

HOW TO HANDLE UNPRECEDENTED WORKPLACE TENSION THIS ELECTION SEASON: A 10-STEP ACTION PLAN

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What a year! 2020 has been full of challenges, both personal and professional. Personally, each of us have our own story. Professionally, workplaces have been rocked with unprecedented turmoil as we navigate COVID-19 and the lasting impact of the social justice protest movement. And now, we will close out 2020 with a contentious presidential election.

A pandemic, racial tensions, concerns about inaccurate news, fears of election fraud, and the potential for high stakes espionage may make workplace issues seem trivial – but just wait until it's *your* workplace, regardless of whether you are an employee, manager, or senior leadership. You should anticipate election-related workplace issues regardless of whether your workplace remains virtual, never closed, or falls somewhere in between.

As we count down to the election (less than 60 days to go!) and then the inauguration (a little more than four months to go!), we all have some listening to do. Why listen? Because it may turn out that you are wrong. This article will cover some common misconceptions and provide some legal standards to keep in mind. It then offers a 10-point action plan to proactively avoid problems and respond to them if they arise. The article concludes with information about an interactive workshop that may be of value in helping you address specific issues of tension in your workplace.

NUMBER ONE EMPLOYEE MISCONCEPTION: “I HAVE FREE SPEECH RIGHTS!”

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Many employees believe they have “free speech rights” to speak their minds – including at work. They are wrong. The First Amendment protects *citizens* against *government* action limiting speech. For private employees, very little speech is protected. Government employees have broader, but not unlimited, speech rights.

However, the First Amendment has no application to a private employer. A “private employer” does not mean a privately held company – it means all *non-government* employers including public, private, and not-for-profit. Employees of non-government employers do not have a “constitutional” right to speak their minds about politics in the workplace. As a result, non-government employers may generally regulate political expression as they would other forms of disruptive workplace communication. Business owners, leaders, and managers may address political discussion during working time, even in the absence of potentially offensive content.

NUMBER ONE EMPLOYER MISCONCEPTION: “THIS IS A NON-UNION WORKPLACE!”

A big surprise for many employers is that the National Labor Relations Act (NLRA) applies to your organization, even if you have a non-union workplace. Section 7 of the NLRA applies to all employees in the private sector, regardless of their union or union-free status. Section 7 gives all employees the right to act together for purposes of collective bargaining or other mutual aid or protection. The NLRA recognizes that employers have a right to regulate speech during work time so long as that regulation does not end up encroaching on employees Section 7 rights.

For an employer, the difficult task is determining the difference between speech that can be regulated (such as a disruptive discussion about politics) and speech that cannot be regulated because the subject matter has crossed the line into Section 7 territory. For example, a worker may share the news that a certain candidate pledged to raise the minimum wage. The employee may chat up co-workers about the news in a way that touches on their own workplace scenario. That conversation may constitute Section 7 activity if there is evidence that the issue at hand establishes a shared concern. Such discussions may blur the line between political speech and protected speech.

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As if blurry rules were not enough of a challenge, NLRA protection also extends to taking time off work to attend rallies or protesting when there is a tie to work-related issues such as pay equality. NLRA protection further extends to organized activity in support of another employer's workers (such as the living wage movement) and appeals to legislators when connected to working conditions.

MUTUAL MISCONCEPTION: "JUST VOTE. OR JUST VOTE THE *RIGHTWAY*."

Some employers take a proactive (or some might say offensive) approach by encouraging employees to vote, while some employees may ask to share the "get out the vote" message. Simple encouragement to vote is low-risk for the employer, but you should ask your workers to seek company permission before sharing even a neutral "vote" message.

Some employers go as far as suggesting how employees should vote based on the potential business impacts. This is a dangerous choice, and a line you should resist crossing. Both state and federal laws impact (or outright prohibit) making voting recommendations to your workers depending on the context. Even in a state where an employer can make recommendations, it is always illegal to coerce an employee to vote a certain way.

Because the line between a recommendation and coercion is a thin one (when someone is dependent on your company for their livelihood), you should err on the side of caution. Never fire or take any adverse action against an employee in connection with voting, and actively avoid the appearance of coercion. While New York and California are particularly employee-friendly when it comes to political activity, you should be careful in every state and consider local laws, too. Also, remember that most states guarantee an employee time off to vote if needed – sometimes even with pay. Be sure you know the voting laws in your states of operation.

FINDING COMMON GROUND: A 10-POINT PLAN

So, how do employees and employers find common ground? Both management and employees need to be reminded of workplace rules, the necessity of respect in the workplace, and the importance of working productively. And, in these crazy times of COVID-19, with so many employees working

remotely, you should reiterate that workplace rules are not limited to “the physical workplace.” Workplace rules apply when an employee is working or interacting with co-workers or clients regardless of where and how the work is being performed. At a minimum, be sure these 10 key points are clear to all:

1. Remind all employees at all levels about your equal employment, anti-discrimination, and anti-harassment **policies**. Consider offering extra training to reinforce your message and adding specific examples of inappropriate conduct to your policies. You may find employee counseling easier if you have policy language specific to political speech.
2. Train your managers on how to **interrupt conversations** that may be problematic and put the focus back on business. They should emphasize productivity and business concerns rather than the nature of the speech, unless it is serious.
3. Teach management about the relationship between political activity and protected activity under the **NLRA**.
4. Evaluate your **existing policies**. Do they inadvertently infringe on NLRA rights? In particular, review your social media policy to determine if it is lawful.
5. Encourage employees who feel uncomfortable to **speak up**. Clearly describe multiple avenues for complaints to ensure that employees feel comfortable reporting any issues.
6. Remind everyone of the **consequences** of disrespectful behavior and follow through with consistent counseling and discipline.
7. Consider the potential impact of the increased use of **videoconferencing** and the ease of recording conversations through platforms like Zoom and others.
8. Check your **state and local laws** for rules about politics in the workplace. Not all states treat these issues equally.
9. Remind everyone that while they are entitled to their opinions, those **opinions** should generally not be expressed at work, whether virtual or in person.

10. Remind management about **exposure risks** if they commit a misstep, both from a legal perspective and in terms of public relations damage.

OR WHAT IF COMMON GROUND LITERALLY MEANS COMMON GROUND?

Some employers may find that company culture supports an environment of open dialogue and respectful exchange of ideas on tough subjects. The average employer may find this a slippery slope. But in the right environment and with the right guardrails, you may support employees sharing their stance on contentious issues.

While it is legal for you to bar political speech at work, what is legal may still be bad for business or employee morale. Restrictive workplace rules on politics and social discourse could turn off customers or lead to a boycott. In our highly political and digital age where people are ready to take a stand against a company based on political, social, and moral issues, you might need to collaborate with company decisionmakers at all levels to determine what's right for your organization.

AND WHEN THE INEVITABLE HAPPENS...

When you receive an employee complaint about politics, political issues, or voting, be ready to respond appropriately. Track, document, and investigate complaints. Make sure the employee who made the complaint receives status updates on your investigation. This is not the time to think "this will be over in November and everything will go back to normal." Consider whether your policies have been violated and determine the appropriate response. Remember: no response is never the appropriate response.

You should plan in advance how to address political workplace activity such as apparel buttons (or stickers) that champion causes or support candidates, get-out-the-vote campaigns, inviting political candidates to the office or coworkers to partisan events, coworkers who are political candidates, coffee break discussions about the latest sound bite or debate, bumper stickers, sharing of political memes, jokes, or banter, social media posts, charitable campaigns with inadvertent ties to political issues, and a whole host of similar activity. Be sure your front-line managers are trained and equipped to manage such issues or trained to escalate these matters to a designated response team. And come

election day, be prepared for reduced productivity. Plan now to allow employees any needed time off to vote without actual or implicit barriers and be sure to comply with state and local laws on voting time – and sometimes even voting pay.

RESOLVING CONFLICT IN THE WORKPLACE: INTERACTIVE TRAINING SESSION

Is your organization prepared to handle the tensions in the workplace related to freedom of speech? Do your supervisors know how to handle these difficult conversations that may be caused by the pandemic, social justice issues, and the upcoming election? Do you have appropriate policies in place to foster an environment of dignity and respect in your workplace? If not, your organization could pay the price in terms of potential litigation, low morale, lost productivity – even workplace violence. So what can you do?

Our firm's wholly owned subsidiary, [Foundations Human Resources Consulting](#), has specifically designed an interactive training session entitled "Managing 2020 Workplace Tensions" to meet the unique challenges we are facing at the current time. At this session –which can be customized to fit the needs of your organization – management and front-line leaders alike can learn how to successfully handle tough societal issues that are impacting both in-person and remote workplaces. These issues are likely causing tensions now and will almost certainly increase through the end of the year. Don't get caught unprepared.

The training is two hours in length and can be delivered virtually or in person. If you are interested, please contact your Fisher Phillips attorney or contact Caroline Baesler ([by email](#) or phone at 859-286-1117) for scheduling and pricing information.