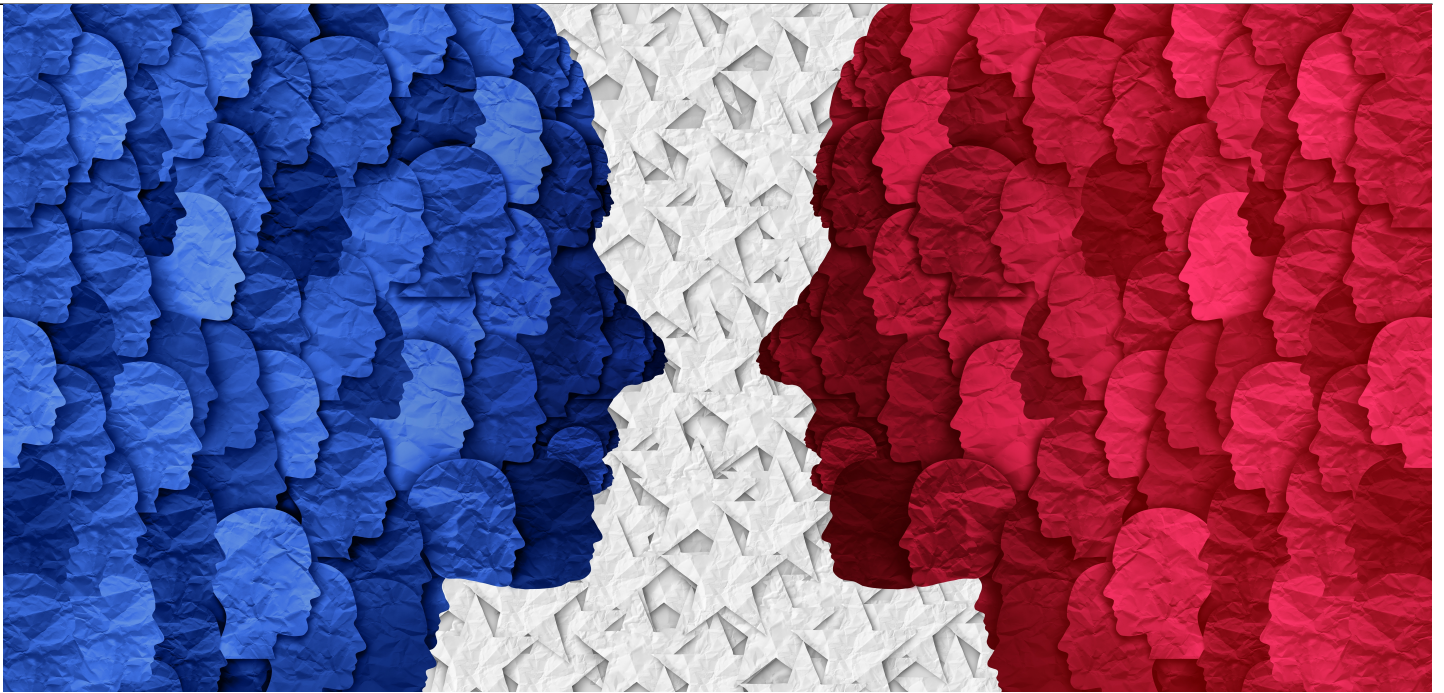




## **How to Navigate Employment Issues in an Election Year**

**Employment and Labor**



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With 2024 being an election year, employers will likely see an uptick in certain employment issues. Federal and state laws impact various matters, such as discussions among employees about candidates or politics, employees expressing their political opinions in and outside of the workplace, and time away from work on Election Day. Employers should be aware of the various laws that may apply to them, so they can navigate election season.

## **Political discussions in the workplace**

While employees may think they are free to say whatever they want at work because of US First Amendment guarantees, free speech generally only restricts action by the government — it is not applicable to private employers. However, the [National Labor Relations Act](#) (NLRA) [provides](#) private sector employees, union and non-union, the right to engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection. Such activity includes statements related to wages, changes to work schedules, and job security, which might, of course, lead into political discussions, as well. As a result, discussing politics as it relates to employment could be protected under the NLRA, but political activity that is unrelated to employment concerns would not be protected.

In addition, although state and federal antidiscrimination laws do not directly protect political activity or speech, employees' activity or speech on certain topics could trigger these laws. If a discussion in the workplace about politics also involves discussion of race, color, sex, sexual orientation, gender identity, national origin, religion, age, or disability, for example, employers should be careful before taking any disciplinary action against employees involved in the discussion, as the employees could claim such discipline is a proxy for discrimination. In addition, employers should address political discussions consistently for all employees so as not to create an appearance of prejudicial treatment

based on a protected characteristic.



Political discussions in the workplace can initiate antidiscrimination laws if employers are not careful. Jorm Sangsorn / Shutterstock.com

Beyond traditional antidiscrimination laws, some states prohibit adverse action against an employee based on political expression. For example, in North Carolina it is unlawful for an employer to discipline, intimidate, or oppose an employee because of any vote the employee has cast or may cast. In South Carolina, it is unlawful to intimidate or discipline an employee because of their political opinions or the exercise of their political rights. There are also several laws, such as those in Missouri, New Mexico, and Washington, DC, that prohibit employers from discriminating against an employee with respect to employment because of the employee's present or past political affiliation, or lack thereof.

## **Other means of political expression in the workplace**

Some employees may choose to express their political opinions on their apparel or by hanging a poster in their workspace in support of a candidate. Employers can regulate these types of expressions by enforcing a dress code or workspace policies. Employers should enforce rules consistently in this prohibition as well. For example, if an employer does not allow its employees to wear clothes that support a certain candidate, it should prohibit employees from wearing clothing that support any candidates.

An employer can also prohibit employees from using company email to recruit others to volunteer for a campaign, hang a political sign-up sheet in the breakroom, or host an information session about a candidate in the workplace. Note, however, that consistent enforcement of company policies is key whether political or not. For example, if an employer's policy prohibits employees from posting solicitations in the workplace but the employer allows an employee to post an order sheet to buy cookies, it may also have to allow an employee to post a political sign-up sheet. In addition, employers should not restrict employees from engaging in political solicitations during rest and meal breaks, including paid breaks.

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Make sure to distinguish between politically-related activities that fall under the NLRA and from activities considered other political speech.

[ACC members can find more election-related resources in the Resource Library!](#)

## Employees expressing political opinions online

At least one employee of a private employer will likely post something on social media related to an election. If and how the employer addresses an employee's social media post should depend on the nature and content of the post, the employer's policies, and applicable state law.

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Social media policies should be in place to make certain employees are in compliance. Lightspring / Shutterstock.com

Nearly all states are employment-at-will states, meaning an employer or employee may terminate the employment relationship at any time, for any reason, with or without cause, so long as the reason is not prohibited by law.

Some states have off-duty conduct laws that protect an employee's lawful activity off the employer's premises during non-working hours. These laws vary by state and could apply in situations where an employee expresses political opinions online or in another public setting.

For example, California employers are prohibited from coercing or influencing employees, by

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threatening to discharge them, to follow or refrain from any political action or activity. Additionally, Colorado prohibits an employer from wrongfully terminating an employee for engaging in any lawful off-premises activity, including political activity, unless the activity relates to a bona fide occupational requirement or is necessary to avoid a conflict of interest. For example, to avoid the appearance of a conflict of interest, an employer may be able to terminate an employee for attending a political rally if the employee fails to report to work for a scheduled shift in violation of the company's policies and procedures.

Employers should consider implementing a social media policy if they don't already have one. Generally, employers can require employees to be respectful in social media posts that are related to company business, comply with confidentiality and trade secret obligations, and not use inflammatory language when discussing coworkers or company business. However, the rules are not absolute and particular facts will dictate whether a social media post is legally protected. (See, e.g., [Nat'l Lab. Rel. Bd. v. Pier Sixty, LLC](#), 855 F.3d 115 (2d Cir. 2017)).

Employers who have an existing social media policy should review it and make sure it complies with the National Labor Relations Board's (NLRB's) decision in [Stericycle, Inc., 372 NLRB No. 113 \(2023\)](#). In *Stericycle*, the NLRB changed the standard for evaluating whether a workplace conduct policy violates the NLRA. Under the new standard, the NLRB analyzes whether an employee would reasonably construe a rule or policy as chilling protected conduct under the NLRA. In particular, the NLRB examines whether a rule or policy has a reasonable tendency to interfere with employees' NLRA rights. If an employee could reasonably interpret the rule as doing so, even if another interpretation is reasonable, the burden shifts to the employer to justify it. The employer must show that the rule or policy advances a legitimate and substantial business interest, and it is unable to advance that interest with a more tailored rule or policy.

## **Employee time off on election day**

Federal law does not require employers to provide employees with time off to vote. However, many states provide protected leave for employees to vote, including, but not limited to, Arizona, California, Connecticut, Georgia, Illinois, Massachusetts, Minnesota, New York, Ohio, and Texas. Voting leave laws vary by state and address a variety of logistical considerations including, but not limited to, eligibility, whether the leave is paid or unpaid, and the amount of time an employee may take. In addition, California and New York require employers to post notice in the workplace about employees' right to voting leave.

In Alabama, Connecticut, Illinois, Minnesota, Virginia, and Wisconsin employees may take leave to serve as an election official, election judge, or elector in certain elections. These laws vary in terms of who is a covered employer, the reason for leave, and the amount of time employees may be entitled to take.

## **Company leadership's support of candidates or positions**

An employer's leaders likely have personal views about particular candidates, such as favoring a specific candidate because, if elected, that person may help the company. Whether the company or its leadership should take a public stance on a political position or candidate should be carefully reviewed or, at least, companies should consider the potential impact on company culture. Employers should also provide clear direction to managers that they cannot take political positions on behalf of the company. A company's establishment and consistent enforcement of the various policies and

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practices discussed above can help with that potential issue.

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Potential issues may occur if employers do not consistently apply policies for company leadership speaking out on political issues. KitohodkA / *Shutterstock.com*

An employer should be cautious about requiring employees to attend a meeting where leadership will discuss why the company or its leadership believes a certain candidate is the better choice for the company. Minnesota, Maine, New York, and Oregon have laws that ban such meetings. Those states prohibit employers from requiring employees to attend or otherwise participate in employer-sponsored meetings or requiring employees to listen to or receive communications regarding employer opinions on political matters under threat of discharge, discipline, or some other penalty. Even if attendance is not mandatory, employers should be cautious about engaging in such activities as federal and state laws prohibit employers from coercing an employee to vote a certain way. (See, e.g., [52 U.S.C.A. § 10101\(b\)](#) [52 U.S.C.A. § 10307\(b\)](#); [M.G.L. c. 56, § 33](#); and [N.J.S.A. 19:34-27](#)). It can be a fine line between recommendation and coercion if an employee feels like they need to appease their employer.

## **Minimize issues without impeding rights**

With the variety of issues that can come up during election season and the patchwork of laws in effect across the United States, employers should be mindful of what types of employee speech and conduct can be regulated. By creating and consistently enforcing applicable and compliant workplace rules and policies, employers can minimize workplace issues while not impeding employee rights.

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