Political Expression In The Workplace

BY ANDREW GOULD, ESQ.

WE ARE NOW less than six months from another presidential election. As much news coverage as it is generating already, rest assured, the dialogue and discourse will only increase as we move toward November. What better time than now to consider the laws governing political expression (and suppression) in the workplace.

Freedom of speech does not mean ability to speak freely all the time. We all know that the First Amendment of the Bill of Rights provides every American with various rights and freedoms, including that of free speech or free expression. In the employment setting, however, the First Amendment applies only to, and protects the political expression of, public employees (the rights of the First Amendment apply equally to both federal and state employees thanks to the Due Process Clause of the Fourteenth Amendment). Therefore, those individuals who are employed by state or federal municipalities, agencies, and the like are protected from adverse employment acts for expressing their political views at work.

On the other hand, private employees do not have the same luxury and are not protected from discipline or termination for expressing their political beliefs at work whenever, wherever, or however they wish. Private employers may regulate conduct at work that is disruptive, for example. As a result, an employer is within its rights to prohibit individuals from wearing pro-candidate buttons or from using company resources like e-mail or other electronic forums for campaigning or political fundraising purposes if reasonably believed to be disruptive or counterproductive to operations.

May employers regulate off-duty conduct? Where the issue becomes more challenging is when an employer seeks to regulate the behavior of someone when they are off the job. Most employees in the United States are employed "at-will," which means they can resign their employment at any time, for any reason, and they may be terminated from employment at any time and for any reason. There are certain specific exceptions to the at-will doctrine that limit when employers can take adverse actions against an individual. In the context of politics, employers, private and public, are forbidden from taking action against an employee for exercising their right to vote.

Certain states provide additional protections for off-duty conduct that may or may not be political in nature.

The bottom line is, it is always best to stay away from the subject of politics at work. (And the same can be said for religion.) While I haven't always followed that adage in social settings, the consequences of not heeding it are far greater in an employment setting than in any other. By the same token, companies would be wise to check with their attorneys before taking any adverse action specifically in response to an employee's political comment or expressions.

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States such as California, New York, Colorado, and North Dakota all prohibit an employer from taking adverse actions (i.e., disciplining, demoting, or firing someone) against a private employee for engaging in lawful outside activities, which includes political activities.

Other states like New Jersey, Wisconsin, Pennsylvania, Michigan, and Washington prohibit employers from taking adverse action, or threatening to take adverse action against an employee depending on how they may vote in an election.

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