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ALERT

Maintaining Civility Post-Election – Guardrails on Employee Political Speech

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Election season is officially over, but the tension surrounding discussions about the candidates and the issues in American society is unlikely to end soon. That tension is extending beyond dinner tables and social gatherings—it's infiltrating the workplace, where most American adults spend a significant portion of their day. The Society for Human Resources Management (SHRM) estimated that U.S. employers were losing $1.2 billion a day in worker productivity due to workplace incivility. When that "incivility" arises from political disputes, the topics can range into territory that doesn't just make the workplace uncomfortable, but also has the potential to create employer liability for allegedly creating a hostile work environment or taking adverse actions based on protected traits like race, gender, gender identity, and religion.

Understanding Employee Free Speech in the Workplace

One of America's foundational principles is the right to free speech, and many workers and employers struggle to understand how that right applies in the workplace. Exercise of the right to free speech comes with responsibilities, and employers are authorized to take reasonable action to address worker speech or conduct (Speech) that could disrupt a healthy workplace environment and to make and enforce policies that ensure professionalism and respect in the workplace. This alert outlines current legal protections for employees' Speech, focusing on political speech and activity in CA, NY, MD, VA, and DC and offers some best practices for employers post-election.

Federal Protection of Employee Speech

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Many private-sector employees mistakenly believe that the First Amendment limits their employers' ability to tell them what Speech is appropriate and to punish them for Speech the employer deems inappropriate within the workplace or while using employer-controlled devices. However, employees of private companies do not have a constitutional right to free speech at work or while using employer-controlled devices because the First Amendment only applies to attempts by the government to restrict Speech. Thus, government employees or contractors have some First Amendment protections, but private-sector employees do not enjoy those same protections.

Federal law protects some employee Speech, but only in limited contexts. For example, the National Labor Relations Act (NLRA) protects employees—in unionized and nonunionized workplaces—from adverse treatment because they choose to engage with their colleagues in discussions about the terms and conditions of employment (often referred to as "protected concerted activity"). To be protected under the NLRA, the Speech must involve more than one employee and bear a "sufficiently close relationship" to the employees' terms and conditions of employment (e.g., wages, hours, etc.). (*Auto Workers Local 174 v. NLRB*, 645 F.2d 1151, 1154 (D.C. Cir. 1981)). For example, statements by non-supervisory employees advocating for a law requiring paid family leave may qualify for protection, but complaints about a candidate's position on foreign policy likely would not.

Employees also have the right to discuss and address possible unlawful conduct in the workplace, such as harassment, discrimination, workplace safety violations, and other issues under various federal laws. However, those same laws require employers to ensure the workplace is free from potentially racist, sexist, or discriminatory comments.

In summary, federal law prohibits employers from preventing or punishing employees for engaging in Speech that would be considered protected activity under a relevant statute. However, employers are entitled to adopt and enforce policies addressed to Speech that could disrupt a healthy workplace environment and to take action when employees engage in Speech the employer believes in good faith is a violation of its policies, even if the Speech is political.

State Protection of Employee Speech

A patchwork of state laws controls the extent to which employees' political Speech is protected. Most states do not have laws addressing protected political Speech by employees.

As is typically the case, California affords the most robust protections to employee political Speech. California employers may not "make, adopt, or enforce any rule, regulation, or policy: Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office" or "[c]ontrolling or directing, or tending to control or direct the political activities or affiliations of employees." (Cal. Lab. Code §§ 1101). California courts have interpreted "political activities" broadly as extending beyond "partisan activity" and including "the espousal of a candidate or a cause, and some degree of action to promote the acceptance thereof by other persons." (*Napear v. Bonneville Int'l Corp.*, 669 F. Supp. 3d 948, 963 (E.D. Cal. 2023) (emphasis in the original)).

In New York, it is unlawful for any employer "to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against a worker concerning compensation, promotion, or other terms and conditions of employment because of" the worker's "political activities outside of working hours, off of the employer's premises and without the use of" employer-controlled devices or other property, as long as those activities are legal. (N.Y. Labor Law § 201-d). The range of protected "political activities" under the law is limited to running for public office, campaigning for a candidate for public office, or participating in political fundraising activities. Thus, under the law, New York employers are generally free to restrict or punish Speech, including political Speech, that takes place in the workplace or Speech through employer-controlled devices if they believe it to be disruptive to the workplace. One caveat, however, is New York Election Law § 17-150, which affords employees protection from employer threats or intimidation intended to compel a worker to vote or refrain from voting—whether generally or for or against a particular person or ballot measure, or to register or refrain from registering to vote.

In Maryland, the primary legal protection for employee political Speech that employers must be aware of prohibits employers from posting threats or intimidation to compel or influence employees' political opinions or actions in the 90-day lead-up to an election. (MD. Election Law Code § 13-602(8)). The law also prohibits employers from posting notices that the election or defeat of a particular ticket or candidate will cause workplace closures, wage reductions, or hours reductions. Aside from those limited restrictions, Maryland employers are free to adopt and enforce policies addressed to Speech that could disrupt a healthy workplace environment and to take action when employees engage in Speech the employer believes in good faith is a violation of its policies, even if the Speech is political in nature.

In Virginia, employers may not require local electoral board members, general registrars, or election officers to use vacation or sick leave to perform their duties or take adverse action against them for their service. (Va. Code Ann. § 24.2-119.1). Employers also cannot compel employees to make P.A.C. contributions. (Va. Code Ann. § 24.2-949.1). Aside from those limited restrictions, Virginia law does not address protected political Speech by employees. Accordingly, Virginia employers may adopt and enforce policies addressed to Speech that could disrupt a healthy workplace environment and to take action when employees engage in Speech the employer believes in good faith is a violation of its policies, even if the Speech is political in nature.

The District of Columbia provides limited protection for employee political Speech. Under DC law, DC employers may not discriminate against employees in the terms and conditions of employment based on their political affiliation, which the law defines as "the state of belonging to or endorsing any political party." (D.C. Code § 2-1401.02; 2-1402.11). District of Columbia courts have limited protection under DC law to political party membership and party activity, not political activity in general. (*McCaskill v. Gallaudet Univ.*, 36 F. Supp. 3d 145, 153 (D.D.C. 2014)). Thus, employers may not take adverse actions against employees based on their political party affiliation, but employers may still institute policies addressing Speech that ensure respectful dialogue in the workplace and take action against employees who they believe in good faith have violated those policies.

Advice for Employers

Given the current environment, it may be tempting for employers to ban political Speech in the workplace altogether. Even if such a policy would be lawful, it would likely be unworkable and negatively impact employee morale. Employers should instead rely on creating a holistic set of guidelines that address workplace Speech generally and that can be applied to political Speech consistent with the employer's general right to ensure a productive and healthy workplace and appropriate use of company resources.

Policies that employers should consider revising or creating include:

- Codes of conduct
- Policies addressing harassment and discrimination
- Social media and employer-provided internet usage
- Workplace violence policies
- Use of employer technology policies
- Professionalism in the workplace
- Open-door policies
- Conflict of interest policies

The primary focus in reviewing or crafting these policies should be to ensure that their content consistently emphasizes that the basis for the policies is to create and foster respect and professionalism in the workplace, not to limit or restrict employees' legal protections.

Training for management and staff is also essential to reinforce new, revised, and existing policies. The training should explain the policies, identify individuals who can provide support, and emphasize the importance of holding people accountable, being a good example, and being proactive when issues arise. It is also critical to ensure that workplace policy enforcement is based on an employer's good faith judgment that its policies have been violated and not on an individual's protected traits, affiliations, or political identity.

By implementing these best practices, employers can navigate the challenges of addressing workplace political Speech while fostering a culture of respect and professionalism. This approach can also help employers to mitigate potential conflicts, preserve productivity, and promote a positive workplace environment. Now is the time for employers to review existing policies related to employee Speech and create additional policies as needed. Employers can put themselves in the best position to maintain a respectful and productive workforce into 2025 and beyond by consulting legal counsel to ensure that existing policies are effective and comply with local and federal laws regarding employee Speech. The attorneys in Wiley's Employment & Labor Practice are prepared to assist.