

POLITICAL APPRENTICE AT WORK? YOU'RE FIRED! A GUIDE TO SURVIVING THE ELECTION SEASON AT THE WORKPLACE

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This presidential election cycle creates unique concerns for companies dealing with employees who wish to discuss politics at work. Regardless of what side they fall on, some of your workers could be more passionate, maybe even incensed, about the perceived inefficiencies occurring in the federal government.

Take the rise and surge of Donald Trump and Bernie Sanders, for example. The overwhelming majority of individuals who support these two candidates feel underrepresented in D.C. Some of their followers are your employees, and they are particularly passionate this election season.

With passions running high, even turning into anger, individuals run the risk of making comments and behaving in ways which may be considered unprofessional, hostile, or even discriminatory towards each other. In fact, a recent study by CareerBuilder found that one in five employees who discussed politics at work had fights or heated debates with their coworkers over their political views.

This particular election cycle also brings other unique challenges. So far, we have heard presidential candidates comment on each other's or their spouse's treatment of the opposite sex, discuss plans for

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temporarily banning people from entering the country based on their religion, disparage people from specific foreign countries, and pronounce that people from a particular state have a different set of values. As you can imagine, these sorts of comments made in the workplace could have disastrous effects. So, what should you do?

The First Amendment

To answer that question, it is important to first distinguish the differing obligations of public and private employers. Private employers have greater flexibility on whether to allow political discussion in the workplace. The First Amendment – which guarantees freedom of speech and association – does not protect the curbing of political speech by private employers. For public employers, it is a little different.

As a general proposition, the First Amendment prohibits non-political public employees (such as police officers, firefighters, and teachers) from being terminated or demoted for supporting a particular political candidate. Those public employees are free to support the candidate of either political party (or neither) without fear of repercussion. An employee who proves they faced retaliation because of such support could have a valid First Amendment claim against their employer.

The NLRA

The second consideration to take into account is the federal National Labor Relations Act (NLRA). This statute applies to all private employers, even nonunion workplaces, and in certain circumstances protects politically charged speech. In pertinent part, Section 7 of the NLRA gives employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

The “mutual aid or protection” provision covers not only interactions between an employer and employee, but also covers efforts by employees to “improve their lot as employees through channels outside the immediate employee-employer relationship.”

Therefore, the NLRA protects certain concerted actions by employees who are discussing changes to a workplace condition. As you can imagine, with political hot-button topics such as minimum wage and immigration issues, politics and workplace conditions can often run hand-in-hand. In fact, the General Counsel of the National Labor Relations Board (NLRB) concluded that an employer may not interfere with political speech where there is a "direct nexus between employment related concerns and the specific issues that are the subject of the advocacy."

For example, employees are generally protected if they say, "Support Bernie Sanders because he will raise the minimum wage," whereas other employees would not be protected if they simply said, "Support Donald Trump because he will make America great again." Once determined to be protected activity, the NLRB will then generally look to your policies regarding employee conduct during work hours and in working areas to determine employees' ability to engage in that activity.

The Board also pays close attention to your restrictions on employees' use of social media during and after work hours. You should take caution to ensure that your social media policies and practices are applied fairly and consistently throughout this election season (read more [here](#)).

Federal Antidiscrimination Laws

Your next consideration should be federal antidiscrimination laws. These statutes do not directly protect political activity or speech, but your workers' activity or speech could lead to circumstances that trigger these laws, especially because other employees may be offended by the topic of discussion. The most common federal statutes – Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act – prohibit discrimination based on race, color, sex, national origin, religion, age, disability, and genetic information.

Many of these protected categories fall squarely within political discourse. As such, you must be careful to closely monitor behavior which may trigger a complaint of discrimination or harassment. Managers should take caution when discussing political candidates and issues to ensure that the discussion does not explicitly or implicitly discriminate, harass, or retaliate in any manner related to one of the protected classes mentioned above.

State Laws

The final consideration you should take into account is the law of your particular state. Some states broadly prohibit adverse action against an employee based on political expression, while others provide no such protections. You should look to the law in each state where you operate to determine the level of political expression protected.

In North Carolina, for example, it is unlawful for an employer, directly or indirectly, to intimidate, discharge, or threaten to discharge an employee on account of any vote the employee has cast or may intend to cast. Whereas, in South Carolina, it is unlawful to intimidate or discharge an employee "because of political opinions or the exercise of political rights and privileges guaranteed to every citizen" by federal or state law.

If you operate in a state that prohibits adverse action based on political expression, you should take extreme caution prior to taking action against any employee who has made their political expression known. Furthermore, as good practice, you should rarely discharge an employee for political speech outside of the workplace, even if the opinion runs counter to your company values.

Conclusion

Election time can be fun. Employees who are passionate about candidates are also likely to be passionate about other things, which you can use to your benefit. That being said, even if your company policy requires workers to keep political discussions in the workplace to a minimum, such discussions are

bound to happen over the next year. As such, here are a few tips to consider when dealing with your very own Donald or Hillary this election season.

HELPFUL TIPS

1. Encourage your employees to vote, but where possible, remain neutral. Voting is a good thing.
2. Avoid inappropriate comments and jokes about political views. These can make certain employees feel singled out.
3. Remind employees of your harassment, discrimination, and equal employment opportunity policies and retrain them if necessary. If you do not have these policies, get them!
4. If you do not have one, consider adding a company "Code of Conduct." It should outline your expectations that all employees will treat each other with dignity and will respect differences in opinions.
5. Consider amending your dress code policies to cover political apparel.
6. Limit employee solicitations in general to nonworking time and distributions to nonworking areas.
7. Limit employees' use of email and restrict access to certain Internet and social media sites. Your electronic policy should advise employees that they should only use the company's information systems for business-related purposes and that all activities will be monitored.
8. Deal with any productivity issues created by political discussions rather than the specific content underlying the speech, and make sure you are consistently applying these standards.
9. Thoroughly and quickly investigate any allegation of bullying or harassment.

10. Before disciplining an employee for political expression, check to see if the political expression is concerted protected activity; if the manner of expression is protected; and whether your policies, as previously applied, allow you to discipline the employee.
11. Always check with counsel before implementing any plan or policy curbing political speech or before taking adverse action against an employee because of political speech or expression.

For more information, contact the author at ABridgers@fisherphillips.com or 704.778.4173.