

Ballot Box Banter

Navigating Employee Speech Issues in the Workplace During Election Season

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It's About More Than Just Politics

“Stop the Steal”

The Israel-Hamas War

Immigration/the Border

The 2024 Election

Reproductive Rights

The “Stop Woke” Act

LGBTQ Rights

Speech at Work

- With some exceptions, private employers can regulate statements employees make on the job, and may discipline and terminate employees who act unprofessionally, offend others or create disturbances (even if the expression at issue is political/controversial in nature).
- Employment is at-will and can be terminated for any lawful reason, including unwanted speech, unless the speech is protected.
- What protections are there?
 - Anti-discrimination and anti-harassment laws (such as Title VII)
 - The National Labor Relations Act (NLRA)
 - State laws protecting political speech at work.
 - Collective bargaining agreements
 - Also: don't forget your own company's policies – social media, electronic communications

The Truth About the First Amendment and Freedom of Speech

“I have a First Amendment right to say what I want!” Right?

- No. The First Amendment limits only the *government’s* ability to suppress speech.
- Only individuals employed by the government have First Amendment protections at work.
- Private-sector employees do not have First Amendment or free speech rights in the workplace.

Title VII and State Antidiscrimination Laws

- Some speech may be *protected* by these laws:
 - Some speech may be protected due to religious accommodation requirements. This speech can be restricted, but an accommodation analysis must be done first. E.g., a pro-life employee who covers the inside of his cubicle with pictures and language against abortion.
 - Speech related to protected categories cannot be prohibited when other, similar forms of speech are permitted. Wearing a Black Lives Matter tee shirt, for example, or an LGBTQ+ pin or a hat with a cross on it, may be protected if other tee shirts, hats and pins with logos or slogans are permitted.
 - What about political speech when protected categories are not implicated? Can one wear a MAGA hat because someone else wears a Biden/Harris hat? Protected categories are not directly implicated. But excluding the MAGA hat may have a disparate impact on White males. Plus, in general, similarly-situated employees should be treated the same.

Title VII and State Antidiscrimination Laws

- Some speech may be *prohibited* by these laws:
 - Statements critical of work permits for asylum seekers? Could be harassment based on national origin.
 - Statements critical of reproductive rights or supporting abortion bans? Could be sex harassment.
 - Statements about the war in Gaza could be viewed as harassing based on religion, race, national origin
 - Statements about police shootings, or critical of Black Lives Matter could be racial harassment
 - Statements supportive of state laws restricting LGBTQ rights could be harassment based on sex.
 - But employers must undertake a reasonable accommodation analysis before restricting religious rights. E.g. case requiring religious employee to sign DEI policy

The National Labor Relations Act (NLRA)

- The NLRA protects the right of non-supervisors to engage in concerted activities “for the purpose of collective bargaining or other mutual aid or protection.”
- It is unlawful for an employer to interfere with or restrain these rights. This is true in unionized workplaces *as well as* non-unionized workplaces.
- Political speech can be protected under the NLRA.
 - E.g., an employer violated the NLRA when it discharged an employee for refusing to remove the hand-drawn letters “BLM” from their uniform. The Board found this was related to prior concerted employee protests about racial discrimination in the workplace and an attempt to bring those group complaints to the attention of management.
 - “Vote for Smith” vs. “Vote for Smith – She’ll Raise the Minimum Wage”

State Law Protections

- Many states and local governments have laws protecting employee political speech or activities, for example:
 - Broward County (Florida), California, Colorado, Connecticut, D.C., Georgia, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oregon, South Carolina, Utah, Washington, West Virginia, Seattle (Washington), and Madison (Wisconsin)
- Scope of protections vary greatly among states' laws:
 - Political opinions
 - Political activities
 - Election-related speech
 - Political party affiliation

Union vs. Non-Union

- Collective bargaining agreements (“CBAs”) often limit an employer’s ability to terminate workers without a performance-related reason
- Some CBAs may protect political activity.
- Check the CBA before taking action.

Company Policies



What about our own policies?

- Anti-Harassment
- Professional Conduct
- Social Media and Electronic Communications
 - Remind employees of policies regulating internet and email usage in the workplace
- Dress Codes
 - Ensure that they are unambiguous and consistently applied.
- Be mindful of the NLRA:
 - A policy that prohibits nonsupervisors from (for example) criticizing or disparaging their employer or supervisor electronically, including on social media, etc. is overbroad and likely unlawful.

Is Speech *Outside* of Work Out Of Bounds?

Can employers control what employees say off-duty?

- Many believe that an employee's offsite activities or statements (such as on social media) are beyond the purview of their employers
- But off-duty speech can impact the workplace, such as when an employee engages in racist, sexist or other hate speech outside of work.
- Employers are free to take action based on off-duty statements, unless the speech is protected by one of the laws discussed above.
- Posting content that is inconsistent with the employer's policies, including its commitment to prohibiting bullying, harassment and discrimination of any kind, may result in disciplinary action up to an including termination.
- Managers should be held to a higher standard than non-managers, because they make personnel decisions and speak for the organization.

To Analyze These Issues, Take These Steps.

- Is the speech protected in some way – National Labor Relations Act, state laws – if so, speech *cannot* be regulated. Exception: highly disruptive speech, speech that advocates violence, speech that violates anti-harassment laws can be prohibited in some circumstances even when it implicates NLRA protections.
- If the speech is not protected, it *can* be regulated or prohibited at work.
- If the speech is harassing or discriminatory – it *must* be prohibited at work.
- If religious rights come into conflict with another protected category, such as LGBTQ rights, the speech can be prohibited if it is discriminatory and no accommodation is possible.

Best Practices

- Ensure that your policies are clear, uniformly enforced, and sufficiently protective of an inclusive workplace without crossing the line into NLRA-protected speech.
- Ensure managers are aware of the employer's policies and practices towards political speech at work.
- Be attuned to statements or situations that involve controversial topics and ready to step in if the workplace becomes unproductive, offensive or unprofessional.
- Keep in mind morale as well – employees may resist overly restrictive limitations on political speech even where an employer can lawfully ban it.
- Don't forget to undertake an accommodation analysis when religious rights are implicated



Thank you.

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