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HR COMPLIANCE BULLETIN

Employer Considerations for Navigating Election Season

Election season can be a fraught time for employers. Employers are often faced with the challenge of fostering a culture of open communication while ensuring a civil work environment and navigating a variety of federal, state and local laws. Therefore, as the 2024 election approaches, it is critical for employers to understand their legal rights and responsibilities, as well as the steps they can take to prevent and mitigate political tension in the workplace.

Among the issues employers may want to consider in the lead-up to the election include:

- Employee rights and restrictions with respect to political speech in the workplace;
- Employee rights regarding off-duty conduct, including social media use and other political activity;
- Employer rights to and restrictions on political speech and activities; and
- Employee voting leave rights.

Action Steps

Employers may encounter a number of challenges during election season, as politics may introduce heightened tension and conflict in the workplace. In addition, employers must contend with a range of laws governing political speech, activity and related conduct. Therefore, it is important for employers to take proactive steps to encourage a civil workplace and avoid potential legal pitfalls. This Compliance Bulletin provides guidance employers may use to navigate politics in the workplace.

Highlights

Heading into the 2024 election season, employers may want to consider the potential issues that may arise with respect to:

- Employee speech in the workplace;
- Employee off-duty conduct, including social media use, political candidacy and other political activity;
- Employer speech; and
- Voting and other election-related leave rights.

Workplace Considerations During Election Season

Employee Speech in the Workplace

In general, the free speech protections granted by the First Amendment of the U.S. Constitution do not apply to private employers and their employees. In most states, absent an employment agreement to the contrary, employees are considered "at-will" employees and may be terminated for any lawful reason. Therefore, subject to limited exceptions, employers may refuse to hire, discharge or otherwise discriminate against employees based on their speech.

However, there are certain legal protections and other considerations with respect to restricting employee political speech in the workplace, as outlined below. These restrictions generally apply to all forms of employee political speech, including but not limited to written or verbal speech, wearing clothing or displaying symbols conveying political opinions, and distributing literature regarding political issues.

NLRA Protections

In some circumstances, employee political speech and conduct may be protected under Section 7 of the National Labor Relations Act (NLRA) as concerted activity. Specifically, Section 7 grants employees the right to engage in concerted activity for the purposes of collective bargaining and mutual aid or protection. These protections apply to both unionized and nonunionized nonsupervisory employees. "**Concerted activity**" generally includes any activity by a group of employees attempting to improve wages, hours and working conditions for the group. The National Labor Relations Board (NLRB) has stated that concerted political activity may be protected under Section 7 of the NLRA when the subject of that advocacy has a direct nexus to employee working conditions.

Therefore, although employers may limit political speech, they must be careful that such restrictions do not infringe on employees' right to engage in protected concerted activity under the NLRA. If any political discussions relate to the terms and conditions of employment, they are likely protected by the NLRA, and employees may not be penalized or discriminated against on the basis of such discussions.

However, the NLRB has expressed that speech that is derogatory, abusive or discriminatory such that it may lead to a hostile work environment is **not protected**, even if it relates to employee working conditions.

Equal Employment Opportunity Laws

There are no federal laws that protect employees from discrimination on the basis of their political affiliation. However, federal equal employment opportunity (EEO) laws protect employees from discrimination and harassment on the basis of a protected characteristic (e.g., age, race, sex and disability). Discrimination claims can arise under EEO laws even if the alleged discrimination was unintentional, such as policies or practices that have a disparate impact on members of a protected class as compared with employees who are not members of such protected class. Therefore, employers who choose to restrict political speech should ensure that such restrictions are enforced consistently to avoid claims of discrimination.

Furthermore, employees are generally protected from unwelcome conduct based on a protected characteristic when either enduring such conduct becomes a condition of employment or the conduct is so severe and pervasive that it creates a work environment that a reasonable person would consider intimidating, hostile or abusive. As a result, employers must carefully balance employee rights to engage in protected activity under the NLRA with their obligations to protect employers from discriminatory language and hostile work environments under EEO laws.

State Law Political Affiliation Protections

In addition to the protections provided under federal EEO laws, a small number of states and localities have enacted additional laws that protect employees from discrimination on the basis of their political affiliations and views and affiliation with a political party. Therefore, employers should review applicable state and local antidiscrimination laws to determine whether employees are entitled to separate protections on the basis of their political views or activities.

Off-duty Conduct

Employee political activity frequently takes place outside of the workplace. As a general matter, subject to certain exceptions, there are no federal laws that specifically restrict employers from discriminating against or discharging employees for political conduct that they engage in while they are off duty. However, there are several factors employers should consider before taking adverse action against an employee based on off-duty conduct.

Social Media Activity

One of the most common methods employees use to convey their political opinions and engage in political discussions is social media. Employers may wish to terminate or discipline an employee for statements or posts they make on social media. However, although employees are considered at-will employees in most cases (absent an employment contract to the contrary) such that employers may terminate them at any time for any or no reason, there are some restrictions on when employees may be punished for conduct on their personal social media accounts.

As an initial consideration, the determination of whether an employer can lawfully discriminate against or discharge an employee based on their personal social media account hinges on the manner in which the employer obtained the social media content. Approximately half of all states in the United States have enacted social media privacy laws that restrict employers from accessing an employee's nonpublic social media posts. Specifically, these laws generally prohibit employers from requesting that employees and applicants provide login credentials to their personal social media accounts.

However, even if an employer obtains an employee's personal social media through lawful methods, employers should consider these factors before taking adverse action on the basis of an employee's social media activity:

- **NLRA protections**—The NLRA protects employees who engage in concerted protected activity on their social media accounts. Therefore, employers should ensure that any actions taken are not in response to employee discussions regarding working conditions.
- **State off-duty conduct and political affiliation protections**—Employers should ensure that social media activity is not subject to state laws that protect employees from discrimination on the basis of their political affiliation or certain lawful off-duty conduct (including political activity).

Other Off-duty Conduct

As with social media activity, employers may not take any action in response to employee off-duty conduct that restricts employee rights under the NLRA to discuss issues related to employee working conditions. Additionally, a few states have enacted laws that prohibit employers from discharging or discriminating against employees who engage in lawful conduct outside of the workplace and during nonworking hours (including engaging in political activity). These laws may limit the extent to which employers may penalize employees for expressing controversial opinions and participating in demonstrations or protests.

Many states have also enacted laws that prohibit employers from preventing employees from engaging or participating in politics or running for elected office.

Employer Speech

In addition to employee rights regarding political speech, private employers are generally permitted to express their political views in the workplace, subject to certain exceptions as outlined below.

Captive Audience Bans

There is currently no federal law that prohibits employers from mandating attendance at meetings in which employers discuss political or religious matters, referred to as "captive audience" meetings. However, a growing number of states have enacted legislation prohibiting employers from coercing employees to attend such meetings. The increase in such laws coincides with a 2022 memorandum by the general counsel of the NLRB asking the board to declare captive audience meetings unlawful under the NLRA. However, the NLRB has yet to rule on this issue.

As a general matter, these bans prohibit employers from discharging, disciplining, penalizing and otherwise discriminating against employees who refuse to attend meetings or listen to communications in which the primary purpose is to communicate the employer's opinions on religious or political matters. Therefore, employers should ensure that they are not violating any such captive audience bans by holding mandatory meetings or issuing employer communications in which they express their views on political matters. However, many of these laws provide exceptions for employers to hold meetings or issue communications in which employee attendance or participation is wholly voluntary or in which the communication is necessary for employees to perform their job duties.

Employers who wish to discuss politics in the workplace should carefully review applicable state and local laws to ensure that such political discussion does not violate any such captive audience bans.

Political Donations and Candidate Support

Other than the limitations set forth under state captive audience bans, employers are generally free to express their own political views in the workplace and engage in other political activities. Additionally, most employers are allowed to donate to political campaigns and may generally contribute as much money as they wish to the political cause of their choosing. However, federal contractors are prohibited from making contributions or promising to make any contributions to any political party, committee or candidate for federal office or any political person for any political purpose or use.

Further, employers are generally prohibited under both federal and state laws from coercing or bribing employees to vote a certain way in an election and seeking to review an employee's ballot. Coercion can include discharging, disciplining or otherwise discriminating against, or threatening to discriminate against, an employee with respect to the terms and conditions of employment.

Voting and Other Election Leave

Although there is no federal law that entitles employees to take time off in order to vote, over half of the states in the United States have enacted laws that require private employers to provide voting leave in certain circumstances. The terms of the leave requirements vary by state; however, some states have voting leave laws that:

- Require the voting leave to be paid;
- Impose a notice requirement on employees;
- Mandate employers to post a notice of employee rights under such voting leave laws; and

- Allow employers to designate the hours employees may be absent to vote.

Some states specify that voting leave is only required when employees do not have sufficient nonworking time to cast their ballots. Most states have not addressed whether employers may consider an employee's ability to vote by mail in determining whether the employee has enough time outside of work to vote. However, a small number of states have specifically included provisions in their voting leave laws that require employers to provide time off to cast and request absentee ballots.

In addition to voting leave, some states require employers to provide leave for **election workers** to perform their election duties. Most states require employees to provide advance notice of such election worker leave, and, in general, such leave is not required to be paid.

Additional states require employers to provide leave so employees may fulfill their duties as **elected officials.**

Given the variance in state laws, employers should carefully review the laws of the states in which they have employees to ensure they are providing voting and other election-related leave.

Next Steps for Employers

Establish Clear and Consistent Policies

To prepare for the upcoming election, employers may wish to review and update relevant workplace policies to ensure compliance with federal, state and local laws and promote a civil workplace. For example, employers may wish to update policies regarding social media use, harassment, discrimination, employer-mandated meetings, voting leave and dress code policies.

In addition, employers must ensure that any workplace policies that restrict political speech are carefully drafted and enforced so as not to run afoul of employee rights under the NLRA. Specifically, employer policies **may not** restrict an employee's ability to discuss issues related to the terms and conditions of employment.

Regardless of an employer's policy, it is imperative that employers apply the policy consistently to avoid inadvertently discriminating against employees. For example, if an employer prohibits employees from displaying political symbols in the office, they should enforce that policy against all employees regardless of their political beliefs.

Train Employees and Managers

Heading into the election season, employers may also consider training employees on any relevant policies, including antidiscrimination, social media or dress code policies. Employers may also take the opportunity to remind employees of the importance of maintaining a civil workplace despite heightened tensions. Employers may also want to separately train managers on how to handle and respond to employee conflicts and on their obligations regarding speech that is protected under the NLRA and state or local laws.

Review State and Local Laws

As outlined in this Compliance Bulletin, a number of states and municipalities have enacted laws regarding employer and employee rights and obligations with respect to politics in the workplace. Therefore, employers should carefully review such laws in the states where they have workers to ensure their practices and policies comply with such laws. Given the

wide range and complexity of these laws, employers may also wish to work with local counsel to better understand their legal rights and responsibilities.