



Political Speech At Work

Insights

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With the election just a month away, everyone seems to have strong opinions about the candidates and issues. Inevitably, these opinions will come up during conversations on the jobsite and can be disruptive and interfere with productivity. They also can expose employers and employees to legal risks if they do not fully understand the laws that govern political speech at work.

Many people are surprised to learn that free speech at work isn't the same as free speech on the street. For some practical advice on handling possible disruptions caused by strong political feelings at work, see *"Politics In The Workplace,"* elsewhere in this issue. In this article, we'll set out a breakdown of a number of laws that regulate political speech on the jobsite.

U.S. Constitution

The drafters of the U.S. Constitution viewed the First Amendment as being about the freedom of political speech. By protecting free speech, they intended to support citizen participation in democracy. Many people believe this participation applies to the workplace in terms of wearing a button, engaging coworkers in conversation or distributing an office-wide email to garner support for a certain candidate.

Because political campaigning is considered protected speech under the First Amendment, many employers and employees incorrectly assume they can exercise this right on the jobsite. But the First Amendment applies only to state action, that is, action taken by federal, state or local governments. These "protections" do not apply in the private workplace, and it would not violate the Constitution to terminate an employee for expressing views contrary to those of the employer. Such a discharge could violate other laws, however.

National Labor Relations Act (NLRA)

The NLRA may not apply directly to political speech in the private workplace, but it does give non-supervisory employees a limited right to engage in free speech and other protected concerted activities for their "mutual aid and protection." Under this law, employees may usually wear union buttons or insignia on a jobsite. They may engage in solicitations on the jobsite so long as neither the employee doing the solicitation nor the employee being solicited are engaging in such activities during working hours.

Similarly, employees may engage in the distribution of political materials on the jobsite so long as the distribution does not occur in working areas. Allowing candidates to come onto the jobsite to

the distribution does not occur in working areas. Allowing candidates to come onto the jobsite to campaign may undermine your rights to enforce otherwise lawful limits on employee solicitation or distribution.

Employees can engage in political campaigning that may be contrary to the interests or positions of their employer. For example, discharging employees for campaigning against repeal of a state's right-to-work law would be unlawful.

The National Labor Relations Board has been very active in applying employees' right to engage in protected concerted activities to social media such as Facebook and Twitter. You need to take care not to violate these emerging employee rights.

State And Municipal Laws

Many states, including California, Colorado, New York, and North Dakota, prohibit adverse action against an employee based on political expression or lawful, off-duty activity. Employers doing business in these states should not discharge an employee for the employee's speech or conduct outside of the workplace.

Election Laws

Employers can participate in political speech in several ways: allowing free use of facilities for campaigns, sponsoring a candidate, allowing employees to use company time to contribute to a campaign and openly endorsing a candidate. Based on a Supreme Court decision, a corporation may distribute publications to the general public and spend money in elections independent of a candidate or party.

However, an employer's right to campaign is limited based on the status of the employees to whom the campaigning is directed. When communicating with executives, stockholders or administrative personnel, a corporation may address any subject, including advocacy and solicitations for candidates and parties. But, corporations are prohibited from communicating with employees, salaried foremen and others who supervise hourly employees.

State And Federal Employment Discrimination Laws

Employers are prohibited from discrimination, harassment and retaliation under Title VII of the Civil Rights Act, the Americans with Disabilities Act and a myriad of other federal, state and local laws. Race, national origin, sex, and religion may sometimes be fundamentally intertwined with various political issues, including affirmative action, abortion, prayer in schools and immigration.

Employers and their agents should be careful that their discussions of candidates or issues do not imply directly (or even indirectly) that they will discriminate, harass or retaliate against any employee based on their opinions, which may be related to their status in a protected class.

The Bottom Line

While various laws limit employers' ability to restrict political speech on the jobsite, companies also may impose certain restrictions on employees. For example, you may limit employee solicitations to non-working time and distributions to non-working areas, as well as ban non-employees from engaging in such activities on a jobsite. You also may impose limits on employee use of corporate computer and email systems, or restrict access to certain Internet sites through employer-owned electronic systems.

The bottom line is that both employees and employers have rights in this area; check with your legal counsel before adopting overly broad restrictions on employee political activities or taking adverse action against an employee for such activities.

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