

## *Free Speech Isn't Always Free: Employer Regulation of Political Expression*

RECOUNT! LOCK HER UP! ABOLISH THE ELECTORAL COLLEGE! MAKE AMERICA GREAT AGAIN! During politically charged times such as the present, employers often face complicated challenges in managing workplace dialogue. In a recent study by CareerBuilder, as many as one fifth to a third of all employees surveyed admitted to having engaged in heated discussions with co-workers about politics.

In addition to the obvious problems that passionate political expression can have on the productivity and morale of employees who do not share the views of their coworkers — not to mention a potential loss of customers and vendors who may be offended by an employee's political statements — employers may face liability as well. A primary concern is the risk of actionable harassment, discrimination, and retaliation developing out what may have started as seemingly innocuous chatter about current events. Political discussions can easily escalate from factual debates to generalizations about such contentious and legally implicated subjects as race, national origins, sexual orientation, gender, religion, age, or disabilities (or worse, to violence resulting in injury).

Generally speaking, federal law does not prohibit private-sector employers from restricting partisan political speech in the workplace. However, a blanket prohibition on all political discussions in the workplace would not only be nearly impossible to enforce, but federal and state laws often protect employees from disciplinary actions based on certain types of speech, including political expression. For example, the National Labor Relations Board (NLRB) severely restricts employers — **with or without incumbent labor unions** — from infringing on the rights of employees to engage in “concerted activity” related to the terms and conditions of their employment. And in recent years, the Board has readily cited employers who maintain policies that have any perceptible “chilling effect” on employee speech related to their work conditions, particularly with respect to the politically charged issue of labor union support. Such rulings often involve policies about buttons, pins, hats, or other campaign paraphernalia.

Many states, such as Washington, New Jersey, and Florida, specifically prevent employers from forcing employees to support or reject a specific political position or candidate, and a large number of states restrict employers from taking adverse actions against employees based on off-duty activities, such as political participation.

What advice should employers follow regarding politics in the workplace?

1. Review state and federal law concerning employee political expression.
2. Ensure that supervisors understand the importance of creating a civil, respectful, politically-neutral work environment.
3. Set a good example from top management down. Advise managers and supervisors to avoid unnecessary political conversations, pronouncements, or prominently displaying candidate signs in their offices or at their workstations.

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4. Do not pressure employees to support or reject a particular political position or candidate.
5. Never threaten adverse action based on political views.
6. Remind managers to report employee complaints, including those involving conduct with political overtones.
7. Remind managers of the company's non-retaliation policy and be cognizant of potential discrimination, harassment, and retaliation issues that may be connected to political beliefs.
8. Consider implementing carefully drafted non-solicitation policies, restricting the employees' ability to use computers or telephones to solicit money or support for political causes.
9. Consider implementing a carefully drafted policy concerning political expression that may harm productivity or impact client, customer, or vendor relationships.
10. Review electronic communications policies concerning the use of the employer's computer system, including the internet.
11. There will be individuals with strong views or who are active in politics off of the clock. Such individuals cannot reasonably be expected not to talk about politics. Accordingly, they should be advised (and reminded as necessary) that all workplace speech should be respectful and tolerant of others' views.
12. In the event of political disagreements between employees, be prepared to intervene to and return the focus to productivity and common objectives.

FisherBroyles partners are available and happy to assist you in a review of your policies, practices, and employment decisions.

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