COVINGTON

Compliance in Employee Communications

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Election and Political Law

The 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 about candidates for public office. With the upcoming 2016 presidential election and the increased use of mobile technology for personal political activities, corporations should become acquainted with the fast-changing and conflicting laws that regulate electoral politics in the workplace.

Managing a 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.

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 Chamber of Commerce encourage member companies to include political advertisements in employees' pay envelopes, and 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, greater 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 Federal Election Commission—the federal agency responsible for the neutral enforcement of our nation's campaign finance laws—was recently embarrassed to find a staff lawyer sending personal tweets soliciting contributions for a presidential candidate from her workplace at the agency.

This memorandum provides general information on the laws that apply to politics in workplace communications.

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. We provide a fuller description of the rules for defining "executive and administrative personnel" in our client alert entitled *"Communicating with the "Restricted Class."*

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 executive and administrative personnel 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 subjects 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. However, candidate appearances in the workplace, fundraising, whether electoral communications trigger FEC disclosure obligations, and how "independent" a company must be of a candidate or political party for these more relaxed communication rules to apply all can involve complicated legal questions, and companies 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 contributions to an employer's PAC. 11 C.F.R. § 114.5(a). But in two surprising cases, the Federal Election Commission failed to find an employer guilty of violating federal law where it was alleged it coerced its employees to participate in political activity.

- One case involved a labor union attorney, who alleged she was discharged for refusing to participate in union-sponsored independent political activity to re-elect a local congressperson, including canvassing and waiving 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." Statement of Reasons, Chair Hunter and Comm'rs McGahn II and Petersen at 2, MUR 6344 (United Public Workers) (footnote omitted).
- 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 waive 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." First Gen. Counsel's Rpt. at 17-18, MUR 6651 (Murray Energy Corp.). 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 or

intimidation on the basis of who an employee votes for or against, *see* 18 U.S.C. §§ 241, 242, 594; *see also* 52 U.S.C. §§ 10307(b), 20511, it is less clear that the 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.

These two FEC decisions 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.

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 are more expansive, and bar efforts to "control" or "influence" the political activities of employees. For example:

- *Louisiana:* "No [employer of 20 or more employees] shall adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees, nor coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or of loss of employment in case such employees should . . . participate in political activities of any nature or character." La. Rev. Stat. Ann. § 23:961.
- *California*: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." Cal. Lab. Code § 1102 (West).
- *Nebraska:* providing that any person who "attempts to influence the political action of his or her employees by threatening to discharge them because of their political action" is guilty of a class IV felony." Neb. Rev. Stat. § 32-1537.

Further, at least three states explicitly bar an employer from requiring employees to attend an employer-sponsored meeting on political matters. *See* N.J. Stat. Ann. § 34:19-10; Or. Rev. Stat. § 659.785; Wis. Stat. Ann. §§ 111.32, 111.321. 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. D.C. Code § 2-1402.11.

These broader protections may be brought to bear in circumstances 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 Justice Department 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. *See, e.g., Kunkle v. Q-Mark, Inc.*, No. 3:13-CV-82, 2013 WL 3288398 (S.D. Ohio June 28, 2013) (allowing claim for wrongful discharge in violation of public policy to proceed where plaintiff alleged she was terminated the day after she voted for President Obama, and that her termination violated the public policies set forth in Ohio's voter intimidation

laws). While federal campaign finance law has a strong preemption provision, 52 U.S.C. § 30143(a), it is not clear if that provision would bar state-law suits against a private employer when a controlling group of FEC Commissioners have concluded federal law does not regulate the activity.

Employee Voluntary Participation in Politics in the Workplace

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 during duty time, so long as they continue to perform a normal level of work. 11 C.F.R. § 100.54(a) (no "contribution" results if an employee expected to work a certain number of hours engages in political activity during duty time and makes up the time in a reasonable period). 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. 11 C.F.R. § 114.9(a)(1)(i).[1] The agency's regulations create a "safe harbor" for this *de minimus* standard of one hour a week or four hours in a month. 11 C.F.R. § 114.9(a)(2). More extensive use of meeting rooms, food services, or activities that increase a company's incremental costs should be pre-cleared 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 *de minimus* 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 as to whether a ban is evenly applied to corporate executives, or is implemented despite the company itself communicating with employees about politics.

Conclusion

The price of the freedom corporations have won with *Citizens United* and similar legal rulings that have deregulated politics is an increasingly complex world of federal 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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[1] This rule exempts such use from being considered a prohibited "contribution" or "expenditure" but does not grant an affirmative right to engage in such activity. Thus, an employer's personnel policies could trump this exemption from the general ban on corporate political expenditures. Nor does this exemption apply when the employer instructs the employee to engage in the activity. FEC Campaign Guide for Corporations and Labor Organizations, at p. 96 (Jan. 2007).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

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