



Taming the Pyraptors: Contending with Political Speech Both Within and Outside the Workplace

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Introduction and Overview

- » With the November 5th general election quickly approaching, the hot topic around the break room may be starting to get a little political.
- » Political conversations can create workplace issues by invoking strong emotions and feelings among different groups of people.
- » These strong feelings can compromise the camaraderie and teamwork in the office and cause lower productivity, especially during contested local, state, or federal elections.
- » Political discussions can also open the door to defamatory remarks, and racial and sexual issues in the workplace.
- » Before these concerns can be addressed, we need to have an understanding of what political speech entails and the rights afforded to employees under federal, state, and local laws.

What is Political Speech?



- » **Political speech** extends beyond verbal or written expression on political topics.
- » Examples:
 - » wearing clothing or accessories supporting or endorsing certain issues;
 - » displaying political posters, decals, or bumper stickers
 - » liking, sharing or posting about politics on social media
 - » political affiliation and association
 - » contributing to a political campaign

The First Amendment

“Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble....”



- » The First Amendment only regulates government actors such as public employers.
- » Thus, under federal law private employers have great flexibility to regulate employee’s speech and behavior at the workplace.
- » Private employers are generally free under federal law to:
 - » curtail employees from using company computers, email, mail and faxes for political purposes
 - » prohibit employees from using company phones for fundraising and “get out the vote calls”
 - » ban politically motivated flyers, posters, pins and all political discussions at work.

State and Local Laws on Workplace Political Speech

- » Many states (and local governments) have enacted ***specific protections for political activities***, and voting; that is they require voting leave and prohibit employers from taking adverse action for political participation, activities, off-duty/off-site conduct like campaigning.
 - In Florida, it is a **third-degree felony** for an employer to terminate or threaten to terminate any employee for voting or not voting for a specific measure or candidate. Fla. Stat. § 104.081.
 - Some Florida counties include political affiliation as a category protected from employment discrimination, including:
 - **Broward County**, Code of Ordinances, Sec. 16½-33
 - **City of Miami Beach** Human Rights Ordinance, Sec. 62-33



Employers' Rights Regarding Political Speech

- » Employers may engage in political activity in the workplace.
 - » Employers can communicate their support or opposition to proposed legislation or regulation that may affect the company, the employees or stakeholders.
 - » No limitation on how much a company may contribute to elections.
- » Employers commit a federal crime if they interfere with an employee's ability to vote for federal candidates, or to coerce the employee to cast a ballot in a specific way. 18 U.S.C. § 594.
- » Some states, such as Florida, prohibit employers from intimidating, threatening, or coercing an employee's decision to vote



The National Labor Relations Act



» RIGHTS OF EMPLOYEES – 29 USC 151-161

» Sec. 7. [§ 157.] **Employees shall have the right** to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of** collective bargaining or **other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

What is Protected Concerted Activity?

- » Applies to non-supervisory employees in union and nonunion settings.
- » “Concerted activity” means two or more employees or one employee speaking on behalf of other employees.
- » “Protected activity” involves the terms and conditions of employment wages, hours and other terms and conditions of employment.
- » Example: An employee’s posts on social media platforms may be considered protected concerted activity if the employee is discussing working conditions and other labor relations matters.

NLRA and Political Speech at Work

- » Issues arise when there is an intersection between political speech and terms and conditions of employment.
- » Political speech or activities with a sufficient connection to employment-related issues may be protected by the NLRA.
 - » For example: Vote for Smith, they'll raise the minimum wage.
- » The NLRB tends to take a very expansive view on what speech affects the terms and conditions of employment.



NLRA Expands the Scope of Protected Concerted Activity

- » NLRB has expressed an interest in expanding the scope of protected concerted activity to cover social justice issues that interest employees.
 - » **NLRB complaint filed by employee against multinational home improvement retailer:**
 - » NLRB protected employees engaged in social justice advocacy at work
 - » Employer violated Section 8(a)(1) of the NLRA by constructively discharging the employee when the employee engaged in Section 7-protected activity by declining to remove BLM insignia from their work apron.
 - » The Board determined that the employee's actions in wearing the insignia was a "logical outgrowth" of the employee's and other employees' recent complaints about race discrimination in the workplace.



Social Justice Advocacy at Work Must be Tied to Workplace Issues to be Protected

- » Recent decisions have stressed that employees' engagement in political/social justice movements must coincide with the terms and conditions of their employment to constitute protected concerted activity.
- » **SFR, Inc. d/b/a Parkside Café (373 NLRB No. 84) – social justice advocacy must be tied to workplace issues**
 - » Employer asked employees who continued to participate in BLM demonstrations during off duty hours to resign, which resulted in three employees resigning from employment.
 - » Employees concerted activity was not protected under Section 7 of the NLRA because there was no connection between the BLM protests and any specific workplace issues.



NLRA AND State Laws on Captive Audience

- » Employers have traditionally been permitted to hold mandatory employer-sponsored meetings to educate employees on certain topics, particularly the employer's views on unionization.
- » In 2022, the NLRB general counsel Abruzzo issued a memorandum claiming that these “captive audience” meetings violate the NLRA.
- » This coincides with recent trend of states enacting laws restricting employers from holding “captive audience” meetings to discuss political matters or preventing employers from taking adverse action against employees for not attending these meetings.
- » While Florida has not enacted such a law, at least seven states have passed captive audience laws with even more states considering them.

Employees Political Speech on Social Media

- » Florida is not among the 30 states with laws that restrict private employers from discriminating based on employee ***lawful off-duty conduct***.
- » How should employers handle online statements made by employees on recent social and political issues?
- » Factors to consider:
 - Where is the message? Online? Who brought it to the employer's attention?
 - Is the employee leading a group or acting individually? Does the person making the statement identify him/herself as an employee of the company? Are they connected with other coworkers online where the post was made?
 - What is the messaging? Is it about terms of work? Is it to aid and benefit other coworkers?
 - If so, it may be protected under state or local laws or the NLRA.
 - Does the post violate the employer's policies or the law? Is it hate speech?
- » Employees may be disciplined for social media posts unrelated to concerted activity in the workplace
 - E.g., discriminatory, threatening, harassing, bullying, vulgar or obscene statements, disclose company confidential or proprietary information,

Reasons for Employers Not to Investigate or Review Employees' Social Media Accounts for Political Speech



- » If your managers already have access to the posted material, or if someone has shared the posts with them then, those posts should be brought to the attention of Human Resources or Legal Departments.
- » Managers should **not** independently investigate or review the employee's social media accounts.

Reasons for Employers Not to Investigate or Review Employees' Social Media Accounts for Political Speech

» Why not?

- **National Labor Relations Act (NLRA)** protects an employee's right to engage in "protected concerted activity" with fellow employees regarding the terms and conditions of employment, including on social media platforms. Coworkers' social media posts may be considered protected concerted activity and should not be restricted.
- **Stored Communications Act (SCA)** affords privacy protection to certain "private" communications that are transmitted and stored electronically. The SCA makes it unlawful to intentionally access stored electronic communications without authorization or beyond the limits of authorization. Certain non-public social media posts may be subject to protection under the SCA and the company should not pressure coworkers to provide access to private social media sites.
- **State and Local Protections on Personal Social Media Information** – More than two dozen states have enacted laws addressing employers' access to current or prospective employees' social media accounts. Employers cannot require an employee or applicant disclose passwords, require them to access their social media in the presence of the employer, or require the employee to divulge social media content unless the circumstances are subject to an exception such as a legitimate workplace investigation.
- **Fair Credit Reporting Act (FCRA)** – (and state mini-FCRA provisions) employers and third-party vendors must comply with the FCRA's notice and consent requirements when performing background checks. Conversely, employer access to voluntarily provided information on public platforms is not private, legally protected information.



Workplace Policies Regarding Political Speech

» **Be proactive – implement and distribute policies on political speech in the workplace.**

- Prohibit all forms of political messaging that is unrelated to the workplace
- Implement dress code policies to prohibit employees from displaying political items at work, such as hats, pins, t-shirts, etc.,
 - Under the NLRA, however, employers generally cannot prohibit employees from displaying union-related material at work. While an employer may be able to prohibit an employee from wearing a "Vote for Harris" t-shirt, it generally cannot prohibit a t-shirt (or pin, button, hat, etc.) that says "SEIU (or another union) Supports Harris."
- Prohibit discussions between supervisors and employees involving political views.
 - Employees may rely on comments made during a political discussion as evidence of discrimination or harassment. For example, a female employee who claims she was denied a promotion because of her sex may argue that her supervisor's comment that he would never vote for a woman reflects his discriminatory animus.
- Prohibit speech that is abusive, discriminatory, derogatory, or leads to a hostile work environment
- Include/update electronic communications policy limiting their use for business purposes only.

» **Evaluate the conduct at issue on a case-by-case basis.**

» **Enforce the policies consistently.**

» **Investigate complaints**



How Should Employers Handle Discipline to Enforce Workplace Rules of Conduct?

» Ensure Discipline is Imposed Uniformly

- » Employers are entitled to enforce rules of conduct and to discipline employees whose actions disrupt the workplace, even if the actions are politically related. The focus of any adverse action should be on the employee's disruptive behavior and not the opinions expressed by the employee.
- » Given the NLRB's view that an employee does not lose their protections to engage in protected activity even if they disrupt the workplace, employers should evaluate whether the political speech involved a term or condition of employment.
- » It is also important to ensure that any discipline is imposed uniformly, without regard to categories protected by anti-discrimination laws, such as religion, race, sex, disability, age or national origin.



Voting Leave

Employees May Be Entitled to Time off to Vote

- Many states have laws that provide some form of voting leave even though federal law does not require employers to permit employees to take time off from work to vote.
- Florida law does not require employers to provide leave to employees for voting.
- Florida employers cannot discharge or threaten to discharge any employee for voting or not voting in any state, county, or municipal election for any candidate or measure. Fla. Stat. § 104.081.



Thank you!



Questions?



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