
Hiring to Firing Podcast — Managing Political Discourse at Work With Lessons from Mad Men**Hosts: Tracey Diamond and Emily Schifter****Recorded 9/23/24****Tracey Diamond:**

With the upcoming election, today's episode couldn't be more timely. Stay tuned to hear a lively discussion about politics in the workplace with clips from the popular TV show, *Mad Men*. But before we turn to that, I have an important announcement. My co-host and partner, Evan Gibbs, has decided to step down from *Hiring to Firing* to concentrate his time on his burgeoning multi-disciplinary corporate espionage practice.

It has been an amazing three years working with Evan. We have discussed so many topics, from professional work attire, to the right way to terminate employees, to leadership, using such diverse TV shows and movies as *Parks and Recreation*, *Modern Family*, *The Matrix*, *Beef*, *Office Space*, and many more. Evan and I are amazed and very proud of the podcast growth with a total of more than 40,000 listeners in the past three years.

As our podcast begins its next chapter, I am excited to announce that my partner, Emily Schifter, will be joining me to co-host the next episodes of *Hiring to Firing*. Emily works with and counsels clients on a wide variety of employment and human resources matters, including employment discrimination, leave issues, accommodation requests, and wage and hour litigation. With much thanks, we bid Evan farewell and welcome Emily. Now, on to the show.

[INTRO]

Tracey Diamond:

Welcome to *Hiring to Firing*, the podcast. I'm Tracey Diamond, and I'm here with my partner, Emily Schifter. Together, we tackle all employment issues from *Hiring to Firing*.

Emily Schifter:

Today, we welcome Trisha Earls of The Hawkins Firm. Trisha focuses on independent internal investigations of employment issues. Before joining The Hawkins Firm, Trisha was Associate Group Counseling Compliance and Ethics Officer at Equifax, Senior VP and Associate GC for Education Management Corporation, and Chief People, Legal and Compliance Officer at Tegra, a private equity-owned sports apparel manufacturer.

Welcome, Trisha. Why don't you tell us a little bit about your practice?

Trisha Earls:

Thank you, Emily. It's great to be here. As you mentioned, yes, I'm in private practice now. Primarily, my practice is conducting independent investigations for companies. Generally, these

investigations are around harassment, discrimination, retaliation-type issues. I've had companies also outsource escalated hotline or ethics whistleblower complaints for investigation.

Really, I think I accidentally fell into this niche because having spent so much time in-house. I've spent 15 years in my career in-house and human resources and legal roles and just got good at or have a gift for developing rapport with employees and knowing how corporations work. It makes it easy to navigate these types of things. I accidentally ended up in this niche.

Emily Schifter:

You definitely have a gift. I know you've helped several of my clients with some tricky investigation issues, so you're in the right niche, for sure.

Trisha Earls:

Well, thank you.

Tracey Diamond:

We're thrilled to have you today, Trisha. Thank you for joining us. Today, in light of the upcoming election, we thought it would be a good time for a discussion about managing political discourse in the workplace. As we always do on *Hiring to Firing*, we're going to kick off our discussion with a TV show. For today's topic, we chose *Mad Men*, the drama series starring Jon Hamm that chronicled the lives of executives of Sterling Advertising Agency on Madison Avenue in the 1960s Manhattan. In this clip, Don and his colleagues watch an ad for Nixon in light of the upcoming 1960 presidential election between Kennedy and Nixon.

[BEGIN CLIP]

Announcer:

I would like to talk to you for a moment about dollars and cents, your dollars and cents. Now, my opponents want to increase federal expenditures as much as \$18 billion a year. How will they pay for it? There are only two ways. One is to raise your taxes.

Don:

Turn it off.

Announcer:

The other –

Don:

An ad made by a public relations team. Message received and forgotten.

Paul:

We should give this to France for some music. Nixon's campaign song in the key of E. Ethel, go get the ice pick. That Nixon guy is on TV again.

Don:

Should have never been this close.

[END CLIP]

Emily Schifter:

In today's world, if the polls are any indication, our country remains pretty divided with really strong opinions on both sides of the political spectrum. This means that it's likely that in most workplaces, employees have strong opinions on both sides of all issues and certainly want to talk about them in the workplace. As we get closer and closer to the election, what are some best practices for maintaining a calm professional workplace?

Tracey Diamond:

What do you think, Trisha?

Trisha Earls:

I would recommend that you start with reminding employees about the policies you do have. Most companies don't have policies that ban all political discourse in the workplace. That kind of policy would, frankly, just not be very easy to enforce, and you would run into First Amendment issues for public employers and NLRA issues for all employers but especially unionized employers. Some states have laws around that political speech is protected speech.

I think the most practical way to address this is just focus on the policies you do have, and remind employees that your no harassment policy or your equal opportunity or no discrimination policy or your retaliation policies are still in effect, so that if political discourse turns into arguments about religion, For example, the abortion issue around immigration, which are very hot issues right now, that it could run afoul of these policies. The best way to tackle this is just rely on the common sense policies you already have and remind employees about them.

Tracey Diamond:

Do you think that it would be okay for employers to say to employees, "While you're on the clock, we need you to be focusing on the work that's at hand and not talking about anything personal, including your political beliefs?"

Trisha Earls:

I think, generally, yes. But anything taken too far could start running afoul of some of these issues. I think, generally, it's a great idea to say, "Hey, we're here to work, and Redirect them

back to the work of the work, as opposed to engaging in personal conversation. Then if it becomes extreme, then you have to consider disciplinary measures.

But then you also have to take a fact- specific inquiry, right? What did they say? Is it protected speech under the First Amendment? Is it about the terms and conditions of employment, so it could be covered by the NLRA? Is it other types of political speech, depending on which state you're in? Then you have to get a lot more focused on what you do. But generally speaking, yes, my practice has always been redirect them back to the work of the work.

Tracey Diamond:

Let's say an employee starts talking about their political beliefs, and let's say their political beliefs are on the extreme side of one side or the other, and it starts getting other employees upset. Emily and Trisha, what do you think an employer can do at that point to try to calm everybody down?

Emily Schifter:

I think Trisha is right that you can start with your existing policies. If you've got standards of conduct or respect in the workplace type of a policy, that's kind of your first step. I think you're right, Trisha. A lot of my clients don't have specific policies about political speech specifically or leading up to the election. I've had some ask about whether we should or whether we shouldn't.

But I think one of the challenges, I'd be curious to bring your thoughts on that, is how to make sure that you are placing people, so to speak, equally. How do you make sure managers know if maybe you disagree with the employees' opinion, so you're deciding to crack down on that but maybe not someone who you agree with? How do you make sure that that is handled equally?

Trisha Earls:

Yes. That's a tricky one because the HR leader or the business leader is not in every conversation. You don't know. But I think you hit on an important policy that I didn't mention before, and most companies have some version of standards of conduct, i.e. be professional in the workplace, right?

If political discussions, even if they don't touch on religion or immigration or other things that makes them encompassed by the no harassment policy, if they're still engaging in hostile communication or it's devolving into a fight, then you can address it under those policies by stating it's unprofessional to engage, to be uncivil to your colleagues in the workplace.

In terms of equal enforcement, I mean, I think you just have to go out, again, being proactive sometimes is helpful here. Remind your managers these are our policies, and remind them of the standards of conduct or be professional in the workplace policy, whatever your company calls it. Then remind them they have to address things equally. They represent all employees, just like HR does. You have to represent all of your employees, and so you have to be neutral and fair. You can't bring your political opinions into whom you discipline and whom you don't.

The HR person should be asking those questions. If it comes to them and it's always one side of the aisle versus the other, then they should be asking those questions before they head down the discipline path.

Emily Schifter:

Right. Doing some fact-finding themselves. You mentioned something else, too, about concerns about protected speech. I know sometimes employers, especially who are not unionized, forget a little bit about what the rules are there and may even erroneously assume that the National Labor Relations Act doesn't apply to them. What are the important things to be aware of there, especially as we're heading into election season?

Trisha Earls:

It's a very broad net, right? The National Labor Relations Act protects employees if they are discussing generally, and you guys can certainly correct me and add to this definition, the terms and conditions of employment. If it's related to the terms and conditions of employment, and it's concerted, meaning it's more than one person discussing it, then it's protected speech. Employers have to be very careful about cracking down. For example, telling employees they can't share their salaries with each other would run afoul of that.

Tracey Diamond:

What about employees that come into the office wearing political insignia; a t-shirt, a hat, a pin? Can employers do anything to prohibit that? If not, how do they handle if an employee on the other side of political spectrum gets upset?

Trisha Earls:

Yes. Another landmine, right? This is also probably a fact-specific inquiry I would think. I would definitely like you guys to opine as well. But I think it starts with what type of employer are you, right? Are you a public employer? Does the constitution apply, which has First Amendment protections, and so that might be protected speech? Are you a unionized employer, even though, as we just said, NLRA applies to all employers? But maybe your collective bargaining agreement says something about this if you are a unionized employer.

Also, what state are you in? Last time I looked, there are 11 states that have some sort of protection for political activity, and they're all phrased very differently. What they actually protect is very different, so you have to know what state you're in. Then what are your existing policies? If your existing policies already ban slogans, any type of slogan, in the workplace, then maybe you can regulate and say no political pins whatsoever or political slogans whatsoever. It's a minefield. I definitely like your thoughts on this as well. How have you tackled this?

Tracey Diamond:

Yes. I would say that if an employer really is concerned about this that it would be good for them to put out a policy now, assuming they're in a state where they can do so before somebody comes in wearing some kind of political slogan that they're going to have to handle. This way,

the policy's out for everybody to see ahead of time, and it's written in a very neutral way. Emily, what do you think?

Emily Schifter:

That's right. I think you have to pretty much ban everything. It's not just political speech, but it might be even things like I'm wearing a Livestrong bracelet or trying a breast cancer pink ribbon in October, which might be tough culturally. I think employers have to think about that, too. If you're going to do a broad policy like that, are you going to inadvertently take away things that employees are used to being able to express?

I think it also depends on the type of workplace. Certainly, if you're the type of employer where employees are wearing uniforms or there might be safety considerations, neutral reasons to limit what people can wear, the types of things that they can bring if they're directly interfacing with customers. That might be a different situation than maybe a white-collar workplace where people are in their individual offices and cubicles. I think it really does take consideration not just of the law applicable to you, where you operate, but what your workplace culture is like.

Tracey Diamond:

Yes. I think that if you take it to the next level, think about remote workplaces, too. If someone's in their home office and there happens to be some kind of, I don't know, bobblehead, something on their desk that is visible on the camera, can you regulate that when it's actually in their home? It's very interesting.

Trisha Earls:

I just want to expand on something you just said. The word culture is really important. Your company culture really. You really have to understand it to know the reaction you're going to get if you implement a new policy, especially right before the election. One thing I would say is any heavy-handed policy or just broad encompassing policy that you enforce, it can backfire on you. Remember, these are your employees after the election, too, and you may have done some harm to morale that is going to take you a while to recover from.

Again, being a practitioner, practically speaking, having been in-house, sometimes the best way to handle this is just address it if it becomes an escalated situation where you have to step in and take action. But trying to prevent all actions from the beginning sometimes is a fool's errand.

Tracey Diamond:

Such an important point. Yes. I'd like to take us to our next clip. In this clip, an applicant who goes by the name Duck discusses or is asked who he's going to vote for in the Kennedy-Nixon election. He talks about whether he should tell the agency who he's going to vote for. Let's take a listen.

[BEGIN CLIP]

Bert:

Here's a test. Who'd you vote for?

Duck:

If I say Nixon, you'll think I'm buttering you. If I say Kennedy, you'll want to reform me, so I'll say Nixon.

Bert:

That's nice to say.

[END CLIP]

Tracey Diamond:

Is it allowed? Is Sterling Agency violating any laws by asking Duck who he's going to vote for?

Trisha Earls:

Certainly not today. As we talked about, voting is protected speech, and voting is protected political activity. Let's say it that way. If you're a public employer asking that question, it's very problematic. Then in many states, as we talked about, it could be very problematic because then the assumption will be if the individual doesn't get the job that it's because of their political views. You basically set yourself up for some potential liability.

Tracey Diamond:

Yes. I would say it's a bad idea. Even for private employers that may not have any express prohibitions against asking, don't think it's necessarily a good idea to be asking because if you then take any form of adverse action, it'll be assumed that it was because of the person's political beliefs which could be problematic.

Trisha Earls:

Employees have a long memory.

Tracey Diamond:

That is true.

Trisha Earls:

Even if you do hire them, three years from now, that will be remembered, so generally not a wise thing to do.

Tracey Diamond:

What about customers or clients that bring up political discussions to employees? Is there any concerns there?

Trisha Earls:

I think so. I mean, especially if the employee is offended. I think, again, something you can do practically is to prepare if an employee is customer-facing and it is likely that that employee has a sensitivity to certain issues or you know your customer base is likely to say something, then you prepare the employee for how to respond, right? You give them the script, so to speak.

You say, "We understand this may happen. If it happens, please report it to us immediately, and we will look into it. However, here's something you could say that would not be offensive to the customer and changes the dialogue or change the narrative or just changes the conversation." Arming employees with how to respond helps prevent that customer situation from devolving into something even worse.

Tracey Diamond:

Yes. What you said, Trisha, reminds me of another important point, which is it would be a good idea now to start talking to your managers and training them on how to handle these situations as they come up, as we get closer and closer and closer to the election, rather than just sort of avoiding the issue and hoping it doesn't make its way into your workplace. Be prepared, so you know how and your managers and supervisors know how to respond if any of this heats up.

Trisha Earls:

Great idea. Very good to be proactive in training your managers.

Emily Schifter:

It's a good time to remind them, I think, kind of to your point earlier, Trisha, about all your existing policies. I think whether it's a co-worker or whether it's a customer, reminding them that hostile work environment claims, harassment, discrimination, all of those things are things they need to be aware of, especially as managers in particular. To the extent that any election-related discourse evolves into a situation that might raise one of those issues, I think it's absolutely a good idea to be putting that on manager's radar.

Trisha Earls:

I agree.

Tracey Diamond:

Clearly, there were strong opinions about the 1960 election, and they were very pro-Nixon. I would imagine we have employers who also have strong opinions about the election results. Talking about the private workplace now, can an employer encourage employees to vote a certain way? Can they mandate that their employees vote a certain way, donate to political

causes, attend a political rally? Where are the limits to what an employer who wants the election to go a certain way? What they can do in terms of their workplace?

Trisha Earls:

Well, lots of questions in there. Let's start can they ask employees to vote a certain way. Not generally. Even in the private workplace, as we talked about, there are lots of states that have laws around this. Again, it's just an unwise thing to do, setting yourself up for some type of claim that any subsequent adverse action was because of their political views. More importantly, we have a private ballot, right? You're not going to know how your employees vote anyway, so it also seems like a pretty impractical thing to do.

Tracey Diamond:

Impossible to enforce, right?

Trisha Earls:

Exactly. Part B of that was donate –

Tracey Diamond:

Donating to a political cause or attending a political rally. Can employers require employees to do so?

Trisha Earls:

Yes. I think, generally, the answer is the same. It's "not really" even for private employers. I do know there is an exception under the Federal Election Commission rule. For senior executives, companies can ask them to support political action committees, and I've had clients do that. But in that context, it's generally because there was some legislation pending against that particular employer that they were asking for such support. I haven't seen employers do it in just a general presidential election.

Tracey Diamond:

I have seen employers who are politically connected or politically minded inviting candidates to their offices and inviting the employees to come listen to them talk. That seems to be okay, as long as it's voluntary and not something that's mandated.

Trisha Earls:

Right. Because there's one state that says you can't hold mandatory meetings on political issues.

Emily Schifter:

Right. There's captive audience laws in certain states that say you can't force employees to sit and listen to you, which I think more commonly comes up when you're an employer who's trying

to maybe discourage employees from voting to join the union, but definitely would apply in this situation, too.

Trisha Earls:

Again, and I agree with you, Tracey, that employers do invite political candidates. But then you run the morale risk because as the polls show, we're pretty evenly divided as a country. You had the morale risk that employees think that is a heavy-handed thing to do. Or they feel like if they don't go, they feel ostracized. They will perceive that potentially. This is all potential, but they'll potentially perceive any negative action subsequent that it's because you didn't attend the speech of their favorite candidate.

A better practice that I've seen and usually employees generally tend to appreciate it is to just encourage voting. Even on the company Intranet, have a link to all of the candidates' websites with a message about "Go educate yourself. This is our privilege as an American society. We encourage you to vote. We encourage you to educate yourself and make the decision that's best for you." Messages like that resonate with employees, as opposed to subtly trying to persuade them to vote a particular way.

Tracey Diamond:

Yes. I love that. I think that's a great message that's not controversial, which is go out there and vote. Whatever side of the political spectrum you're on, we're encouraging you to go exercise your civic duty. On that note, are there any laws around time off for voting or working as a poll worker or an election official?

Trisha Earls:

Tons of them. There's tons about time off. It varies widely by state. Some states where you expect that it'd be paid time, it's not. Very generally speaking, the law is generally that you have to give some amount of unpaid time in most states to allow employees to vote if they can't get to the poll during normal work hours or outside of normal work hours. Let me say it that way. But not all states. Some states don't have any laws on it whatsoever. So then turning to what is the best practice, as opposed to what's legally required.

Generally, employers will, again, do some education ahead of time and give certain time off unpaid or paid, depending on the state or depending on their policy, to allow employees to have plenty of time to go vote.

Emily Schifter:

Yes. I think this is an area where multi-state employers can sometimes have just a morass of different laws and requirements. Do you have to let them go vote if there's three hours before their shift or two? You're right. Some states, they don't require a leave, but they just say no one can be terminated or disciplined for going to vote.

There are states where you have to give particular notice of what the voting rules are in that state to employees. It's definitely something – this is a perfect time for employers to be brushing

off those laws and making sure that they're aware of what exactly it is that they need to offer to employees.

Tracey Diamond:

Or just being generous and letting employees go exercise their civic duty and vote.

Trisha Earls:

Yes.

Tracey Diamond:

For sure.

Trisha Earls:

For the morale, HR morale's perspective, best practices get on top of this now and come up with your policy and go educate your managers. This is our policy. Usually, it's going to be more generous than the law, and allowing two hours paid time off at the end of Election Day to go vote is widely appreciated by the employees. Yes, some employees will abuse it and not go vote, but that's okay. You gain more in terms of the morale, improving morale and trust.

Tracey Diamond:

It's not very long, and it's only once a year.

Trisha Earls:

Yes.

Emily Schifter:

Yes. We've talked a lot about limiting speech in the workplace and arming managers with the tools that they need to kind of quiet things down, calm things down. But speaking of morale, I'm kind of curious, both of your thoughts. Is there a place where we might encourage political speech in the workplace? Or is there room for healthy productive dialogue in the workplace? What guard rails could employers who don't want to just say, "Absolutely not. Let's limit it as much as possible," could put into place to make sure it stays productive?

Trisha Earls:

Well, if you'd asked me this 20 years ago or 10 years ago, I would have given you a very different answer. I will share one story. During the pandemic and when the George Floyd murder happened, I was in-house. I was head of HR for a manufacturing company at that time. We found that there was a lot of workplace conflict, and there was a lot of just disruptive behavior, and there's a lot of lack of productivity. I understand this is not purely a political issue, but it does veer into politics. But it was a very emotional issue for our employees.

One thing we did, was hold listening sessions. The CEO and I flew to every location in the United States and had open employee meetings and invited anybody that wanted to come. We just open the meeting with, "We understand this is what transpired was very upsetting to many of our employees, and we're just here to listen." The only question we asked was "how do you want your company to support you during this time?"

What surprised me, they didn't ask us to do anything. They just wanted to be heard. There was an incredible amount of respect given to the employees who wanted to be heard. I was very pleased, and they were very pleased that the CEO took time out of his schedule to come listen. The amount of goodwill we gained from that and trust, it was immeasurable. That's an example. I don't know if that completely applies in the purely political context. But if there's something that is so hurtful that is disrupting your organization, you could try some version of that.

Tracey Diamond:

Well, before you get to your next story, though, Trisha, I just want to point out, at the end of this election, this election will come, and it will go, and somebody is going to win, and somebody is going to lose. To your point earlier about how the country is evenly split, it means that you may very well have employees that are very happy in your workplace at the same time as having employees that are very upset.

Thinking through those post-election conversations with employees to make sure the employees that are upset are okay and getting everybody back to work I think are very – it's a very important thought process as well that it doesn't just end on Election Day. That there needs to be some thought put into the post-election scenario as well.

Trisha Earls:

Yes, yes. How you manage through a crisis is very telling of whether you either gain credibility or lose it.

Tracey Diamond:

It'll be a crisis to some but not to all, and that's what makes this so interesting, right? Because some people will be celebrating. At the same time, there'll be employees that'll be upset.

Emily Schifter:

Yes. It's always the challenge of employment law, right, is people bring – they can't help but bring what's going on outside the world to the workplace. I think being aware of that and supporting employees no matter where they fall on the happy or sad side of things is important.

Trisha Earls:

Yes, yes.

Tracey Diamond:

Trisha, you had one other example that you wanted to share as well.

Trisha Earls:

Well, and this is a strategy that may work for after the election. It flows nicely from what you just said. Also during the pandemic, we had employees who were very energized, motivated, passionate about certain political causes that they wanted to champion. Rather than turn the workplace into a place to debate these things, we formed a committee and said, okay, it was basically the civic or charitable employee committee, and asked them to go out and research various different charitable causes that they would like the company to get involved in. Come back with suggestions.

We put some conditions on it. It's not just where you want the company to donate money. Where are opportunities for employees to get involved in donating time, we will give employees paid time off to do it. If they felt passionate about it, then they should want to donate their time to it as well. They came back with some great ideas that really crossed the political aisle as well, where everyone – and we found some charities that really appeal to the vast majority of our organization, and we adopted those.

We turned to what was started out as divisive and brought people together.

Tracey Diamond:

It's a great way to be forward-thinking and try to bring everybody back together again after November comes and goes. This has been a really timely discussion, and we very much appreciate you taking the time to talk with us today, Trisha. Thank you to our listeners for listening in. Please don't forget to check out our blog, [hiringtoiring.law](https://www.troutman.com/blog/hiring-to-firing-law). Listen to our other podcast episodes, *Hiring to Firing*, where you could find them on all of the major podcast platforms. Shoot us an email. Let us know what you think and give us some suggestions for future TV shows and episodes. Thanks for listening.

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