

Employment Law Considerations

Employment

With the 2020 election around the corner, employers should be alert to election-related issues in the workplace, including requirements for time off to vote and employee protections concerning political speech or activity at work. Employers should consider the following employment law issues leading up to and following the 2020 election.

Time Off Related to the Election

- Compliance with voter leave laws. Federal law does not require private employers to provide employees with time off to vote. However, 30 states have adopted such laws, with varying requirements regarding how much time must be granted, when leave may take place, whether notice is required, and whether the leave must be paid.
 - Employers should review applicable state and local law to determine their precise obligations.
 - Given predictions that many polling places may be subject to hours-long wait times on election day, employers may also want to consider providing more leave than is required by applicable law.
- Consider other voting or election leave. While not mandated, employers may want to consider providing employees with additional time off benefits related to the 2020 election.
 - For example, employers may want to allow employees time off to vote early, or even permit a full day off for employees who would like to serve in non-partisan, civic, election-related positions, such as poll workers.
 - Time off should not be tied to a requirement to vote or participate in political activities.

Discrimination, Political Speech, and Political Activities

- Consider discrimination implications of workplace policies. Employers should strive to implement neutral policies related to political speech and activity by employees in or outside the workplace.
 - Federal anti-discrimination laws do not contain explicit protections related to employee political opinion or political activity, though a small number of states and local jurisdictions have enacted some protections for political opinion or political activity outside the workplace.
 - Regardless of which laws apply, treating employees differently on the basis of political opinion or activity outside the workplace can create legal risk because political opinions often intersect with issues that are protected under anti-

discrimination laws, such as race, gender, sexual orientation, and immigration. When such issues are implicated, it may not be easy to draw the line between permissible activity and prohibited discrimination.

- Treating employees differently on the basis of political opinion and activity may also contribute to a negative work environment.
- Regulating speech in the workplace. Employees of private employers do not have First Amendment rights in the workplace, meaning that private employers are free to restrict employee political speech, subject to some limited exceptions for union-related activity.
 - When it comes to politics, employers may want to consider blanket prohibitions on political speech, apparel, and activities in the workplace.
 - Employers may also want to consider reminding employees about codes of conduct or other policies that require respectful treatment.
 - Any such policies should be applied neutrally. When applying such neutral policies, employers should still distinguish between genuine political speech and racist, sexist, or otherwise harassing or unlawful conduct which may require a more serious response.

Social Media Policies

- Problems posed by social media. Social media presents a sensitive issue in the employment context.
 - Employees can make controversial statements about the upcoming election or political candidates.
 - Employees are likely to be protective of their personal social media accounts, but problematic conduct or statements made on those accounts could require employer intervention if they are made publicly and viewed by co-workers.
- Social media policies. Many employers have implemented social media policies to address these issues.
 - Social media policies can include provisions limiting employees' ability to affiliate themselves with their employer on private social media accounts, encouraging employees to exercise good judgment in what they post, and reminding them that posts that are racist, defamatory, or otherwise violate company policies could result in discipline if they impact the workplace.
 - Employers are generally permitted to monitor public social media activity, but several jurisdictions prohibit requiring employees to provide passwords to their accounts.

* * *

If you have any questions concerning the material discussed, please contact:

<u>Lindsay Burke</u>	+1 202 662 5859	<u>lburke@cov.com</u>
<u>Tom Plotkin</u>	+1 202 662 5043	<u>tplokin@cov.com</u>
<u>Carolyn Rashby</u>	+1 415 591 7095	<u>crashby@cov.com</u>