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Politics and the Water Cooler: Liability for Bringing Politics Into the Workplace

Commentary by
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Every presidential election cycle spurs an uptick in political banter in break rooms throughout the country. But few presidential contests have stayed as top-of-mind and tip-of-tongue as the 2016 race. Even Super Bowl 50 was overshadowed when, two days later, Donald Trump won his first primary.

For employers, the spike in political talk naturally has raised concerns about the manner of political talk around the water cooler. Trump, for example, has openly eschewed political correctness when communicating his political objectives. And opponents in both parties have followed suit when attacking those objectives. When the resulting political discourse — supercharged and sometimes provocative — finds its way into the workplace, it creates a challenging legal climate for employers. It is a climate from which allegations of discrimination and hostility may emanate.

What exposure do employers face, and how can potential liability be avoided? To answer that question, employers must understand



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the legal landscape. Private employers have wider latitude than their public counterparts to curb employees' political expression. Generally speaking, the U.S. Constitution's guarantees of freedom of speech apply to governmental infringement in the public sector.

Public employers generally must allow political discourse involving matters of public concern as long as it does not impact operational efficiency. In *Pickering v. Board of Education*, the U.S. Supreme Court created a balancing test to address political speech by

governmental employees. The court overturned the firing of an Illinois public school teacher who spoke out against the local school board. In doing so, the court created a balancing test in which the public employee's interests would be weighed against the governmental employer's interest "in promoting the efficiency of the public services it performs through its employees." Generally speaking, political water cooler talk and advocacy are OK provided they do not become disruptive to the governmental entity's operations. Private employers, on the

other hand, have much wider latitude to curb political speech. In *Rendell-Baker v. Kohn*, the U.S. Supreme Court affirmed the dismissal of five private school teachers who engaged in debate on local politics.

ON AND OFF DUTY

With these general standards in mind, how far should an employer go? In past elections, allowing employees to pontificate in support of a major party candidate or to wear a candidate's button or sticker around the office was mostly noncontroversial. That analysis is trickier this election cycle. Using Trump again as the example, much-publicized, controversial comments by that candidate have likely offended large groups of workers. The employee wearing a Trump button who engages in otherwise standard political discourse may nonetheless be seen as hostile and discriminatory. And if he or she is a supervisor disciplining or terminating an employee who belongs to a group that Trump has commented on, a retaliation claim may be in the offing. Conversely, a strongly conservative or devoutly religious employee may not accept the stated reasons for a disciplinary action levied by an outspoken supporter of Hillary Clinton.

In this climate, it is not surprising that employers may feel it wise to tamp down on the political discourse. Employers that have not already implemented a nonsolicitation policy may be doing so in an effort to discourage employees from soliciting other employees for politically related contributions. Employers will likely be creating or brushing up on their anti-discrimination and anti-harassment policies, and educating or reeducating employees on those policies. Relatedly, they will likely be reminding employees how criticizing

a candidate's religiousness or gender may be seen by some who share the same views or status as being discriminatory. Corporate complaint procedures will be discussed, as will the importance of reporting any complaints relating to discrimination or harassment. And employers may be creating and enforcing policies for monitoring the use of business computers, and regulating their use for political communications via email or social media.

Employers must take care, however, not to regulate employee political activism away from work. Many states prevent adverse action against employees for their work outside the office. Most everywhere, an employee's political preferences cannot be factored into decisions about that employee's job.

Employers' concerns over political discourse do not begin and end with what their employees are saying around the water cooler. Increasingly, and especially in the wake of *Citizens United v. FEC*, companies themselves are entering into the arena of political expression and activism. Emboldened by studies suggesting that employees find political communications from their employers to be particularly credible, employers have delivered pointed messages to employees about which presidential candidate has the company's backing.

In the last election, for example, tens of thousands of Georgia-Pacific employees received a list of candidates endorsed by the Koch brothers, who own the company's parent entity. And the 7,000 employees of Westgate were told by their CEO that if President Barack Obama won reelection, the CEO would "have no choice but to reduce the size of this company." These types of communications do not violate any federal law. However, some state laws

prevent coercion or voting pressure, which some employees might feel if presented with language that is overt enough.

Other companies have gone to creative lengths to fund the political process. Wal-Mart has encouraged employees to contribute to political action committees — which companies like Wal-Mart cannot contribute to directly — in exchange for Wal-Mart's matching contributions to the company's employee hardship fund. This indirect process is legal, and contributions have gone to politicians on both sides of the aisle, but it has been criticized by the company's own employees, some of whom feel the company's focus is misaligned.

For the same reason that political discourse by employees may be a lightning rod for discrimination and retaliation claims this election cycle, these political endorsements by employers carry the same risks. As much as it may water down the message, companies that endorse any candidate may do well to disclaim the endorsement to the extent any employee feels it to be discriminatory. In an election in which the parties do not seem to be afraid to talk about the issues very frankly and without the usual smokescreens, companies may find themselves using similar degrees of openness to communicate to their employees about politics. More than ever, employers may find themselves having to explain to employees how freedom of speech does not extend absolutely into the private arena, and why policies and practices aimed at limiting political discourse around the water cooler are beneficial.

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