

Talking Politics at Work

What Employers Should Know This Election Season

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As Cleveland braces for the influx of GOP Convention delegates this July, the 2016 presidential campaign has been dominating the national collective consciousness for months. Fueled by non-stop media coverage, discussions of the candidates' policy positions and political antics have no doubt popped up around the water coolers of America's workplaces. So, what does this heightened political focus mean for employers? Well, in addition to the inevitable loss of productivity from employees' countless time spent rehashing the previous night's debate performances or state election results, there can also be real legal consequences for employers who fail to address inappropriate political discourse in the workplace or who improperly interfere with employees' rights to participate in the political process. What follows are just a few of the issues that employers should keep in mind this election season and tips on how to avoid trouble before it starts.

Free Speech in the Workplace: What do you mean I can't say that? Isn't this a free country?

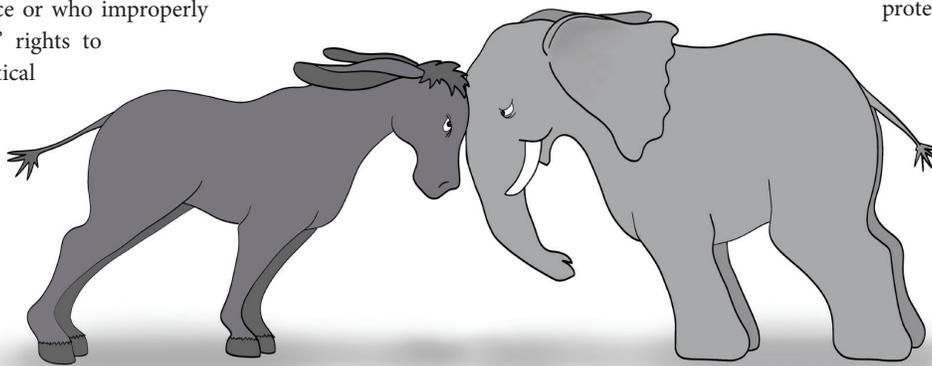
A common misconception among employees and employers alike is that employees' First Amendment rights to free expression extend into the workplace. In fact, the First Amendment only applies to *governmental* action that censors speech based on its content or viewpoint. *Private* employers, therefore, are generally free to restrict their employees' speech — political or otherwise — and discipline or terminate employees based on the content of that speech

without violating their employees' First Amendment rights. To paraphrase Judge Oliver Wendell Holmes in an 1892 opinion, a person may have a constitutional right to talk politics, but a person does not have a constitutional right to a job. While a handful of states have passed legislation prohibiting employer retaliation for employees' political speech and activities, even in those states, employers still maintain a legitimate business interest in controlling their employees' political speech and conduct in the workplace.

Public employees, on the other hand, enjoy more First Amendment protections than private employees. But, over the years the Supreme Court has carved out significant exceptions

This is not to say that employers face no legal risk when they prohibit or restrict their employees' political speech. Depending on the circumstances, an employer may still run into trouble if an employee's political expression also falls under the protection of other federal or state laws. For example, the National Labor Relations Act, which applies to most private employers, protects employees' rights to engage in concerted activity for their "mutual aid and protection." Generally, this prohibits employers from restricting employees' discussions on employment-related topics or on issues related to the "terms and conditions of their employment." Therefore, depending on the circumstances, employees' political discourse regarding, for example, the candidates' views on equal pay legislation, a proposed increase in the minimum wage, or even immigration reform have the potential to fall under the protections of the NLRA.

Another potential risk area for employers is when their employees' political speech may be protected under federal and state anti-discrimination laws. For example, the candidates' religious beliefs and affiliations have been front and center this election season. Title VII of



the First Amendment's application to public employees' speech, stressing that "even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." *Waters v. Churchill*, 511 U.S. 661, 672, 114 S.Ct. 1878, 1886, 128 L.Ed.2d 686 (1994). As a result, public employers are generally free to restrict their employees' speech unless that speech relates to issues of "public concern" and does not detrimentally impact the efficient operation of the government.

the Civil Rights Act of 1964 and its analogous state laws require employers to accommodate their employees' sincerely held religious beliefs by permitting them to engage in religious expression in the workplace to the extent that it does not create an "undue hardship" for the employer. Therefore, an employee's expression of support for a particular candidate as a result of their shared religious beliefs or views on issues connected to religion, depending on the circumstances, could be protected by Title VII. For this same reason, any unequal treatment

of employees based on their political views or speech could result in a discrimination claim to the extent that the employer's disparate treatment of its employees is related to the employee's views on issues connected to religion or any other protected characteristic (i.e. race, gender, religion, national origin, etc.).

When Political Speech Creates a Hostile Work Environment: Help, I am feeling harassed!

There has been no shortage of hot button issues this campaign season. Some candidates have taken controversial and divisive positions on issues of race, religion, national origin, gender, and gay rights, and their debate of these issues has, at times, pushed the bounds of civil discourse. It should come as no surprise, then, that employees' discussions of these issues can become quite heated and some employees may feel uncomfortable, offended, or under attack. As a result, political speech in the workplace can increase the risk of an employee making a hostile work environment claim under state or federal anti-discrimination laws.

For example, a Muslim employee may feel harassed and threatened when his or her co-workers are very vocal in their support of Donald Trump and his positions related to the Muslim community. Similarly, employees' discussions related to abortion, the Black Lives Matter movement, and even Bernie Sanders' age could potentially spawn hostile work environment claims based on religion, race, or age discrimination. Depending on the frequency or severity of the comments and actions directed toward an employee, his or her employer could face legal liability for failing to prevent and address these situations.

So what should employers do? Employers should diligently monitor their employees' political discussions and promptly address those conversations that stray to topics centered on the characteristics protected by federal and state anti-discrimination laws. When employees' political discourse focuses on legally protected characteristics, employers should instruct them to refrain from discussing such topics or other sensitive and controversial

subjects while in the workplace. Often, it is simply enough to remind the employees involved that while they may feel strongly on a particular issues, others may not share their views and may feel uncomfortable, but, depending on the circumstances and the nature of the employees' speech, more serious corrective action may be required.

It is equally important that employers promptly investigate and address any complaints made by employees related to the political speech of others, just as the employer would treat any other complaint of discrimination or harassment. Employers should also consider whether the current political discourse creates the perfect excuse to conduct that refresher anti-discrimination and harassment training session that is often sidelined by more pressing business matters. As the saying goes, an ounce of prevention is worth a pound of cure. With months remaining until November's general election, and the national political discourse likely to only intensify in the meantime, an "ounce" of anti-discrimination and harassment training now could stave off several "pounds" of legal heartache in the long run.

Employees' Rights to Engage in the Political Process: It's election day. Can I leave work to go vote?

The ultimate form of political expression takes place in the voting booth, not at work. But what happens when an employee's work obligations hinder his or her ability to vote? Many states have enacted laws requiring employers to provide their employees with time off from work to vote. Some states, like Alaska, California, and Nebraska, also require employers to pay their employees for this time.

In Ohio, an employer is prohibited from terminating or threatening to terminate an employee for taking "a reasonable amount of time to vote on election day." O.R.C. §3599.06. Employers who fail to adhere to Ohio's voting law face fines of \$50 to \$500 for each violation. Ohio's law does not require an employer to pay employees for the time they take off to vote. It is important to remember, however,

that an employer may not deduct these voting hours from exempt employees' salary without violating state and federal wage and hour laws.

Unlike several other states, Ohio's voting law does not require employees to provide advance notice to employers of the need to take time off to vote, nor does it designate that the hours off need to be at the start or end of an employees' shift. To minimize the impact to business operations, Ohio employers should consider establishing voting leave policies that define how employees should request time off to vote and that gives the employer discretion to designate when during an employee's shift the voting leave will be provided.

At the end of the day, employers cannot realistically prevent employees from engaging in political discussions at work — nor should they want to. A healthy work environment in which employees feel engaged and connected with their co-workers and free to share their thoughts, views, and experiences in a thoughtful, respectful way can increase job satisfaction, loyalty, and productivity. And, most political discussions by employees pose little to no risk of legal liability for employers. Employers should simply remain cognizant of the rare circumstances when employees' political speech can go too far, and be diligent in promptly and appropriately addressing issues as they arise.



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