

Navigating the Challenges of Election Year Politics in the Workplace

First Thursday CLE Program

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Introduction

- **A Presidential election year offers some unique challenges for employers in the workplace as it relates to speech and expression.**
 - **Corporate counsel and in-house attorneys often have the responsibility of regulating individual expression of political ideas and vocal support for candidates while preventing such from creating a negative and turbulent workplace environment.**
 - **This program will cover what you need to know about your rights and responsibilities as an employer now that the 2024 election season is officially upon us.**
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Agenda

- **The policies that address political speech in the workplace and staying within the lanes that the NLRB has prescribed for such policies**
 - **Social media policies that address employee speech outside the workplace**
 - **Employer's responsibilities for providing opportunities and time off for employees to vote in light of more readily available early voting and mail-in voting options**
 - **Planning for workplace issues the weeks and months post-election using the 2020 election reactions as a guide**
 - **Ideas for planning in 2025 and beyond with the effects of the election outcomes on the leadership and goals of the federal agencies (NLRB, EEOC, DOL and DOJ)**
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Policies that Address Political Speech in the Workplace

An employee is claiming they have the right to say whatever they want at work about the upcoming election, saying they have a First Amendment right to free speech. Are they correct?

- “But I have a First Amendment right to say whatever I want!” is a common refrain you might hear from applicants or employees who face workplace repercussions for the things they say.
- However, the First Amendment’s “Freedom of Speech” guarantee generally does not apply to private employers disciplining their employees for engaging in prohibited conduct.
- The Constitutional freedoms found in the Bill of Rights and elsewhere generally restrict state action by the government and not private employers deciding how to manage their workforces.

Policies that Address Political Speech in the Workplace

So that means we have an unrestricted right to prohibit whatever election-season speech in the workplace we want? And we can discipline or even fire any employee that violates our rules?

- Not so fast. Private sector employees have the right to engage in concerted activity under the National Labor Relations Act (NLRA) for purposes of collective bargaining or other mutual aid or protection. This is true in both union and nonunion work groups.
- Under Section 7 of the NLRA, concerted activity includes statements made for the purpose of initiating, inducing, or preparing employees for group action, such as discussions about higher wages, changes to work schedules, and job security. Therefore, certain political discussions impacting terms and conditions of employment would fall under the NLRA's purview, while political activity that is unrelated to employment concerns would not be protected.
- It is worth noting that the General Counsel for the National Labor Relations Board (NLRB) wants to expand the definition of protected concerted activity to specifically include certain "political statements," such as writing phrases in support of political and social causes on company uniforms.

Policies that Address Political Speech in the Workplace

Do we have any other concerns besides protected concerted activity claims if we discipline or terminate an employee for expressing a political opinion at work?

- Federal antidiscrimination laws don't directly protect political activity or speech, but your workers' activity or speech could trigger these laws.
 - If the discussion directly (or perhaps even indirectly) involves race, color, sex, sexual orientation, gender identity, national origin, religion, age, or disability, you need to be careful.
 - After all, an employee could claim that your action responding to their political discussion on such subjects is actually a proxy for illegal discrimination.
 - Think twice and check with counsel before disciplining any employee for engaging in such a discussion.
 - You'll also want to be consistent in how you address political discussion across all employees so as not to create any appearance of preferential treatment based on a protected characteristic.
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Policies that Address Political Speech in the Workplace

One employee is wearing a “Trump 2024” button to work. Another one just hung a “Biden/Harris 2024” poster in their workspace. And one more employee told us they just got a t-shirt promoting a local candidate and will be wearing it to work this Friday. We’re afraid this will all lead to arguments and tension and become a workday distraction. What can we do about this kind of political expression?

- Creating and implementing a consistent dress code or appearance policy is key in these situations.
- Be sure to consistently enforce any rules prohibiting employees from wearing apparel and accessories with political statements.
- For example, if you don’t allow employees to wear “MAGA” hats in support of Trump, you also shouldn’t let them wear hats promoting Biden or any other political candidate.
- Likewise, you can establish reasonable, consistent limits on posters and other workplace displays, so long as you comply with the NLRA rules mentioned above regarding employment topics.

Policies that Address Political Speech in the Workplace

An employee is volunteering for a local campaign and wants to help promote the candidate here at the workplace. They want to email around a call for volunteers and hang a sign-up sheet in the breakroom and have even asked about holding a lunch-and-learn visit from the candidate.

How should you approach this?

- You can generally prohibit employees from engaging in political activities such as campaigning or distributing political literature in the workplace during work hours. But there are some things you need to know about any non-solicitation rules you put into place.
 - You need to enforce them consistently and across the board. If you allow an employee to post a sign-up sheet for Girl Scout cookies in the breakroom, you may also have to allow someone else to post a political rally sign-up sheet.
 - You need to make sure you don't stop employees from engaging in political solicitations during breaks and meals (even paid breaks).
 - Make sure you distinguish between union-related activities or other actions taken for the mutual aid and protection of your workers – which are generally protected – from political speech.
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Policies that Address Political Speech in the Workplace

Is there anything we can do to try to minimize the chances of our workers getting into arguments about politics this year? And what should we do if we learn that workers are already getting into arguments?

- You probably already know that workers want to talk to each other about politics. In fact, 61% of workers in the country say they've discussed politics with co-workers during the last year, according to a Glassdoor survey. While you might not be able to stop the conversations altogether, it's important to set expectations on professionalism and appropriate workplace interactions.
 - Consider taking the time early this year to train managers on how to spot unproductive or heated conversations and address them appropriately.
 - You may also want to designate a contact in your HR or legal department for managers to call with concerns.
 - You'll also want to ensure your workplace conduct policies are up to date under the NLRB requirements and guidelines.
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Policies that Address Political Speech in the Workplace

Consider Implementing a Company Policy

Prohibited Political Activity Policy

- [Company Name] encourages employees to participate in lawful political activities. Participating in these activities must be conducted on the employee's own time and should in no way suggest [Company Name] support. Vacation leave may be requested to conduct such activities.
- The following activities are prohibited from being performed while on-duty:
Demonstrating.
 - Counting or recounting votes.
 - Circulating petitions.
 - Soliciting votes or contributions at any time in any working area of a [Company Name] facility.
 - Conducting or participating in opinion polls.
 - Fundraising.
 - All other activities not considered part of the employee's normal duties.
 - Employees may not use [Company Name] equipment or resources for making, copying or distributing political materials or messages.
 - Political messages that are inappropriate or offensive to co-workers are prohibited. Harassment of co-workers, customers or vendors regarding political preferences will not be tolerated.

Social Media Policies that Address Employee Speech Outside the Workplace

What can our social media policy say to try to prevent future situations like this?

- You can generally require employees to be respectful with respect to postings related to company business, to uphold workplace confidentiality or trade secrets, and not use incendiary language when discussing coworkers or company business. But these aren't absolute rules.
- However, tread carefully - A federal appeals court ruled that an employee who used a public Facebook page to curse out his boss – and his boss's mother and entire family – should not have been fired from his job because of the specific circumstances surrounding the situation. ***NLRB v. Pier Sixty, LLC, 855 F.3d 115 (2nd Cir. 2017)***.
 - **Employee was upset at his Supervisor for talking to him in a “harsh tone.” Employee alleged that, just two days before the election, Supervisor directed him to “stop chitchatting” and “move, move” during a catering event in a way that seemed demeaning. Forty-five minutes later, during an authorized break from work, Employee used his smartphone to post the following message about Supervisor to his Facebook page:**
 - **Bob is such a NASTY MOTHERF___ER don't know how to talk to people!!!! F___k his mother and his entire f___king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!**

Social Media Policies that Address Employee Speech Outside the Workplace

What can our social media policy say to try to prevent future situations like this?

- *NLRB v. Pier Sixty, LLC*, 855 F.3d 115 (2nd Cir. 2017).
 - The edits to make this language somewhat family friendly were made by this author, whereas Employee's post was not censored in any way.
 - Employee's Facebook friends included 10 coworkers, and his page was publicly accessible.
 - The company was made aware of the offensive post and terminated Employee's employment.
 - The Pier Sixty employees voted in favor of unionization, and Employee eventually filed an unfair labor practice charge with the NLRB.
 - The Board issued a decision in Perez's favor and ruled he had been discharged in retaliation for engaging in protected activity. The Employer appealed the decision to the 2nd Circuit Court of Appeals.
 - The court pointed to three main factors that led it to conclude that the termination violated the NLRA:
 - 1) Subject matter of obscene post was about workplace
 - 2) Employer consistently tolerated foul language
 - 3) Online statement was different than in-person outburst

Social Media Policies that Address Employee Speech Outside the Workplace

What can our social media policy say to try to prevent future situations like this?

- Make sure your social media policies comport with the relatively new NLRB standard that restricts employers from imposing certain workplace conduct rules. ***Stericycle, Inc.*, 372 NLRB No. 113 (2023):**
 - Instead of seeking to balance the interests of the employer and employee, the Board first determines whether a given work rule could be reasonably interpreted to "chill" employees from exercising their Section 7 rights.
 - If so, the rule is deemed presumptively unlawful, even if the rule could just as easily be interpreted to not infringe on any concerted activity, and even if the employer had no intention of impacting Section 7 rights whatsoever.

Social Media Policies that Address Employee Speech Outside the Workplace

What can our social media policy say to try to prevent future situations like this?

- *Stericycle, Inc.*, 372 NLRB No. 113 (2023) – What Does This Mean In Practice
- The following four policies are now likely to be deemed unlawful:
 - 1. Workplace civility rules - So called “workplace civility rules” requiring employees to positively engage with co-workers are likely to be deemed unlawful under the Stericycle standard.
 - 2. Loitering rules - A policy stating that, “at no time are you to loiter around the premises off duty” was previously deemed unlawful under the Lutheran Heritage standard. The NLRB specifically held that, “an employer’s rule denying access to all off-duty employees to all areas of its premises violates the Act unless there are legitimate business concerns to justify the rule or policy.”
 - 3. Rules prohibiting unlawful strikes, work stoppages, and slowdowns - Rules prohibiting employees from “engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any [Company Name] facility or official business meeting” have also been found to be unlawful under the Act. As organizing activity increases throughout the country, employers must be careful to determine whether and to what extent these prohibitions can be maintained.
 - 4. Restrictions on video and/or cell phone recording - This was one of the main policies at issue in Boeing, which permitted the possession of camera enabled devices. The policy added: “However, use of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security.” The rule was in place to comply with the federal contracting requirements.

Employer's Responsibilities to Provide Opportunities and Time Off for Employees to Vote

Oklahoma law 26 O.S. § 7-101 allows time off for voting

- **By law, employers must allow employees, who are registered to vote, two hours of time to vote either on Election Day or during early voting periods; however, there are several provisions.**
 - 1) **An employee must work at such a distance that extended time off would be necessary to vote.**
 - 2) **Time off for voting can only be granted upon oral or written request and must be made at least three days prior to the day in which the voter intends to be absent.**
 - 3) **The employer may select the day(s) and/or hour(s) the employee may use to vote.**
 - 4) **Time off will not be granted to employees, if a three-hour voting period exists before or after the employees' normal working hours.**
 - 5) **Employers may alter an employee's work scheduled to accommodate voting hours.**
 - **Upon proof of voting, an employee will not be subject to any loss of compensation or other penalty for such absence.**
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Ideas for planning in 2025 and beyond (NLRB, EEOC, DOL and DOJ)

- Since it's a rematch between President Biden and Donald Trump, you need to consider what happens if either wins (and who controls the houses of Congress). It's likely to be one of these scenarios:
 - President Biden vs. a Republican Congress (new).
 - President Biden vs. a split Congress (what we have now).
 - President Trump vs. a split Congress (what we had 2018-2020).
 - President Trump vs. a Republican Congress (what we had 2016-2018).
 - Proactive in-house counsel are starting to sketch out what these scenarios might mean to them and the company's strategic direction and goals.
 - 1. Be ready if the leadership at the NLRB, EEOC, DOL and DOJ:
 - Stay the same for 2025-2028
 - Change (but there is the phase-in timeframe of 1 year)
 - 2. Review employment and company policies to withstand transition.
 - 3. Get ahead on training and mentoring managers to prepare for the outcome.
 - 4. Shore up financial and insurance situations to be ready either way.
 - 5. Communicate with owners and/or decision-makers the issues and plan.
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Thank you!

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