ELECTION 2020

NAVIGATING POLITICAL SPEECH AND ACTIVITY IN THE WORKPLACE

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In November, Americans will head to the polls to determine who will be the next president, who will represent them in the U.S. Congress, who will represent them at the state and local levels, and which ballot initiatives they will approve. Considering the increased political rhetoric that has surrounded our offices and institutions, the coming months will inevitably see an increase in political discussion in the workplace. When these discussions raise issues for employees, even a small disagreement can quickly escalate, resulting in lost productivity, lower employee morale and damaged workplace relationships.

At a time when political speech appears more heated than ever, how can employers navigate their legal obligations by respecting their employees' right to speech while simultaneously ensuring a productive and harmonious workplace? Some employers might seek to minimize political discussions at work while others might try to introduce politics into the workplace. How employers address these situations is complicated, as it involves understanding and applying relevant law and company policies, applying compliant policies consistently, and exercising good judgment.

Public or Private Employer?

As a threshold issue, the ability to regulate speech first depends on whether the employer is public or private. For public employers, employee speech is generally protected by state and federal constitutional provisions, including the First Amendment. However, if the employee's speech is not of public concern, it is not protected, and even if it is, courts will still balance a variety of factors including whether the speech interferes with the employee's duties, creates a conflict, or undermines public trust and confidence.

For private employers, Nevada employees are presumed to be "at-will," meaning their employment is terminable at the will of the employer or the employee, for any reason or no reason at all. In part, restrictions on the ability to discipline Nevada employees for political activities rest upon statutory and common law rights. For example, Nevada Revised Statute (NRS) § 613.040 provides, "It shall be unlawful for any person, firm or corporation doing business or employing labor in the State of Nevada to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office in this state." While Nevada courts have yet to interpret this statute,[1] employers must remain cognizant of its admonishment in

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disciplining employees for political activities.

Conversely, when an employee is employed pursuant to a contract, or is represented by a union and through a collective bargaining agreement, adverse action based upon political expression may be a matter of contract.

Be Cautious of the NLRA

Employers can generally limit political discussions that disrupt work, with some important caveats. Section 7 of the National Labor Relations Act (NLRA)—which applies to both unionized and nonunionized nonsupervisory employees in the private sector—provides that "[e]mployees shall have the right … to engage in … concerted activities for the purpose of … mutual aid or protection." The U.S. Supreme Court has interpreted this provision to mean that employees may organize as a group to "improve their lot" outside of the employer-employee relationship. With respect to political discussion, this means that employers may not prohibit conversations relating to labor or working conditions, even if those conversations are couched in terms of politics or current events. Employees may engage in protected political advocacy so long as it relates to labor or working conditions, and such advocacy can include contacting legislators, testifying before agencies or, more relevantly for election season, joining protests and demonstrations. Employers are generally barred from retaliating against employees who participate in these types of political activities outside the workplace, so long as the means used are not themselves prohibited.

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Even neutral workplace "civility" codes—which may require employees to refrain from embarrassing, hurtful or insulting comments about co-workers—have at times proven to be problematic. While the National Labor Relations Board (NLRB) has recently looked more favorably at workplace civility codes,[2] it is important to remember that not all "neutral" workplace rules governing conduct or civility will pass NLRB muster. Rules that specifically ban concerted activity protected by Title VII, the Americans with Disability Act (ADA) or the Age Discrimination in Employment Act (ADEA), or rules that are promulgated in response to protected concerted activity, may still be found to be unlawful. Moreover, even neutral conduct rules must be applied in a manner that does not violate Section 7 of the NLRA. The application of a facially neutral rule in a discriminatory manner, or against protected activity, could still be found unlawful.

Accordingly, blanket rules or handbook policies put in place to govern workplace civility—especially regarding elections—could be deemed overly broad under federal law. If an employer is not sure about either the legality of its policies or the protection afforded to an employee's political advocacy, the best course is to contact counsel.

Employers' Rights to Restrict Political Activities in the Workplace

Considering the heightened emotional and polarizing discourse that has surrounded our political institutions of late, many employers may try to minimize workplace political discussions. Generally, private employers have latitude to limit or ban political discussions in the workplace, simply because there is no First Amendment right or statutory scheme at play in most circumstances. Similarly, many employers have adopted policies that preclude employees from initiating political conversations with clients or vendors.

Such policies are generally permissible, so long as they are tailored to address purely political speech and are sensitive to the NLRB's previously discussed guidance. Alternatively, employers may elect to rely on vaguer policies, such as those reminding employees to "[b]e thoughtful in all your communications and dealings with others, including email and social media."

Additionally, because companies typically have a property interest in their resources, many employers prohibit employees from using company property (like computers, printers and

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office supplies) for political activities. They often also restrict employees from using the employer's telephones for political fundraising or making campaign calls to potential voters.

It is important for an employer to have a written, formal policy regarding such usage, even if it is encompassed in a broader limitation on the personal use of employer resources. Moreover, any such rules—including those prohibiting wearing campaign buttons or displaying posters in a workspace—must be enforced uniformly, regardless of an employee's role within the organization or political point of view. Employers should, however, include language to clarify that nothing in a particular policy is intended to prevent employees from discussing their working conditions or engaging in other concerted activity protected by law.

Employers' Rights to Introduce Political Speech in the Workplace

Like rank-and-file employees, executives, officers and managers generally have the right to engage in their own political activity in the workplace. That activity, however, is limited where it could be construed as intimidation or coercion on the part of the employer with respect to the employees' free choices in voting. The line is often blurred between an employer's free expression under the First Amendment and coercion, especially where the employer's own financial fortunes are concerned.

Moreover, it is a federal crime for private employers to interfere with an individual's ability to vote for federal candidates or to coerce that individual to cast a ballot in a specific way.[3] Similarly, it is unlawful to bribe or offer an "expenditure" to an individual in exchange for voting a certain way.[4] Employers and their agents must refrain from doing either with respect to their employees.

Employers and the Right of Employees to Participate in Elections

In Nevada, NRS § 293.463 enables employees to vote during what would otherwise be working hours, "if it is impracticable for the voter to vote before or after his or her hours of employment." An employer may therefore designate a sufficient time for employees to vote ranging from one hour to three hours pursuant to the statute. Voting laws do vary widely across jurisdictions, so multi-state employers may face particular challenges in creating uniform policies.

Practical Considerations

In preparation for November, employers might want to consider:

- Reviewing handbooks and updating policies as needed;
- Consistently and even-handedly enforcing any policies intended to minimize confusion regarding whether employees can engage in political activity in the workplace;
- Ensuring that employees are not pressured by anyone within the workplace to contribute or volunteer for any particular candidate;
- Ensuring that employees are not discouraged by supervisors from voting or engaging in political activity outside of the workplace; and
- Considering making dispute resolution procedures available to employees who may feel uncomfortable as a result of political activity in the workplace.

When in doubt, employers should consider consulting with employment counsel regarding any concerns they may have concerning political speech or activity.

1. *See Whitfield v. Trade Show Servs., Ltd.*, No. 2:10-CV-00905-LRH, 2012 WL 693569, at *6 (D. Nev. Mar. 1, 2012) (recognizing that Nevada courts have yet to address the question of whether NRS § 613.040 applies as an exception to the at-will employment doctrine).
2. *See The Boeing Co.*, 365 NLRB No. 154 (2017).
3. 18 U.S.C. § 594.
4. 18 U.S.C. § 597.

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