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Election Season and the Workplace, Part 1: Employee "Free Speech" and Political Activities



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With Election Day just around the corner, we'll be highlighting some of the issues facing employers in a two-part series on elections and the workplace. In this first installment, we'll look at employee protections around political speech and activity both in and outside the workplace. In Part 2, we'll address statutory leave entitlements for employees to vote or engage in other political activities.

Political Speech in the Workplace

Political speech and activity in the workplace is a recurring source of employer concern, for a number of reasons. First, when these discussions or activities occur during working hours, they can impact performance, productivity, or even cross the line into unlawful bullying or harassment.

In addition, if the employer is a tax-exempt organization, certain political speech can also implicate the organization's tax-exempt status. Many tax exempt-organizations are subject to significant restrictions on lobbying and political activities in exchange for the public subsidy that they receive. For example, a 501(c)(3) organizations may lose their tax-exempt status if they engage in political campaign activities or if a substantial part of its activities involve lobbying. Speech by an employee that constitutes political campaign or lobbying activity may be attributed to the organization if it can be inferred that an employee's speech is made as a representative of the organization or that the speech has been ratified by the organization. This could happen, for example, if an employee, using their own social media account that the employee also uses to engage in speech on behalf of the organization, engages in lobbying activity by urging followers to contact their state representative to advocate for the adoption or rejection of proposed legislation.

Finally, when employees attend political rallies or support causes – for example, on social media – they may (intentionally or not) criticize or create a conflict of interest with their employer. How far employers can go to restrict employee speech and activity is a complicated question, governed by several sources of law.

Employee "Free Speech."

Despite popular misconception, there is no general right to "free speech" in a private sector workplace. As an initial matter, because the U.S. Constitution is primarily concerned with issues that involve state actors rather than private actors, the First Amendment does not prevent private employers from prohibiting political speech in the workplace. Speech by public sector employees may be protected by the First Amendment, but only to the extent it involves a matter of public concern. Therefore, subject to the limited exceptions discussed below, private sector employers are generally free to prohibit and discipline employees for discussing politics at work.

Free speech protections can extend to private sector employees by statute. For example, **Connecticut General Statute § 31-51q** prohibits employers from taking any adverse action against employees for exercising their First Amendment rights, provided that such activity does not interfere with the employee's job performance or the employment relationship. As in the context of public sector free speech protections, courts have interpreted this statute to only protect statements made outside of the scope of employment, and not speech pursuant to official duties (*e.g.*, reports of labor law or payroll violations).

In addition, Section 7 of the National Labor Relations Act ("NLRA"), which applies to both union and non-union employees, protects certain "concerted activities" of employees for the purposes of "mutual aid or protection." Political speech or activity that is unrelated to employment – for example, an employee distributing campaign literature encouraging co-workers to vote for their candidate or political party of choice – would not be covered or protected by the NLRA. The NLRA therefore does not prevent employers from prohibiting these purely political discussions or activities in the workplace.

However, political speech may be protected by the NLRA when it relates to the terms or conditions of employment. For example, conversations regarding wages, hours, workplace safety, company culture, leaves, and working conditions may be deemed protected concerted activity and therefore be protected. An employee who encourages co-workers to vote for a candidate because the candidate supports an increase in the minimum wage might claim protection under the NLRA.

The same rule generally applies to employee advocacy. When employees are engaging in advocacy unrelated to employment, the **National Labor Relations Board** has taken the position that employees are simply acting "in the interest of the community at large and in furtherance of [their] own political agenda." For example, a construction worker engaging in advocacy involving police reform at a protest or before a legislative body would likely not be protected because the topic of the advocacy is unrelated to the employee's job as a construction worker. However, if the same construction worker was advocating before a legislative body in support of safety regulations that would impact the jobsite, the employee's advocacy would likely qualify as protected concerted activity.

Therefore, despite that employers have broad authority to prohibit political discussions at work, employers should ensure that their policies and practices do not infringe upon rights granted to employees under state law or the federal NLRA.

Lawful Outside Activity/Off-Duty Conduct Statutes.

Many states have laws that prohibit adverse action against employees based on lawful activities outside the workplace, including political activities. For example:

- In approximately a dozen states, employers are prohibited from preventing employees from participating in politics or becoming candidates for public office. **New York Labor Law § 201-d** prohibits employers from discharging or otherwise discriminating against employees because of their "political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal." Political activities are

defined to include: (1) running for public office, (2) campaigning for a candidate for public office, or (3) participating in fund-raising activities for the benefit of a candidate, political party, or political advocacy group. Similar laws exist in **California**, **Louisiana**, and **Minnesota**, among other states.

- Other states – including **Delaware**, **Florida**, **Massachusetts**, and **New Jersey**– prohibit employers from attempting to influence an employee's vote in an election. For example, in **Florida**, "[i]t is unlawful for any person … to discharge or threaten to discharge any employee … for voting or not voting in any election, state, county, or municipal, for any candidate or measure submitted to a vote of the people." A dozen or so states approach this issue in a more limited fashion by prohibiting employers from attaching political messages to pay envelopes.
- At least two states, **Illinois** and **Michigan**, prohibit employers from keeping a record of employee's associations, political activities, publications, or communications without written consent.
- **Washington, D.C.** prohibits discrimination in employment on the basis of political affiliation. Despite its seemingly broad scope, this statute has been interpreted to only protect political party membership and not (1) membership in a political group, or (2) other political activities, such as signing a petition.

These laws vary considerably from state to state, so it is important for employers to consult the statutes in each jurisdiction in which they operate and ensure that their policies and practices are compliant.

Employer Access to Employee Social Media.

As employees turn to social media to discuss the election and other political and social issues, employers should remain mindful of restrictions on their ability to monitor or discipline employees for their social media use. In addition to potential issues under the NLRA and state-level free speech guarantees, the federal Stored Communications Act ("SCA") and a number of state statutes also regulate an employer's ability to monitor employee social media activity.

The SCA affords privacy protections to certain electronic communications. Although the law predates the advent of social media as we know it today, courts have applied it to unauthorized access of employee social media accounts. Therefore, employers across the country should exercise caution before accessing employees' social media accounts without their authorization or coercing employees to turn over information posted on social media. Such actions not only carry risk under the SCA, but also under various state laws. For example:

- Approximately half a dozen states – including **Colorado**, **New Hampshire**, and **Vermont** – prohibit employers from requesting that employees change their privacy settings to make information on social media accounts visible to their employer.
- In more than two dozen states – including **California**, **Illinois**, **Louisiana**, **Maryland**, **New Jersey**, and **Virginia** – employers are prohibited from requesting social media usernames and passwords from employees.

Despite these limitations, employers generally have significantly greater leeway to monitor social media activity conducted on the employer's systems when such monitoring is pursuant to the employer's written policy. In addition, many of the statutes prohibiting employers from requesting social media log-in information contain exceptions that allow employers to request this information for the purpose of accessing an employer-owned device or account. Employers relying on their internal policies to justify action with an impact on employees should always be mindful to interpret and apply those policies in a consistent and otherwise non-discriminatory manner.

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All signs point to this year's election season being one of the more contentious in U.S. history. Given the wide range of federal, state, and local laws protecting employee speech and political activities, employers should: (1) review their policies to ensure that they are compliant with the laws in each jurisdiction in which they operate, (2) communicate these policies to managers and supervisors and provide effective training where necessary; and (3) monitor compliance on a regular basis.

If you have any questions about politics and the workplace, please contact a member of Proskauer's Labor & Employment Department.

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