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Politics in the Workplace: A Primer for the 2016 Elections

From the Experts

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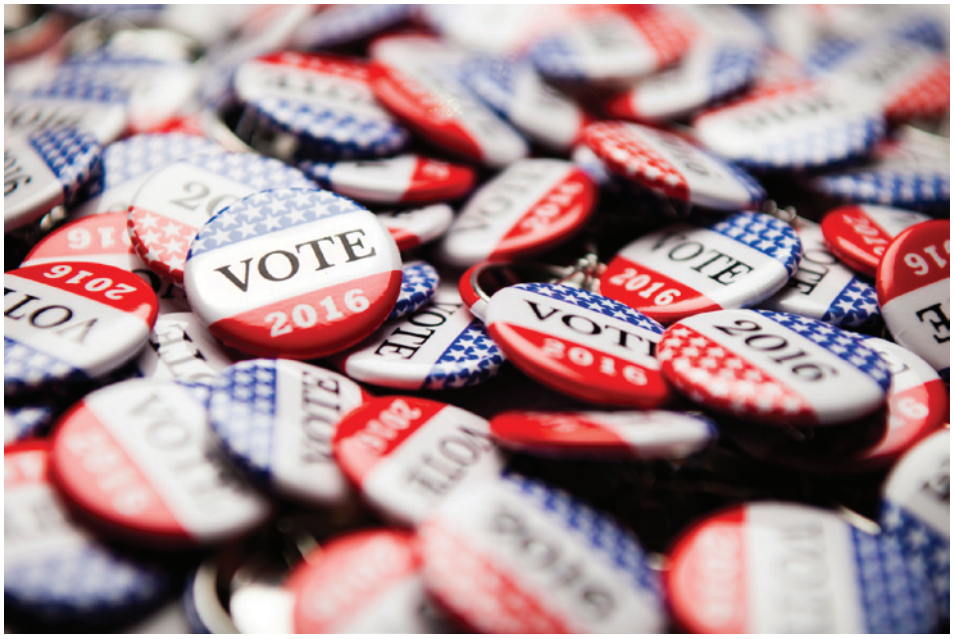
When most corporate counsel hear "workplace politics" mentioned, they probably do not immediately think of the type of politics that results in people being elected to public office. But the U.S. Supreme Court's decision in *Citizens United* expanded the rights of corporations to engage in political activity, particularly concerning their First Amendment right to express their views to the public. With the coming of the 2016 presidential election, and the increased use of mobile technology for personal political activities, corporate counsel should become acquainted with the fast-changing and conflicting laws that regulate electoral politics in the workplace.

Managing the company's involvement in electoral politics used to be a relatively simple matter of ensuring that the PAC was well run, that personal political activities stayed outside the workplace and that if an executive wanted to engage in personal fundraising, she or he was clear on how the event was to be organized and paid for. No more.



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The 2012 presidential race saw candidate Mitt Romney urge members of the National Federation of Independent Business to tell their employees whom to vote for, the U.S. Chamber of Commerce encourage member companies to include political advertisements in employees' pay envelopes and it saw the Federal Election Commission (FEC) deadlock on whether it was illegal for a company to compel its employees to attend a presidential campaign rally. Depending on which side one is on, these actions were either hailed as pioneering or decried as manipulative. But one thing is certain: The pressure for businesses to be involved in the 2016 elections–and to involve their employees in the elections–will be even greater. At the same time, expanding access to mobile devices and the growing role of Internet-based political activism means personal political activities can more easily find their way into the workplace. Even the FEC-the federal agency responsible for the neutral enforcement of our nation's campaign finance laws–was embarrassed to find a staff lawyer sending personal tweets soliciting contributions for a presidential candidate from her workplace at the agency.

What follows is a basic primer for corporate counsel on the laws that apply to politics in the workplace.

Involving Employees in a Company's Political Activities

A corporation may ask its employees to contribute to a corporate PAC. The law is well settled that a company may ask its executive and administrative personnel to make voluntary contributions to the company's PAC. Two important principles underlie this rule. First, contributions must be voluntary and cannot be reimbursed by the company. The voluntariness of a contribution can be lost if an employer conditions an employee's compensation, promotion or discharge on whether she or he contributes to the PAC. Second, only "executive and administrative personnel," shareholders, and their families can be asked to give.

A corporation may now communicate with all employees about candidates, including encouraging them to vote for or against particular candidates. Federal law has long allowed corporations to communicate with senior level staff about politics, including sponsoring candidate appearances, recommending who they vote for and encouraging senior staff to contribute to particular candidates.

Since the Supreme Court's decision in *Citizen United,* the corporation's right to communicate about all of the above now extends to all company employees, so long as the

corporation acts independently of federal candidates or political parties. This means that companies can broadly and openly discuss with their employees at every level why they should vote for particular candidates and what certain pieces of legislation may mean for their business. However, candidate appearances in the workplace and fundraising beyond the PAC are murky areas of the law, as are questions about whether electoral communications trigger FEC disclosure obligations and how "independent" a company must be of a candidate or political party when it engages in independent speech. Corporations should seek legal counsel before moving forward with these types of activities.

Requiring employees to participate in company-sponsored political activities remains risky. The FEC's regulations have long barred employers from threatening employees with detrimental job action to compel them to make contributions to or fundraise on behalf of federal candidates or political parties. But in two surprising cases, the FEC failed to find an employer guilty of violating federal law by coercing its employees to participate in political activity. One case involved a labor union attorney, who alleged that she was discharged for refusing to participate in union-sponsored independent political activity to re-elect a local congressperson, including canvassing and waving campaign signs to passing cars on a local road. Three FEC Commissioners noted: "[The Union]'s independent use of its paid workforce to campaign for a federal candidate post-*Citizens United* was not contemplated by Congress and, consequently, is not prohibited by either the Act or Commission regulations."

The second case involved a coal company alleged to have required employees to attend a pro-coal rally where a presidential candidate spoke and the employees were given signs to wave encouraging voters to "fire Obama." Because the event was organized with the candidate, the company could not avail itself of the exemption in *Citizens United* for "independent" political speech. In this context, the FEC staff lawyers concluded it would be a violation for a company to require its employees to attend the candidate's rally, but found "the size or significance of the apparent violation is not sufficient to warrant further pursuit." The FEC split 3-3 on whether to dismiss the matter entirely or begin an investigation, and ultimately agreed to simply close the case.

This weakness in prosecution flows in part from the Federal Election Campaign Act of 1971, as amended, which clearly prohibits coerced contributions to a company's PAC, but is silent on other kinds of coerced political behavior. While other federal statutes prohibit coercion, intimidation or remuneration on the basis of who an employee votes for or against, or whether they vote at all, it is less clear that these statutes bar compulsory political activity not directly related to voting, such as attending a rally in support of an employer's preferred candidate.

Threatening job security, discipline or termination for political activity may present significant risk under state law. The two FEC decisions discussed above can give a false sense of comfort to those who only look to federal election law in assessing risk. Many commentators believe that the National Labor Relations Act's bar on threatening employees to close a plant or facility if they unionize can be extrapolated to bar threats of job loss based on the outcome of at-large elections.

And many states have a statutory right to political freedom that could support a claim of wrongful adverse action, were an employer to discipline or discharge an employee for his or her off-duty political activities. While these statutes are most often drafted to bar discharge in retaliation for an employee's independent political activity, some, such as those in California, Louisiana and Nebraska, are more expansive, and bar efforts to "control" or "influence" the political activities of employees. Others, such as those in New Jersey, Oregon and Wisconsin, explicitly bar an employer from requiring employees to attend an employer-sponsored meeting on political matters. And some jurisdictions, such as the District of Columbia, have adopted "political affiliation" as a protected activity under their anti-discrimination statutes, suggesting that any adverse action taken for reasons motivated by an employee's political activity may be prohibited. These broader protections may be brought to bear in circumstance where discipline arises from a refusal to participate in an employer's preferred political activity that conflicts with the employee's personal views. Unlike federal law, where the FEC and the U.S. Department of Justice have exclusive jurisdiction to enforce the statute, many state law rights are enforced by a private right of action, either present in the statute or through the tort of wrongful discharge in violation of public policy.

Employees' Voluntary Participation in Workplace Politics

While an employer may choose to ban political activity in the workplace, interestingly federal law does not require it. The FEC's rules acknowledge that employees may engage in a *de minimus* amount of political activity at work, so long as they continue to perform a normal level of professional duties. The FEC also allows employees engaged in volunteer activity in support of federal candidates to make occasional, isolated or incidental use of their employer's equipment and facilities for their political activity. The agency's regulations create a "safe harbor" for this standard of one hour a week or four hours a month. More extensive use of meeting rooms, food services or activities that increase a company's incremental costs should be cleared in advance with legal counsel.

But given the increased use in the workplace of personal mobile devices, employers may be at a loss as to how to police employee political activity during work time and ensure that the rules are observed. How many tweets make up an hour? Is commenting on a Facebook page a personal political activity?

For some, a ban on all employee volunteer political activities while on duty or using a company's facilities or equipment may seem a clear and risk-free approach. After all, politics can be a divisive issue, may distract from the day-to-day needs of the company and may result in allegations of unlawful or harassing conduct if political conversations in the workplace devolve into arguments implicating race, sex, religion or national origin. But state law should be consulted, and consideration given to whether a ban is evenly applied to corporate executives, or is implemented despite the company itself communicating with employees about politics.

The Bottom Line

Freedom comes with a price. For corporate counsel, the price of the freedom corporations have won with *Citizens United* and similar legal rulings is an increasingly complex world of regulation, and perhaps a mistaken mood among many companies that this freedom means that no rules exist. The truth, unfortunately, is far more complicated.

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