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Preparing for the November Election: Best Practices for All Employers?

Labor & Employment Workforce Watch

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As the November 2024 election approaches, many employers are facing issues ranging from providing time off for employees to vote, addressing political speech in the workplace, and navigating the tension between encouraging employees to support political causes on their own behalf and maintaining a safe and respectful workplace for all employees. The political landscape continues to evolve due, in part, to polarizing political views and employees' increased social media use. Accordingly, below are best practices that employers should consider in relation to several of the most prevalent election-related issues:

1. Time Off for Voting

Many states require employers to provide paid or unpaid time off for employees to vote. In Illinois, for example, employers must provide employees two hours of paid leave to vote in an election. 10 Ill. Comp. Stat. 5/7-42. Specifically, employees must provide advance notice of their need for voting leave, employers may specify the hours of leave, and employers must provide Illinois employees two hours of paid leave if polls are not open for at least two hours before or after the employee's shift. *Id.* Similarly, in Texas, employers must provide employees paid time off to vote if the polls close within "two consecutive hours outside of the voter's working hours." Tex. Elec. Code Ann. § 276.004. Employers should review the relevant voting laws in the jurisdictions in which their employees work to ensure all employees receive any statutorily mandated voting leave. Employers should also train managers on voting leave laws to ensure the employer appropriately considers and approves any lawful requests for time off.

2. Anti-Retaliation for Voting

In addition to providing employees voting leave, many states prohibit employers from retaliating against employees for *how* or for *whom* the employee voted. In Massachusetts, employers cannot take an adverse action against an employee "because of the giving or withholding of a vote or a political contribution." Mass. Gen. Laws ch. 56, § 33. In Texas, it is a felony for an employer to retaliate against an employee because of how the employee voted, or for refusing to reveal how the employee voted. Tex. Elec. Code Ann. § 276.001. And in California, employers may not adopt or enforce any rules or policies: "[f]orbidding or preventing employees from engaging or participating in politics . . . [or] . . . [c]ontrolling or directing, or tending to control or direct the political

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activities or affiliations of employees." Cal. Lab. Code § 1101. Although employers can encourage employees to participate in elections and fulfill their civic duties, employers should not question employees about how they voted or for whom they voted.

3. Protected Off-Duty Conduct

Beyond voting, an increasing number of states have enacted laws that protect employees' off-duty conduct, including social media use and political activity. New York expressly prohibits an employer from discriminating or taking an adverse action against any employee for engaging in lawful off-duty conduct, including "political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property." N.Y. Lab. Law § 201-d. Other states, including California, have adopted similar "off-duty" conduct laws, which are often broad enough to cover a wide range of political and social media activity. Accordingly, if employers receive reports or complaints about an employee's political or social media activity occurring *outside* the workplace, employers should carefully review any relevant local laws and work closely with counsel to consider the best approach to addressing the conduct.

4. Political Speech in the Workplace

Finally, employers often grapple with how to regulate political speech that occurs *in* the workplace. Although the First Amendment to the U.S. Constitution does not generally apply to private employers, federal and state laws may nevertheless protect employees' speech and conduct in the workplace.

For example, the National Labor Relations Act generally protects non-supervisor employees' rights to engage in protected concerted activity and discuss the terms and conditions of their employment. Recently, Jennifer Abruzzo, General Counsel of National Labor Relations Board (NLRB), stated that protected concerted activity should include "political statements." In addition, NLRB GC Memorandum 21-03 explains that protected concerted activity "includes employees' political and social justice advocacy when the subject matter has a direct nexus to employees' 'interests as employees.'" (Internal citations omitted). As a result, the NLRB's expanding definition of protected concerted activity could lead to employees and unions filing unfair labor practice charges against employers who take adverse actions against employees for engaging in political discussions in the workplace.

On the other hand, employers have a duty to maintain a safe, harassment-free, and discrimination-free workplace for all employees. Likewise, employers should encourage respectful and differing viewpoints. Unfortunately, when political speech enters the workplace, employers must juggle these competing interests. Before an employer takes any adverse action against any employee who is engaging in political discussion in the workplace, employers should work closely with counsel to consider whether such workplace political speech is "protected" and whether the employer can, or should, consider regulating the speech, investigating the matter, and/or disciplining employees for any such statements or activity.

As the November 2024 election quickly approaches, employers should review and update their existing policies and procedures regarding voting, political activity, and political speech. Any policies should ensure employees have sufficient channels to report any harassment, discrimination, or retaliation. In addition, employers should continue training their managers on these evolving issues and how to properly address any employee questions or concerns related to the election.

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