Labor Letter

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Political Speech At Work

By D. Albert Brannen (Atlanta)

With the election just a month away, everyone seems to have strong opinions about the candidates and issues. Inevitably, these opinions will come up during conversations on the jobsite and can be disruptive and interfere with productivity. They also can expose employers and employees to legal risks if they do not fully understand the laws that govern political speech at work.

Many people are surprised to learn that free speech at work isn't the same as free speech on the street. For some practical advice on handling possible disruptions caused by strong political feelings at work, see *"Politics In The Workplace,"* elsewhere in this issue. In this article, we'll set out a breakdown of a number of laws that regulate political speech on the jobsite.

U.S. Constitution

The drafters of the U.S. Constitution viewed the First Amendment as being about the freedom of political speech. By protecting free speech, they intended to support citizen participation in democracy. Many people believe this participation applies to the workplace in terms of wearing a button, engaging coworkers in conversation or distributing an office-wide email to garner support for a certain candidate.

Because political campaigning is considered protected speech under the First Amendment, many employers and employees incorrectly assume they can exercise this right on the jobsite. But the First Amendment applies only to state action, that is, action taken by federal, state or local governments. These "protections" do not apply in the private workplace, and it would not violate the Constitution to terminate an employee for expressing views contrary to those of the employer. Such a discharge could violate other laws, however.

National Labor Relations Act (NLRA)

The NLRA may not apply directly to political speech in the private workplace, but it does give non-supervisory employees a limited right to engage in free speech and other protected concerted activities for their "mutual aid and protection." Under this law, employees may usually wear union buttons or insignia on a jobsite. They may engage in solicitations on the jobsite so long as neither the employee doing the solicitation nor the employee being solicited are engaging in such activities during working hours.

Similarly, employees may engage in the distribution of political materials on the jobsite so long as the distribution does not occur in working areas. Allowing candidates to come onto the jobsite to campaign may undermine your rights to enforce otherwise lawful limits on employee solicitation or distribution.

Employees can engage in political campaigning that may be contrary to the interests or positions of their employer. For example, discharging employees for campaigning against repeal of a state's right-to-work law would be unlawful.

The National Labor Relations Board has been very active in applying employees' right to engage in protected concerted activities to social media such as Facebook and Twitter. You need to take care not to violate these emerging employee rights.

State And Municipal Laws

Many states, including California, Colorado, New York, and North Dakota, prohibit adverse action against an employee based on political expression or lawful, off-duty activity. Employers doing business in these states should not discharge an employee for the employee's speech or conduct outside of the workplace.

Election Laws

Employers can participate in political speech in several ways: allowing free use of facilities for campaigns, sponsoring a candidate, allowing employees to use company time to contribute to a campaign and openly endorsing a candidate. Based on a Supreme Court decision, a corporation may distribute publications to the general public and spend money in elections independent of a candidate or party.

However, an employer's right to campaign is limited based on the status of the employees to whom the campaigning is directed. When communicating with executives, stockholders or administrative personnel, a corporation may address any subject, including advocacy and solicitations for candidates and parties. But, corporations are prohibited from communicating with employees, salaried foremen and others who supervise hourly employees.

State And Federal Employment Discrimination Laws

Employers are prohibited from discrimination, harassment and retaliation under Title VII of the Civil Rights Act, the Americans with Disabilities Act and a myriad of other federal, state and local laws. Race, national origin, sex, and religion may sometimes be fundamentally intertwined with various political issues, including affirmative action, abortion, prayer in schools and immigration.

Employers and their agents should be careful that their discussions of candidates or issues do not imply directly (or even indirectly) that they will discriminate, harass or retaliate against any employee based on their opinions, which may be related to their status in a protected class.

The Bottom Line

While various laws limit employers' ability to restrict political speech on the jobsite, companies also may impose certain restrictions on employees. For example, you may limit employee solicitations to non-working time and distributions to non-working areas, as well as ban non-employees from engaging in such activities on a jobsite. You also may impose limits on employee use of corporate computer and email systems, or restrict access to certain Internet sites through employer-owned electronic systems.

The bottom line is that both employees and employers have rights in this area; check with your legal counsel before adopting overly broad restrictions on employee political activities or taking adverse action against an employee for such activities.

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Getting Off OSHA's "Black List"

By Matthew Korn (Columbia)

After two years of uncertainty, employers have finally been given some guidance on how to be removed from OSHA's Severe Violator Enforcement Program (SVEP). On August 16, 2012, the Directorate of Enforcement Programs (DEP) issued a memorandum detailing the removal criteria for the SVEP, clarifying a process that has not been clear since the implementation of the program in June 2010.

What Is The SVEP, Anyway?

If you do not know what the SVEP is yet, consider your company lucky. The SVEP was created by OSHA to "focus enforcement efforts on significant hazards and violations by concentrating inspection resources on employers who have demonstrated recalcitrance or indifference to their OSH Act obligations by committing willful, repeated, or failure-to-abate violations" in certain defined circumstances. An employer may be put in the SVEP for violations involving fatalities or catastrophes, the identification of severe hazards, exposure to highly hazardous chemicals, and all other "egregious" enforcement actions.

As its name suggests, the SVEP involves much more invasive enforcement of the OSH Act. Employers on the SVEP can expect enhanced follow-up inspections, nationwide inspections of related workplaces, and increased publicity of OSHA enforcement, both within the company and externally. Additionally, OSHA may order the employer: to hire a safety and health consultant to develop a new safety program; submit to the Area Director a log of work-related injuries and illnesses on a quarterly basis; notify OSHA of any serious injury or illness requiring medical attention, and; consent to OSHA inspections based on this information.

Getting Off The SVEP

Prior to August 16, the only certain way to be removed from the SVEP was to have the SVEP-qualifying citation vacated by the Review Commission or to enter a settlement agreement with OSHA that withdrew the citation. Obviously, a company cannot ensure a favorable outcome under either of these methods. But the newly-released removal criteria identifies a process to get off the SVEP that allows companies to have more control over their status.

Now, an employer on the SVEP can be removed after three years from the date of final disposition of the SVEP-qualifying citation. Final disposition can be accomplished through either a failure to contest, a settlement agreement, or a Review Commission decision. But removal is not automatic after three years. To be removed from the program, an employer must: 1) abate all SVEP-related hazards affirmed as violations; 2) pay all final penalties; 3) abide by and complete all settlement provisions; and 4) not have received any additional serious citations related to the hazards identified in the SVEP inspection at the initial establishment or any related establishments.

If an employer fails to meet these criteria, the company will remain on the SVEP log for an additional three years and will be re-evaluated. Removal from the SVEP program will be at the discretion of the Regional Administrator, unless a national corporate-wide settlement is involved, in which case the DEP will make the determination regarding the employer's removal from the Program.

And Staying Off

As a practical matter, the existence of the SVEP, the relatively easy requirements to be placed on it, and the difficulty in being removed from the list, make it even more important that employers: 1) carefully manage OSHA inspections to minimize the number of citations or lay the groundwork for later appeals; 2) not be hesitant to "contest" citations; 3) build good will throughout an inspection, and demonstrate your commitment to safety; 4) talk to legal counsel about "creative" alternatives to traditional citations; and 5) get even more serious about proactive safety-management processes which engage employees.

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Politics In The Workplace

A Practical Approach

By Laurel Cornell (Louisville)

As the 2012 presidential election rapidly approaches, employers must brace themselves for an inevitable spike in political banter in the workplace. Indeed, with social and political issues such as healthcare reform and same-sex marriage on the forefront, political passions are almost certain to flare in the coming months.

If not properly addressed, political discourse can present unique challenges to employers trying to maintain a working environment free from conflict and distraction. Seemingly innocuous remarks regarding any candidate or their political positions may potentially offend some employees, which can lead to an increase in discrimination and harassment claims.

For a discussion of the legal implications of workplace speech, see *"Political Speech @ Work"* elsewhere in this issue. In this article, we'll focus on how speech can create workplace distractions resulting in lost productivity as well as a decline in employee morale. Beyond this, politically charged discussions in the workplace can alienate clients or customers who are offended by or disagree with the opinions expressed by employees.

Cool Down Heated Discussions

Private employers enjoy wide latitude in implementing rules and enforcing restrictions designed to maintain a productive and non-hostile working environment. Given the inherent risks involved, private employers can and should strive to limit political speech in the workplace. While no plan is fool-proof, the following guidelines may help to prevent unnecessary workplace conflict and distractions, and perhaps most importantly, costly litigation.

Refresh and retrain employees on relevant anti-harassment, anti-discrimination, and equal employment opportunity policies. To this end, describe the types of conduct prohibited by these policies, and emphasize that attacking the beliefs (political or otherwise) of other employees can arguably constitute harassment. In addition, encourage employees to promptly report any speech or activity they find to be harassing or in violation of company policy.

If your company policies or employee handbooks don't already contain one, consider adding a code of conduct advising employees that failure to respect divergent opinions, beliefs, and values may warrant disciplinary action. Similarly, because heated discussions may be sparked

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Stretching The Limits On Flexible Work Arrangements

By Michael Abcarian (Dallas)

Are we seeing the end of 40-hour work weeks by employees? While some workers may be accustomed to toiling around the clock in an effort to climb the corporate ladder, a recent study shows that more and more employers are encouraging improvements in work-life balance by offering flextime, alternative worksites, and optional overtime in hopes of retaining employees who may be lured away by less intensive hour requirements or more lucrative job opportunities.

By The Numbers

According to the 2012 National Study of Employers conducted by the Society for Human Resource Management and the nonprofit Families and Work Institute, 77% of companies who were surveyed said that they now permit or encourage flextime, up from 66% from 2005. Nearly two-thirds reported that they allow employees to work occasionally from home, which is a significant increase from 34% prior to the recession seven years ago. Employees are also finding it more acceptable to turn down overtime hours. Now, 44% of employers surveyed said they give their workers a say in whether or when they will put in extra hours, which is an increase of 28% since 2005.

Many employers are adopting creative work schedules to encourage employees to stay put now that the job market is opening up. But in doing so, they may not be paying sufficient attention to the compliance implications of wage payment laws that may affect these arrangements. There are potential pitfalls under both federal wage and hour laws and the requirements and limitations of local and state laws that demand close attention, which means it may be time to make sure your human resources department is managing employee working hours the right way.

Don't Bend The Rules

Most wage-payment laws were not designed to be flexible or adaptable, or to facilitate the practical concerns of modern-day employers. Nevertheless, these requirements remain in force, and you should ensure that alternative-scheduling plans comply with what at times may seem antiquated, or even nonsensical, legal requirements.

You can reduce the likelihood of unintentional violations by understanding a few key concepts and being proactive.

Recordkeeping

If employees are allowed to work flexible or unusual hours, it may be necessary to implement a more precise recordkeeping system to track the time worked. If not, small timekeeping errors may gradually accumulate, leading to hundreds of thousands of dollars in liability, penalties, and attorneys' fees if you are forced to defend wage-payment claims on a class basis.

Supervisors must properly train and monitor employees in connection with accurate timekeeping practices both for those who work inside the office or plant, and those who work at home or telecommute. Discipline those who violate these important rules.

Overtime Work and Pay

Just because overtime work may be optional for some flextime employees, it's still crucial to account for all overtime hours worked and properly compute overtime pay for employees who are not exempt from the overtime pay provisions of federal and state laws.

Classifications

Most flextime litigation has to do with misclassification of workers who are thought to be exempt from the overtime pay provisions of federal or state law.

As a general proposition, all employees are presumed to be *non-exempt* from the overtime pay provisions of the FLSA, unless you can show that a specific exemption applies. In other words, employees are entitled to overtime pay for all overtime hours. Research shows that a significant number of employees – for example those who perform safety duties – are treated as exempt when they usually do not fall within any specific exemption category under the FLSA. Although it may be possible to defend such exemption strategies, you must be sure all employees are properly classified in order to avoid this common wage payment problem.

First, See If It Fits

When implementing a flexible work schedule, it's a good idea to pilot the program. Analyze the pros and cons after a few laps around the track, obtain employee feedback, and make any necessary adjustments before setting the ongoing plan in place. At the outset of the pilot program, remind employees that if the plan proves unsuccessful, the company will return to prior work scheduling arrangements.

With the number of wage-payment claims soaring in recent years, these matters can be time consuming and expensive to defend, even if you've done little that is found to be out of compliance. Generally, these cases boil down to little more than the mechanics of how your employees should have been paid.

To avoid costly litigation, take time to understand your obligations under the FLSA and other applicable wage payment laws, and make compliance a priority. Good-faith efforts go a long way toward improving the odds of a smooth trip when traveling down the path of wage and hour compliance.

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Politics In The Workplace

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from political buttons, stickers or other signage worn or displayed by employees, you may want to amend existing dress code and appearance policies to cover political apparel.

Political speech and activity by employers can also be problematic. While you may certainly facilitate and encourage employees to vote, you should not persuade employees to vote for or financially support certain candidates or issues, as doing so may not only be construed as coercion, but may also run afoul of federal or state election laws.

Ice Down The Water Cooler?

Political discussions in the workplace are largely unavoidable. But implementing these guidelines may help to limit the conflict and distractions that such banter can create.

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"Preparing for and Surviving an OFCCP Compliance Review"

By Cheryl Behymer and Richele Taylor (Columbia) and Celia Joseph (Philadelphia)

The Office of Federal Contract Compliance Programs (OFCCP) is the U.S. Labor Department's enforcement agency for federal contractors subject to affirmative action requirements. In general, these requirements are imposed by Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as well as the Jobs for Veterans Act.

Employers with 50 or more employees and a federal contract or subcontract in the amount of $50,000 or more, as well as certain financial institutions, are required to prepare written affirmative action programs on an annual basis. These affirmative action programs (AAPs) include statistical analyses of the employer's workforce demographics, by race and gender. In addition, the OFCCP has proposed regulations that, if passed, would require similar statistical analyses of the employer's veterans and individuals with disabilities demographics in its workforce.

Recently, the OFCCP has increased its enforcement activities and more contractors have been subjected to OFCCP's compliance reviews. Here are some things you should know.

How Do I Learn I'm Being Audited?

Most audits begin with a scheduling letter detailing the information the contractor must provide within 30 days of receipt of the letter. The contractor should immediately establish a response team and create its own internal deadlines. Prior to submitting any documentation to the OFCCP, you should carefully review all statistical analyses; identify and correct, if possible, any areas of potential adverse impact; compare similarly situated employees for compensation purposes; and ensure that the data you provide is accurate and consistent in every area.

Typically, the OFCCP requests additional detailed compensation data for all or some of your employees. With this in mind, it's important that you have identified which employees are similarly situated to each other.

Can The OFCCP Come Onsite?

Yes, and OFCCP's onsite reviews have increased dramatically recently. Even absent any indicators of discrimination, OFCCP has stated that it will conduct a random onsite audit, which includes employee interviews, for every one out of 25 compliance reviews. In the onsite, your job is to educate the OFCCP about your company, to explain your company's relevant business practices, and to showcase the company's outreach and diversity efforts. Be sure to carefully prepare for the audit just as you would for a trial.

What If The OFCCP Finds A Problem?

Often, the OFCCP will provide a predetermination notice stating its preliminary findings of discrimination and providing the contractor an opportunity to respond. If the contractor fails to satisfy the OFCCP by its response, or if the OFCCP has skipped the predetermination notice, the contractor should expect to receive a notice of violation.

At this point, if not earlier, you may choose to engage in conciliation attempts with the OFCCP. If these efforts are successful, the OFCCP and the contractor will enter into a conciliation agreement. If unsuccessful, the OFCCP may ask the solicitor's office to move forward with further legal remedies. Remedies may include back pay, debarment, or injunctive relief, which often require the contractor, even without any financial penalties, to provide reports to the OFCCP for a specified period of time.

Preparation Is Key

Your initial attention to detail in creating your AAP, proper maintenance of required reports and records, and efforts at internal diversity programs and outreach efforts will all assist you during the compliance review process.

In addition, you should internally audit compensation practices as well as your adverse-impact analyses, which may enable you to correct issues in their earlier stages prior to discovery or identification by the OFCCP.

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Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters

State Election Leave Laws

In addition to the issues raised in the two articles on politics in the workplace found in this issue, you should also be aware that many states have specific laws requiring certain amounts of election leave. A chart setting out state-by-state requirements is available on our website at www.laborlawyers.com.

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