

Politics & Election Law in the Workplace: Midterm Elections 2018

Labor & Employment Law Update

on October 24, 2018

It's that time again: Election Season. Employers must be aware of important legal issues when responding or reacting to politics in the workplace, as well as understanding workers' rights to engage in the political process. This article provides key reminders to public and private employers to manage the workplace without accidentally violating relevant laws.

Imposing a blanket ban on political discussions may run afoul of the NLRA.

The National Labor Relations Act (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: an employer may 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 may also implicate anti-discrimination, anti-harassment, & anti-bullying protections.

Hot political issues may overlap with an employee's protected status. For example, impassioned conversations may be deemed discriminatory or harassing to an individual based on race, religion, national origin, religion, or gender, and, as applicable, could even implicate anti-bullying laws. For example, consider recent issues related to the #MeToo movement, harassment of non-English speakers at restaurants, or even Justice Brett Kavanaugh's confirmation hearings.

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 on federal, state, and local levels. Remember: the workplace is not the place to

“try out” new material – especially for supervisory and management personnel.

Avoiding a 1st Amendment *Covfefe*.

The First Amendment protects *public* employees from discipline and termination as a result of their protected free speech and political views or activities. Many local ordinances similarly protect county, municipal, and other public agency employees’ political speech. That said, public employees may not lawfully use public resources – including on-the-clock time – for campaign activities.

The First Amendment does not constrain *private* employers from banning political discussion in the workplace (subject to the above). But proceed with caution. Some state 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 records 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, all employers have a legitimate and lawful interest in ensuring that employees are productive and that political discussions or activities do not impede the normal business operations, especially during working hours. Related employment policies 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.

Employees probably have the right to voter leave.

In many states, employees have the right to take time away from work to exercise their vote. Often times, missed worktime is paid, but employers can mandate the hours the employee takes so as to minimize the disruption to the workforce and paid leave.

For example, **Illinois** employees are entitled to two hours of leave, “without penalty,” 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 may 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 5:00 a.m. to 9:00 p.m. “double” would be given two hours of *paid* leave to vote, at a time chosen by the employer.
- An employee working 6:00 a.m. to 6:00 p.m. either would need to be either (a) released by 5:00 p.m. (and paid for the one hour of missed work) 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, without additional compensation.

Missouri employees may take up to three hours of paid leave– 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 employers may dictate the time of leave.

Unlike its Midwest sisters, **Indiana** has no specific employment voting leave rights.

Of course, **California** provides unique challenges for companies operating in different states. Employees must be granted “enough” leave so that they will actually be able to vote, but only two hours of working time needs to be paid. 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 giving at least two working days’ notice of their need for time off to vote).

Employers may want to encourage early and absentee voting.

To minimize disruptions to the work day, employers may want to try to encourage employees to take advantage of early and absentee voting as permitted by the various states. For example, in Illinois any eligible voter may now request to vote by mail. (It used to be permitted in only special circumstances when a voter was absent from his/her home jurisdiction).

Election judge leave may also be protected.

Wisconsin requires employers to provide an unpaid leave of absence for the entire Election Day to any employee who is appointed to serve as an election official. Employees making this request must give the employer seven days’ notice, and the employer is entitled to request that the election district’s municipal clerk verify the appointment.

Illinois companies with 25 or more employees may limit 10% of the workforce to serve as election judges. Employee(s) must provide twenty (20) days’ notice of need for leave. While this time need not be paid, employers may not otherwise

penalize employees nor require use of paid time off.

California protects employees from suspension and discharge while serving as an election worker, while **Missouri** and **Indiana** have no specific laws on the topic.

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 / workplace 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.

Politics & Election Law in the Workplace: Midterm Elections 2018