



Political Discussions in the Workplace

Prepared by:
Barbara G. Stephenson
Sheehan & Sheehan, P.A.

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POLITICAL DISCUSSIONS IN THE WORKPLACE

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I. OVERVIEW

It's probably safe to say that most employers have policies or procedures that discourage or prohibit the gross level of incivility seen in the recent presidential debates. That low bar of behavior aside, there are things which an employer can and should do regarding political discussions in the workplace. Divisive political discussions, which at times can turn into religious discussions, can damage morale or worse, or lead to grievances, charges or lawsuits. Discussed below are some topics for employers to consider between now and the end of the current campaign season.

II. BOUNDARIES OF THE FIRST AMENDMENT

Employees in the private sector may be under the impression that they have "First Amendment rights" to express their political opinions in the workplace. This is not true. The First Amendment of the United States Constitution reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The "freedom of speech" portion of the First Amendment generally applies only to government censorship of speech. Consequently, private employers are allowed to regulate speech in the workplace and even to bar political discussions entirely. Some states, *not* including New Mexico, do have laws protecting political activities by employees. For example, California provides that "No employer shall make, adopt, or enforce any rule, regulation or policy: (a) forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office; (b) controlling or directing, or tending to control or direct,

the political activities or affiliations of employees.” California Labor Code, Section 1101. Statutes of this type, however, apply to conduct outside the workplace and are not viewed as prohibiting a private employer’s right to control political discussions and related activities within a workplace.

In the public sector, employees may be somewhat more protected; however, even governmental entities can impose speech limits to ensure efficient operations. In the 2006 case of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the United States Supreme Court considered whether the First Amendment protected a governmental employee from discipline based on speech made pursuant to the employee’s official duties. In *Garcetti*, the Court ruled that a district attorney who claimed he was passed up for promotion for criticizing the legitimacy of a warrant had no First Amendment protection because his statements were made pursuant to his position as a public employee. Under *Garcetti*, the First Amendment does not prevent employees from being disciplined for expressions they make pursuant to their official duties.

Even though employers may restrict or bar political discussions in the workplace without fear of First Amendment claims, in doing so, employers should consider potential negative fallout from such action. Morale may be adversely affected and employees may feel reluctant to speak up on matters of importance to the employer. In addition, if claims are filed, even if baseless, they still will have to be defended with the attendant costs and disruptive of litigation.

III. NEW MEXICO STATUTE REGARDING VOTING

As noted above, New Mexico does not have the type of laws some states have which prohibit employers from trying to control or direct the political activities of their employees. The extent to which politics and elections are considered in New Mexico statutes is found in NMSA Section 1-12-42 which requires that employers allow employees to be absent from work for the purpose of voting. If an employee’s work day begins less than two hours after polls open and

ends less than three hours before the polls' closing, the employer must allow the employee to be absent from work for two hours for the purpose of voting. This absence is with pay; however, the employer may specify the hours in which the employee is absent for voting. *See* Section 1-12-42(A) and (B). Employers who violate these provisions are subject to a fine of \$50 to \$100, although this penalty is rarely, if ever, applied. A more serious consequence for the employer could be defending some type of claim or lawsuit if an employee is retaliated against for having voted.

IV. RELIGIOUS/POLITICAL DISCUSSIONS IN THE WORKPLACE

In this day and age, election campaigns, particularly at the national level, frequently involve religion. One candidate may accuse his or her competitors of not being religious or of being of a religion other than Christian. Political/religious discussions of this type can, and should, be restricted by an employer.

Under both state and federal law, employers are prohibited from discriminating on many bases, including religion. Further, employers cannot allow harassment of their employees based on any protected status, including religion. A form of unlawful discrimination is creating or maintaining an abusive, intimidating or hostile work environment and such an environment can be created by employee differences and disagreements over religious/political principles. Depending on the nature of the discussion, claims can be created both by the actions of those who criticize a co-worker's religion and by those who seek to impose their religious beliefs on co-workers. When politics are added to this mix, the result can be particularly volatile, as employees may argue over such current issues as same-sex marriage, right to die laws, and abortion.

Employers should be on guard for religious activities which cross the line and create potential claims. Under the EEOC's current guidance on religious discrimination, the EEOC

states that an employee probably has a right to display something such as the Bible on her desk at work. The employer, however, can prohibit any employee's advocacy of specific religious beliefs or advocacy of political candidates who support those religious beliefs. Overall, an employer's nondiscrimination and non-harassment policies should be written so as to prohibit harassment against any employee for his or her religious beliefs, as well as harassment by believers against co-workers who are non-believers.

V. NON-SOLICITATION

Political discussions also can implicate solicitation practices where, for example, an employee solicits campaign contributions, the signing of qualifying petitions, voting for a specific candidate, and the like. Allowing such practices in the workplace can be dangerous, particularly where there may be an appearance of coercion when a supervising employee seeks contributions or support from a subordinate employee. A well-drafted non-solicitation policy can, and should, prohibit such activities. Many employers choose to have a broadly-written non-solicitation policy which prohibits solicitation both by managers, staff or third parties. Impermissible forms of solicitation may include the collection of money, goods, or gifts for schools, community groups, religious organizations, political causes, charitable groups or personal interests. Any such policy must be uniformly enforced and applied to all employees, regardless of their position with the employer.

VI. OFF-DUTY CONDUCT

As noted, states such as California prohibit employers from preventing the employee from engaging or participating in politics, including running for elected office. In Texas, an employer cannot reduce or threaten to reduce an employee's wages or other employee benefits for voting for or against a particular candidate or for refusing to disclose how he or she voted. *See* Election Code, Title 16, Chapter 276.001. While New Mexico has no such statutes,

employers should be cautious as to what information they seek about an employee's outside-the-workplace activities. Generally, there is no legitimate business reason for employers making inquiries into its employees' off-duty conduct, including political activity. Further, where employers have employees covered by collective bargaining, the resulting union contracts specifically may prohibit an employer from taking action against an employee based on his or her political activities.

VII. RECOMMENDATIONS REGARDING POLITICAL DISCUSSIONS

As the current campaign season intensifies, employers may wish to review current policies to determine if the company has adequate prohibitions on non-discrimination and harassment. If appropriately-drafted policies already are in place, employees, including managers and supervisors, should be retrained on these policies. An employer also should review its electronic communications policy, if it has one, since electronic systems frequently are used to disseminate political materials and solicit support for a candidate. An electronic communications policy should be drafted broadly enough to prohibit, for example, the forwarding of such things as political requests for contributions or support.

An employer also might consider adopting a non-solicitation policy that prohibits all forms of solicitation, including those which are politically-related, during work time. If such a policy is enacted, it, too, should be uniformly and consistently applied to all employees, regardless of title or rank. Regarding political discussions in the workplace, if a private employer chooses to prohibit such discussions, this, too, must be uniformly enforced. If political discussions are not barred, all employees must be reminded that such discussions will not be tolerated if they lead to conduct which can be interpreted as discriminatory, harassing or construed as creating a hostile work environment.

