

ELECTION SEASON IN THE WORKPLACE: EMPLOYERS' ESSENTIAL FAQs FOR 2024

Insights
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The coming election year promises to be turbulent, and your workplace will not be immune from the challenges that are sure to face us. What do you need to know about your rights and responsibilities as an employer now that the 2024 election season is officially upon us? This handy FAQ document provides all you need to know throughout the primary elections and right up through Election Day 2024.

Employees Expressing Political Opinions at Work

An employee is claiming they have the right to say whatever they want at work about the upcoming election, saying they have a First Amendment right to free speech. Are they correct?

"But I have a First Amendment right to say whatever I want!" is a common refrain you might hear from applicants or employees who face workplace repercussions for the things they say. However, the First Amendment's "Freedom of Speech" guarantee generally does not apply to private employers disciplining their employees for engaging in prohibited conduct. The Constitutional freedoms found in the Bill of Rights and elsewhere generally restrict state action by the government and not private employers deciding how to manage their workforces.

So that means we have an unrestricted right to prohibit whatever election-season speech in the workplace we want? And we can discipline or even fire any employee that violates our rules?

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Not so fast. Private sector employees have the right to engage in concerted activity under the National Labor Relations Act (NLRA) for purposes of collective bargaining or other mutual aid or protection. This is true in both union and nonunion work groups.

Under Section 7 of the NLRA, concerted activity includes statements made for the purpose of initiating, inducing, or preparing employees for group action, such as discussions about higher wages, changes to work schedules, and job security. Therefore, certain political discussions impacting terms and conditions of employment would fall under the NLRA's purview, while political activity that is unrelated to employment concerns would not be protected.

It is worth noting that the General Counsel for the National Labor Relations Board (NLRB) wants to expand the definition of protected concerted activity to specifically include certain "political statements," such as writing phrases in support of political and social causes on company uniforms. We'll track the status of this issue throughout election season and provide an update should employers need to adjust their actions.

Do we have any other concerns besides protected concerted activity claims if we discipline or terminate an employee for expressing a political opinion at work?

Federal antidiscrimination laws don't directly protect political activity or speech, but your workers' activity or speech could trigger these laws. If the discussion directly (or perhaps even indirectly) involves race, color, sex, sexual orientation, gender identity, national origin, religion, age, or disability, you need to be careful. After all, an employee could claim that your action responding to their political discussion on such subjects is actually a proxy for illegal discrimination. Think twice and check with counsel before disciplining any employee for engaging in such a discussion. You'll also want to be consistent in how you address political discussion across all employees so as not to create any appearance of preferential treatment based on a protected characteristic.

You'll also want to check the state law where you operate before taking action. Some states broadly prohibit adverse action against an employee based on political expression, while others provide no such protections. In North Carolina, for example, it is unlawful for an employer to intimidate,



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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 such a state take extreme caution prior to taking action against any employee who has made their political expression known.

One employee is wearing a “Trump 2024” button to work. Another one just hung a “Biden/Harris 2024” poster in their workspace. And one more employee told us they just got a t-shirt promoting a local candidate and will be wearing it to work this Friday. We’re afraid this will all lead to arguments and tension and become a workday distraction. What can we do about this kind of political expression?

Creating and implementing a consistent dress code or appearance policy is key in these situations. Be sure to consistently enforce any rules prohibiting employees from wearing apparel and accessories with political statements. For example, if you don’t allow employees to wear “MAGA” hats in support of Trump, you also shouldn’t let them wear hats promoting Biden or any other political candidate. Likewise, you can establish reasonable, consistent limits on posters and other workplace displays, so long as you comply with the NLRA rules mentioned above regarding employment topics.

An employee is volunteering for a local campaign and wants to help promote the candidate here at the workplace. They want to email around a call for volunteers and hang a sign-up sheet in the breakroom, and have even asked about holding a lunch-and-learn visit from the candidate. How should we approach this?

You can generally prohibit employees from engaging in political activities such as campaigning or distributing political literature in the workplace during work hours. But there are some things you need to know about any non-solicitation rules you put into place.

- You need to enforce them consistently and across the board. If you allow an employee to post a sign-up sheet for Girl Scout cookies in the breakroom, you may also have to allow someone else to post a political rally sign-up sheet.

- You need to make sure you don't stop employees from engaging in political solicitations during breaks and meals (even paid breaks).
- Make sure you distinguish between union-related activities or other actions taken for the mutual aid and protection of your workers – which are generally protected – from political speech.

Is there anything we can do to try to minimize the chances of our workers getting into arguments about politics this year? And what should we do if we learn that workers are already getting into arguments?

You probably already know that workers want to talk to each other about politics. In fact, 61% of workers in the country say they've discussed politics with co-workers during the last year, [according to a Glassdoor survey](#). While you might not be able to stop the conversations altogether, it's important to set expectations on professionalism and appropriate workplace interactions.

Consider taking the time early this year to train managers on how to spot unproductive or heated conversations and address them appropriately. You may also want to designate a contact in your HR or legal department for managers to call with concerns. You'll also want to work with legal counsel to ensure your workplace conduct policies are up to date given that the [legal standards have recently shifted when it comes to how workplace conduct can be addressed](#).

Employees Expressing Political Opinions Outside of Work

We learned that one of our employees posted a very strong opinion about a very controversial topic related to this election season on their social media platform. What can we do about it?

In the U.S., nearly all states adhere to the at-will employment doctrine. Under this doctrine, an employer (or employee) may terminate the employment relationship at any time, for any reason, with or without cause, so long as that reason is not otherwise prohibited by law. But the evaluation is not that simple, and there are many factors to consider before addressing an employee's social media post.

You should note, for example, that some states have an off-duty conduct law that protects an employee's lawful activity

off the employer's premises during non-working hours. These state laws vary in the level of protection they offer employees, but they definitely could apply in situations where an employer learns of an individual expressing controversial opinions in a public setting. [You can read our playbook for responding to controversial opinions in the workplace here.](#)

What can our social media policy say to try to prevent future situations like this?

You can generally require employees to be respectful with respect to postings related to company business, to uphold workplace confidentiality or trade secrets, and not use incendiary language when discussing coworkers or company business. But these aren't absolute rules. [A federal appeals court in fact ruled that an employee who used a public Facebook page](#) to curse out his boss – and his boss's mother and entire family – should not have been fired from his job because of the specific circumstances surrounding the situation. Make sure you read our summary of that case and understand why certain inappropriate social posts might be in fact legally protected if they relate to protected concerted activity.

Finally, make sure your social media policies comport with [the relatively new NLRB standard released in 2023 that restricts employers from imposing certain workplace conduct rules](#). If you haven't taken a look at all of your policies and adjusted them in light of that new ruling, you should do so now before election season gets heated.

Employer Rights to Support Candidates or Positions

Our organizational leaders are all solidly in favor of a specific candidate that they believe will benefit our organization and our employees if elected. Can we use company resources to support that candidate?

Can private employers do so? Yes. Should you? The answer is quite the double-edged sword. On the one hand, [a recent survey by Glassdoor](#) revealed that 64% of workers appreciate and feel supported when a company takes a public stance on a political position they care about. But on the other hand, only 45% of employees say that companies should actually do so. And to make it worse, 36% of employees say they wouldn't even apply for a company if the CEO supported a candidate they didn't agree with. That

number jumps to 49% when we just isolate Gen Z applicants.

Any decision about whether and how your business demonstrates support for a candidate or position should be made deliberately and with the input of stakeholders and leadership across a broad organizational spectrum. You should take your company culture into account before doing so. You will also want to provide clear direction to your managers regarding the process for taking such positions. You don't want a renegade leader taking positions "on behalf of the company" unless the entire organization has signed off on such a move.

Can we take it a step further and actually encourage employees to vote for a specific candidate or position?

Suggesting how employees should vote based on the potential business impacts 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.

We want to require our employees to attend a meeting where our leadership will talk about why a certain candidate is the better choice. Can we do something like that?

Be cautious about doing so in New York, Minnesota, Connecticut, Maine, and Oregon – [where so-called "captive audience" meetings are banned by state law](#). These states prohibit employers from requiring employee attendance or participation in employer-sponsored meetings or otherwise requiring them to listen or receive communications regarding employer opinions on "religious" or "political"

matters under threat of discharge, discipline, or some other penalty.

As for everywhere else, captive audience meetings are still allowed – for now. Make sure you stay up to speed on swiftly changing labor law at the federal level, as things could change in a heartbeat. [The NLRB's General Counsel specifically said she believes mandatory meetings violate federal labor law and has urged the Board to overturn 75 years of precedent and ban them.](#) We'll track the status of this law throughout election season and provide an update should things take a turn.

What about using company funds for political donations supporting candidates or positions that we believe benefit our organization's mission?

There are two issues to consider here – *can* you do so? And *should* you do so?

There are some clear rules to keep in mind about whether your organization can legally make political contributions. Federal law permits certain specific business entities to do so depending on how they are taxed. Professional corporations and federal contractors, among others, are barred from making contributions. Some organizations can also set up or contribute to Political Action Committees in some circumstances to provide support. Check with your tax advisors for details about whether and how your organization is permitted to financially support candidates, political parties, or causes.

But corporate political donations come with risk. Your employees and potential applicants – not to mention the general public, your customer base, shareholders, and other potential investors – will take note of your activities and could adjust their actions accordingly. Make sure you understand the potential ramifications of your corporate donations by including your leadership and main stakeholders in an honest conversation before opening your checkbook.

Providing Employees Leave to Vote

What are our responsibilities when it comes to allowing employees time off work on Election Day?

While federal law does not require you to provide employees with time off to vote, you should carefully review the applicable state law. Many states allow employees to take leave to vote in certain circumstances. Notably, however, state laws vary on the details, including the following aspects:

- Whether voting leave is paid or unpaid;
- How much time an employee can take;
- Whether employees are entitled to leave if the polls are open for a significant period before or after their shift;
- Whether employees must provide advance notice before taking leave to vote;
- Whether employers can designate voting hours;
- Whether you can ask employees to provide proof of voting; and
- Whether the right to leave includes early voting or registering to vote.

Additionally, states like California and New York require employers to post notice about employees' right to take voting leave. *Want to know more? Reach out to your Fisher Phillips attorney and stay tuned for our state-by-state resource which we'll be releasing later this year.*

Our state allows voters the option of mailing in their ballot, which they can do weeks ahead of Election Day and on their own personal time. Can we require them to do that so that they don't need to take time off work?

You could be violating state voting leave laws in some locations by requiring employees to mail in a ballot rather than attend the polls on Election Day. So, it's a good idea to allow employees to participate on Election Day or consult legal counsel before placing parameters on such leave.

Bookmark This FAQ and Check Back!

We will update this FAQ throughout election season to keep pace with all the twists and turns sure to come our way. Make sure to bookmark this link and check back frequently.

Conclusion

If you have questions, contact your Fisher Phillips attorney, the authors of this FAQ, or [any attorney in our Government Relations Practice Group](#). Make sure to sign up for [Fisher Phillips Insights](#) to stay up to speed on the latest developments and any critical updates to this FAQ document.