Insight

IN-DEPTH DISCUSSION

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Election 2016: Political Speech and Activity in the Workplace

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On November 8, voters across the country will head to the polls to determine the next president. Some states have already begun the early voting process. Voters will also decide who fills various U.S. congressional seats, who will represent them at the state and local levels, and which ballot initiatives will be approved. As voters contemplate their important choices, the heated rhetoric on the campaign trail will undoubtedly make its way into the workplace. For instance, in June 2016, 26% of responding human resources professionals reported an increase in the amount of employee political concern and expression this election season.[1]

In addition to talking with their colleagues about political issues, workers may also show greater interest in contributing to or volunteering for campaigns, or otherwise taking an active role in the process. How should employers respond when politics inevitably spills over to the workplace? In some cases, employers might seek to minimize political discussions at work. In others, employers themselves might try to introduce politics into the workplace. Regardless of whether an employer allows political activity in the workplace, employees have certain rights to conduct political activities outside of work, and, in some jurisdictions, to take time off from work to vote in an election.

Above All Else, Heed Federal Law

It is a federal crime to interfere with an individual's ability to vote for federal candidates, or to coerce that individual to cast a ballot in a specific way.[2] Similarly, it is unlawful to bribe or offer an "expenditure" to an

1 According to survey conducted earlier this year, 26% of responding human resources professionals reported an increase in employee political concern and expression this election season. Society for Human Resource Management, *Election 2016 in the Workplace: HR Reports Some Political Volatility at Work, SHRM Survey Shows*, (June 19, 2016), https://www.shrm.org/about-shrm/press-room/press-releases/pages/political-activities-at-work-survey.aspx.

2 18 U.S.C. § 594.

individual in exchange for voting a certain way.[3] Employers and their agents must refrain from doing either with respect to their employees.

Also, Section 7 of the National Labor Relations Act (NLRA)—which generally applies to both unionized and non-unionized non-supervisory employees working in the private sector—provides that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[4] The U.S. Supreme Court has interpreted this provision to mean that employees may organize as a group to "improve their lot" outside of the employer-employee relationship.[5] Essentially, employees may engage in protected political advocacy so long as it relates to labor or working conditions; this can mean contacting legislators, testifying before agencies, or, more relevantly for election season, joining protests and demonstrations. Employers are generally barred from retaliating against employees who participate in these types of political activities outside the workplace, so long as the means used are not themselves prohibited.

While the nexus is not always clear between the political advocacy and the benefit to workers, the General Counsel for the National Labor Relations Board (NLRB) has offered guidance that includes the example of an employee attending a demonstration in favor of immigration reform as being protected by Section 7. In the example offered by the NLRB, because some employment verification legislation could be deemed to chill even legal hiring activity, a demonstration against immigration reform sufficiently relates to employees' "mutual aid or protection" to be protected activity.[6]

Additionally, workplace rules or policies that dissuade non-supervisory employees from exercising their rights to advance their "mutual aid or protection" can run afoul of Section 7. In 2015, the NLRB General Counsel issued a report evaluating the legality of common employer rules.[7] The report not only clarifies what types of rules may be unlawful, but further explains that ambiguous rules will be interpreted against the employer.[8] Of particular interest, the report clarified that rules chilling advocacy, argument, and debate among employees are deemed unlawful by the NLRB. Because Section 7 protects the rights of employees to debate issues regarding management, employee support for or opposition to unions, and workplace conditions—and because those discussions are often controversial—rules that broadly attempt to curb passionate debate violate the NLRA.

For example, according to the NLRB:

- A rule broadly requiring employees to "show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, *such as politics and religion*" is unlawful because discussions protected by Section 7 can be inflammatory.[9]
- A rule simply stating "don't pick fights" on the internet is unlawful because employees could construe it to restrict "protected discussions with their coworkers."[10]
- And somewhat surprisingly, the NLRB took the position that even a rule merely prohibiting making "insulting, embarrassing, hurtful or abusive comments about other employees" is impermissible

3 18 U.S.C. § 597.

4 29 U.S.C. § 157.

5 *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 564–65 (1978).

6 Ronald Meisburg, N.L.R.B., *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy*, Memorandum GC 08-10 at 8 (July 22, 2008) (noting that "partial or intermittent strikes, sit-down strikes, and work slowdowns are unprotected regardless of the employees' objectives").

7 Richard F. Griffin, Jr., N.L.R.B., *Report of the General Counsel Concerning Employer Rules*, Memorandum GC 15-04 (Mar. 18, 2015) [hereinafter *NLRB Employer Rules Report*].

8 *See* Fred Miner & Adam Tuzzo, *NLRB General Counsel Issues Report Concerning Legality of Common Employer Rules*, Littler Insight (Mar. 25, 2015).

9 *NLRB Employer Rules Report at 11* (emphasis added) (explaining that a "restriction on communications regarding controversial political matters, without clarifying context or examples, would be construed to cover . . . Section 7 communications").

10 *Id.* at 10.

because "debate about . . . protected concerted activity is often contentious and controversial" and the rule could be viewed as "limiting [employees'] ability to honestly discuss such subjects."[11]

Accordingly, blanket rules or handbook policies put in place to govern workplace civility—which would otherwise seem useful this election season—could be deemed overly broad under federal law. To the extent an employer is not sure about either the legality of its policies, or the protection afforded to an employee's political advocacy, the best course is to contact counsel.

Restrictions on Employer Solicitations for Political Contributions

There are also limits on what employers can do to raise money for political candidates from their employees. Some companies may seek to create "separate segregated funds"—more commonly known as Political Action Committees (PACs). However, contributions to those PACs from employees must be entirely voluntary under federal law,[12] meaning employers may not condition employment or any change in employment status on those contributions. Furthermore, employers are prohibited from reimbursing their employees for contributions made to the company's PAC.

Even for companies that have PACs, solicitations of a corporation's entire employee population—as opposed to merely its "restricted class" of non-unionized managers, officers, and executives—are illegal and might even confer on a labor union a right to solicit its own members in ways that would otherwise be prohibited. Companies that maintain employee PACs should ensure that the content and recipient list of any solicitation message be cleared by counsel before distribution.

Employers' Rights to Restrict Political Activities in the Workplace

Because political discussions often raise important personal issues for employees, even a small disagreement can quickly erupt into a heated argument among employees. This can have serious consequences for productivity, employee morale, and working relationships. Many employers therefore try to minimize such discussions. Generally, private employers have latitude to limit or ban political discussions in the workplace, simply because there is no First Amendment right or statutory regime at play in most circumstances. Similarly, many employers adopt policies that preclude employees from initiating political conversations with clients or vendors.

Such policies are generally permissible, so long as they are tailored to purely political speech and are sensitive to the NLRB's guidance discussed above. Alternatively, employers may elect to rely on vaguer policies, such as those reminding employees to "[b]e thoughtful in all your communications and dealings with others, including email and social media."[13]

In addition, because companies typically have a property interest in their resources, many employers prohibit employees from using company property (like computers, printers, and office supplies) for political activities. They often also restrict employees from using the employer's telephones for political fundraising or making campaign calls to potential voters. It is important for an employer to have a written, formal policy regarding such usage, even if it is encompassed in a broader limitation on the personal use of employer resources. In addition, any such rules—including those prohibiting wearing campaign buttons or displaying posters in a

11 *Id.*

12 52 U.S.C. § 30118.

13 *NLRB Employer Rules Report* at 28 (setting out examples of acceptable employer policies).

workspace—must be enforced uniformly, regardless of an employee's role within the organization or political point of view.

For any such restrictions, however, employers should include language to clarify that nothing in a particular policy is intended to prevent employees from discussing their working conditions or engaging in other concerted activity protected by law.

Employers' Rights to Introduce Political Speech in the Workplace

Like rank-and-file employees, executives, officers, and managers generally have the right to engage in their own political activity in the workplace. In some states, however, that activity is limited where it could be construed as intimidation or coercion on the part of the employer with respect to the employees' free choices in voting. California, for instance, makes it impermissible for an employer to "coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."[14] West Virginia maintains similar prohibitions.[15]

Of course, the line between an employer's free expression under the First Amendment and coercion is often blurred, particularly where the employer's own financial fortunes are mentioned. In the context of Section 8(a)(1) of the NLRA—which prohibits employers from using threats or coercion against employees considering unionization—courts have tried to draw a fine line between an employer's objectively based predictions of negative consequences for the business, and express or implied threats to employees. The former are protected by the First Amendment, while the latter are not. While the same distinction likely carries analogous force in the political speech context, courts can be unpredictable in defining the contours of permissible employer statements.

In short, even when an employer's political speech may be legal, it is generally advisable to avoid political activity in the workplace. Strong emotions can be associated with political speech, and the workplace may suffer from distractions and dissension, particularly if the employees disagree with the political speech of their employer or its agents.

Employers and the Right of Employees to Participate in Elections

A significant number of states have enacted laws enabling employees to vote during what would otherwise be working hours. Some states even require paid leave for that time, and mandate that employers post notices advising employees of their rights within 10 days of an election.[16] Voting laws vary widely across jurisdictions, so multi-state employers face particular challenges.[17]

Practical Considerations

An employer that has questions about the permissible scope of its political activity, or the activity of its employees, should consult counsel as to state and federal requirements or limitations on political activity. Employers might want to also consider:

- Reviewing handbooks and updating pertinent policies as needed.

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14 Cal. Lab. Code § 1102.

15 W. Va. Code § 3-9-15; *see also* W. Va. Code § 3-8-11 (information "containing any threat, either express or implied, intended or calculated to influence the political view or actions of the workmen or employees" is punishable criminally).

16 Cal. Elec. Code § 14001.

17 Various state election laws will be discussed in a separate article.

- Consistently and even-handedly enforcing any policies intended to minimize the ambiguity regarding whether employees can engage in political activity in the workplace.
- Ensuring that employees are not pressured by anyone within the workplace to contribute or volunteer for any particular candidate.
- Ensuring that employees are not discouraged by supervisors from voting or engaging in political activity outside of the workplace.
- Considering making dispute resolution procedures available to employees who may feel uncomfortable as a result of political activity in the workplace.