



Managing Your Workforce Through the Current Social and Political Climate

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Objectives

- 01** First Amendment protections in the workplace
- 02** Political and social justice speech in the workplace in turbulent times
- 03** Rationales for limiting workplace speech
- 04** How the National Labor Relations Act applies to politically charged conduct
- 05** California political speech issues
- 06** Managing employee communications to maximize productivity and morale

Two Movements Impacting Employers

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- Increased Focus and Support of Inclusion, Equity, and Diversity Initiatives
 - Transparency & ESG Reporting
 - Shareholder Lawsuits
 - Pay Equity Reporting
 - Political and Social Justice Speech

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- **Reverse Discrimination Lawsuits**
 - **Political Speech**

Can Employers Take Any Action If An Employee...



- Refuses to take off a MAGA baseball cap after clocking in?
- Refuses to stop wearing a “Black Lives Matter” mask to team meetings?
- Displays political posters and buttons on the outside of their cubicle near the entrance to the office?

Can We Limit Employees' Political and Social Speech and Conduct at Work?



- Public vs. Private Employers
- First Amendment Rights
- National Labor Relations Act (NLRA) Protections
- Anti-Discrimination Laws

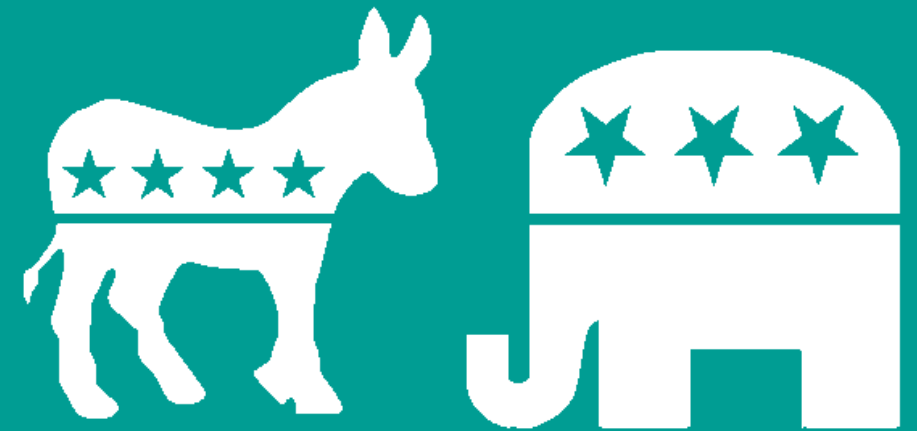
Employees’ “Rights” to Free Speech and Expression at Work



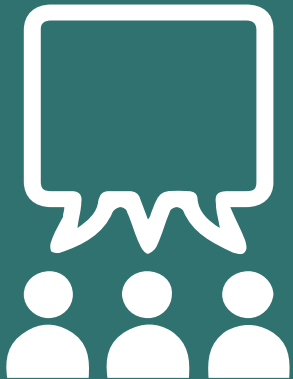
- The First Amendment applies to and limits government restrictions on speech
 - Some public roles require “political loyalty” allowing employers to terminate employees who have differing political beliefs
- Employees of **private** employers have **no** general “First Amendment” protections
- **Private** employers can generally control speech and expression at work
 - Dress codes, including face masks
 - Company bulletin boards
 - Verbal conversation

Polling Question 1

Does your company have a political speech policy?



Employers May Sometimes Control Speech and Expression Outside the Workplace



- Speech or expression that reflects on or can impact the employer's business
- Social media posts from an employee that are harassing, offensive, or threatening
- Speech/expression/social media posts from an employee that brings negative attention from the employer's customers or client base

Real Life Examples:

- Employee fired for flipping off President Trump's motorcade
- Employee fired for refusing to move a candidate bumper sticker

Polling Question 2

Has your company taken a public stance on a political issue?



Considerations for Employers Who Take a Political Position



- Employers more likely to have employees who want to discuss the company's stance or other politically-charged subjects.
- As the company navigates its messaging and approach to these issues, it should take care to remind employees of the importance of complying with its anti-discrimination, anti-harassment, and EEO policies.
- Remember that the organization and its employees are a microcosm of the overall company morale, values, and culture.
- Practice creating a safe space that encourages freedom of thought while remaining thoughtful and inclusive of differences.

Practical Implications of Restricting Speech and Expression



Implications

- Bad publicity
- Poor employee morale
- Employee protests

Tips

- Acknowledge difficult moments
- Create safe spaces for critical conversations
- Reward allyship

Practical Implications of Allowing Political Speech and Expression



- Increased divisiveness
- Speech or expression that may be classified as unlawful harassment must be prohibited
 - Example: MAGA hat wearing worker filed a lawsuit against his employer claiming that a Black employee unlawfully harassed him (abused him with profanity and accusations of racism).
- Tension between co-workers
 - According to a survey conducted by SHRM last year, **almost half of working Americans** have personally had a **political disagreement** at work.
 - **1 in 10 working Americans** say they have personally experienced either **differential treatment or political affiliation bias at work** because of political views.

NLRA and Political Speech



- Political speech usually does not raise NLRA concerns, but it can.
 - Political speech + messages directed at terms and conditions of employment (*i.e.*, demand for pay increase/challenging pay disparity for women or minorities)
- When drafting written policies restricting speech or expression, be careful.
 - General ban on slogans or logos on apparel or buttons is unlawful under Section 7, absent special circumstances (employee safety, damage to machinery or equipment, interference with public image)
 - Recommend caution when relying on this narrow exception
 - Ban on political messages on apparel or buttons
 - Current Board would view this as a neutral rule
 - Recommend giving specific examples of what is permitted/ prohibited
 - Include a carve out for Section 7 related logos and message

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NLRA and Political Speech



- NLRB interprets protected concerted activity broadly, to include activity for political purposes
- Protected concerted activity is protected only if:
 1. its purpose has a “direct nexus” to working conditions and
 2. the employer can somehow control the objective of the activity.

Off-Duty Protections for Employees in California

- Most generally prohibit discrimination/retaliation based on any legal off-duty conduct
- California prohibits discrimination based on political beliefs/political affiliation
 - California Labor Code governs employee speech protections



California-Specific Protections for Employee Politics



Section 1101 of the California Labor Code:

- 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.
- Can extend to espousing a candidate or cause, including participation in broad social movements (e.g., LGBTQ rights movement)
- Key: did employer have “political motive” in taking action against employee?

Responding to and Preventing Speech-Related Conflicts Between Employees



- **Be proactive**
 - Employee and management training
 - Policies
- **Create, and consistently apply, policies**
 - Dress code
 - Attendance
 - Bulletin boards
 - Email
 - Conduct

Responding to Speech-Related Conflicts Between Employees



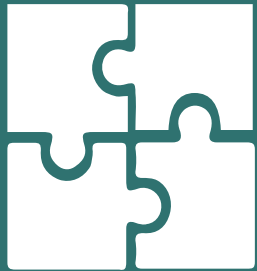
- Communicate company policies regarding political expression in the workplace
 1. How does the organization communicate their values?
 2. Are these values affirmed by leadership?
- Create safe spaces to discuss tumultuous climate outside of the scope of work
 1. Recall political beliefs and views are an extension of human emotion
 2. Encourage healthy dialogue
- Redirect difficult conversations to keep them from getting out of hand
 1. Support differences, demand respect

The Takeaway



- Intersection between employee political discussions/symbols and Title VII
 - e.g., employee wears apparel depicting the Confederate flag
- Importance of viewpoint-neutral policies re: conduct and attire
- ***Evenhanded enforcement of workplace policies***
- Employees' political expression does not take priority over workplace safety or compliance with federal and state anti-discrimination laws

Conclusion



- Companies are **free to engage in expression**, but beware of EEO concerns.
- Be aware of **California restrictions on employers' right to restrict** political speech and expression at work and off-duty.
- **Be consistent in enforcement** of policies (social media and political speech).
- Don't forget about **NLRA protections** for concerted activities.
- **Encourage** dialogue, **empower** difference, **embrace** diversity



Thank You!