

It's Almost Election Time – Navigating the Minefield of Politics at Work

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One only needs to turn on the television or visit any social networking site, such as Twitter, to understand how divisive our country is along social, religious, and economic lines. Now, with high-stakes November midterms less than a month away, many employers will likely find themselves grappling with how to keep political discussions out of the workplace. According to a 2022 study conducted by the Society for Human Resources Management (SHRM), 40% of employees surveyed reported political discussion has become more common in the last three years.¹ However, because political topics often involve highly personal issues, these discussions tend to lead to disagreements. In fact, nearly half of U.S. workers have experienced political disagreements in the workplace.² The closer we get to midterms, political discussions—and, naturally, disagreements—will undoubtedly become more frequent in the workplace. Indeed, small discussions can escalate quickly, result in decreased employee productivity, and lower employee morale. This leaves employers walking a fine line of having to ensure compliance with relevant laws—such as the Section 7 of the National Labor Relations Act (“NLRA”)—and needing to redirect employees’ attention to the matter at hand—their job. While navigating these issues can be complicated, particularly in our country’s polarized state, employers are not without solutions. This article will discuss the relevant laws and provide some tips and tricks to help employers manage these challenging situations.

The Interplay Between the NLRA and Politics

¹ *A Workforce Divided: Survey Finds Alarming Rise of Politics at Work*, SHRM, Nov. 5, 2019, <https://www.shrm.org/about-shrm/press-room/press-releases/pages/survey-finds-alarming-rise-of-politics-at-work.aspx>.

² Allen Smith, *Political Affiliation Bias Strains Some Workplaces*, SHRM, Oct. 5, 2022, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/political-affiliation-bias-strains-some-workplaces.aspx>

Many employees incorrectly believe the First Amendment allows them to say anything political in the workplace. However, generally, private employers can limit political discussions at work with some important exceptions. One of those exceptions is Section 7 of the NLRA, which applies to most private sector employers and protects union *and* nonunion nonsupervisory employees. Section 7 provides, “[e]mployees have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid and protection.”³ Protected concerted activities include engaging in or refraining from certain conduct such as: unionizing; striking; discussing wages, benefits, or other working conditions with co-workers; collective bargaining; and talking to the media or a governmental agency about issues in an employees’ workplace. Moreover, section 8(a)(1) of the NLRA makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of Section 7 rights.⁴

The National Labor Relations Board (“NLRB”) is the administrative agency tasked with enforcing the NLRA. Employers can run afoul of the NLRA when they try to prohibit employees—by policy or discipline—from discussing certain topics or engaging in certain activities. This is particularly concerning, as the current Chairman of the NLRB, Lauren McFerran, favors a broad interpretation of the NLRA. For example, in a previous NLRB decision, *Amnesty International of the USA and Raed Jarar*,⁵ the majority held employees did not engage in protected activity when they joined non-employee unpaid interns’ petition seeking pay, finding Section 7 of the NLRA only protects workers when they advocate for fellow employees—not non-employees. Although she concurred with the result, McFerran dissented, expressing her belief that the majority’s decision put NLRA-protected workers at risk for discipline or discharge if they acted together at

³ 29 U.S.C. § 157.

⁴ 29 U.S.C. § 158(a)(1).

⁵ 368 NLRB No. 112 (2019).

work on behalf of coworkers not covered by the Act. McFerran's dissent touches on the scope of workers' protected rights to take group action, which is expected to be an area of focus for the new Board. With that in mind, this raises the issue: what should employers do? While the current legal landscape makes it increasingly more difficult to monitor employee political speech, there are a few steps employers can take to try to minimize legal exposure, including with the NLRB.

Avoid Content-Based Policies

First, employers should review their current handbook policies. When considering policies, employers need to remember it is not unlawful to create content-neutral policies prohibiting employees from doing something generally, such as talking or using their cell phone during work hours. However, policies prohibiting specific content or activity may violate the NLRA. For example, the NLRB found an employer's handbook policy stating "one should never discuss politics . . . in public—and in this case at work" violated Section 8(a)(1) of the NLRA.⁶ The Board found the policy "prevent[ed] employees from engaging in a wide variety of protected activities, including discussing obvious topics such as legislation aimed at improving employees' working conditions, candidates' positions on work related matters, increasing Federal minimum wage, right to work legislation and the benefits of unionization, to name a few."⁷ As such, employers are encouraged to stay away from overly broad, content-specific handbook policies, which may infringe on protected concerted activity, and opt for more generalized policies.

Make Complaint Procedures Available and Investigate Complaints

As mentioned above, employees are finding themselves in problematic situations due to political disagreements. Employers should train management on how to properly deescalate

⁶ *Chipotle Services LLC, d/b/a Chipotle Mexican Grill and Pennsylvania Workers Organizing Committee, A Project of the Fast Food Workers Committee*, 364 NLRB No. 72 (2016).

⁷ *Id.*

situations if a discussion between employees becomes too emotional or even aggressive. Training gives managers the tools they need to diffuse a situation and, hopefully, prevent employees from crossing any lines. However, the reality is lines still may be crossed. As such, employers should remind employees of complaint procedures available to them and thoroughly and promptly investigate all complaints consistently.

Consistent Enforcement

Indeed, neutral and consistent enforcement of policies is key. Employers must apply all policies uniformly, regardless of employees' political beliefs, positions within the company, or decision to engage in protected concerted activity. Because the application of a facially neutral law in a discriminatory manner could be found to be unlawful, employers should not apply content-neutral rules in a manner that violates Section 7 or 8(a)(1) of the NLRA. For example, a dress code policy prohibiting employees from wearing jewelry or other accessories at work is facially neutral. Applying the policy in different ways based on the type of jewelry or its content, however, could be problematic.

All in all, there is simply no one right way to handle political discussions in the workplace. However, one thing is certain. Given the shift in the NLRB's leadership, employers should not sit idle and hope another election cycle passes without incident. Instead, employers should consider the above strategies and consult with employment counsel if they have concerns about their current policies to avoid receiving complaints from the NLRB this election cycle.

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