

Managing Political Speech in the 2020 Workplace

Workplaces are not insulated from political discussions. On the brink of a presidential election and amid political movements that have divided our country, political discussions continue around kitchen tables, cubicles, breakrooms, and the digital watercoolers of social media and Zoom gatherings. From “MAGA” face masks, “Nasty Woman” t-shirts, to “Black Lives Matter” pins, employers are considering approaches to address employee expressions of political beliefs. Addressing these expressions poses significant challenges for employers.

When political discussions surface in private workplaces, they have the potential to disrupt productivity, affect morale, and impact working relationships. However, before an employer takes any adverse action against an employee for political affiliation or speech, or attempts to implement regulations, the employer must understand the laws that impact political speech in the workplace. Workplace protection for employees based upon their political affiliations and political speech is a complex issue requiring an analysis of federal and state law, including (i) federal anti-discrimination laws, (ii) federal labor laws, and (iii) state-specific freedom of speech laws. Additionally, such an analysis depends, in part, on whether an employer is public or private; however, this article focuses on the private workplace. Ultimately, it would be wise for employers to first consider the various intersections of these laws and the protections they may offer employees, and then proceed with caution when managing issues that result from political speech.

Rights under anti-discrimination laws may be implicated by statements that some employers may deem “political.” Under the traditional anti-discrimination laws, employees are protected from unlawful discrimination, harassment, and retaliation based on, for example race, national origin, color, religion, sex, age, and disability. Although political affiliation is not a protected class recognized under these laws, political speech and expression may relate to issues involving protected-class status and thus may trigger certain employee rights.

To illustrate, discussions of controversial current events may have legal consequences. Consider a discussion in the workplace about President Donald Trump referring to COVID-19 as the “China Virus,” during which an employee laughs or agrees with the statement. One of that employee’s coworkers, who is of Chinese descent, complains to human resources that he is being subjected to a hostile work environment on account of his national origin. The original employee’s statements, although communicated as part of a political discussion, may implicate prohibitions under federal and state law against discrimination and harassment on the basis of race and national origin. Upon receipt of such a complaint, the employer must conduct a prompt, neutral, and thorough investigation of the allegations, and if the investigator concludes that the allegations are founded, the employer must take appropriate remedial action geared to eliminating the inappropriate conduct.

Employees have the right to engage in concerted political discussions under the National Labor Relations Act (NLRA). The NLRA applies to workers in both union and nonunion settings and restricts an employer’s right to limit or interfere with non-supervisory employees’

communications about wages, hours, and “other terms and conditions” of their employment. The general counsel for the National Labor Relations Board (NLRB), the federal agency that enforces the NLRA, has taken the position that employers may not interfere with political speech where there is a direct nexus between the speech and employee-working conditions. As such, political speech and conduct may constitute protected activities in the workplace to the extent that they implicate an employee’s terms and conditions of employment. As a practical matter, there may be a relationship between politics and many workplace conditions, including healthcare, immigration, minimum wage, transgender rights, and right-to-work legislation.

In addition to federal protections, some states and local governments have laws and regulations that directly or indirectly address politics in the workplace. For example, some states require that employers allow employees time off from work to vote, and some further require that employers pay employees for that time off. Some states outright prohibit employers from attempting to influence employee’s votes with employment actions, whether adverse or favorable, and others prohibit discrimination because of political activities and affiliations.

New Hampshire law does not require employers to give employees time off from work to vote. It does, however, prohibit direct and indirect bribes in exchange for votes and coercion or intimidation used to knowingly induce or compel any person to vote in a particular manner and makes such conduct a crime (see RSA 659:40). While there is no New Hampshire law that expressly addresses political conduct in the private workplace, it would not be far-fetched for an employee to argue that certain conduct at work violates a New Hampshire law, such as the state’s Law Against Discrimination (see RSA 354-A:7).

For multistate employers, different rules may apply in different states, and employers should take care to comply with all applicable laws. Employers should also be aware that the conduct of their managers and supervisors, as agents of the employer, may be imputed to the employer.

There are steps that employers can take to balance the competing interests of maintaining a productive workplace while also allowing employees to engage in political discourse without retribution. A complete ban on political discussion is illegal under the NLRA and may also violate state laws. If employers have policies that address purely political activities in the workplace that comply with federal and state laws, they should uniformly and consistently enforce them. Employers should also regularly disseminate policies concerning expectations for the workplace behavior of employees, keeping in mind the NLRB’s position that employers cannot interfere with employees’ ability to discuss topics that relate to the terms and conditions of the workplace and that sometimes those discussions may not necessarily be “respectful” or “polite.” Such policies also should reinforce that they are not intended to prevent or discourage employees from discussing their working conditions or engaging in other concerted activities protected by law. Fundamentally, employer policies regarding political speech should enact and communicate unambiguous expectations as to the policies and should provide reasons for their implementation.

Although employees do not have a constitutionally-protected right to freedom of speech in the private workplace, employers face the possibility of opening a “can of worms” when

employee conduct involves political speech or activity. Private employers would be wise to proceed carefully in assessing the intersection of the political affiliation and speech issues that can arise in the context of employee discipline.

The lines between political speech subject to employer regulation, speech that is protected as a communication about the terms and conditions of employment between non-supervisory workers, and speech and conduct that violates other laws is not always clear. To complicate matters further, federal agencies tend to be in flux, and agency positions are subject to change. Before disciplining an employee for conduct that involves political speech, employers and their counsel should first: (i) determine if the conduct is either protected or prohibited by federal, state, or local law; (ii) consider whether the conduct impacts workplace expectations and standards (e.g. productivity); and (iii) assess whether the conduct is governed by any enforceable workplace policies.

Should you have any questions about how the laws apply to you or your business, please contact a member of our Employment Law Practice Group, comprised of Terri L. Pastori, Beth A. Deragon, Ashley D. Taylor, and Brooke A. Moschetto (Candidate NH Bar Exam, results pending) at 603.369.4769. We are here to help.