Political Speech in the Workplace: A Private Employer's Guide

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As our nation gears up for the 2020 presidential elections in a climate that seems more politically charged than ever, talk of politics will inevitably reach the watercooler at work. However, many employees may not realize that their political speech is not necessarily protected in the workplace. The First Amendment states that "Congress shall make no law…abridging the freedom of speech" (USCS Const. Amend. 1), but that restraint applies only to government; the Constitution does not protect an employee's freedom of speech if he or she works for a private entity. Thus, private employers – unlike public employers – have a wide latitude of discretion to restrict political speech in the workplace. However, there are important exceptions to this general rule.

A. The National Labor Relations Act

First, the National Labor Relations Act ("NLRA") protects both union and non-union employees working in the private sector who engage in certain concerted activity related to the terms and conditions of their employment. 29 U.S.C.S. § 151 *et seq.* Specifically, Section 7 provides that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C.S. § 157. Section 8 (a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C.S. § 158.

Thus, a private employer generally cannot restrict their employees' right to discuss the terms and conditions of their employment. This is relevant in the context of political speech because a statement like "Vote for X because he will protect your right to healthcare" or "Candidate X will raise the minimum wage" could arguably fall under the NLRA protection.

This type of political speech was discussed by the Supreme Court in the landmark case, Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). In Eastex, union members requested permission from their employer to distribute a newsletter that urged employees to support the union. The newsletter also contained content that encouraged employees to write their legislators to oppose their state's "right-to-work" statute, and also criticized the President's veto of an increase in the federal minimum wage. The employer denied permission to distribute the newsletter, arguing that these other sections of the newspaper had nothing to do with the employer's relationship with the union.

The Supreme Court rejected the employer's argument, and affirmed the lower court's broad interpretation of the "mutual aid or protection" clause, holding that employees do not lose their protection under the clause just because "they seek to improve terms and conditions of

employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." Id. at 565. Moreover, the Supreme Court noted that an employer may not prohibit its employees from distributing union organizational literature in nonworking areas of its industrial property during nonworking time, absent a showing by the employer that a ban is necessary to maintain discipline or production. Thus, under the precedent set by Eastex, employees who are disciplined or terminated for speech that is protected under the NLRA, even when that speech has political overtones, could have a legal claim against their employer.

B. Political Speech that Triggers Potential Discrimination Claims

In New Jersey, political affiliation is not a legally protected characteristic for employees working in the private sector. [This varies by state, however, as some states, such as California, do have statutes that provide specific protection for a private employee's political affiliation].

Nevertheless, while political speech in the private workforce is generally not protected in New Jersey, such speech *can* bleed into other areas that are protected under the state and federal discrimination statutes, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), and the New Jersey Law Against Discrimination (NJLAD). For example, an employee could voice religious objections to a candidate's stance on abortion at the workplace – and while their speech may not be protected, they could have a claim if they could show that they were somehow discriminated against because of their religion. Likewise, an employee might make statements about a candidate's position on border security or immigration that leads to discussion about race or national origin, and might make another employee feel that a hostile work environment is being created based on a protected class.

C. Practical Considerations and Best Practices

While private employers are within their rights to enforce a policy prohibiting or regulating political speech or activities, such a policy would need to be carefully crafted in order to avoid infringing on other rights that are protected.

In lieu of adopting a policy that outright bans all forms of political speech or political activity, private employers might consider drafting a more general "Code of Conduct" or "Civility Code" that would promote the treatment of co-workers with respect and civility and the maintenance of an inclusive and professional environment that is free of discrimination, harassment, and intimidation.

During the Obama administration, these type of general civility codes could still be deemed to violate employees' rights under the NLRA, even if they did not explicitly restrict any activity protected by the NLRA if employees would "reasonably construe" the language to prohibit such activity. However, under the Trump administration, the NLRB has overruled the "reasonably construe" standard, and has instead given employers more latitude in crafting rules and policies in their handbook. See The Boeing Co., 365 NLRB No. 154 (Dec. 14, 2017).

Relying on such broader policies may be the more practical solution for many employers. While an employee may chafe at being told that they cannot engage in any political speech (even if the employer is within its right to prohibit it), many employees would likely agree that they should be "civil" to one another and treat each other with respect. Such a code should work in conjunction with existing workplace policies, such as anti-discrimination and anti-harassment policies and complaint procedures. Any employment policy regulating speech or conduct in the workplace should also include specific language noting that nothing in the policy is meant to limit or interfere with the employee's rights to engage in protected activity under the NLRA or other federal or state laws.

Employers should address internal complaints about political speech the same way they would address complaints about any other speech or conduct. Specifically, the employer should take prompt action to investigate the complaint to determine whether the speech complained of violates the company's policies or rules and then determine whether any remedial action needs to be taken. This helps to shield the employer from liability should a complaint about the "political speech" in question eventually result in a claim.

Employers might also consider enforcing a general non-solicitation policy, which would prohibit any type of soliciting -- including soliciting for political causes, as well as any other causes unrelated to work, such as school fundraisers -- during working time.

Additionally, employers could enforce a general dress code policy, which would prohibit employees from wearing or displaying political paraphernalia (T-shirts, buttons, hats, signs, etc.) at the workplace during work time, but such a policy should be consistently applied in order to avoid any claims of disparate treatment. The exception to this is that under the NLRA's "mutual aid or protection" clause, non-managerial employees are allowed to engage in activity to advance a union clause, including wearing union insignia that might include political speech.

Recent news coverage has highlighted employers' use of general codes of professionalism or other policies to discipline or terminate employees for speech or activity violating those policies. In May 2018, two employees from a Cheesecake Factory restaurant in Miami were fired for reportedly making disparaging comments and gesticulating toward a patron who was wearing a "Make American Great Again" hat because they disagreed with the political message associated with the hat. Even though the employees were allowed to express their political beliefs, Cheesecake Factory stated that the employees were fired because they did not adhere to the company's standards.

Similarly, in the summer of 2017, Google terminated an engineer who circulated a controversial memo that criticized Google's "diversity" initiatives and argued that innate "biological" differences between men and women accounted for women's underrepresentation in the tech industry. Google determined that the former employee's speech violated its code of conduct and policies against harassment and discrimination. The former employee filed a complaint with the NLRB, asserting that he had engaged in "concerted" activity for the purpose of "mutual aid and protection" that was protected under the NLRA. The NLRB concluded that the Google employee's memo contained both protected and unprotected statements, and Google did not violate the former employee's rights under the NLRA when it terminated him solely for his unprotected statements. The employee filed a class action lawsuit in January 2018 with a group

of former Google employees and applicants who claim they were denied jobs allegedly, in part, because of their actual or perceived conservative political views. The action is still pending in California state court.

Both the Cheesecake Factory and Google examples are informative because they demonstrate how a private employer may discipline an employee for any speech – political or otherwise – that is violative of its policies.

D. Conclusion

In sum, while private employers are generally free to restrict political speech in the workplace, any employment policies regulating or limiting such speech should be sensitive to speech that is protected by the NLRA or speech that may implicate claims under other law, such as federal and state discrimination statutes. General codes of conduct can be used to create a tolerant and inclusive environment and enforce professional norms in the workplace, without outright banning political speech.