

Legal Updates & News

Bulletins

Employment Law Commentary, September 2008

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Political Discussion in the Workplace: Small Talk or Big Problems?

The 2008 presidential election is, and will likely continue to be, one of the most contentious presidential elections in decades. The historic uniqueness of this election season, combined with the around-the-clock news coverage of the election, will likely force employers to confront the challenging issue of setting limits on political dialogue at work.

For example, this election has seen an unprecedented focus on and media infatuation with such topics of the “black vote,” the “white vote,” and the “Hispanic vote,” as well as discussions on gender and the differences between “college-educated” voters and “blue-collar” voters. The constant discussion of these issues, combined with the diversity of the presidential candidates, ensures that the workplace will be forced to deal with this debate as well.

While political debate is often mere “watercooler” fodder and may even be a perfect forum to increase camaraderie and interaction between employees, this debate may also escalate into the display of campaign literature, the distribution of politically oriented emails, or the posting of signs. And while many of these activities may not be intended to provoke or create conflict, they can easily be the source of arguments, disrupt workplace productivity, and possibly lead to formal complaints and divide the workplace.

One troubling scenario is a potential lawsuit arising from a heated political discussion that crosses appropriate boundaries. Interestingly, this year’s election at times has focused on issues of race, gender, national origin, and age, which are also all categories protected under Title VII of the Civil Rights Act. The discussion of these topics is inevitable, creating the potential for inappropriate, off-hand, or thoughtless comments that could quickly descend into a verbal exchange that could be used to show a history of discrimination or an intolerant work environment.

Even if it is unlikely that political discussions in your workplace will descend to the level of litigation, there are certain steps that can be taken to avoid workplace conflict rooted in political difference and to ensure continued productivity amidst a distracting political season.

Clearly Articulate Your Policies

Employers should provide clear and consistent policies informing their employees of what constitutes acceptable political activity in the workplace. Your policies should address the following topics:

a) Restrict the display and distribution of political information

You may prevent employees from using your email system, company bulletin boards, or work space to solicit and distribute non-work-related information.^[1] The best way to do this is through a written policy that explicitly prohibits the solicitation and distribution of noncompany materials during work time.^[2] Be sure to enforce this equally for all types of solicitation and distribution. Disciplining an employee for distribution of material on one issue, and not disciplining for another, may also lead to claims of discrimination. All policies must be applied equally.

b) Limit political dialogue at work

You can't, nor would you want to, stop an employee from conversing with a colleague about an issue that they both care about, even if not all of their colleagues agree with their position. Similarly, an employer should not get involved in employees' political activities during non-work time and in non-work areas, as these activities are generally considered protected activity. However, an employee's political activities in the workplace, and on work time, can quickly escalate into an argument or disrupt the workplace. For example, employees may be adamant about their position on a particular issue or insist that their co-employees share their views on a particular presidential candidate. As such, you may ask the employees to not discuss that particular topic inside the workplace on work time.^[3] If appropriate, inform the employees that political discussion may be bad for business, make fellow employees uncomfortable, limit productivity, and could even be misconstrued or used as evidence to support a claim of discrimination or hostile work environment. For example, a heated discussion about John McCain, Sarah Palin, or Barack Obama could quickly derail into a shouting match that includes less thoughtful, offhand, and inappropriate comments regarding race, gender, or age.

c) Ban campaign paraphernalia in the workplace

You have the right to ask an employee to stop wearing a button, T-shirt, or sign if it interferes with worker morale or productivity.^[4] Similarly, you can prohibit the display of buttons, T-shirts, or signs of your employees if they interact with customers or clients. Again, this policy must be applied in a consistent manner, regardless of the message conveyed, to avoid any perception of discriminatory application in the policy.

Employers should anticipate that these policies will often be met with skepticism or be viewed as an encroachment on an employee's free speech rights. In anticipation of this, employers should remind their employees that the First Amendment does not empower employees to engage in speech that includes discriminatory statements regarding race, color, sex, national origin, or religion. And while Title VII does not prohibit discrimination on the basis of political affiliation, many states and municipalities have enacted such protections.

Again, consistent application of these policies is as important as making them clear. Disciplining or restricting the speech of an employee for one statement, while ignoring or allowing the speech of another, may be the basis for other discrimination claims. Both the policy and its implementation should be carefully evaluated.

Supporting Supervisors and Managers

Just as employee political banter can descend into conflict or hostility, the political activities of supervisors and/or managers must also be addressed by employers. Employers should discuss company policies regarding political activities with their supervisors and managers and also the role they would like to see their supervisors play in the implementation of these policies. For example, in a recent survey,^[5] many employees have commented on feeling pressured to conform to their supervisor's political views. This can quickly lead to a feeling of unwanted compulsion, affecting worker morale and productivity. Because of this, it is imperative that supervisors be mindful of their own opinions, and in particular their expression of these opinions during a politically lively period. Remind your supervisors that statements about a presidential candidate's age, race, or gender could fuel or even support a claim of discrimination or hostile work environment.

Similarly, if supervisors do choose to express their political positions or beliefs, remind them that employees often make certain assumptions about their supervisors based solely on their position on one issue. Also, employees may begin to interpret their supervisors' political positions as statements on morals or beliefs. As a result, supervisors' workplace decisions may begin to be evaluated and judged as reflections of their political positions. Again, this can potentially put an unwanted and unnecessary strain on workplace relations and trigger unnecessary conflict, impacting morale and productivity in the workplace.

It may also be necessary to train your supervisors on how to best diffuse disagreement in the work environment, because it is likely that supervisors will have to make split-second decisions as to when to get involved in a potentially disruptive conversation or argument. Your supervisors must be aware of the difference between the healthy exchange of ideas and a potentially hostile environment. As a general rule, because political discussions can easily escalate into unproductive argument, remind your supervisors to immediately get involved in any discussion that even appears on the verge of escalation. They should err on the side of involvement because, often, a supervisor's "non-action" or silent response to a situation does not in fact display neutrality or impartiality. Rather, it may easily be interpreted as the exact opposite. An employee may interpret this silence as support for or acceptance of the views expressed. These assumptions and misinterpretations, while potentially unfair, may paint a supervisor's prior or future work-related decisions with a tainted brush. Remind your supervisors that intervention at any early stage is likely the best approach to a potentially heated discussion.

In closing, as the presidential election season shifts into a new gear, acquaint yourself, your supervisors, and your employees with your workplace policies while stressing the importance of creating a productive and politically tolerant work environment. Use your policies and procedures in a manner that fairly diffuses inappropriate political activity and is applied consistently without regard to the position presented.

Disciplining Employees Involved in Political Advocacy Under the NLRA

This past summer the National Labor Relations Board general counsel Ronald Meisberg issued guidelines discussing a framework to analyze unfair labor practice charges being filed against employers disciplining their employees for acts of political advocacy. While employees have a right to engage in activities for their "mutual aid or protection," as protected by section 7 of the National Labor Relations Act ("NLRA"), according to the new guidelines this advocacy is only protected if there is a "direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees." Common activities that meet this test include employee complaints, written or oral, to regulatory bodies and employee appeals to legislative representatives addressing political topics directly impacting the employees work conditions.

Employee activities that meet this standard, are non-disruptive, and take place outside of work and in nonwork areas are protected by the NLRA. Similarly, an employer's discriminatory enforcement of valid workplace policies in an attempt to prevent an employee's activities may violate the NLRA. However, under the new guidelines, if an employee's activities are done while on duty, or require work stoppages, they may be subject to restrictions imposed by neutrally applied work rules and policies. For more information on this emerging area of the law, see National Labor Relations Board, *Memorandum GC 08-10: Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy* (Jul. 22, 2008).

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Upcoming Speaking Engagements

The following is a list of upcoming employment and labor events in which Morrison & Foerster attorneys will be participating.

James Boddy

October 2-3, 2008

"Employment Discrimination: Economic and Statistical Evidence"
ERS Group Seminar

Craig Schloss

October 8, 2008

"Trade Secret Theft"
North County Personnel Association Luncheon Meeting

David Murphy and Linda Shostak

October 29, 2008

“Noncompete Agreements and Other Post-Employment Restraints in California: What Now?” Practising Law Institute Seminar and Live Webinar

[Daniel Westman](#)

November 11, 2008

“Complaint Investigations: How to Be Thorough and Avoid Legal Pitfalls”
Business 21 Publications Webinar

[Miriam Wugmeister](#)

November 19, 2008

“Information Security and Data Privacy Summit 2008 — Understanding Risks and Emerging Issues”
West Privacy Seminar

Upcoming Seminar: Wage & Hour Update--Meal Periods After *Brinker*, Class Action Developments, and Other Current Issues

Morrison & Foerster will be holding seminars in four cities covering the *Brinker* decision and other current developments. To learn more about the seminars, including how to register, please click on one of the cities listed below:

[San Francisco, Tuesday, October 14, 2008](#)

[Palo Alto, Tuesday, October 14, 2008](#)

[Los Angeles, Wednesday, October 15, 2008](#)

[San Diego, Tuesday, October 28, 2008](#)

Footnotes

[1] See *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 803 n. 10 (1945).

[2] *California Employers Guide to Employee Handbooks & Personnel Policy Manuals*, Morrison & Foerster, § 2.25[3] (September 2007).

[3] See National Labor Relations Board, *Memorandum GC 08-10: Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy* (Jul. 22, 2008).

[4] *Id.*

[5] Vault, *Politics in the Workplace: Survey 2007*, available at: www.vault.com/surveys/politicsindex.jsp.

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