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Political Expression at Work

By Justin DiGennaro

In recent months, many employers have struggled with how to respond when the heated political discourse sparked by the 2016 presidential election and its aftermath has spilled over into the workplace. On the one hand, permitting a free-for-all of political discourse can negatively impact workplace productivity and employee morale, as well as increase the risk of discrimination claims when bosses and subordinates disagree about political issues that touch upon race, gender, religion, and the like. On the other hand, prohibiting any discussion of politics at work would likely violate the National Labor Relations Act. In this article, we outline the federal legal landscape¹ governing political expression at work and provide guidance for employers on how to handle employees' political discourse consistent with federal law.

The First Amendment

Many employees wrongly assume that an employer prohibition on discussing politics at work or retaliation against employees for holding unpopular political opinions would violate employees' First Amendment rights to freedom of speech. In fact, the First Amendment prohibits only governmental abridgement of free speech. It does not give the employees of private employers a constitutional right to express their views at work. It does not restrict private employers from regulating speech at work, or even prohibiting political discussion altogether at work. Nor does the First Amendment restrict private employers from refusing to hire, deciding to discharge, or taking other adverse action against employees who express political views with which the employer does not agree.

Federal Anti-Discrimination Law

Federal anti-discrimination laws do not directly address political speech or activity. However, the characteristics on the basis of which federal law prohibits discrimination—race, color, sex, national origin, religion, age, disability, genetic information—often overlap with political issues. Employees' statements about such political issues could lead to a complaint of discrimination or harassment, if other employees are offended by the statements and/or view them as evidence of bias against a particular group.

The National Labor Relations Act

Section 7 of the National Labor Relations Act (NLRA)—which applies to unionized and non-unionized non-supervisory employees—protects

employees' right "to engage in ... concerted activities² for the purpose of ... mutual aid or protection."³

The National Labor Relations Board takes the position that political advocacy by employees qualifies as "mutual aid or protection" when "there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees."⁴ For example, employee appeals to legislators regarding working conditions—e.g., wages, health benefits, workplace safety concerns—are protected. In contrast, the NLRA does not protect purely political activity, e.g., campaigning for a particular candidate, without reference to specific workplace-related issues. The same test applies to political discourse within the workplace.⁵ For example, the NLRB has found that an employer policy against discussing "topics that may be considered objectionable or inflammatory, such as politics and religion," is unlawful absent clarifying examples because "Section 7 protects communications about political matters, e.g., proposed right-to-work legislation."⁶

Advice for Employers

There are a number of steps that employers can take to try to minimize the possibility for political conflict at work and the ensuing legal risks, while still providing the appropriate space for discussion, as mandated by the NLRA. Some steps that employers may consider taking include:

- Adopting a "no political activity" policy with carve-outs for communications and activities protected by the NLRA or applicable state law.
- Discouraging supervisors (who are not protected by the NLRA) from having political discussions with subordinates, as such conversations may be construed as potentially discriminatory or hostile.
- Consistently enforce all workplace "political activity" policies regardless of a particular employee's political persuasion, as well as consistently enforce all no-solicitation and no-distribution rules regardless of the content of the solicitation. This may include prohibiting the solicitation of money or other support for any causes (political, charitable, or otherwise) during working times in working

areas, and/or prohibiting the distribution of any non-work-related materials or literature during working times in working areas.

1. Employers should be cognizant that certain states and municipalities have laws governing the extent to which employers may restrict employees' political expression and/or discriminate against employees for expressing their political beliefs. See e.g., Cal. Lab. Code § 1101 (West) ("No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office; (b) controlling or directing, or tending to control or direct the political activities or affiliations of employees."); N.Y. Lab. Law § 201-d(2)(a) (McKinney) ("[I]t shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privilege of employment because of an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property..."); D.C. Code Ann. § 2-1402.11 (West) ("It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived [] political affiliation of any individual.").
2. The phrase "concerted" has been interpreted to cover the actions of individual employees when they seek to induce group activity or when they act as a representative of at least one other employee. See *N.L.R.B. v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984).
3. 29 U.S.C. § 157. See *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 563-66 (1978).
4. Ronald Meisburg, N.L.R.B., *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy*, Memorandum GC 08-10 (July 22, 2008), at 7.
5. Protected political expression that takes place during working times in working areas, however, may be subject to restrictions by an employer imposed by lawful and neutrally-applied work rules. *Id.* at 13-14.
6. Richard F. Griffin, Jr., N.L.R.B., *Report of the General Counsel Concerning Employer Rules*, Memorandum GC 15-04 (Mar. 18, 2015), at 11.

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