

Introduction to Legal Considerations for the WAP and CSBG Network

NASCSP 2020 Winter Training Conference
Tuesday, February 25, 2020

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CAA Leaders' Legal Guide

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<https://caplaw.org/resources/PublicationDocuments/CAALeadersLegalGuide.html>

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Agenda

- Overview of federal grant law
- Financial management of federal grants
- Program laws and guidance
 - Community Services Block Grant
 - Weatherization Assistance Program
- Lobbying and political campaign activity rules

This afternoon...

- Tripartite Boards
- State Nonprofit Laws
- Federal and State Tax Laws

Overview of Federal Grant Law

What is a Federal Grant?

- Assistance vs. Procurement: Types of federal financial awards
 - **Grants**
 - Supports **recipient's** own activities, which carries out a public purpose
 - To state/local governments, non-governmental organizations, individuals, for-profit entities
 - **Cooperative agreements**
 - Same as grants, except substantial involvement of the federal government/pass-through entity
 - **Procurement contracts**
 - Used to purchase goods or services for the **government's** own use

What Rules Apply to Federal Grants?



Who Awards Federal Funds to a CAA?

Discretionary, e.g., Head Start – Federal Agency

- Federal agency **may exercise judgment** in selecting grantee and/or setting award criteria and funding levels
- Often made through a competitive grant process

Block, e.g., CSBG, LIHEAP – State Agency

- Block grants are awarded to one source and distributed to multiple subrecipients for similar purposes
- Distribution under block grants often based on a **formula** set by Congress or established by the federal agency

Formula, e.g. WAP – State Agency

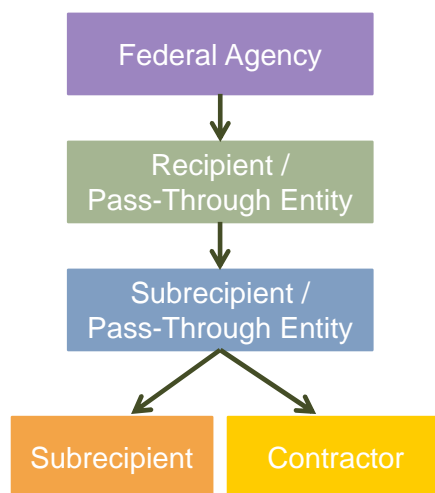
- Amounts calculated by **formula** in authorizing statute
- Federal cross-cutting requirements, including Uniform Guidance, apply

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Federal Grant Relationships

- Depending on the award, a CAA may be:
 - **Recipient**
 - **Subrecipient**
 - **Contractor**



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Enforcement Actions

- Possible enforcement actions that awarding agency can take against a federal grantee:

Disallowances of costs

Additional specific award conditions*

Suspension and Debarment

Temporary suspension/ withholding of awarded funds*

Termination*

Denial of refunding*

** May not be applicable to certain grant programs or may require specific procedures*

Quiz #1: Federal Grant Law

1. A CAA can be which of the following? (Select all that apply)
 - a. A recipient
 - b. A subrecipient
 - c. A pass-through entity

Financial Management of Federal Grants

What Is the Uniform Guidance (UG)?

- Codified at 2 C.F.R. Part 200
 - Each federal department has adopted its own version (e.g., 45 C.F.R. Part 75 for HHS)
- Contents
 - **Subpart A:** Acronyms and Definitions
 - **Subpart B:** General Provisions
 - **Subpart C:** Pre-Federal Award Requirements and Contents of Federal Awards
 - **Subpart D:** Post-Federal Award Requirements
 - **Subpart E:** Cost Principles
 - **Subpart F:** Audit Requirements
 - **Appendices:** Required contract provisions, indirect costs etc.

How Does UG Apply?

UNIFORM GUIDANCE BASICS

- Answer: Depends on the funding a CAA receives and the applicability provisions in the UG (2 C.F.R. 200.101):
 - **Direct Grants:**
 - Generally, must comply with all of UG, e.g., Head Start
 - **Formula Grants**
 - Generally, must comply with all of UG, e.g., Weatherization Assistance Program (WAP)
 - **Block Grants**
 - Compliance with only a few, select UG provisions, e.g., Low-Income Home Energy Assistance Program (LIHEAP)

When do Additional UG Provisions Apply?

UNIFORM GUIDANCE BASICS

- Answer: Additional UG provisions may be incorporated by reference via the:
 - Authorizing statute for the federal funding
 - Grant agreement between the pass-through entity and the non-federal entity
 - State statutes and regulations

Which UG Provisions Apply to CSBG?

UNIFORM GUIDANCE BASICS

- **Answer:** The following UG provisions apply to all block grants, including CSBG:
 - **Subpart A** (Acronyms & Definitions)
 - **Subpart B** (General Provisions)
 - **Subpart F** (Audit Requirements)
 - **Certain provisions of Subpart C**
 - § 200.202 – Requirement to provide public notice of federal financial assistance programs
 - § 200.330 – Subrecipient and contractor determinations
 - § 200.331 – Requirements for pass-through entities
 - § 200.332 – Fixed amount subawards
- *** Additionally:** Subpart E, Cost Principles, applies to CSBG because CSBG Act, the authorizing statute (42 U.S.C. § 9916(a)(1)(B)), specifically requires it

Federal Agency Versions of UG

- Agencies have codified their own versions of the Uniform Guidance:
 - **HHS:** 45 CFR Part 75
 - **Dep't. of Energy:** 2 CFR Part 910
 - **CNCS:** 2 CFR Part 2205
 - **HUD:** 2 CFR Part 2400
 - **DOL:** 2 CFR Part 2900
 - **Dep't. of Education:** 2 CFR Part 3474

Quiz #2: Federal Grant Law

2. Does the Uniform Guidance apply to Weatherization Assistance Program funds?

- a) Yes
- b) No

Why?

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Quiz #3: Federal Grant Law

3. Do the Cost Principles in the Uniform Guidance apply to CSBG funds?

- a. Yes
- b. No

Why?

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Administrative Requirements

Pass-Through Entity Requirements

Must ensure that every subaward:

- Is clearly identified as a subaward
- Includes certain specified info, when awarded
 - Federally Negotiated Indirect Cost Rate (FNICR)
 - If none, either a rate negotiated between the pass-through entity and subrecipient or a 10% “de minimis” rate
- Subrecipient is notified of any modifications

Pass-Through Entity Requirements

- Additional pass-through entity obligations
 - Evaluate a subrecipient's **risk** of noncompliance for purposes of determining the appropriate level of monitoring
 - Consider imposing **specific subaward conditions**
 - Monitor a subrecipient's activities as necessary to ensure that the subaward is used for **authorized purposes**
 - Verify that the subrecipient is audited as required by **Subpart F** of the Uniform Guidance
 - Consider whether the results of a subrecipient's audits, on-site reviews, or other monitoring indicate conditions that necessitate adjustments to a pass-through entity's **records**
 - Consider taking **enforcement action** against a noncompliant subrecipient

Competition and Procurement

- All procurement transactions must be conducted in a manner providing **full and open competition**
- Rules outline specific methods of procurement and requirements for each method

Competition and Procurement

<u>Micropurchase</u> \$0 - \$10,000	Reasonable Distributed equitably among qualified suppliers
<u>Small Purchase</u> \$10,000.01 - \$250,000	Written price or rate quotations from an adequate number of suppliers
<u>Sealed Bids</u> \$250,000.01 and above Fixed-price contract	Cost or price analysis Invitation for bids, solicited from at least two suppliers Bids opened publicly and awarded to lowest responsive and responsible bidder

Competition and Procurement

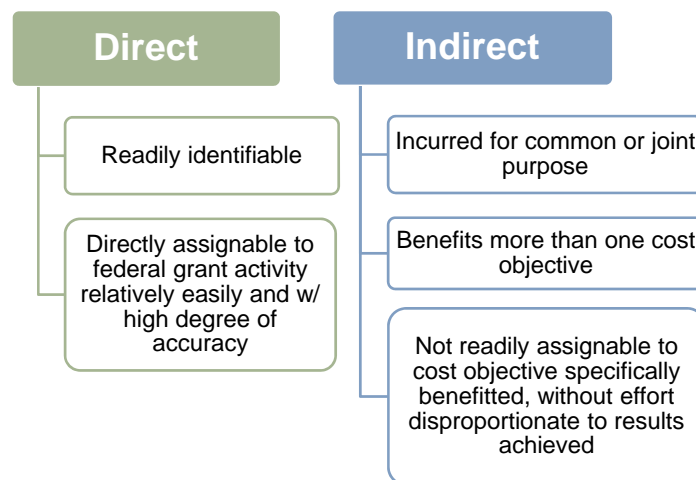
<u>Competitive Proposals</u> \$250,000.01 and above Conditions not appropriate for use of sealed bids	Cost or price analysis Request for proposals, solicited from at least two suppliers Written method used to conduct technical evaluations of the proposals
<u>Sole Source/Noncompetitive Proposals</u> Item only available from a single source Public exigency or emergency Written request granted by federal awarding agency or pass-through entity Competition is determined inadequate	Solicitation of proposal from single source

Cost Principles

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Cost Allocation

Types of Costs



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Cost Allocation

Basic Considerations

- Good or service costs are chargeable to a Federal award in accordance with the relative benefit received

is incurred specifically for a federal award

can be properly distributed using reasonable methods when it benefits both federal awards and other work

is necessary for overall operations and assignable in part to the federal award in accordance with the cost principles

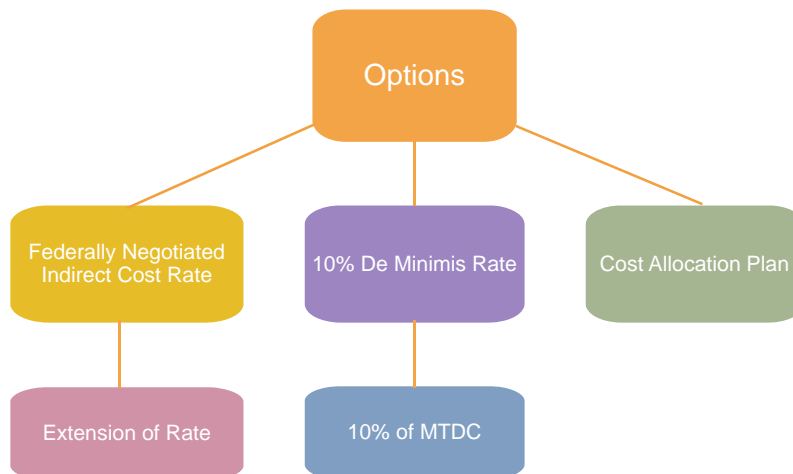
- 2 C.F.R. § 200.405

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Cost Allocation

Recovering Costs



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Specific Items of Cost

Salaries and Wages

Charges must be based on records accurately reflecting work performed

If following standards met, no additional documentation required:

- Supported by system of internal control
 - Incorporated in official records
 - Reasonably reflect the total compensated activity
 - Encompass all activities – federal and non federal
 - Comply with established accounting practices and policies
 - Support distribution of employee's salary among specific activities or cost objective
- 2 C.F.R. § 200.430

Specific Items of Cost

Salaries and Wages - Budget Estimates

- If using budget estimates (estimates determined before work is performed), must:
 - Have a system that produces reasonable approximation of actual activity
 - Enter significant changes into records in a timely manner
 - Follow processes to review after-the-fact interim charges to estimate and ensure final amount charged is accurate, allowable and properly allocated

- 2 C.F.R. § 200.430

Specific Items of Cost

Fringe Benefits

- Allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages (e.g. leave, gym membership, insurance)
- Must be reasonable
- Must be required by law, non-Federal entity-employee agreement, or established policy

- 2 C.F.R. § 200.431

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Specific Items of Cost

Fundraising and Investment Management Costs

- Financial campaigns, endowment drives, solicitation of gifts and requests, or similar expenses incurred to raise capital or obtain contributions (incl. to meet program objectives)
 - Unallowable except with prior written approval from awarding agency
- Investment counsel and staff costs are only allowable when associated with investments covering pension, self insurance or other funds which include federal participation
- Costs related to physical custody and control of monies and securities are allowable

- 2 C.F.R. § 200.442

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Specific Items of Cost

Proposal Costs

- Preparing bids, proposals, or applications on potential Federal/non-Federal awards or projects, including development of support data
- Successful or non-successful
- Treated as indirect and allocated to all entity activities
- No past proposal costs will be allocable to current accounting period

- 2 C.F.R. § 200.460

Specific Items of Cost

Fines, Penalties, Damages, Settlements

- Settlement costs and damages resulting from violations of, alleged violations of, or failure to comply with laws and regs
- Unallowable except:
 - When incurred as a result of compliance with Federal award provisions or
 - With prior written approval from the awarding agency

- 2 C.F.R. § 200.441

What if Specific Cost is not in the UG?

- **Answer:** UG (2 C.F.R. § 200.420) explains that failure to mention a specific item of cost does *not* imply that it is allowable or unallowable; rather, an allowability determination is based on the treatment provided for similar/related items of cost and the basic considerations (2 C.F.R. §§ 200.402-411).
 - UG establishes factors to consider when determining if a cost is:
 - Allowable
 - Reasonable
 - Allocable

Quiz #4: Uniform Guidance

4. A CAA uses the 10% de minimis rate for CSBG. What are its options for charging indirect costs to WAP? Choose all that apply.
- a. The 10% de minimis rate
 - b. Direct cost allocation principles
 - c. 5% WAP de minimis rate
 - d. Negotiate a rate with state WAP agency

Quiz #5: Uniform Guidance

5. Does a CAA using the 10% de minimis rate have to provide documentation of its actual indirect costs?
- a. Yes
 - b. No

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Quiz #6: Uniform Guidance

6. Are proposal costs a direct or indirect cost?
- a. Direct
 - b. Indirect

Are they allowable?

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Single Audit Requirement

A CAA must conduct a Single Audit if:

- It expends \$750,000 or more in federal awards during the CAA's fiscal year

- 2 C.F.R. § 200.501

Single Audit Requirement

Frequency

- With limited exceptions, the Single Audit must be performed annually

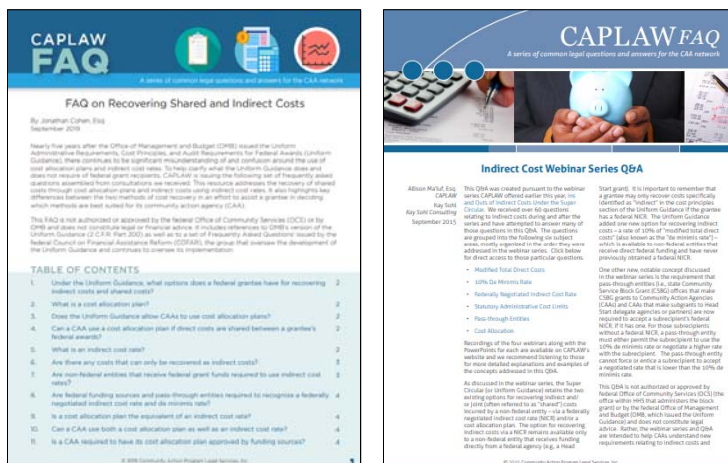
- 2 C.F.R. § 200.504

Cost

- A reasonably proportionate share of costs involved with performing the audit may be charged to the federal award

- 2 C.F.R. § 200.425

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2020 OMB Proposed Revisions

- Allows requests for **higher micro-purchase threshold**
- Clarifies that pass-through entities **must accept FNICR**
- Expands eligibility** for the 10% de minimis rate
- Pass-through entity only responsible for **audit findings** related to its subaward
- Prohibits incorporation of **non-binding guidance** into terms and conditions of federal awards
- Non-Federal entities given **120 days** (90 for subrecipients) to submit closeout reports

Comments due March 23, 2020!

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Community Services Block Grant Act

Laws and Guidance

Federal

- **Federal CSBG Act**
 - 42 U.S.C. § 9901 *et. seq.*
 - States primarily responsible for grant administration
- **Cross-cutting Requirements**
 - Drug-Free Workplace Act
 - Byrd Amendment
- **Federal Block Grant Regulations**
 - 42 C.F.R. Part 96
- **Information Memoranda (IMs)**
 - Non-binding guidance
 - Example: Information Memorandum #82 (CSBG IM #82)

Laws and Guidance

State

- **State CSBG Laws**

- e.g., Indiana Code 12-14-23-1 through 12-14-23-10
- e.g., None in Florida (CSBG statute repealed in 2012)

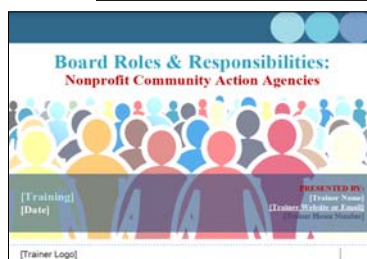
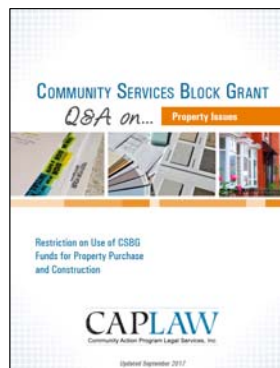
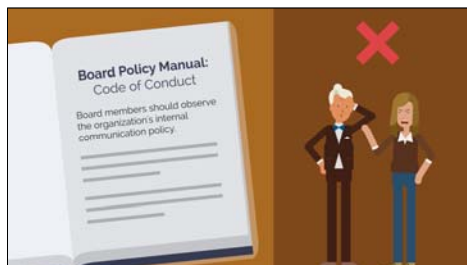
- **Organizational Standards**

- Developed by the CSBG Organizational Standards Center of Excellence (COE)
- Published in IM #138
- Separate sets of Standards for nonprofit and public CAAs

Block Grant with Strings Attached

- **Allocations**
- **Designation of subrecipients**
- **Governance**
 - Tripartite board
- **Use of funds**
 - Buildings and facilities
 - Lobbying and political activity
 - Match
- **Carryover**
- **Reduction and termination**

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Raising the Low-Income Voice
Case Studies in Democratic Selection Procedures

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Weatherization Assistance Program

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Laws and Guidance

Federal

- **Enabling Legislation**
 - 42 U.S.C. § 6861 *et. seq.*
- **Cross-cutting Requirements**
- **Federal Formula Grant Regulations**
 - 10 C.F.R. Part 440
 - Appendix A, Standards for Weatherization Materials
- **Program Guidance**
 - WAP Memorandums
 - Weatherization Program Notices

Laws and Guidance

State

- **State WAP Laws**
 - e.g., AR ST § 15-10-207
- **State Contract Law**
 - Subcontractors
- **Additional Guidance**
 - WAPTAC

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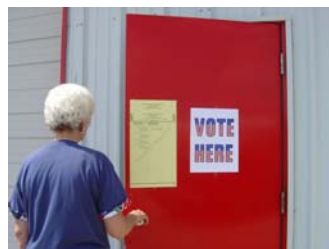
Lobbying and Political Campaign Activity Rules

Can Tax-Exempt Orgs. Lobby or Get Involved in Political Campaigns?

Lobbying
Issues + Legislation



Political Activity
Campaigns +
Candidates



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Tax Law Restrictions on Lobbying

- IRC § 501(c)(3): Lobbying cannot be a substantial part of organization's activities
 - “Substantial part” test
 - 501(h) election/expenditure test
 - BOTH tests:
 - Must report lobbying on Form 990
 - Must keep track of money spent on lobbying
 - Violation may result in:
 - Loss of tax exemption
 - Punitive tax on organization and its managers

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Tax Law Restrictions on Lobbying

- **Substantial part test (default test)**
 - Subjective, facts and circumstances analysis
 - Volunteer lobbying counted (time/expenses)
 - Must provide detailed description of lobbying activities and expenses on Form 990
- **Expenditure test**
 - Objective, specific dollar limits (% of org.'s exempt purpose expenditures)
 - Must opt in by filing 501(h) election on Form 5768
 - No limit on lobbying activities that do not incur expenses (e.g., unreimbursed lobbying by volunteers)
 - Must report lobbying expenses (only) on Form 990

Lobbying Practice Tips

- **Use non-federal, unrestricted funds to lobby**
 - Track time spent by employees lobbying
 - Don't include lobbying costs as part of the indirect cost pool
- **Lobby using board members or other volunteers**
 - Do not need to track volunteer time if making 501(h) election
- **Lobby on personal time, without using CAA resources**
 - Be careful when asking non-exempt employees to volunteer to lobby
- **Keep records of lobbying costs**

Political Campaign Activities

IRS: Federal Tax Law

501(c)(3) tax-exempt organizations may NOT:

Directly or indirectly participate or intervene in any political campaign on behalf of or in opposition to a candidate for public office (local, state or federal)

(IRC § 501(c)(3))

Political Activity Do's and Don'ts

IRS Revenue Ruling 2007-41

Voter Education/Voter Registration

- Ok so long as conducted in a nonpartisan/unbiased manner; can't mention parties
- Can't use CSBG/Head Start funds; no identification with CSBG

Organization Leaders' Own Activities

- Ok if speaking as individuals, rather than on behalf of the organization

Candidate Appearances

- Ok if all candidates invited and have equal opportunity to speak; no identification with CSBG
- Don't invite in a non-candidate capacity close to election time

Websites

- CAA is responsible for the content of website and links to other sites

Issue Advocacy

- May take positions on public policy issues, but cannot favor or oppose a candidate

Political Campaign Activities

CSBG and Head Start Restrictions

CAAs may not use CSBG or Head Start funds for:

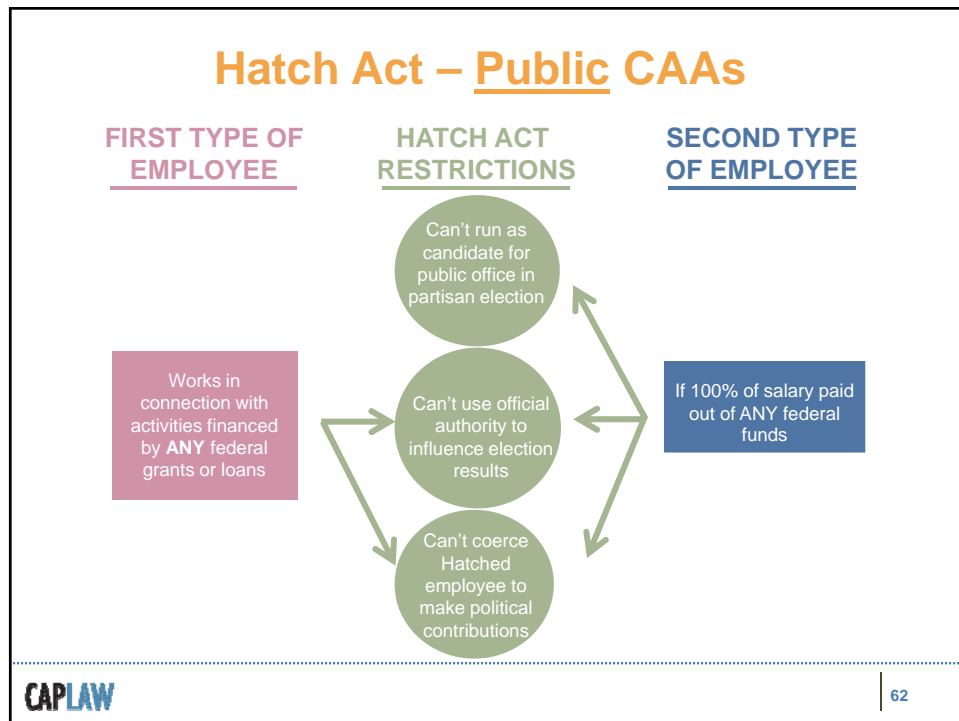
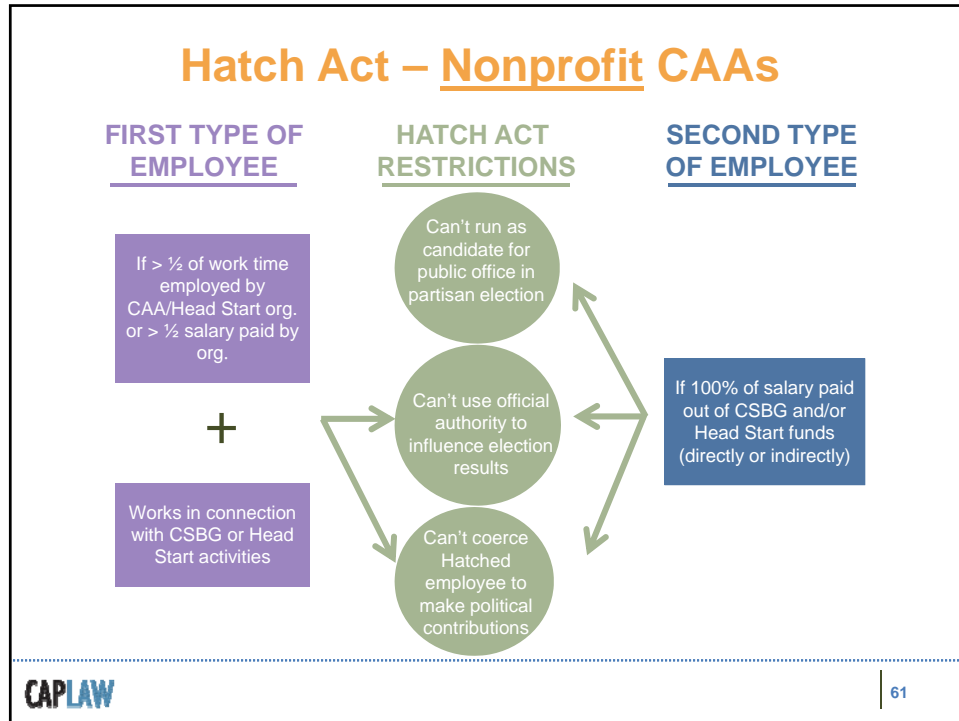
- Any partisan or nonpartisan political activity
- Transporting voters to the polls
- Any voter registration activity

*But a **nonpartisan organization** MAY use Head Start facilities during the CAA's regular hours of operation to conduct voter registration

Political Campaign Activities

▪ Hatch Act

- Federal law that applies mainly to federal, state, or local employees and NOT employees of nonprofit organizations
- However, **applies to certain employees** of **nonprofit CAAs** who are paid out of CSBG and/or Head Start funding (42 U.S.C. § 9918(b); 42 U.S.C. § 9851(a))
- Limits activities of employees, not the CAA
 - Restrictions apply regardless of whether activity is conducted at the workplace or on work time
 - Restrictions apply even when employee is on unpaid or paid leave



What Can Covered Employees Do Under the Hatch Act?

Be a candidate in a nonpartisan election

Be a candidate in a partisan election, if salary is not 100% paid out of CSBG/Head Start funds (nonprofit CAA) or 100% out of any federal funds (public CAA)

Express opinions on political subjects

Vote as one chooses

Participate in political campaigns and parties

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Quiz #7: Lobbying & Political Activity

7. Which of the following statements about a CAA engaging in lobbying and political activity is TRUE?

- a. It may be able to lobby with nonfederal, unrestricted funds
- b. No employees paid out of CSBG/HS may run for partisan office
- c. Only employees of public CAAs are subject to the Hatch Act
- d. It can use CSBG funds to ask Congress to increase CSBG funds

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Quiz #8: Lobbying & Political Activity

8. Which of the following statements about political activities is FALSE?
- a. CAA staff are prohibited from conducting voter registration
 - b. The Hatch Act limits an organization's (the CAA's) political activities

Questions?

