Politics & Election Law in the Workplace: "Are you seriously voting for that candidate?!"

Labor & Employment Law Update

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With the 2016 general election heating up, discussions about politics and candidates will inevitably enter the workplace. Employers should be aware of several critical legal issues when responding or reacting to politics in the workplace, as well as understanding workers' rights to engage in the political process.

Imposing a blanket ban on political discussions may run afoul of the National Labor Relations Act.

The NLRA, which applies to private unionized and non-unionized workplaces, protects non-supervisory employees' discussions about terms and conditions of employment. As such, employers may not prohibit all political discussion in the workplace because some political speech could intersect with work-related matters (*e.g.*, immigration reform, equal pay, or the minimum wage) and therefore may be protected. The same is true for an employer's ban of political insignia in the workplace. While an employer can prohibit buttons, signs, or clothing bearing pure political speech in the workplace (*e.g.*, "Vote for Candidate X!"), a ban on similar insignia sufficiently connected to employment issues (*e.g.*, "Vote for Candidate X to raise the minimum wage!") may violate the NLRA.

Political speech in the workplace may also implicate anti-discrimination and harassment protections.

As seen in the most recent election cycle, hot political issues may overlap with an employee's protected status. For example, impassioned conversations about political platforms related to immigration and terrorism may be deemed discriminatory or harassing to an individual based on race, religion, national origin, or ancestry. Views on abortion could be deemed harassing or discriminatory to employees based on gender or religion.

Employers must be careful that political discourse in the workplace does not create a hostile or discriminatory work environment for other employees or otherwise implicate various equal employment opportunity and civil rights laws.

For public employers, First Amendment protections may be implicated.

The First Amendment prohibits the government's restriction of free speech. As such, *public* employers may not terminate or otherwise discipline employees because of their political views or activities. Many local ordinances similarly protect county, municipal, and other public agency employees' political speech. That said, it is prohibited for public employees to perform campaign activities on taxpayer time or by using public resources.

On the other hand, *private* employers are not limited by the First Amendment from banning political discussion in the workplace (subject to the above). But proceed with caution! Some states and local laws (such as D.C., California, and New York) prohibit discrimination based on political affiliation and political activity outside of the workplace. Additionally, some states (like Illinois) prohibit employers from gathering or keeping record of employees' associations, political activities, publications, communications, or non-employment activities. Similarly, many states (like Illinois, Wisconsin, and Missouri) protect an employee's privacy surrounding their off-duty political speech on the internet, including speech on social media sites like Facebook or Twitter.

Of course, both private and public employers have a legitimate and lawful interest in ensuring that employees are productive and that political discussions or activities do not impede the normal operation of an employer's business. Policies and rules implemented to address this lawful interest should be neutral without favoring a certain political view.

Private employers may persuade only a "restricted class" of individuals to vote for or against a political candidate.

Federal election laws define this restricted class as "executive or administrative personnel" who receive a salary and have policymaking, managerial, professional, or supervisory responsibilities. However, a corporation may not advocate for a particular candidate or political party in its communications to employees outside of the restricted class, including hourly employees.

In many states, employees have the right to voter leave.

For example, **Illinois** employees are entitled to two hours of leave when the polls are open to vote. The employee must request the leave at least the day before the election (note: requests made on election day can be denied). The employer may dictate the hours of leave. However, employers must permit a two hour absence during one's actual work day where an employee's working hours begin less than two hours after polls open and end less than two hours before the polls close. For example, if the polls are open from 6:00 a.m. to 7:00 p.m., then:

- An employee working a 16-hour "double" shift from 5:00 a.m. to 9:00 p.m. would be given two hours of *paid* leave to vote, at a time chosen by the employer.

- An employee scheduled to work a 12-hour shift from 6:00 a.m. to 6:00 p.m. either would need to be (a) released from work by 5:00 p.m. (and paid for the one hour of missed work from 5:00 p.m. to 6:00 p.m.) to have a two-hour period to vote, or (b) allowed any other two-hour period off work while the polls are open, with pay, to vote.
- An employee working from 6:00 a.m. to 3:00 p.m. may be directed to vote after work, and no time after 3:00 p.m. needs to be compensated.

In **Missouri** employees may take up to three hours of paid leave to vote – but only if the employee actually votes. **Wisconsin** permits up to three hours of unpaid leave. Like Illinois, Missouri and Wisconsin employees must provide notice before Election Day, and the Employer may dictate the time of leave. Unlike its Midwest sisters, **Indiana** has no specific employment voting leave rights.

It should not surprise readers that **California** has its own unique provisions. Employees must be granted "enough" leave so that they will actually be able to vote. Fortunately, only two hours of working time taken off needs to be paid. Employees must give at least two working days' notice. Also, California employers must post a "Time Off to Vote" Notice at least ten days before any state-wide election (failure to post would likely excuse employees from providing the requisite notice of their need for voting leave).

The Bottom Line:

Election law is state (and sometimes county and city) specific. If the election cycle is creating any sort of workplace tension, employers should revisit conduct standards, anti-harassment / bullying policies, and reporting procedures. Experienced employment counsel may assist with implementing sound policies and practices to help manage workplace issues that may arise during election season.