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## Political Speech and Activity in the Workplace: The 2014 Midterms are Here

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Election season can be a heated time. In many contexts, this can mean arguments with friends, family, and acquaintances. It can also mean added tension and disagreement in the workplace. In some cases, employers may seek to minimize political discussions at work. In others, employers themselves may try to introduce politics into the workplace. Regardless of whether an employee may engage in political activity in the workplace, employees may have rights to conduct political activities outside of work, and to take time off from work, where needed, to vote in an election.

### 2014 Midterms

On November 4, 2014, voters around the country will head to polling places to vote for candidates for the U.S. House and Senate, and for representatives at the state and local levels. Indeed, in several states, voting has already begun with the casting of absentee ballots and vote-by-mail ballots, and early voting at polling stations open before Election Day. Because these elections determine control of legislative bodies or governors' mansions, a host of candidates, political parties, and independent committees have encouraged voters to contribute, volunteer, and express their political preferences by talking to their friends and neighbors. Naturally, individuals may also bring their political preferences to work. How should employers respond in these circumstances?

### Federal Laws Protecting Employees

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.<sup>1</sup> Similarly, it is unlawful to bribe or offer an "expenditure" to an individual in exchange for voting a certain way.<sup>2</sup> Obviously, employers and their agents should refrain from doing either with respect to their employees.

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1 18 U.S.C. § 594.

2 18 U.S.C. § 597.

In the same vein, Section 7 of the National Labor Relations Act, which applies to both unionized and non-unionized employees, provides that “[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.”<sup>3</sup> The U.S. Supreme Court has interpreted the provision to mean that employees may organize as a group to “improve their lot” outside of the employer-employee relationship.<sup>4</sup> 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 activity, so long as the means used are not themselves prohibited.<sup>5</sup>

While the nexus is not always clear between the political advocacy and the benefit to workers, the General Counsel for the 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. According to the General Counsel, because employment verification legislation could be deemed to chill even legal hiring activity, the demonstration sufficiently relates to the employees’ “mutual aid or protection.”<sup>6</sup> To the extent an employer is not sure about whether an employee’s political advocacy is protected by Section 7, the best course is to contact counsel.

Additionally, there are limits to what employers can do to raise money for political candidates. For instance, improper solicitations of a corporation’s “restricted class”—its non-unionized managers, officers, and executives—may generate a labor union’s right to solicit its own members in ways that would otherwise be prohibited.<sup>7</sup> Similarly, although corporate entities may establish “separate segregated funds”—more commonly known as connected Political Action Committees (PACs)—contributions to those funds from employees must be entirely voluntary under federal law.<sup>8</sup> That is, employers may not condition employment or any change in employment status on those contributions. Unsurprisingly, employers are also prohibited from reimbursing their employees for contributions made to the company’s PAC.<sup>9</sup>

Other than these prohibitions on employer misconduct, much of the law varies by state. We address several areas of the relevant law below, but urge you to consult counsel about your specific state’s laws and to take steps to ensure your company’s compliance with those laws.

## Employers’ Rights to Restrict Political Activities in the Workplace

Because political discussions often involve salient 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 wide latitude to limit or prohibit political discussions in the workplace, simply because there is no First Amendment right or statutory regime at play in most circumstances.<sup>10</sup> Similarly, many employers adopt policies that preclude employees from initiating political conversations with clients or vendors. While a complete prohibition on political speech may seem draconian, advising employees that political discussions should be limited generally appears reasonable. This is because a limit on political speech in the workplace will often benefit employees of all political stripes, since there are workplace partisans on both sides of the political aisle.

Moreover, because companies generally have a property interest in their resources, employers often 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. For the 2014 midterms and beyond, it is important for employers to have written, formal policies regarding such usage, even if it is encompassed in a broader limitation on the personal use of employer resources.

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3 29 U.S.C. § 157

4 *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-65 (1978).

5 R. Meisburg, Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Memorandum GC 08-10 at p.12 (Jul. 22, 2008, linked [here](#)) (noting that “partial or intermittent strikes, sit-down strikes, and work slowdowns are unprotected regardless of the employees’ objectives”).

6 *Id.* at p. 8

7 The Hidden Union Access and Solicitation Pitfalls Associated With Employer Corporate PACs, Bloomberg BNA Daily Labor Report, Feb. 14, 2014.

8 2 U.S.C. § 441b(b)(3)(A).

9 2 U.S.C. § 441f.

10 *Federer v. Gephardt*, 363 F.3d 754, 760 (8th Cir. 2004) (rejecting civil conspiracy claim with respect to private employer under 42 U.S.C. § 1985(3) for lack of state action).

## Employers' Rights to Introduce Political Speech in the Workplace

Executives, officers, and managers generally have the right to engage in 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. For instance, in West Virginia, state law strictly limits the nature of what an employer or its agents can do regarding political campaigns:

Any employer or agent of any employer or corporation, who prints or authorizes to be printed upon any pay envelope or who distributes directly or indirectly, or gives directly to any employee any statement intended or calculated to influence the political action of his employees for any candidate for public office, or posts or exhibits in the establishment, any posters, placards, or handbills, or delivers verbally any message to any such employees, containing any threat, notice or information that if any such candidate is elected or defeated, work in the establishment will cease, in whole or in part, or other threats expressed or implied, intended to influence the political opinions or votes of his employees, shall be guilty of corrupt practices, and, upon conviction, shall be fined not less than one thousand dollars nor more than twenty thousand dollars or be imprisoned in jail not more than one year, or both.<sup>11</sup>

Similarly, California makes it a violation of law 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."<sup>12</sup>

The line between an employer's free expression under the First Amendment and coercion is blurred, particularly where the employer's own financial fortunes are mentioned. In the context of 29 U.S.C. § 158(a)(1), which prohibits employers from using threats or coercion against employees considering unionization, courts have tried to draw a fine line between an employer's mere predictions of negative consequences for the business, and outright threats to employees.<sup>13</sup> 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.

Moreover, because political communications are often broadcast to a number of employees, they present a unique problem in employment litigation. Employees who bring lawsuits may allege, in addition to their other claims, that they felt coerced by corporate officials with respect to voting or political contributions. Thus, even where an employer may have a strong defense to a race- or gender-based claim brought by an employee, a secondary claim for impermissible political coercion can add negotiating power to a plaintiff's settlement demands.

Thus, in many cases, even when an employer's political speech may be legal, it is often the best course of action to avoid political activity in the workplace. As noted above, strong emotions can be associated with political speech, and the workplace can suffer from distractions due to political disagreements and dissension, particularly if employees disagree with the political speech of their employer or its agents.

## Employers and the Right of Employees to Participate in Elections

A large number of states have enacted laws enabling employees to vote during what would otherwise be work hours. Several of these laws even provide for paid leave for that time. For instance, in California, employees who will not otherwise be able to vote may take up to two hours of paid leave to do so.<sup>14</sup> Regardless of whether any employees take such leave, employers must post notices advising employees of their rights within 10 days of a given election, and keep those notices posted until Election Day.<sup>15</sup>

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11 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).

12 Cal. Labor Code § 1102.

13 *GE v. NLRB*, 117 F.3d 627, 630-31 (D.C. Cir. 1997).

14 Cal. Elec. Code § 14001.

15 Cal. Elec. Code § 14001

Whether an employee is entitled to take leave—and whether that leave is paid or unpaid—varies greatly among states, and often depends on the specific hours polls are open in a jurisdiction, as well as the employee’s work schedule.<sup>16</sup> Thus, for many employees who are able to vote before or after their work shifts—often defined as having somewhere between one to three hours of non-working time while polls are open—these laws have little effect on employers.

Penalties for violations of these statutes can be severe. In Colorado, for instance, an entity that is found to deny employees two hours to vote under the terms of Colo. Rev. Stat. § 1-7-102(1), “shall forfeit its charter and right to do business in this state.”<sup>17</sup> This is in addition to criminal misdemeanor charges, which could include fines and even imprisonment.<sup>18</sup> In Missouri, denying an employee three hours to vote under the terms of Mo. Rev. Stat. § 115.639 is a Class Four elections offense, punishable as a criminal misdemeanor by a fine of \$2,500 and potential imprisonment of one year.<sup>19</sup>

Some employees want to do more than just vote. Many want to take Election Day off to volunteer at polling locations or to help with “Get Out The Vote” drives. Employers generally have no duty to give employees any time off to participate in these activities. However, if an employee seeks to use vacation time to participate in these activities, it may be a violation of law to deny an employee’s request for vacation on the basis that he/she will be volunteering to participate in Election Day activities.<sup>20</sup>

## 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;
- Adopt and consistently enforce a policy that minimizes ambiguity regarding whether employees can engage in political activity in the workplace;
- Consider making dispute resolution procedures available to employees who may feel uncomfortable by political activity in the workplace;
- Ensure that employees are not pressured to contribute to or volunteer for any political candidate; and
- Ensure that employees are not discouraged by supervisors from voting or engaging in political activity outside of the workplace.

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16 O.C.G.A. § 21-2-404 (Ga. 2014) (“[I]f the hours of work of such employee commence at least two hours after the opening of the polls or end at least two hours prior to the closing of the polls, then the time off for voting as provided for in this Code section shall not be available.”); Colo. Rev. Stat. § 1-7-102(2) (“This section shall not apply to any person whose hours of employment on the day of the election are such that there are three or more hours between the time of opening and the time of closing of the polls during which the elector is not required to be on the job.”).

17 Colo. Rev. Stat. § 1-13-719.

18 Colo. Rev. Stat. § 1-13-111.

19 Mo. Rev. Stat. § 115.637(6)

20 Mo. Rev. Stat. § 115.637(6) (defining class four elections offense to include an employer “making, enforcing, or attempting to enforce any order, rule, or regulation or adopting any other device or method to prevent an employee from engaging in political activities); Cal. Labor Code § 1101(a) (“No employer shall make, adopt, or enforce any rule, regulation, or policy ... [f]orbid[ding] or prevent[ing] employees from engaging or participating in politics or from becoming candidates for public office.”).