How Private Employers Can Limit Political Discord At Work

By **Lindsay Hedrick and Victoria Bliss** (October 14, 2020, 12:54 PM EDT)

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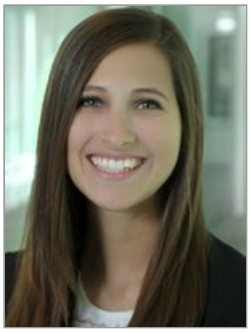

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Election season is upon us. Politics pervade the news, social media feeds and dinner table conversations. But can and should politics infiltrate the workplace?

While there may be some positive aspects to political expression by employees, it can also polarize colleagues, diminishing office morale; distract workers, reducing productivity; and alienate clients, damaging a company's brand and negatively impacting the bottom line.

Further, so-called political speech by an employee could also create a hostile work environment if it relates to a protected characteristic — e.g., race, color, religion, sex, sexual orientation, gender identity and national origin. For those reasons and others, employers may desire to limit their employees' political expression.

This article will examine what lawful steps nongovernment employers can take to keep politics from having a negative impact on the workplace, particularly in this contentious political climate.

Do employees have a right to express their political beliefs?

Contrary to popular belief, employees of private employers do not have a constitutional right to free speech at work. The First Amendment prohibits the government from limiting speech, but does not limit a nongovernment employer from restraining speech of its employees. Paraphrasing the former U.S. Supreme Court Justice Oliver Wendell Holmes Jr.: An employee may have a constitutional right to talk politics, but he doesn't have a constitutional right to a job.[1]

No federal law protects private employees based on their political affiliation or political activity. Thus, under federal law, an employer can limit the expression of political beliefs at work, among co-workers or with clients — whether around the water cooler, over email or even on social media.

There is an exception for political beliefs that are related to employees' jobs. The National Labor Relations Act protects an employee's right to engage in concerted activity "for the purpose of collective bargaining or other mutual aid or protection."[2] The NLRA protects both union and nonunion, nonsupervisory employees who engage in concerted activity.[3]

Thus, some political expression — if it is related to the employee's terms and conditions of employment — could be protected under the NLRA. For example, an employer may run afoul of the NLRA by taking adverse action against an employee for discussing in a breakroom how one candidate is more supportive of organized labor than another, for marching in a protest to raise the minimum wage, or for making a social media post about racial justice or sexual harassment since those issues could implicate work culture.

Beyond the protection afforded by the NLRA on political speech related to terms and conditions of employment on the federal level, Washington, D.C., and several states, including California and

Louisiana, have passed laws prohibiting employers from discriminating or retaliating against employees based on political affiliation or engaging in certain political activities or election-related speech.[4]

A Connecticut law imposes liability on employers who discipline or discharge employees for exercising rights guaranteed by the First Amendment, so long as the activity does not substantially or materially interfere with the employee's job performance or the working relationship between the employee and employer.[5]

Other states like Colorado, North Dakota and Utah limit employers' ability to take adverse employment actions based on all or some lawful conduct occurring outside of work.[6] Under most statutes protecting off-duty activities, lawful conduct is generally protected if it occurs: (1) during nonworking hours and (2) off the employer's premises.

The statutes also have certain employer-friendly exceptions. In general, these carveouts provide that the prohibition does not apply if the employee's conduct has a connection to work; for example, where the employee's conduct conflicts with the employer's business interests or the employer's restriction relates to a bona fide occupational requirement.

With more employees working remotely due to the COVID-19 pandemic, the line between on- and off-duty is blurred, and disputes are likely to arise about, among other things, the boundaries of the employer's premises or workplace and the definition of working hours.

New York's law, which protects off-duty recreational activities and certain off-duty political activities, defines "work hours" as "all time ... that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work."[7] Thus, for example, an employee is unlikely to be considered off-duty if she answers a work-related phone call from her supervisor outside of normal working hours.

Given the current heated political climate, employers may learn that employees have made controversial statements on social media, engaged in protests or participated in some other form of political activity during their free time. Employers tempted to discipline employees for such activities must be cognizant of the potential legal ramifications of doing so.

And in the COVID-19 world, employers must tread carefully when determining whether remote employees' activities take place at work and/or during working hours. Even if a state statute does not apply, employers must also be mindful of other claims that could be made in certain states, such as claims for wrongful termination in violation of public policy.

Ultimately employers must balance the need to maintain a productive workplace, profitable business, good reputation, and culture of civility and respect with employees' desire to express their beliefs, whether at work or on their own time. And multistate employers need to be mindful of the patchwork of state laws that could apply to their workforce.

Can employers restrict political apparel or the display of political paraphernalia at work?

Just as an employer can restrict political speech, employers can also implement policies restricting employees from wearing shirts, hats, masks, buttons or other apparel expressing political opinions, subject to the NLRA. Employers can accomplish this through a dress code that specifically bars political apparel or more generally, by prohibiting employees from wearing any apparel with slogans, messaging, advertising or logos that are not company-related — perhaps with an exception for a small clothing brand logo.

Employers that permit apparel promoting a certain ideology or political position and not others (e.g., LGBTQ rights, but not racial justice) run the risk of discrimination claims under Title VII of the Civil Rights Act or state anti-discrimination statutes.

Just like political speech, employers should be mindful of the NLRA when drafting a dress code and enforcing it. The National Labor Relations Board and courts have issued numerous rulings over the years on employer policies that restrict workers from wearing union or pro-labor insignia.

In 2017, the NLRB rejected an employer's attempt to prohibit its employees from wearing "Fight for $15" buttons at work.[8] But in December 2019, a more conservative NLRB ruled in favor of an employer's policy limiting the size of union buttons employees could wear to small, nondistracting insignia no larger than the size of employee name badges.[9]

The NLRB cited a 2017 decision, which laid out a new test for looking at facially neutral workplace policies to determine whether the policy is lawful.[10] Under the new standard, the NLRB must weigh the NLRA rights of workers against the legitimate justifications of the employer.

Employers can also have policies that prohibit the display of political paraphernalia like signs or bumper stickers at work. While it may not be problematic for an accounts receivable clerk in the back office to display a political sign inside their cubicle, that same sign hung on the desk by the receptionist in the front lobby may wrongly give visitors the impression that the company, rather than just the receptionist, holds a particular political belief. For that reason, it is best practice to have a uniform, issue-neutral policy applicable to all employees.

Can an employer prohibit an employee from taking time off from work to engage in political activities or vote?

During election season, employees may want to attend a political rally, volunteer on a candidate's campaign, or serve as a poll watcher for a particular political party — during the work day. Employers should treat such requests for time off to engage in these activities no differently than other requests by employees for personal time off. Employers should adhere to their attendance policies to determine whether such time off should be granted and paid.

Depending on the state where the employee is located, employers must treat time off for voting and certain other election-related and political activities differently. Many states have some form of voting leave requirement. In general, these laws impose conditions on the provision and use of leave.

For instance, in a number of states, leave need be provided only if employees do not have sufficient time to vote outside of working hours.[11] In others, employees must give advance notice of their need for voting leave.[12] And the contours of these laws differ on topics like the amount of leave required, whether the leave must be paid, and whether employers must post notice of employees' rights.[13]

Finally, some states require leave for other activities, such as serving as an election officer or performing duties if elected to serve in certain offices.[14] The bottom line for employers is that they not only must review state law carefully, but they also must stay abreast of the changes in such laws that may come in light of the COVID-19 pandemic's impact on voting issues, such as the need for election officers and the prevalence of absentee and early voting.

Takeaways

Private employers can have policies that limit employees' political expression and activity, subject to limitations imposed by the NLRA and state law. As with all workplace policies, it is critical that the rules be clearly articulated, and enforcement by management must be consistent and objective.

The same dress code barring apparel with slogans, messaging or logos would bar a shirt saying "I Love NY" just as it would bar a shirt emblazoned with "Notorious RBG," "Make America Great Again" or "#TimesUp." Further, employers must remain aware that despite the lack of constitutional or federal protection, employees in a number of states have the right to engage in certain political activities.

Finally, employers must adapt these principles to a remote workforce, confronting questions like how to respond when an employee has an "All Lives Matter" sign in the background while attending a Zoom meeting from home, or how to determine whether an employee's 6 p.m. Instagram comment using profanity and attacking supporters of President Donald Trump was posted during working hours.

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[1] See McAuliffe v. Mayor of New Bedford , 155 Mass. 216, 29 N.E. 517 (1892).

[2] 29 U.S.C. §157.

[3] Id.; see also 29 U.S.C. §152(3).

[4] See, e.g., D.C. Code Ann. §2-1402.11; Cal. Lab. Code §§1101-02; La. Stat. Ann. §§23:961-62.

[5] Conn. Gen. Stat. Ann. §31-51q.

[6] See, e.g., Colo. Rev. Stat. Ann. §24-34-402.5; N.D. Cent. Code §§14-02.4-01, 03, 08; Utah Code Ann. §34A-5-112.

[7] N.Y. Lab. Law §201-d.

[8] 365 NLRB No. 39 (Mar. 21, 2017).

[9] 368 NLRB No. 146 (Dec. 16, 2019).

[10] 365 NLRB No. 154 (Dec. 14, 2017).

[11] See, e.g., Iowa Code Ann. §49.109; Mo. Ann. Stat. §115.639; N.Y. Elec. Law §3-110.

[12] See, e.g., Ala. Code §17-1-5; Ga. Code Ann. §21-2-404; Wis. Stat. Ann. §6.76.

[13] See, e.g., Cal. Elec. Code §14001 (requiring that employers post notice of California's voting leave law); Okla. Stat. Ann. tit.26, §7-101 (requiring that employers grant two hours of time in which to vote, subject to certain conditions).

[14] See, e.g., Ky. Rev. Stat. Ann. §118.035(4); Conn. Gen. Stat. Ann. §31-51l.
