

The Victorious Employer:

EMPLOYMENT AND LABOR NEWS FOR
WINNING IN THE WORKPLACE

POLITICAL DIALOGUE IN THE WORKPLACE

Last year, CNBC reported that a survey of 500 employees across the United States by research firm Gartner found that 78% of people talk about politics at work. And 47% of people said the 2020 presidential election impacted their ability to get work done. One-third of those polled said that the 2020 presidential election led them to spend more time getting political news while at work, which took time away from other important work-related tasks. The Gartner study also found that some 36% of employees said they have avoided talking to, or working with, a coworker because of their political views. About 31% of those who talk politics at work say these conversations are "stressful and/or frustrating." Meanwhile, some 29% of employees have witnessed at least one instance of unacceptable treatment of a coworker, including being called offensive names, Gartner found. According to a recent Glassdoor poll of over 1,200 employed adults, 57% of workers say they have talked about politics while on the job – despite 60% saying they "believe discussing politics

at work is unacceptable." According to a recent survey from the Society for Human Resource Management, 42% of U.S. employees say they have personally experienced, and 44% say they have witnessed, political disagreements at work. A majority (56%) said that discussing politics at work has become more common in the past four years.

Beyond the employee morale and productivity issues that may be implicated, political dialogue in the workplace also may create potential liability for employers. Conversations regarding candidates often focus on race, sex, or religion and can easily provide potential grounds for harassment, race, religious, age and/or gender, among other forms of discrimination, retaliation, or other types of workplace complaints.

In this issue of The Victorious Employer, I will answer some common questions concerning political speech in the workplace and what employers can and can't do to regulate political discussions at work.

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**JASON
GUINASSO**

PARTNER

We are pleased to present Issue 3 of The Victorious Employer, our periodic employment law newsletter. This and future issues will cover a range of topics of interest to those with an interest in employer/employee interactions.

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1 Do the First Amendment's freedom of speech protections allow employees to express their political views in the workplace?

Employers have wide discretion when it comes to limiting the political expression of employees in the workplace. The First Amendment generally applies only to government censorship of speech. As such, the Constitution allows private companies to regulate speech, even to bar political discussion entirely. Public employees are more protected by free-speech rules, but even governmental entities can impose speech limits to ensure efficient operations. In general, an employer can discipline or discharge an employee for legitimate, business-related reasons, even if the conduct involves political expression at work.

For example, if an employee's political expression interferes with his/her work, disrupts his/her co-workers, or infringes upon a business objective, the employer can take action consistent with its written policies and practices. However, employers can run afoul of discrimination laws (including laws protecting political expression, religious beliefs, race, gender, religion, and other protected characteristics) when there is evidence of disparate treatment, uneven application of the employer's policies, or adverse or retaliatory treatment based solely upon an employee's political expression.

2 Can an employer require its employees to support the employer's political views?

Federal election laws allow corporations to persuade a "restricted class" of individuals to vote for or against a political candidate. The "restricted class" is defined as "executive or administrative personnel" who are employed by a corporation on a salary basis and have policymaking, managerial, professional, or supervisory

responsibilities. Executive and administrative personnel include a corporation's officers, executives, managers, and lawyers.

However, outside the restricted class, a corporation's communications to rank-and-file employees regarding the election of political candidates is more restricted than under federal election laws.

3 Can an employer prohibit political campaigning at work?

An employee's focus at work should be job-related. Accordingly, an employer should regulate political campaigning at work through the enforcement of a non-solicitation policy, which prohibits employees from soliciting other employees for political purposes during working time. Employers should also immediately and consistently counsel and discipline employees who engage in political activities instead of performing their job duties during working time. In other words, employers should treat political campaigning at work as it would other forms of solicitation under its non-solicitation policies, whether it is for school fundraisers, charitable causes, or other civic endeavors unrelated to work.

4 Can employers prohibit political displays at work (e.g., buttons, signs, posters)?

An employer can implement dress code policies that prohibit employees from displaying political items at work, such as buttons, pins, hats, and other campaign paraphernalia, so long as the employer evenhandedly prohibits the display of all forms of non-business-related items. An employer may want to prohibit employees from wearing paraphernalia at work in order to avoid the appearance that the employer adopts an employee's



“An employer may want to prohibit employees from wearing paraphernalia at work in order to avoid the appearance that the employer adopts an employee’s political views.”



political views. Employers can generally prohibit campaign signs and solicitations and can take control of the information posted within their workplace by enforcing their non-solicitation rules.

However, under the National Labor Relations Act (“NLRA”), employees have the right to display labor union insignia at work. Thus, an employee cannot be disciplined for wearing a union button that contains a political message (e.g., “Teamsters for Obama”) because the political message is likely outweighed by the protected union display. Regulating and restricting political displays and expression at work does not mean that employers must purge the workplace from politics. Each employer must decide the extent of tolerable political expression or activity in the workplace based upon an understanding of its culture, workforce, business needs, and client and marketplace sensitivities.

5 Can employers restrict employees’ off-duty political activities?

Employers need to be careful about not discriminating against employees for engaging in political activity. For instance, companies should not take adverse action against an employee for engaging in lawful off-duty conduct such as supporting a specific candidate or being involved with a particular political party or organization.

Likewise, discriminating against employees for holding political views or participating in off-duty activities on the campaign trail for candidates is often prohibited. For example, employees can put bumper stickers on their cars in support of a presidential candidate or volunteer to pamphleteer or otherwise volunteer when off-duty for a political candidate.

Further, many unions along with their members are very politically active, so that union contracts often prohibit

discrimination or sanctions against union workers based on their political activity. Union workers generally are protected from discipline for any activity outside of working hours and company property unless the employer can prove a direct negative impact on its operations, particularly those whose collective bargaining agreements have a privacy clause.

6 An employee mentions to his supervisor that the employee’s co-worker constantly tells him that a candidate should not become president because of his religion. Another co-worker tells colleagues at lunch that another candidate is too old to be president. What are some of the actions that should be taken by the employer?

As a threshold matter, the employer should follow established procedures for employee complaints. An employer must do what it can to ensure that political dialogue among employees does not turn into a discussion of protected characteristics. Workers in protected categories may feel alienated or isolated if they observe employees criticize a political candidate based upon their own protected characteristics, e.g., Muslims. Consider how a discussion about a candidate’s age might impact his ability to operate as Commander-in-Chief could be part of a discussion that could be perceived as age-based discrimination.

Similarly, discussions of LGBTQ+ rights, immigration, police use of force, black lives matter, abortion, and other political issues currently subject to debate can easily generate inappropriate workplace conversations. Employers should publicize and distribute anti-discrimination and anti-harassment policies that include detailed complaint and non-retaliation procedures. Persistent political dialogue and discussion can be viewed by some employees as unlawful harassment or discrimination.



If an employee complains of inappropriate behavior or unfair treatment based upon a discussion about politics or an individual's political views, the employer should immediately investigate the complaint and take the necessary action to remedy the potentially offensive behavior as swiftly, thoroughly, and seriously as any other discrimination or retaliation complaint it receives. Calling a discussion, debate, or exchange among employees "political" does not obviate an employer's need to investigate or take appropriate corrective action, particularly where a complaint has been lodged.

7 A devout Christian employee displays a Bible on her desk, and strongly urges co-workers to vote for pro-life candidates. Can the employer take disciplinary action against the employee for displaying the Bible and/or for discussing her politics?

Religion and politics are often intertwined because political candidates differ on issues rooted in individuals' religious beliefs. An employer must distinguish between the religious and political aspects of the employee's expression and conduct.

Discrimination on the basis of religion is prohibited under Title VII of the 1964 Civil Rights Act and analogous state laws. Under Title VII and other laws, an employer has an obligation to reasonably accommodate an employee's religious practice, including the display of religious objects and artifacts, absent an undue hardship. The Equal Employment Opportunity Commission ("EEOC") has issued written guidance regarding religious discrimination in the workplace. In the guidance, the EEOC stated that

an employee displaying a religious object (e.g., a poster with the message "Jesus Saves!") in his/her private office does not pose an undue hardship. On the other hand, if the employee sat in the main lobby through which all employees, visitors, clients, and vendors must enter and displayed the religious object, it would likely constitute a hardship because it could be perceived as representing the employer's beliefs and viewpoints. Therefore, under existing EEOC guidance, an employee probably has a right to display the Bible on her desk in her office.

By contrast, the employer can restrict the employee's advocacy of pro-life candidates at work if it offends co-workers. The EEOC's guidance, as well as applicable case law, makes it clear that religious expression directed toward employees by co-workers and managers may constitute harassment if it is abusive or persists after the employees to whom it is directed have made clear that it is unwelcome. In other words, an employer can prohibit an employee from repeatedly urging co-workers to vote for pro-life candidates if other employees complain that the advocacy based upon the employee's religious beliefs is persistent and unwelcome.

8 What are some recommended steps Nevada employers can take regarding politics and political discussion in the workplace?

We recommend you take the following actions regarding politics and political discussions in the workplace:

- » Draft and implement a non-solicitation policy that prohibits all forms of solicitation – including political campaigning – during working time.



- » Draft and implement an electronic communications policy that explicitly mentions that the employer's computer system, including its internet, instant messaging, and text messaging, is primarily for business-related use.
- » Actively and consistently enforce a comprehensive anti-harassment and anti-discrimination policy that provides a clear mechanism for complaints and investigation. Remind employees of the company's non-retaliation policy associated with lodging legitimate complaints.
- » Remind managers and supervisors to avoid political conversations or discussions with their subordinates. You may also want to include a specific section in your company's policies addressing political discussion in the workplace. To the extent that you limit political expression, limit only the types of expression that might harm productivity in the workplace, impact customer, client, vendor, or similar relationships or otherwise disrupt work.
- » Remind managers to report employee complaints, even if the complained-of conduct has political overtones. Remind managers of the company's non-retaliation policy.
- » Remind managers to evenhandedly enforce dress code and non-solicitation policies. Enforcement cannot be influenced by an employee's political views or activities.
- » Seek legal counsel before disciplining any employee for his/her political activities, including missing work to attend a political rally.
- » Advise employees that all workplace speech, whether political or otherwise, should be respectful and tolerant of others' views.
- » Do not press employees to vote for a particular candidate and never use threats of adverse employment action to influence an employee's vote.
- » Communicate with supervisors regularly during campaign and election season to ensure that they understand the importance of creating a respectful, politically-neutral work environment.
- » Be sensitive to potential discrimination, harassment, and retaliation issues. While political beliefs at work are not protected in the same manner as, say, religious beliefs, the potential exposure to these types of claims remains prominent. ■



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PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NEVADA 89145
702.385.2500

500 DAMONTE RANCH PKWY., SUITE 980
RENO, NEVADA 89521
775.853.8746

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