

Election law and the last week of the referendum campaign: key issues for business

The UK is holding a referendum on 23 June 2016 on whether it should remain in or leave the European Union. Our previous [client briefing](#) summarised UK election law as it applies during the referendum campaign. This briefing looks at the key election law issues facing businesses in the last week of the campaign, particularly around communications with employees, the media and the public.

As far as businesses are concerned, election law broadly controls three things:

- **Donations:** a campaign donation cannot be made by any company other than a UK company or an EU company that carries on business in the UK
- **Expenditure:** a person or business cannot incur more than £10,000 expenditure with the intention of promoting or procuring a particular result in the referendum. In principle a business could register as a campaign and spend up to £700,000, but the complex compliance regime and criminal sanctions for inadvertent breaches make this an unappetising prospect for most businesses.
- **Exit polls:** any reports of exit polls cannot be disseminated prior to the close of poll at 10pm.

Our previous [client briefing](#) outlined these rules in more detail, and discussed the role of the Electoral Commission.

This briefing looks at specific issues businesses are facing as we ap-

proach the referendum itself, particularly around communications with employees, the media and the public.

What can businesses tell their employees?

Encouraging employees to vote

It is in our view clear that election law doesn't prevent a business from encouraging its employees to vote, provided it does so in an even-handed way.

So an email to all employees reminding them to vote should have no adverse election law implications. The email could include links to the official Remain and Leave campaigns provided both are given equal prominence. It could also include links to sources that can reasonably be seen as neutral (e.g. the BBC).

Can businesses inform employees of the impact on their business?

Many businesses have had queries from employees concerned at the potential impact of Brexit on the future of the business.

We believe a business should be able to respond to such concerns by communicating with employees (for ex-

ample by email) and setting out the expected impact. Provided it does so in a reasonably objective and neutral way, such a communication should fall outside election law. Naturally care should be taken, particularly if a business views the impact of Brexit as highly negative.

Can businesses recommend that their employees vote in a particular way?

Some businesses have considered emailing all their employees and recommending that they cast their vote in a particular way.

In such a case there is a clear intention to influence the result of the referendum, and the expenditure rules would be in point. An offence would be committed if associated expenditure could be identified of more than £10,000.

It is, however, not at all clear how expenditure should be determined in such a case. The expenditure rules were created to regulate traditional political campaigning (leaflets and canvassing) by traditional political parties and campaigns. The rules apply only with difficulty to the send-

ing of internal email within a large complex business.

There is, therefore, a risk that the associated premises and facilities costs would have to be included in such a calculation, and that these costs could be quite large (particularly if a large number of people within the organisation are involved in preparing the email).

We would therefore advise against any business sending such a communication without obtaining specific legal advice.

Can businesses and business leaders publicly state their views on Brexit?

Many business leaders have strong views on the merits of Brexit, and may feel they have a duty to speak out.

Election law does not prohibit statements of opinion; however those statements could be contrary to the expenditure rules if expenditure can be said to have been incurred in relation to them, and this (together with any other referendum expenditure) exceeds £10,000. The approach will depend on what precisely is planned:

Speaking to the media

The general answer is that election law shouldn't prevent business leaders from writing newspaper opinion pieces and being interviewed by the media – even if material expenditure is incurred.

This is because election law contains a specific media exemption. There are, however, two important caveats to note.

First, PPERA was drafted at a time when the internet was a relatively recent phenomenon.

The exemption for written material is therefore stated to apply to "newspapers and periodicals", with no explicit reference to the internet. We would say that a newspaper's website or an internet-only publication (such as Politico) is likely a "newspaper" or "periodical" within this definition. A blog or aggregator, however, is probably not.

Similarly, the broadcast exemption only covers the BBC and licensed broadcasters; an interview on a YouTube channel (for example) is unlikely to be exempt.

The second caveat is that, even where the election law media exemption applies, authorisation and reporting may still be required under the Companies Act if the media work in question can be said to be outside the ordinary course of business of the company, and if specific expenditure can be identified.

Meetings with employees and/or the public

If a business holds a meeting with employees to explain the potential impact of Brexit on the business itself then that is unlikely to be viewed as intended to influence the result of the referendum. The position will be essentially the same as the email communication discussed on the previous page, and therefore generally shouldn't be subject to election law restrictions.

If, however, the meeting includes the media or the public, then there is a higher risk it is considered to be intended to influence the referendum result. That risk is clearly heightened if speakers will be actively advocating a particular result.

In such cases, the £10,000 limit must be adhered to. The media exemption won't apply (even if the media is present).

A full accounting should therefore be kept of expenditure associated with the event, for example:

- the cost of the premises in which the meeting is held (if the company owns the premises it is prudent to determine a market cost by, for example, obtaining quotes from comparable venues in the area);
- the cost of hiring any audio-visual or other equipment for the event;
- transportation costs for those organising and attending the events;
- staffing costs where staff are provided by a third party, e.g. outsourced security personnel; and
- catering costs.

Note that election law specifically excludes wages and remuneration of the employees of the business from constituting expenditure for this purpose.

Breaching the £10,000 limit is an offence, even if the breach is accidental. Accordingly it is prudent to assess expenditure very carefully, and specific legal advice should be obtained.

Promotional material

If the business decides to produce promotional material advocating a position on the referendum then it will have to adhere to the £10,000 limit. All expenses of producing and printing the material should be included in the expenses calculation (save the wages and remuneration of employees).

This kind of activity is precisely what electoral law is intended to regulate, and the Electoral Commission is likely to scrutinise the expenditure of any business that produces such material.

Exit polls

We understand that broadcasters won't be conducting the kind of exit polls we're used to seeing in previous general elections.

However there have been reports that some hedge funds have commissioned private exit polls to assist in currency trading strategies during the course of voting on the 23rd. This is not itself contrary to election law.

However, it's an offence under the Representation of the People Act to publish exit polls (or other estimates or forecasts derived from interviews after people have voted) before the close of poll at 10pm. The term "publish" has a wide meaning and potentially covers any kind of dissemination.

Breaching this rule is punishable by fines and/or imprisonment of up to six months.

Given the potential political and market impact of the result, there may well be reports and rumours throughout the day as to the initial exit polls findings (online and offline). It will likely be unclear whether these reports are founded on actual leaks or merely speculation. Either way, repeating the reports will potentially be a criminal offence.

We would advise any business whose staff are likely to have a particular interest in Brexit to warn employees not to discuss any exit poll reports or rumours before 10pm. After that point, these rules cease to apply.

Does PPERA apply to people outside the UK?

PPERA is in principle extra-territorial, and applies to any activity throughout the world intended to influence the referendum result.

Further information

If you would like further details on any aspect of election law, or how it applies to your institution, please speak to your usual Clifford Chance contact or any of those listed below.

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