneering communications.

Nonprofit organizations that make electioneering communications must remember that if they solicit contributions specifically to fund electioneering communications, any donors who give for that purpose are subject to the FEC's donor disclosure rules.

Election Complaints Are Not Just for the FEC; UAW Files Unfair Labor Complaint Against Trump Following Interview with Elon Musk

Election complaints are not just for the FEC anymore. On August 13, the United Auto Workers (UAW) labor union announced in a **press release** that it filed an unfair labor practices complaint with the National Labor Relations Board (NLRB) against Donald Trump and Elon Musk. The complaint stems from Trump's interview with Musk on X (formerly Twitter), during which President Trump said to Musk, "I look at what you do. You walk in, you say, you want to quit? They go on strike, I won't mention the name of the company, but they go on strike and you say, that's OK, you're all gone. You're all gone. So, every one of you is gone."

The UAW called this an "illegal attempt [] to threaten and intimidate workers," and said Trump and Musk "advocated for the illegal firing of striking workers."

The UAW filed two separate complaints with the NLRB, **one against Trump** and his campaign committee, and **one against Musk** and Telsa. Both complaints make the same one-sentence allegation that Trump or Musk "interfered with, restrained, or coerced employees in the exercise of their Section 7 rights, including but not limited [sic] making and/or adopting statements suggesting he would fire employes engaged in protected concerted activity, including striking."

The Trump campaign dismissed the complaints as "a shameless political stunt." The UAW endorsed Kamala Harris on July 31.

CONGRESSIONAL ETHICS UPDATE

The U.S. House Committee on Ethics issued a **new version** of its Campaign Activity Guidance "pink sheet" for U.S. House members, officers, and employees. This version does not contain any new standards or interpretations.

The House Ethics Committee also issued updated **guidance on providing hyperlinks** from campaign websites to official websites. The new hyperlinks "pink sheet" includes a revised list of "approved messages a Member's campaign websites and social media accounts may include to redirect constituents to the official accounts." The Ethics Committee's approved language should be used verbatim and the memo warns that "Members must seek written approval from the Committee prior to using any other language in their disclaimer."

UPDATES FROM THE STATES

After Withdrawing from Presidential Election, RFK Jr. Will Appear on Some State Ballots, Withdraw from Others

When Robert F. Kennedy, Jr. ended his presidential campaign on August 23 and endorsed Donald Trump, he indicated he would seek to withdraw his name from ballots in battleground states. Each state has its own withdrawal process, and in some cases, the state's withdrawal deadline has already passed. For example, Nevada's withdrawal deadline was August 20, although a **lawsuit** filed by the Nevada Democratic Party challenging Kennedy's ballot access is pending. Other states do not have a withdrawal process. In Michigan, Kennedy sought to withdraw, but the Secretary of State's office **stated** that "minor party candidates cannot withdraw, so his name with remain on the ballot."

On August 20, a Pennsylvania court **heard arguments** in a lawsuit challenging Kennedy's nominating papers and signatures. On Friday, August 23, after withdrawing from the election, Kennedy's legal team **filed a notice** with the court "withdraw[ing] their opposition" to the challenge and "request[ing] dismissal of their nominating papers so that they do not appear on the Commonwealth's 2024 general election ballot."

On August 12, a North Carolina court **ruled** in Kennedy's favor in a ballot access challenge. On August 23, a spokesman for the Board of Elections **said** that if Kennedy's party in North Carolina "officially withdraws his nomination, the State Board would have to consider whether it is practical to remove his name from ballots and reprint ballots at that time."

Kennedy withdrew his name from the ballot in **Arizona**, Florida, **Maine**, **Ohio**, and **Texas**. Kennedy **sought to withdraw** in Wisconsin, but the Wisconsin Board of Elections **voted** August 27 to keep his name on the ballot.

On August 26, an administrative law judge in Georgia **concluded** that Kennedy did not meet the state's qualification requirements. A final decision rests with Secretary of State Raffensperger.

Earlier in August, a **New York court ruled** that Kennedy's name could not appear on the state's ballot after determining that Kennedy falsely claimed residence in New York on his nomination paperwork. Holtzman Vogel attorney Joe Burns **published an analysis** of the New York court decision. Kennedy has not yet indicated whether he will continue pursuing his appeal of the court's decision.

Kennedy secured ballot access in many other states where he is expected to remain on the ballot, including Alaska, California, Colorado, Delaware, Hawaii, Indiana, Iowa, Louisiana, Maryland, Minnesota, Nebraska, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Vermont, Washington, and West Virginia.

Virginia Governor Youngkin Issues Executive Order on Election Security

Governor Glenn Youngkin issued **Executive Order 35** on August 7 to codify various election security practices in Virginia. Governor Youngkin's Executive Order requires annual certification from the Commissioner of the Department of Elections that various election security procedures are in place and establishes standards for ballot security, voting machine testing, and maintaining accurate voter lists.

The Executive Order notes that Virginia officials removed nearly 80,000 deceased voters from voter registration rolls in 2023, and 6,303 non-citizens from 2022-2024. According to the order, "all data collected by the DMV that identifies non-citizens is shared with ELECT, which uses it to scrub existing voter rolls and remove non-citizens who may have purposefully or accidentally registered to vote." Existing law requires registrars to cancel non-citizen voter registrations and refer such matters to the local Commonwealth's Attorney.

New York State Court of Appeals Upholds Early Mail Voting Law

On August 6, 2024, the New York State Court of Appeals issued a **6-1 decision** upholding the state's new early mail voting law. In 2023, New York legislators adopted legislation allowing any registered voter to apply to vote early by mail. The law was enacted following the defeat of a proposed constitutional amendment in 2021 that would have permitted universal, no excuse absentee voting. The early mail voting law was challenged as a violation of the state constitution's limitations on absentee voting. The Court of Appeals held that the state constitution did not limit the legislature from providing for no-excuse early mail voting. The court acknowledged, however, that upholding the early mail voting law in light of the rejected 2021 constitutional amendment "may be seen by some as disregarding the will of those who voted in 2021."

New York Governor Hochul Signs New Election Laws

Governor Kathy Hochul signed several new pieces of legislation relating to voting and elections into law on August 6, 2024. Each bill serves to expand or clarify voters' rights and election processes.

S.9837/A.10541 makes it easier for New York voters to cure their ballots. The law requires the board of elections to include with the cure affirmation a return envelope with paid postage for the voter to use in mailing the affirmation. The law also provides that voters may submit their cure affirmation in person, by mail, or electronically through email or, at the option of the board of elections, by an electronic upload feature. The law ensures that electronic cure affirmations are timely if received before midnight on the last day to timely cure. The law also provides that cure affirmations may now be received “by five p.m. on the seventh day following the election.”

S.9837/A.10541 makes it easier for New York voters to cure their ballots. The law requires the board of elections to include with the cure affirmation a return envelope with paid postage for the voter to use in mailing the affirmation. The law also provides that voters may submit their cure affirmation in person, by mail, or electronically through email or, at the option of the board of elections, by an electronic upload feature. The law ensures that electronic cure affirmations are timely if received before midnight on the last day to timely cure. The law also provides that cure affirmations may now be received “by five p.m. on the seventh day following the election.”

SS.6130A/A.530A amended New York election law related to watchers. The law expands the availability of poll watchers by allowing “qualified voters” who reside in New York and are licensed to practice law in New York to serve as watchers at any polling place in the state. This allows licensed attorneys to serve as watchers anywhere, rather than only in their county of residence (or New York City for New York City residents).

S.9687/A.10357 amended New York’s Voting Rights Act. The new law expands the definition of “protected class” covered by the act to include individuals rather than “registered voters.” The law clarifies pre-clearance requirements under the NYVRA and creates new reporting requirements for political subdivisions subject to enforcement actions or involved in voting litigation. Finally, the law establishes civil liability for voter intimidation offenses.

S.5943/A.725 creates a standard order in which candidates are listed on ballots. The law requires that offices be listed in order of precedence with the electors for President and Vice President of the United States listed first, followed by the Governor and Lt. Governor of New York and following down in precedence. The law also provides that candidates for partisan offices should be listed before candidates for non-partisan offices and that candidates for judicial office should be listed after all other candidates for partisan offices.

S.8464/A.9409 brought New York law regarding electors into compliance with the Federal Electoral Count Reform Act. The law specifies that electors will meet on the “first Tuesday after the second Wednesday in December next following their election.” The law also provides for proof of authenticity and the transmission of elector lists.

HV Making the Rounds

- Andy Gould and Brennan Bowen's legal victory on behalf of the Arizona Restaurant Association at the Arizona Supreme Court ensures that Arizonians will decide on Proposition 138 (Tipped Workers Protection Act) in November.

- Holtzman Vogel sponsored the annual RNLA Election Law Seminar, where Jessica Furst Johnson spoke on campaign finance, and Mo spoke on redistricting matters.

- Andy Gould and Jonathan Fahey appeared on Fox News to discuss border policies under Vice President Harris vs. former President Trump.

- Steve Roberts and Jessica Furst Johnson will be speakers at the Election Symposium hosted by the *Harvard Journal on Law & Public Policy* and the Heritage Foundation.

- Holtzman Vogel along with the National Jewish Advocacy Center filed an antisemitism complaint, advocating for Jewish students at Colorado College. Jason Torchinsky, Erielle Davidson and John Cycon are counsel in this matter.

- Joe Burns authored "New York's Absentee Ballot Integrity is Undermined and Should Be Restored" for *Buffalo News*.

- Andy Gould spoke at the Arizona Chamber of Commerce's Summer Policy Summit on litigation impacting business.

- Jonathan Fahey and Oliver Roberts author "A Trump Presidency Could Make the U.S. the 'Crypto Capital of the Planet'" for *The Federalist*.

- Steve Roberts will speak on the "Pros and Cons of Social Media and Elections" at the Public Affairs Council's Government Relations & Policy Conference in DC.

- Joe Burns authored "NY Court Errs in Removing RFK Jr. from Ballot" for *Attorney at Law Magazine*. Joe was also interviewed on the topic by NY 1 and other media.

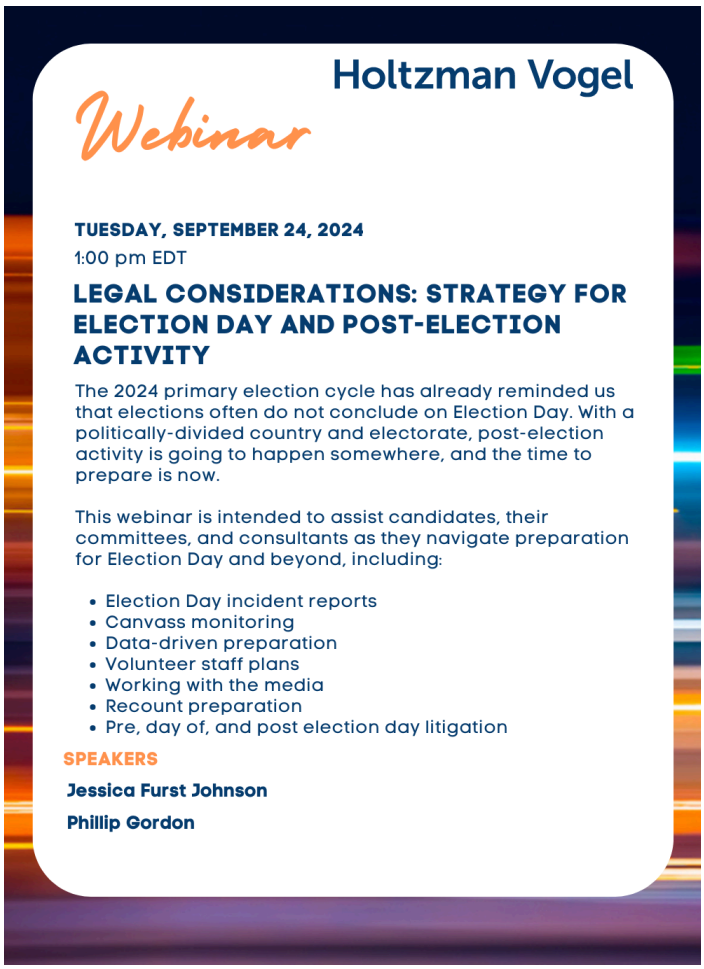
- Jason Torchinsky was quoted as campaign finance and election law expert by *Washington Free Press* on Eugene Vindeman's campaign communications.

- Jessica Furst Johnson was quoted in a *Washington Free Press* article about FEC commissioners attending the DNC while weighing complaint against Harris' campaign.

- Jason Torchinsky and Oliver Roberts authored "FCC Regulation of AI-Generated Political Ads Could Go int Effect This Cycle" and was picked up by *Westlaw Today*.

- Phil Gordon and Caleb Acker authored "Corporate Regulation and Deregulation After the 2024 Presidential Election" for *Corporate Counsel Magazine*.

- Steve Roberts and Oliver Roberts byline a weekly article for *The Federalist*: "Last Week in Lawfare Land: What to Know About Each Legal Crusade Against Trump."



Join us on Tuesday, September 24th at 1pm EDT for a webinar:

"Legal Considerations: Strategy for Election Day and Post-Election Activity"

REGISTER HERE

This update is for informational purposes only and should not be considered legal advice. Entities should confer with competent legal counsel concerning the specifics of their situation before taking any action.

Please reach out to one of the following compliance partners or your personal Holtzman Vogel contact with any questions.

Jan Baran - jbaran@holtzmanvogel.com
Michael Bayes - jmbayes@holtzmanvogel.com
Joseph Burns - jburns@holtzmanvogel.com
Christine Fort- cfort@holtzmanvogel.com
Andy Gould - agould@holtzmanvogel.com
Jessica Furst Johnson - jessica@holtzmanvogel.com
Tom Josefiak - tomj@holtzmanvogel.com
Tim Kronquist - tkronquist@holtzmanvogel.com
Bill McGinley - wjm@holtzmanvogel.com
Matt Petersen - mpetersen@holtzmanvogel.com
Steve Roberts - sroberts@holtzmanvogel.com
Jason Torchinsky - jtorchinsky@holtzmanvogel.com
Jill Vogel - jh@holtzmanvogel.com
Robert Volpe - rvolpe@holtzmanvogel.com

Holtzman Vogel