Employee Political Speech at Work and on Social Media
Legal & Practical Considerations

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September 17, 2020
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Objectives

01 First Amendment protections in the workplace

02 Practical tips for managing political speech at work and on social media

03 How the National Labor Relations Act applies to politically charged conduct

04 Internal protocols and policies related to political speech

05 Anti-discrimination laws and their nexus with political speech

06 Handling and defusing political conflicts at work
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
Poll Question 1

Does your company have a political speech policy?
Employers May 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
Poll Question 2

Does your company have a social media policy?
Hypothetical:

On Facebook, Employee A makes a scathing rebuke of the SCOTUS decision protecting LGBT employees/applicants from employment discrimination and, in so doing, uses offensive epithets about LGBT individuals. Employee B complains that the post is offensive.

How would you handle?
Off-Duty Protections for Employees

- Most generally prohibit discrimination/retaliation based on any legal off-duty conduct

- Some states prohibit discrimination based on political beliefs, voting patterns, or political affiliation

- Other states prohibit threats or promises directed at political activity
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?
**Conn. Gen. Stat. § 31-51g — Private Civil Action**

- Extends First Amendment protections that public employees enjoy vis-à-vis public employers to private sector; courts follow federal First Amendment law

- Public employers: limitations on expression balanced against interests in providing efficient/effective government services

- Factors: impairment of discipline, impairment of workplace harmony, impede performance of duties, interference with employer’s operations, undermining employer’s mission
• No prohibitions on employers’ ability to restrict political speech at work

• Tex. Elec. Code § 276.001 – Felony for retaliating against employees by subjecting/threatening a loss or reduction of wages or benefits because employee voted for or against a candidate/measure or refused to reveal how he or she voted

• Tex. Elec. Code § 161.007 – Prohibits an employer from preventing an employee from attending a county, district, or state political convention as a delegate or retaliating against an employee for doing so
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
In her cubicle, Employee placed a photo on her desk of a boy holding a sign that read “Stop White Supremacy.” IT professional working in Employee’s cubicle saw the photo and interpreted “white supremacy” as code for Trump and therefore a direct challenge to his conservative views. IT professional wants to put up his own sign that reads “Deport All Illegals.”

How would you handle?
• 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 increases in conjunction with Black Lives Matter movement)

• 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
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

• 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.
Responding to Conflicts Between Employees About Political Views

• 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
Poll Question 3

Has your company taken a public stance on a political issue?
• 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.
Company issues a public statement expressing support for the Black Lives Matter movement. The following day, Employee A asks to wear a Black Lives Matter mask. Employee B asks to wear a Blue Lives Matter mask.

How would you handle?
Conclusion

• Companies are free to engage in expression, but beware of EEO concerns.

• Be aware of state law 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!