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Presidential Election, Middle East and More Lancaster SHRM Fall Legal Conference

LANCASTER
SHRM
Society for Human Resource Management



September 20, 2024

AFFILIATE OF
SHRM
BETTER WORKPLACES
BETTER WORLD™

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Presidential Election

True or False:

An employer lawfully may prohibit workplace discussions of the presidential election

General rule: yes

Presidential Election

Primary Exceptions

1. Public employers: 1st Amendment
2. Private employers: NLRB

Presidential Election

Problems with ban

1. Impractical
2. Culture

Presidential Election

What can employers do?

1. Implement certain discrete prohibitions
2. Establish general guardrails
3. Respond to political speech that is discriminatory, uncivil or disruptive

Presidential Election

Examples of discrete prohibition on workplace political speech:

1. No displaying of political buttons or wearing of other political paraphernalia when interfacing with the public
2. No posting of political messages in common areas (such as outside of office door)
3. No solicitation or distribution inconsistent with [compliant] solicitation and distribution policies

Consider pros and cons of NLRB carve out

Presidential Election

Examples of general guardrails:

1. Restraint (in raising your political issues)
2. Respect (in sharing your political views)
3. Civility (in responding to differences)

Consider pros and cons of:

1. Establishing guardrails proactively
2. Including NLRB disclaimer

Presidential Election

Responding to unacceptable and disruptive political speech

1. Uncivil
2. Discriminatory/stereotyping
3. Disruptive (respond to disruption without picking a side)

Careful review of any adverse action for NLRA risk

Discrimination Based on Political Preference/Activities

1. No restrictions as to private employers under:
 - a. Federal law
 - b. Pennsylvania law
2. Potential protections under other state and local laws:
 - a. Political affiliation (for example, District of Columbia)
 - b. Political activities (for example, California)
 - c. Lawful off duty conduct (for example, New York)

Discrimination Based on Political Preference/Activities

3. Viewpoint diversity

- a. Consider diversity of political thought among employees, business partners and customers/clients
- b. Importance of consistency in enforcement to avoid point of view discrimination

Social Media Rule 1

1. Be explicit in social media policy that employees must make clear that their political and other personal posts are not on behalf of the employer
2. How is this accomplished:
 - a. No: “Not on behalf of XYZ Corp”
 - b. Yes: “My personal views only; not on behalf of my employer.”
3. What if profile on social media platform states employer’s name?

Social Media Rule 2

1. Make explicit in both social media and EEO policies that prohibitions on discrimination and harassment apply to social media activity
2. Importance as
 - a. Practical matter (not limited to political speech)
 - b. Legal matter

Social Media Rule 2

3. Legal background:
 - a. Updated EEOC Enforcement Guidance and social media
 - b. 9th Circuit Decision and endorsement of EEOC's enforcement guidance

Social Media Rule 2

4. Approaches for language in both policies
 - a. Option 1: all social media communications
 - b. Option 2: social media communications about employees
 - c. **Option 3: social media communications about or may be seen by employees, business partners, customers, etc.**

Middle East Conflict

2 different roles for employer

1. Employer as speaker
2. Employer as traffic cop

Middle East Conflict

Employer as speaker

1. Recent history of employers making public statements on societal issues (such as murder of George Floyd)
2. October 7 Attack of Israel by Hamas and ensuing conflict

Middle East Conflict

Employer as speaker

3. Employers may want to re-think practice of making public statements about societal issues except to the extent they may affect the employer's workplace
4. State new "practice" prior to next "issue"

Middle East Conflict

Employer as traffic cop

1. Employer must respond to discriminatory/harassing communications (including social media)
2. Employers also need to be careful not to discriminate in responding to discriminatory communications

Middle East

The following are but 2 examples of communications that are not, in and of themselves, discriminatory/harassing:

1. Condemning Hamas
2. Criticizing the policies of the Israeli government

Middle East

The following are but 2 examples of discriminatory/harassing communications:

1. Referring to Palestinians/Arabs/Muslims as “terrorists”
2. Referring to Israelis/Jews as “murderers”

Middle East

What about the following:

1. Referring to protesters as the “ Hamas crowd.”
2. Stating: “From the River to the Sea Palestine will be free”

Attacks on DEI

1. Increase in attacks
 - a. Political
 - b. Philosophical
 - c. Legal
 - i. Title VI Affirmative Action case
 - ii. Title VII case: Muldrow (“some harm”)

Attacks on DEI

2. Focus of the attacks

- a. Preferences given based on Title VII characteristic
- b. In other words, the E in DEI

Attacks on DEI

3. Legal landscape--prohibitions
 - a. Quotas
 - b. Set Aside
 - c. “Plus factor”
4. Prohibitions apply equally to employers who are AA employers under E.O. 11246

Attacks on DEI

5. One possible exception to “plus factor”
 - a. No exception simply because goal is to increase diversity
 - b. Possible exception if remedial purpose
 - i. Manifest imbalance in traditionally segregated job categories
 - ii. Risks in trying to rely on potential exception

Attacks on DEI

6. Danger zones beyond per se rules
 - a. Quantitative goals
 - i. Qualitative goals create less risk
 - b. Tying compensation to quantitative or qualitative goals
 - i. Focus on efforts only
 - c. The “Rooney” Rule
 - i. Diversify the applicant pool

Attacks on DEI

6. Danger zones beyond per se rules
 - d. Limiting any development program based on protected characteristic (such as mentorship, internship, leadership training, etc.)
 - i. If not open to all, use limitation other than protected characteristic
 - e. Restricting ERG membership to the protected characteristic
 - i. If not open to all, use limitation other than protected characteristic

What is Woke?

1. What is not woke:
 - a. Being aware of and thoughtful about words we use
 - b. Sensitivity to and respect for differences
2. What is woke:
 - a. Hyper focus on words and not intent
 - b. Taking sensitivity/micro-aggressions to the extreme

Examples of Woke

1. Don't say older
 - a. Say mature
2. Don't say mom
 - a. Say birthing parent
3. Don't say formerly incarcerated
 - a. Say judicially challenged

Examples of Woke

4. Don't say Christmas
 - a. Say December celebration
5. How about trigger warning?
 - a. Need warning about use of word trigger

Dangers of Woke

1. **Condescending**
 - a. Chopped cow problem
2. **Devalues “real” issues**
 - a. Let’s talk about elder care of moms by moms
3. **Stifles discussion**
 - a. Fear of being judged, blamed and cancelled

Dangers of Woke

4. Promotes social distancing
 - a. Would you want to hang out with a woke warrior?
5. Antithesis of grace
 - a. Why we need grace in our workplaces

Grace

1. What is grace?
2. When is grace appropriate?
3. Why our workplaces need grace
4. Examples of grace in the workplace
5. Role of HR in modeling grace

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