



PROGRAM MATERIALS

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Addressing Political Statements in a Virtual Employment World

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5255 North Federal Highway, Suite 310, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

Addressing Political Statements in a Virtual Employment World

Overview

Human resource professionals and employment lawyers are being asked to devote more time to helping employers manage political speech and discussions between employees. In a virtual world, it is no longer possible to simply require employees to engage in civil discussions as social media platforms, internal communication channels like Slack and Zoom, and other areas of expression play a part in workplace interactions, from recruiting to presentations to postings.

Caution

Addressing political speech requires the intersection of an employer's social media, internet, equipment, anti-harassment, anti-retaliation policies as well as dress code policies, and in this day and age, a formal written policy that clarifies the extent to which political expression is allowed and the activities which are allowed and which are prohibited is in the best interest of both employers and employees.

Program Outline

A. Key Concepts

B. Discussion

1) The Past: What worked and what can we use

2) The Present: Virtual Workplace creates different dynamics

3) The Future: How to plan now for the political friction

C. Question & Answer Period

KEY CONCEPTS

- Generally private employees' ability to engage in political expression in the workplace may be curtailed by employer's reasonably related policies.
- Private employers may generally prohibit certain types of political expression in the workplace or through the use of company owned devices. In other words, except for specific types of speech protected under the National Labor Relations Act, there is no general federal "first amendment" right for employees to engage in political discussion in a private employment setting.

- For the most part, private employees do not have First Amendment or privacy rights when it comes to their internet activity at work, either as to their postings or emails. *See generally Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996). Private employers are free to implement policies allowing management to access its own equipment that is used by or provided to employees, even if that means accessing private communications. *See generally City of Ontario v. Quon*, 560 U.S. 746 (2010) (no violation of officer's rights when department accessed private messages sent over pager provided by department).

NLRA Overlay

- The National Labor Relations Act does protect certain aspects of political expression but only in a limited, narrow focus.
- Section 7 of the National Labor Relations Act protects both union and nonunion employees' ability to engage in concerted activity regarding "mutual aid and protection". This is generally interpreted to mean that employees may discuss the terms and conditions of employment (salary, hours, safety, etc.) but not political speech. However, the NLRA also protects union-related activities which can often have a political undercurrent. *See generally Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 566-69 (1978)
- *See also* NLRB Advice Memorandum (North West Rural Electric Cooperative) (Sept. 21, 2015) (finding employee's social media postings seeking to address workplace health and safety concerns to be protected, concerted activity under Section 7); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (Aug. 11, 2014).

Specific State Laws

As with all things, it is important to check your local and state laws and ordinances which may have restrictions against retaliating against employees who engaged in political activities. For example, Broward County, Florida specifically prohibits employers from discriminating against employees based on political electioneering or party affiliation and attendance at campaign rallies. States such as New York, Illinois, Washington, D.C., Iowa, Utah, Virgin Islands, Puerto Rico and Louisiana have similar prohibitions.

Specific State Laws con't

Colorado and North Dakota go further in prohibiting employers from firing employees for lawful activity conducted after work hours, which has been interpreted to include engaging in political expression.

Specific State Laws con't

Other states such as California, Colorado, New Mexico, Minnesota, Missouri, Nebraska, Nevada, South Carolina and West Virginia, among others, protect employees' rights to engage in political activities. However, each of these states still permit private employers to enact policies to limit or eliminate certain political expression from the workplace, and all of these states support an employer's right to discipline employees who utilize political activity to harass or coerce their fellow employees or where engagement is disruptive to legitimate work objectives.

See generally Kane v. City of Albuquerque, 358 P.3d 249 (N.M. 2015) (upholding city's home rule charter provisions prohibiting hazardous duty officers from seeking elective office because of legitimate concerns over demands in terms of time, energy and availability)

Specific State Laws con't

Certain states, like Connecticut and New Mexico, have created a right to political expression for private employees so as to be protected from retaliation for exercising free speech. Even then, however, the right of an employer to terminate employees for violating workplace rules still exists.

See generally Cotto v. United Tech. Corp., 738 A.2d 623 (Conn. 1999) (although state statute prohibits employer from disciplining employee for exercising free speech rights, employee's termination for creating a disturbance during meeting in which employer handed out American flags for display at workstations was upheld).

Specific State Laws con't

Finally, in general, employers may not interfere with employees' right to vote or abstain from voting. In other words, while an employer can encourage employees to register to vote, it is a violation of almost all states' laws to condition employment on requiring an employee to actually be a registered voter or to vote in a general election. This is because most states prohibit anyone from directly or indirectly unduly influencing any individual to exercise their ability to vote. However federal law does not mandate that employers provide time to employees to actually vote, although several states do mandate such time-off.

DISCUSSION EXAMPLE 1

- Company A has a policy requiring a neutral political dress code for all employees meaning that employees may not wear t-shirts or other type of clothing containing a political message.
- Company B has a policy requiring sales personnel to adhere to a particular dress code but allows back office employees greater leeway in selecting their wardrobe so long as it is work appropriate (i.e., no cut-offs, jeans, t-shirts, miniskirts, etc.).
- Sisters Brenda and Bonnie work for each of the companies part time as do Brothers Bob and Brad. Bob and Brad are in the sales force for both Companies while Brenda and Bonnie are accounting clerks. All four have been friends for years and often socialize outside of work.

- Brenda wears a political button to work one day supporting a local candidate for office by name who is also pro-union which is visible during video conferences with her team. Bonnie wears a political button to work during the same week which supports the effort to unionize both workplaces. Bob wears a button to work similar to Brenda's and Brad wears a button similar to Bonnie's.
- Company A disciplines all four for violation of the company's dress code.
- Company B disciplines Bob and Brad for violating the company dress code, but not Brenda and Bonnie.

Assuming that neither Company A or B is located in a state or county which prohibits employers from disciplining workers for political speech, have the companies acted appropriately in disciplining all four for "political speech"?

ANSWER for DISCUSSION EXAMPLE 1

- The simple answer is NO, neither company acted appropriately.
- First, any blanket prohibition on buttons cannot cover union related buttons during an organization or election campaign as this is protected under the NLRA. Therefore, disciplining Bonnie and Brad for wearing a “union organizing” button by either company would run afoul of the National Labor Relations Act. Only if the wearing of the badges would create a safety hazard or impact a significant, legitimate business purpose can union activity be curbed in this fashion.
- Second, it is possible that someone will argue that both Brenda and Bob’s buttons would be protected speech under the NLRA because the candidate being supported identifies as “pro-union” during the midst of an union organizing campaign. This is a closer call.

- Third, by only disciplining Bob and Brad for conduct that Brenda and Bonnie also engaged in, Company B has potentially opened itself up to a lawsuit for discrimination, wrongful discipline or coercion. This is because any type of “ban” must be uniformly applied and cannot simply cover one category of employees. In order for the ban to be seen as content neutral, it must be applied to all types of political speech regardless of whether it is visible to customers or only fellow employees.

See *Washington State Nurses Ass'n v. NLRB*, No. 06-74917 (9th Cir. May 20, 2008) (overturning NLRB finding that a Seattle hospital could ban nurses from wearing union buttons in the midst of a collective bargaining campaign in areas that were visible to patients or visitors but not in other parts of the hospital complex).

THE PAST

Prior to the explosion of the internet, employers mostly had to address how to defuse conflicts in the physical workplace that might threaten or interfere with legitimate business goals or productivity. In those situations, having a policy that required people to refrain from spending time except on breaks from discussion political issues, candidates or campaigns was sufficient in most situations to avoid disruptions, especially where people could walk away.

Under those circumstances, most political related office policies concerned a prohibition on:

- employees connected the company to a particular political campaign
- soliciting political contributions during working hours
- displaying politically themed items in the workspace
- distributing campaign materials

And supervisors could simply request that either employees tone down heated conversations about political topics or instruct that such conversations had to be continued outside of work.

Even in the past, employers were required to address issues of discrimination, harassment and coercion that often accompanied political discussions in the workplace. Employers who failed to take action to address employees' complaints of harassment in situations where topics about politics, religion or other sensitive subjects were being discussed, could find themselves facing liability and claims for damages.

- *See, e.g., Espinoza v. Count of Orange*, 2012 WL 420149 (Cal. App. Ct. Feb. 9, 2012) (\$800,000 award against employer upheld for failure to curb and address harassment of disabled employee by coworkers); *see, however, Chinery v. Am. Airlines*, 778 F. App'x 142 (3d Cir. 2019) (court dismisses an employee's hostile work environment claim against her employer based on several fellow flight attendants posted offensive remarks about plaintiff on Facebook as the court recognized the posts as "offhand comments and isolated incidents").

The Present

The move by many employers to embrace a teleworking environment in the wake of COVID-19 and the proliferation of social media tools to communicate with and amongst employees has intensified the challenge in addressing political expression in the workplace, especially as the workplace has now moved “online” and “virtual” sometimes making people’s private homes now part of the workplace.

DISCUSSION EXAMPLE 2A

- **Company A has a long standing policy that employees may not display political statements of any kind in their workspace. Company A also has a long standing policy that employees may not engage in verbal or other types of harassment of fellow employees.**

- **During a Zoom conference call amongst a group of Company A employees led by Supervisor Mel, the following items could be seen behind different employees displayed in their homes which had now become their work stations:**
 - A picture of NFL players kneeling**
 - A picture of an American flag with a thin blue line**
 - A display of Klu Klux Klan memorabilia**
 - A rainbow flag**
 - A framed picture of the employee with President Bush at a rally**

- **At the conclusion of the conference call, Supervisor Mel provided information to the human resources department requesting discipline be made against three of the employees for violating the company's ban on political statements and termination of the fourth employee for violation of the anti-harassment policy. Supervisor Mel did not recommend any action against the employee who displayed the picture with former President Bush.**

DISCUSSION EXAMPLE 2B

- **Sue, an employee of the same Company A, posts a picture of herself attending a political rally on Facebook wearing a company t-shirt in which the Company's name and logo are clearly identified.**
- **The Facebook posting is brought to the attention of Supervisor Mel by another employee who is a Facebook "friend" of Sue's. Supervisor Mel initiates disciplinary action against Sue for violating the company's Social Media policy which specifically prohibits employees from associating the company with any particular political campaign.**

- **After receiving the discipline and a reminder of the company's social media policy, Sue attends another rally decked out in even more company clothing and again posts her activity on Facebook and now on a company maintained electronic billboard.**
- **Sue is terminated by her employer.**
- **Sue sues and challenges her termination based upon her right to participate after-hours in a political rally.**
- **What is the outcome of the lawsuit? Would it be different if Sue lived in a state that specifically prohibited an employer for taking action against an employee for participating in political rallies?**

Key Take-Away From Discussion

Example 2A & B

- Employers can prohibit and discipline any speech or display which is profane or derogatory or malicious to other employees or their beliefs. *N.L.R.B. v. Honda of Am. Man. Inc.*, 73 Fed App'x 810 (6th Cir. 2003).

- Employers can prohibit and discipline any speech or display on company devices or in company meetings which is disruptive, interferes with business goals or productivity. *Lee v. Wojnaroski*, 751 F. Supp. 58 (W.D. Pa. 1990) (termination of at-will employee whose spouse supported policies contrary to those of the employer).

- Employers can discipline employees for violation of company directives, even if the conduct at issue has a political overtone, so long as the company is even-handed in its application of the policies and the policies are content neutral. *See, e.g., Shovelin v. Central New Mexico Elec. Coop.*, 850 P.2d 996 (N.M. 1993) (employee terminated after successfully running for town mayor because mayoral duties made it difficult for employee to comply with company's attendance and emergency staffing policies).

- Employers can prohibit employees from linking the company, its brand or its products or services to any particular campaign. *See generally* NLRB Advice Memorandum (Lyft Co.) (July 13, 2018) (upholding restrictions on social media postings under confidentiality and intellectual property policies because any interference in Section 7 rights is slight and employers have significant interest in protecting brand identity).

- **Employers must have a clear, written policy which spells out each of these things.**

Q & A PERIOD

CLOSING POINT

In a virtual world, it is nearly impossible to ban all discussions or symbols that can conceivably relate to politics or convey a political position. While employers may impose limits on the type of subjects discussed and ban the use of company resources such as computers, telephones, equipment, supplies, etc. in an effort to promote a particular political message, in an age of increased workplace activity being undertaken over the internet in tandem with the use of remote platforms, with employees friending each other, sharing or commenting on postings, conditions for vitriolic political based “discussions” between co-workers are more likely to occur, requiring employer intervention and application of a specifically designed policy or policies to prevent these interactions from overwhelming the ability of companies to function.

- THANK YOU FOR PARTICIPATING

Aaron Tandy, Esq.

Pathman Lewis, LLP

atandy@pathmanlewis.com