

The intersection of partisan political speech and employee rights. Look both ways before crossing.

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Considering the barrage of vitriolic campaign ads that invaded our homes on a nightly basis during the past year, you might think that political debate in America had reached a new low.

Think again.

In the 1820s John Quincy Adams (POTUS No. 6) described Thomas Jefferson (the author of our Declaration of Independence and POTUS No. 3) as a “slur upon the moral government of the world.” Classy, but nasty.

In 1845 Andrew Jackson (POTUS No. 7) supposedly made this deathbed statement about two of his political adversaries: “I have only two regrets: I didn't shoot Henry Clay and I didn't hang John C. Calhoun.” Nasty and scary.

In the 1930s, Vice President John Nance Garner was described as a “labor baiting, poker playing, whiskey-drinking evil old man.” Personally, I don't have a problem with playing a little poker and having a sip of whiskey every now and then.

With a past like that, and a deeply divided present, it seems likely that some of your employees – whether they be Red, Blue, or something in between – will engage in protected speech on a political or social issue during the next four years.

Will you know how to respond?

Employee speech on political and social issues. It ain't just water cooler talk.

Employee speech covers a broad array of on-duty and off-duty conduct, including workplace conversations, messages displayed on clothing, social media posts, blogs, and participation in rallies.

Based on the incoming administration's campaign rhetoric, its policies and legislative agenda may prompt some of your employees to engage in speech supporting Black Lives Matter, #MeToo, and the like.

On the other side of the political spectrum, some of your employees may be inclined to engage in speech favoring increased restrictions on immigration, opposing “woke” culture, and more.

When such disputes enter the workplace, they can have a negative impact on employee morale and productivity. They also can lead to claims of discrimination or harassment.

If you think you can maintain the peace at the proverbial dinner table by prohibiting all such activities by your employees, you are likely to fail to achieve your objective, and you could even get sued.

Federal law protections for employee speech

The two most notable protections for private sector employee speech on political and societal issues are the National Labor Relations Act and Title VII of the Civil Rights Act of 1964.

The NLRA protects employee speech on political and social causes when it is related to the employees' wages, hours, and working conditions.

For example, in [Home Depot USA, Inc.](#), the employer was found to have violated the NLRA by terminating an employee who refused to remove a Black Lives Matter message from his work apron. According to the National Labor Relations Board, the message was protected because it was a logical outgrowth of prior employee complaints about discrimination in the workplace.

Title VII, like the NLRA, protects employee speech protesting discrimination in the workplace, including reporting it to the media, posting about it on social media, or picketing about it outside the workplace.

But Title VII also imposes a duty on employers to accommodate their employees' religious beliefs. The resulting conflict between religious beliefs, on the one hand, and anticipated activism about issues including abortion and gender identity, may lead to situations in which an employer needs to balance the speech rights of employees on both sides of the debate.

State law protections for employee speech

According to a 2012 [article](#) in the *Texas Review of Law and Politics*, "about half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation."

Many of these state law protections are broader than those provided by the NLRA and Title VII since they are not tethered to wages, hours, working conditions, or discrimination in the workplace.

For example, some states prohibit termination or discipline for engaging in lawful, off duty conduct, including political activities. What happens away from the workplace is, for the most part, none of the employer's business.

Other states prohibit restraining or influencing an employee's political activity by threatening discharge or discipline because of the activity.

Connecticut protects private sector employees from termination for exercising their rights of free speech as provided for in the state and U.S. Constitutions.

New Mexico protects private sector employees from termination because of the employees' political opinions or beliefs.

Legitimate reasons for employers to regulate employee speech about political or societal issues

Because of the differing federal and state law protections for employee speech, there is no "one-size-fits-all" list of legitimate reasons for an employer to regulate the political or social speech of its employees.

But case law and statutory language appear to permit regulation if the speech does any of the following:

- Creates a risk of injury to employees or damage to machinery.
- Is disruptive and leads to employee dissension, or claims of harassment.
- Disparages the employer's products.
- Unreasonably interferes with a public image that the employer has cultivated as part of its business plan.
- Is inconsistent the employee's duties and responsibilities.

None of these defenses are talismanic. The mere invocation of them will not justify the discipline of an employee for engaging in protected speech on political or societal issues.

If you interfere with employee speech because you believe it unreasonably interferes with a public image your company has cultivated, be prepared to prove the cultivation and interference. The fact that a customer might be offended by the speech typically won't cut it.

If you interfere with employee speech because you believe it could be disruptive to the workplace, be prepared to show something more than the objections of co-workers, including the steps you took to address the complaints before restricting the speech.

Look both ways before crossing

The intemperate expressions of our past and present political leaders provide little reason to believe that your employees will avoid the fray or rise above it.

Instead, you should expect that some of your employees will be motivated to engage in some form of speech either opposing or supporting the policies of the outgoing and incoming administrations.

Considering the federal and state law protections, prohibiting such speech or disciplining the speaker could lead to a lawsuit.

Instead, you need to carefully consider whether the speech is protected and whether you can prove the facts required to restrict it.

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