



Free Speech is Front and Center

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This election year, it seems everyone has strong opinions about the candidates and issues. Inevitably, these opinions will come up during conversations in the workplace. These conversations may disrupt the workplace, but employers need to understand the legal risks of limiting such speech before they cross the line and violate employee rights. Here is a brief outline of some of the laws that regulate employer' attempts to curtail employee free speech.

The First Amendment

Since political campaigning is considered protected speech under the First Amendment, many employers and employees incorrectly assume they can exercise this right in the workplace. The First Amendment applies only to state action—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. However, such a discharge may violate other laws.

National Labor Relations Act (NLRA)

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. As such, employers should be careful not to violate these emerging employee rights.

State and Municipal Laws

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. 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.

Other 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.

The bottom line is both employees and employers have rights in this area, so employers should check with their 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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