A Post-Election Survival Guide For Employers

HOW TO ADDRESS DIVIDED AND DISTRACTED WORKERS

Insights
1.03.17

In the two months since the culmination of what many call the most bitterly contested presidential election in American history, employers are already reporting the conflict among employees is unlike any other in modern times. The 2016 election brought out the good, the bad, and the ugly in many Americans and, in turn, many American workplaces.

Unfortunately, the divisiveness did not end on November 8. Time Magazine recently referred to our nation as "The Divided States of America," and within the past few months we have seen several high-profile examples of dissension between corporate leaders and their employees over the election results. Some conflicts have resulted in employees leaving – or being invited to leave – over differences in opinion with their chief executives.

In anticipation of the inauguration on January 20, 2017 and the months and years to follow, employers can take steps to address continuing issues that result from political discussions at work.

The Perils Of Politics At Work

Employers often prioritize positive attitudes and teamwork among employees. Yet the election has provided a fresh topic for disagreements – some vociferous – between coworkers. These types of disagreements tend to keep workers from devoting their best efforts to their appointed tasks.

So how should an employer respond when an employee expresses particularly enthusiastic support for, or demonizes, the president-elect? Or what if employees voice their strong opinions to coworkers with differing views? You must first understand the risks involved with such political discussions in the workplace before figuring out how best to address them.

Risks of political discourse at work include loss of productivity, decreased morale, and distraction. Time spent at the watercooler discussing the election eats into the workday. What may begin as a polite expression of views can quickly turn into a heated debate, leaving employees with lingering resentment and an inability to work together productively. And those who believe politics have no place in the workplace may become increasingly despondent when their coworkers continue to discuss these issues.

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Another risk is that an expression of views on some of the election's hotly contested issues – such as immigration and women's rights – can result in a complaint of unlawful harassment or discrimination. Although federal antidiscrimination laws, such as Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, do not include protections for employees who engage in political expression, they do prohibit discrimination based on race, color, sex, national origin, religion, age, and disability. Moreover, some state laws provide additional protected classes. Discussion concerning a political candidate, or his or her stance on a protected class, can increase the risk of a discrimination or retaliation claim under federal or state law.

For example, imagine one of your managers says something like, "Trump is too old to be president" or "a woman should never be president" or "I can't wait until they build that wall." An older employee who is later terminated may point to the Trump remark as evidence of age discrimination, a woman passed over for promotion may bolster a gender discrimination claim with the thinly veiled Clinton comment, while the wall-building comment could support a national origin lawsuit. These examples illustrate how the line can quickly blur between politics and possible discriminatory views that make an employer vulnerable to a discrimination or harassment claim.

As President-Elect Trump Used To Say, "You're Fired!"

Can employers discipline or fire employees for expressing support for, or disparaging, President-elect Trump? In most states, employment is "at will," meaning employees can be fired for any lawful reason, or for no reason at all. Although a small number of states offer some protection to employees involved in politics, most employers have the legal right to fire or discipline employees for engaging in political activity or expression at work.

But what happens when that one boisterous employee makes a grand gesture, stands up on a chair, and shouts to his colleagues that his employer's rules barring political speech are illegally inhibiting their freedom of speech? Former Supreme Court Justice Holmes explained it best when he wrote "[an employee] may have a constitutional right to talk politics, but he has no constitutional right [to be employed]." It is pure myth that employees have a constitutional right to free speech while at work.

With few exceptions, the First Amendment does not protect private sector employees who engage in political activity or expression at work from adverse action. Private sector employers may lawfully terminate or discipline employees for expressing their political beliefs. You must keep in mind, however, that the National Labor Relations Act (NLRA) protects employees who engage in "concerted activities" for their "mutual aid or protection," whether or not your workplace is unionized.

If a group of employees (and under some circumstances, a single employee) discusses politics in relation to wages or workplace conditions, you should be mindful of their rights under the NLRA and assess the risks before imposing discipline. The National Labor Relations Board (NLRB), which

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enforces the NLRA, has repeatedly ruled in favor of employees fired for protesting workplace terms and conditions on social media, even when the employee uses profane language or posts derogatory comments about the employer or managers.

Can't We All Just Get Along?

About a quarter of American businesses have implemented some policy governing politics in the workplace. If you have not already done so, you can implement a policy that addresses the propriety of political expression, office decorations, and apparel in the workplace, spelling out the consequences for failure to comply. A clear and consistently applied policy is the key to keeping your workforce productive and minimizing distracting discourse.

Should you choose to allow political speech in the workplace, review your company's policies and codes that address discrimination, harassment, and bullying. Remind your employees that your code of conduct mandates mutual respect among employees, and failure to abide by the code will result in disciplinary action. If you do not have a code of conduct, now is a good time to implement one.

Refer to your social media policy and remind your employees that what they do on the internet is never private. Reiterate that attacking a colleague's belief, political or not, can constitute harassment. Also remind employees of your open door policy, and encourage those who feel that they have been subjected to harassment or discrimination to utilize the policy. Be sure to promptly investigate all complaints and concerns.

A simple step you can take right away is to prepare and distribute a one-page summary of relevant policies. This will remind employees of your code of conduct, anti-harassment rules, nondiscrimination policies, and any other guidelines that govern politics in your workplace. You should emphasize that, regardless of political views, employees are expected to treat each other with respect and professionalism.

This one-pager can state that your company has a zero tolerance policy for name-calling or bullying because of someone's political ideologies. You can thus turn the election into an opportunity to educate employees about mutual respect, perhaps bridging the divide between groups at work.

Action Steps

In conclusion, here is a helpful summary of action steps you can take to minimize risks and ensure post-election harmony in your workplace.

1. **Be aware of all applicable laws** in the states where your company does business. Some states have laws protecting employees from adverse action because of political affiliation, while some have laws that protect employees based on their off-work activities.
2. **Review and, if necessary, strengthen policies** governing workplace behavior including political expression. Ensure that prohibited conduct and consequences are clear.

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3. **Consistently enforce your policies**. Inconsistent enforcement is a surefire way to increase the risk of a discrimination or harassment claim.
4. **Create a plan** to address possible heated political discussions among workers. You can even draft scripts for managers. They can be geared toward emphasizing employees' worth, teamwork, and shared goals.
5. **Train frontline managers and supervisors** to be aware of discussions and conduct that could be considered bullying or harassment. Managers and supervisors should know not to ignore such behavior, and to take prompt steps to diffuse these situations.
6. **Remind employees of available resources**, including human resources professionals, employee assistance programs, educational opportunities, and any other avenues where they can raise concerns.
7. **Finally, remain flexible**. There is no one-size-fits-all solution, and even the best-laid plans may not prepare you for every possible situation. However, clear expectations and well-trained leaders should go a long way to address most scenarios.

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