

Political Speech in the Workplace: How Employers Can Manage Legal Risks in 6 Steps

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The national and global hyperpolitical atmosphere inevitably touches the workplace, where employers and employees must remain productive while navigating the intersection of political expression, workplace culture and policies, and the law. The rapidly approaching 2024 presidential election further highlights the importance of employers understanding the legal and practical considerations at play and managing the risks.

The First Amendment's protection against government regulation of speech does not extend to private employers, giving employers significant flexibility in regulating political expression in the workplace. That flexibility is tempered, however, by a host of other laws bearing on employees' political speech, including:

- National Labor Relations Act (NLRA)
- Anti-discrimination laws
- Laws concerning off-duty conduct

NLRA

The NLRA applies to both union and non-union employees in non-supervisory positions and protects workers who are acting together for purposes of collective bargaining or other mutual aid or protection. This "protected concerted activity" includes communications among employees about the terms and conditions of their employment and encompasses discussions about compensation, hours, benefits, workload, and disciplinary actions. Any political discussions that relate to employees' working conditions are thus protected by the NLRA and beyond an employer's regulation. That the NLRB General Counsel Jennifer Abruzzo has expressed interest in expanding the definition of protected concerted activity to include social justice and certain "political statements," such as writing phrases in support of political and social causes, signals the arrival of even broader protection for political speech.

Anti-Discrimination Laws

Political discussions can often result in polarizing and contentious exchanges. Although federal anti-discrimination laws do not protect political speech, activities, or affiliation, political speech could implicate anti-discrimination laws if it involves age, race, color, national origin, disability, sex, sexual orientation, or any other protected characteristic. Discussions of global conflicts, for example, or the U.S. Supreme Court's reversal of *Roe v. Wade*, could touch on protected characteristics, potentially opening the door to claims of discrimination, harassment, or a hostile work environment. An employee could also claim an employer's action in response to political discussion is a pretext for illegal discrimination. It is imperative that any employer addressing political speech do so in an evenhanded, consistent manner that insulates it from claims of preferring any protected characteristic over another.

Employers must also consider cultural and practical factors. Charged exchanges and

heated arguments on sensitive topics can harm employee morale, productivity, and relationships. Further, how and when an employer responds to political speech can significantly influence its reputation, image, and workplace culture.

Laws Concerning Off-Duty Conduct

Whatever latitude an employer might have to regulate political speech generally does not extend beyond the workplace. Indeed, some states, including California, Colorado, New York, and North Dakota, have laws that prohibit employers from disciplining, discharging, or discriminating against employees for engaging in lawful off-duty conduct, including political activities, conduct, and speech. These laws vary and generally protect employees from retaliation for lawful political speech or activities outside of working hours that do not interfere with the employee's workplace responsibilities.

For instance, Section 201-d of the New York Labor Law protects employees from adverse employment actions based on their off-duty political activities, such as campaigning, voting, or participating in political demonstrations. Employers operating in states with such protections should be particularly cautious about taking action against employees for any out-of-office political engagement to avoid triggering liability under state law.

Best Practices

Managing political speech in the workplace — particularly during a presidential election year — while maintaining a positive workplace culture and complying with applicable laws requires a thoughtful and strategic approach:

1. *Develop Clear Policies:* Create and communicate clear policies regarding political expression in the workplace in compliance with applicable labor and employment laws. These policies should outline acceptable behaviors and the consequences of violating them.
2. *Apply Policies Consistently:* Ensure that any policies related to political speech are enforced fairly and consistently.
3. *Promote Inclusivity and Respect:* Establish and reinforce a company culture that values diverse perspectives and inclusivity. Employees who understand and appreciate these concepts are more likely to respect views that differ from their own.
4. *Training and Education:* Offer regular training to employees and managers on how to handle political discussions in a way that minimizes conflict and fosters an inclusive environment.
5. *Monitor Off-Duty Conduct Laws:* Stay informed of applicable state laws on off-duty conduct to avoid inadvertently violating an employee's rights. Regular legal reviews and consultations with local counsel can help ensure compliance.
6. *Focus on Company Mission and Values:* Encourage employees to align their workplace behavior with the company's mission and values. Avoid allowing political discourse to detract from the employer's goals or disrupt its operations.

Please contact a Jackson Lewis attorney with any questions.

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