

Politics in the Workplace—Drawing the Line

By Felice B. Ekelman &

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Meet the Authors



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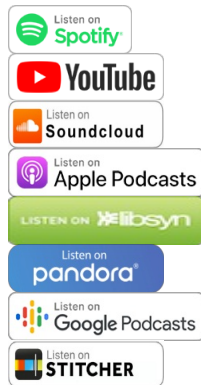
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Details

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Recent Supreme Court decisions, congressional primaries and economic issues have resulted (at times) in contentious and polarizing discussions inside and outside the workplace. These recent events and related social movements remind us how tenuous the balance remains between free speech and a safe, harmonious workplace. What should an employer do?

Jackson Lewis P.C. · Politics in the Workplace—Drawing the Line



Transcript

Alitia Faccone (00:01):

Welcome to Jackson Lewis's podcast. We get work™, focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted.

In the current social economic and political environment, the employee employer relationship has become more dynamic and often unpredictable recent Supreme court decisions, congressional primaries, and the uncertainty of unemployment on the heels of the great resignation, remind us how tenuous the balance remains between free speech and a safe and harmonious workplace.

Revisiting an episode of We get work™ originally recorded in October of 2020, we explore how and whether employers can regulate political speech and activity in the workplace. Our returning host for today's episode are Felice Ekelman and Phil Rosen principles in the New York City office of Jackson Lewis and former members of the firm's board of directors. The breadth of Felice's litigation practice includes everything from defending wage and hour class actions to handling individual plaintiff claims. Phil has also served as managing principal of the New York City office and is co-leader of the labor and preventative practices group. He helps clients

develop creative, strategic, and proactive legal approaches aimed at achieving a company's goals. Felice and Phil, the question on everyone's mind today is given the current economic political and social climate, how does political discussion in the workplace impact my business?

Phil Rosen (01:49):

Thanks so much. This is Phil Rosen, and I'm here with Felice. It does. It absolutely impacts the workplace economic, political and social climate, and those conversations from my perspective, I think about it as our discussion focusing on the intersection between an employer's right to manage its workforce and worker's right to speak their mind about social issues, which has been such a challenge. And I look at it as more than just politics. It's really current events to me in terms of the way I would define it. I know Felice you were thinking about how you would define it in terms of the impact. What would you say?

Felice Ekelman (02:27):

I think it's about societal issues and social activism. Many more Americans are more socially active now than they have been in the past. And when folks are thinking about bringing their whole self to the workplace, which is something that we've been hearing more about in the last couple of years. Being able to express oneself and share with colleagues, what an individual stands for outside of the workplace is of greater importance to more people who are working these days. So, I think it's broader than just political conversation. I think it's social activism and discourse about societal issues.

Phil Rosen (03:12):

And I think in that respect from an employer, they have to figure out what the appropriate position is for them. What's their culture, what's their background? How do they want to be perceived by the public, but also by their employees? Because even in the "Great Resignation" in the last couple of years, as people had an opportunity, employees, to say "I don't want to work for this company. I want to shift to another company" -- whether it's a financial issue, whether it's a social issue. They've tried to align themselves much more with a company which has the same apparent values that they seem to have. And we're going to talk today about, we did this podcast on the same topic, politics in the workplace in 2020. And at that point we were in the middle of a contentious presidential and congressional year. And, if we look back, it was about the COVID-19 pandemic, the presidential election that was coming up, mass demonstrations and violence after George Floyd's death, the Me Too movement, Ruth Bader Ginsburg's death, creating a Supreme court opening and, and everyone was working from home remotely now, fast forward.

Phil Rosen (04:26):

It's interesting. We're going to talk about today and politics in the workplace that we've just defined it. And really what we were looking at is a new landscape, which we're going to talk about what's changed and what hasn't with Supreme Court decisions. For example, with the new Supreme Court overturning *Roe v. Wade* with we're about to, and one of the reasons we're doing this now two years later is we're about to embark on, we are in the middle of primaries for various federal, state and local positions. And we're going to have the congressional elections in November. We have climate change. We have a totally different environment. We have people working from the office as well as from home. So we're going to focus on what an employer should do and how can employers avoid a toxic divisive work environment

while providing space for social discourse. And I know Felice, you were even before we get to some of this other stuff, talking about how can we ensure work is being done at the same time in terms of productivity is a piece of this. So I don't know if you want to comment on that before we go on.

Felice Ekelman (05:32):

Yes, yes. Very much so. So, you know, employers are concerned about employees getting work done and being productive, particularly those employers who have not yet fully embraced the emergent interest in remote work and are still uncertain about the hybrid workplace. And so employers do want to know that when employees are supposed to be working, they are working, yet it's difficult in many industries to attract and retain talent, despite what might be going on in the economy in many sectors of our economy, labor shortages are still acute. And so, you know, employers want to make sure, that they are modeling the type of behaviors in a workplace where employees are incentivized to stay and do good work. So this is tough. Two big issues are facing employers, as they contemplate whether to promulgate policies regulating speech and communications in the workplace. The first is one, what rights do employers have to do so? Can an employer limit employees' communications about political and societal issues, and two, what rights do employees have to engage in this kind of communication that is clearly not work related? So I think what we have to do is unpack those two legal issues. And then once we've done that, we can talk about the pros and cons of promulgating a policy. And if so, what kind of policy may be best in the workplace,

Phil Rosen (07:26):

I think, before we get too far in, let us give you two caveats. One is, we're talking about these issues and our thoughts on how employers can handle workplace related issues. We're not providing political commentary on the issues that I've just mentioned or the issues we're going to talk about. We're not taking any side. So please don't read anything into comments or the examples we give. They're intended to be illustrations of different points and challenges that we see in the workplace. The second thing, as Felice and I started to think about this topic two years later, there's more case law out there, and we decided that we will not use the name of any specific company during our discussion. And we're doing that on purpose because we feel that if we shine a spotlight on any one company, some of whom, frankly, are clients, as they grapple with these difficult issues, that's not necessary to make the point that we need to make about how this fits together in terms of their culture and how they try to maneuver through the public issues and the legal minefield.

Phil Rosen (08:36):

So really we, we, we then began to say, what's changed from two years ago when we did this and what remains the same. And we've already talked about what kinds of topics are out there today. Some of the other things that I saw as I thought about it were, more people in the office that I mentioned they're much more. Yes, people are still remote, but they're coming back to the office more and more. The difference in the economy with layoffs in 2020. And today, there are a lot more jobs that are available. The economy certainly is changing in terms of inflation. There's more case law than there was that we can talk about as we get through some of the legal things. I think there's also more speed in the way, even it was fast two years ago, it's been fast with social media and public demonstrations and, and different issues that come up, but it's even faster today as people put things out.

Phil Rosen (09:31):

And I know Felice, you were talking also about the impact of the DEI movement and how that impacts today, even though that's a specific issue, how that's had an impact. What remains the same? There are still employers grappling with these issues, which is why for us, it's good to do this podcast again. The key cultural issues are probably the same, the backlash with mass demonstrations, stakeholder issues that are out there are probably the same and many of the key steps that employers should take remain the same and the key laws. But realistically, we now have more of a series of laws and we look at with cases that have started. So Felice maybe you can talk about the legal landscape and what you were mentioning, which is what can an employer do to stop people from speaking in the workplace about politics and other current events before we get to the issue of should they, the issue is can they, so maybe you want to talk about that?

Felice Ekelman (10:32):

So first of all, we hear a lot about the First Amendment, but the First Amendment does not apply to private employers. The First Amendment protects against government interference with the ability to engage in free speech. So if you are listening and you work for a public sector employer, state, city, municipality, town, or the federal government, this is not true, but for private employers, there is no guaranteed right to have to provide employees with unfettered free speech. There are however, some state and federal laws that do apply. So a federal law that applies, and that we've seen some case law out of is the National Labor Relations Act. This is a federal law that governs the relationship between employees, employers, and unions. And many people don't realize this, but the National Labor Relations Act applies even in non-union settings. And whether the workplaces unionized or non-union, the National Labor Relations Act guarantees employees the right to engage in what's called protected concerted activities. Basically employees have the right to band together to protest, comment, speak about, or otherwise engage in group activity, for the purpose of communicating with their employer about wages and benefits and other terms and conditions of employment.

Phil Rosen (12:06):

Yeah. And I guess you were just going to get to the examples. So things like Fight for 15 buttons, the Black Lives Matter masks. Sometimes we've talked in the past about when we were remote about the backgrounds, the virtual backgrounds that an employee might use, or even a manager at a facility. Those are some of the things that we see

Felice Ekelman (12:33):

Yes, where people engage in expression in the workplace. And if it is related to terms and conditions of employment, employers have to permit the protected concerted activities with some constraints, but we're not going to get into those right now, but if the communications or the protest have nothing to do with wages, benefits, and other workplace conditions, then the labor law does not protect it. So there was a case in which this was tested, where employees challenged an employers decision to disallow the use of facial mask with black lives matters insignia on it. And so far, the ruling is that while that is a piece of political discourse, it has nothing to do with terms and conditions of work. And so it was not protected by the National Labor Relations Act. Compare that to Phil mentioned the Fight for 15 buttons that has to do with wages.

Felice Ekelman (13:41):

And that is, that was considered as within the realm of protected concerted activity, because it had to do with terms and conditions of employment. So that's the National Labor Relations Act. There's also Title VII and other federal anti-discrimination laws. If there's a policy that prohibits talk based on a protected class, such as gender, or perhaps race or perhaps age or national origin or any protected class under federal law employers have to manage their policy consistently and not discriminate or prohibit some communication based on some protected classes and allow it with respect to others. So that's how the anti-discrimination statutes can come into play.

Phil Rosen (14:37):

And we've seen it also. And I think we'll see it more and more with *Roe v. Wade*, for example, in terms of various things. But one would be, is this religious discrimination in some way, because I'm taking a position on a particular *Roe v. Wade* issue one way or the other, and the employer is trying to stop me, or I was terminated unrelated to that, but I believe it was because of my political discourse in the workplace.

Felice Ekelman (15:06):

Another issue that we're probably going to see coming out of *Dobbs*, which is the case that overturned *Roe v. Wade* is how will courts or agencies interpret communications employees may make about the right to reproductive health benefits? So there is, right now, a reaction to *Dobbs* where in some jurisdiction, some employers are changing their healthcare options to provide for travel benefits associated with healthcare needs as a response to jobs and limitations on the right of women to seek reproductive health services in their jurisdiction. So we're going to have to see how courts would look at that because one can, one could argue that there's a gender aspect to that. So again, we've not seen any case law on that, but that could be coming down the pike somewhere soon. Now, many states and Phil and I are here in the Jackson Lewis office in New York City.

Felice Ekelman (16:10):

So I'm going to point out the New York state legal activities law. There are some states that have laws that protect legal conduct by employees outside of the workplace. So for example, if an employee chose to participate in a demonstration or other activity outside of workplace hours in New York, employers would be precluded from taking employment action, such as a termination based on an employee's participation in that kind of activity. So those are the laws that would regulate this kind of conduct. Now let's talk about employers, if we can, for a minute, who have taken stands in the recent past issued policies. And what's happened again without naming names of corporations, we've read about organizations who have issued prohibitions against political discourse in the workplace, whether it's verbal or on employer communications channels such as slack or email, and the like there was one employer who in response to this policy witnessed 60% of the workplace quit. Now that was one end of the spectrum. But employers who are going to take a position like that and prohibit all discourse should think about what the ramifications might be of such a position.

Phil Rosen (17:48):

And if you did a Google search of political discourse, you would see a series of articles and cases where employers who were trying to find the right balance. And

sometimes they were saying “we don't believe there should be any political discourse in the workplace because it's just too divisive as an issue”. So they're trying to do the right thing. But then the backlash that occurred from, from their own employees as Felice mentioned, part of this is really practically how much does this impact my business and where do I want to position myself as an employer? And where do I feel the line is? I mean, Felice and I have talked about whether or not you have a policy such as that, which is no political talk in the workplace. I don't recommend such a policy. I do believe you need policies.

Phil Rosen (18:39):

We'll talk about in a few minutes, in a variety of areas, maybe we cover it now for a minute, that are things like social media policies and buttons and uniforms and workplace conduct and EEO and harassment policies, diversity, equity, inclusion, you know, voting leave, public relations - who can speak, but those are not policies which prohibit political or current event discourse in the workplace, because I don't think realistically you can enforce it. I think it's important to know what you will do if in fact it becomes intimidating or harassing to an employee based on something went on. And I think you have to have those discussions with your management team, but I don't believe that you should set a policy saying it won't happen in the workplace because it's too hard to enforce. That's my opinion at least.

Felice Ekelman (19:29):

I feel I have worked with many clients in, in many industries who have decided to promulgate, we can call it a respectful communications policy and a policy with a title like that would provide some guardrails, but not get an employer into the thick of having to evaluate every communication and decide whether or not it is appropriate or not rather general boundaries of treating each other employees. One another with respect and communications is the kind of approach that will probably not trigger 60% of the workplace to resign, but rather will give an employer an opportunity when there is a complaint about conduct to say, look, that conduct falls outside the bounds, right. Of what we expect for respectful communications with one another.

Phil Rosen (20:32):

I think a lot of it, I agree with you. I think it's civility in the workplace, it's respect for other people's opinions and you have to respect them and they have to respect you. It's trying to take the emotion out of it and take the divisiveness out of it. And it just becomes hopefully a discussion. That's a civil discussion, and if it's not, then it may fall into one of those other policies. So I think you have to prepare for that disruption prepare for each of these issues. Think about your culture, think about how your management team are. They prepared if I'm an employer large or small. What I want to do is set from the top, what the policy would be or what the approach would be and what the culture would be. And then ensure that you've talked through these issues with your management team and with HR, so that you've got a strategy for response, and that you have the appropriate policies along the lines that we just talked about, that I listed, because otherwise you're caught flatfooted, and we always believe it's better to prevent by thinking about what you believe is going to be best.

Felice Ekelman (21:42):

I would add to the team that is reviewing the policy, the DEI, the diversity equity, and inclusion team, or to make sure that the communication, is not misguided and not subject to misinterpretation again, another layer of buy-in and security, that the

message will be a positive one, for all employees.

Phil Rosen (22:09):

And from that doing the kind of training so that everyone understands legally what they can and can't do. And from a policy standpoint, what your company, your specific company wants to do.

Felice Ekelman (22:24):

Yeah. I think that that wraps it up. Phil we've used up our time, so we want to thank our listeners and both Phil and I would be happy to speak with anyone who has a question about the content of the podcast, or certainly you can speak with any of our colleagues at Jackson Lewis that you know and work with. So thank you Phil.

Phil Rosen (22:47):

Thank you, Felice. Thank you very much for listening and we'll see on the next podcast.

Alitia Faccone (22:54):

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