

4 Tips To Prepare For Political Tension In The Workplace

By **Vin Gurrieri**

Law360 -- The sudden emergence of Vice President Kamala Harris as the likely Democratic nominee for president has already inspired enough racist and sexist attacks from Republican lawmakers that party leaders have reportedly told members to tone it down.



It's incumbent on employers to make sure workers know what constitutes unacceptable behavior well before Election Day rolls around to cut down on potential confusion and problems, attorneys say. ([iStock.com/Tanaonte](https://www.iStock.com/Tanaonte))

With November's presidential election about 100 days away, the race took **an unexpected twist** on July 21 as President Joe Biden withdrew from contention and Harris ascended as the person likely to go head-to-head with former President Donald Trump.

In a race that had already been marked by discussions about Trump's and Biden's age and mental acuity, Harris' move to the top of the Democratic ticket has already been met with attacks that involve use of the term "DEI," an acronym for diversity, equity and inclusion, as a pejorative.

House Speaker Mike Johnson, R-La., sought to quell those types of attacks by encouraging Republican lawmakers in public and behind closed doors to instead criticize Harris on policy positions, according to media reports.

For employers, the line between respectful political debates in the workplace and unlawful conversations that run afoul of anti-discrimination law is a hazy one, particularly if the issues being discussed delve into things like age, race, religion or sex.

"Unfortunately, there is just no bright-line rule about where political speech ends and discriminatory speech starts, particularly because these issues are so intertwined," said Alexander Reich, a partner at Saul Ewing LLP who represents employers. "It makes it really difficult for employers to manage these issues."

As Election Day nears, here are four tips for employers that want to keep tensions in the workplace from boiling over.

Set, Explain Policy in Advance

Even if the line between acceptable political discussion and inappropriate commentary can sometimes be blurry, it's incumbent on employers to make sure workers know what constitutes unacceptable behavior well before Election Day rolls around to cut down on potential confusion and problems, attorneys say.

That means having a clear written policy in place that aligns with any relevant state laws, and making sure workers and managers are trained on it.

The current political climate presents employers with an opportune moment to offer a fresh round of anti harassment training or, if they are in a state where regular training isn't required, to still make sure that workers are aware of the company's policy, according to Reich.

"The difficult thing with this topic is that oftentimes, political speech can cross over into topics that touch on protected characteristics," Reich said. "So it's important that an employer's workforce knows that there are policies prohibiting discriminatory speech, prohibiting harassment, and just general policies that require civility in the workplace."

"The more that you make your nondiscrimination policies a part of your employees' daily lives, a part of the culture of your workforce, I think the less likely you are to face issues of discriminatory speech and the more your workforce will be cognizant of how they speak to one another," Reich added.

Having a detailed policy established can also benefit employers if a heated political conversation or a remark about an issue or candidate that was made in the context of politics and is intertwined with a protected category spurs a discrimination complaint, according to Scott Mirsky of Miller Miller & Canby.

"We've ... encouraged employers [to] remind their supervisors to really limit or avoid having political discussions, if possible, because you may end up showing that you have a discriminatory belief, which then may be used against the company in a subsequent claim or lawsuit," Mirsky said.

Mirsky offered an example of how problems could arise, pointing to a hypothetical conversation in which colleagues are talking about a candidate's age. If a supervisor with the authority to make hiring and firing decisions says they believe a person can no longer function once they hit a certain age, that comment could potentially be used by an older worker as evidence that the decision-maker is biased against a particular group, Mirsky said.

In another hypothetical scenario, a male supervisor and a female employee are having a political discussion in which the supervisor says he doesn't believe women

should be president or in top leadership positions. If the woman is later passed over by the supervisor for a job opportunity, and pursues a gender bias claim, the remark could be cited as a "potential indicator of discriminatory motive," he said.

"That's really where my concern lies with issues regarding political speech," Mirsky said. "The line is so blurry between ... political expression and when it might move into sort of evidence of a discriminatory motive for a subsequent claim that someone may file."

Be Prepared for Free Speech Claims

Aside from complaints from employees that politically charged remarks amount to unlawful hostility, another type of complaint employers may face is from workers who believe their constitutional rights were stifled by their employer's policy.

Even though those complaints are rooted in a misunderstanding of how and where the First Amendment applies, private companies should treat those complaints respectfully while also carefully explaining the nuances.

"One of the things we see a lot are that employers will get complaints from employees that ... say, 'Hey, that speech was protected, you're infringing on my First Amendment rights. That's political speech. I have a right to say that.'" Reich said. "Well, that's a misnomer. That's not really the law. Unless you work for a government entity, you don't have a First Amendment right in the workplace."

Private employers have a "right to control their workspace" and to require that employees treat their colleagues respectfully, he said. But the onus is on employers to make sure they enforce nondiscrimination policies evenhandedly regardless of the political views at issue.

"I think it's important ... to stick to your policies, to apply them consistently, to not play favorites based on your own political viewpoints as a manager or as an employer, and just to try and be consistent and level in how you deal with your workforce," Reich said.

Mickey Silberman, founder of management-side firm Silberman Law PC, noted that the vast majority of employees work in the private sector, where freedom of speech protections in the workplace don't exist even if they have a perception that it does. That disconnect can cause problems when employees' perspective doesn't match the legal reality, he said.

So it behooves employers to get out in front of potential issues and let employees know ahead of time what won't fly so that workers don't believe they are being singled out or treated unfairly for their views.

"If you hear comments that are inappropriate about Vice President Harris or about former President Trump, and then we react and say, 'This is not appropriate and don't do this going forward,' it can easily be misconstrued as favoring one side or the other," Silberman said. "A general set of guidelines, or a reminder of appropriate speech in the workplace and that it shouldn't be offensive, ... is worthwhile. Because then, if and when an employer needs to enforce that and police language in some way, the employer has now set up an objective and what appears to be [a] neutral framework for all of its employees."

Set Expectations for Social Media Conduct

In addition to in-person interactions, the ever-expanding proliferation of social media and remote work over the past two decades makes platforms like Instagram, Facebook or TikTok just as likely to be venues for political interactions between colleagues.

Those interactions can include workers posting written remarks or sharing videos, memes and other content about the election, candidates and issues that their colleagues can access and can potentially cause political friction.

In guidance **finalized in April**, the U.S. Equal Employment Opportunity Commission made clear that a worker might have a viable hostile work environment claim for conduct that occurs "in a non-work-related context" off a job site that nonetheless impacts someone's work environment, including social media posts.

"As the EEOC recognized in that guidance, just because it's not on your work grounds ... it can still lead to some sort of harassment or discrimination," Reich said. "I hate to sound like a broken record, but it's important that [an employer's] ... nondiscrimination policy mentions that explicitly — that you're prohibited from harassing or discriminating against another employee, whether it's on your working time or off your working time, whether it's on company property, or off company property."

Be 'Proactive' About DEI Tension

Upon Harris launching her campaign following Biden's exit from the Democratic ticket, the term DEI has been used online and by some Republican lawmakers as a derogatory attack against her.

Should those sentiments enter workplace interactions, they could be the root of harassment allegations against employers or, more broadly, signal animosity toward employers' own DEI programs.

The issue of DEI and people's varying perceptions of it can "stir up real conflict and friction in the workplace," according to Silberman, whose practice includes a heavy focus on providing employers with guidance on DEI-related issues.

He recommends that employers take a proactive, rather than reactive, approach to avoid that friction during election campaign season because "it is likely, maybe inevitable, that they will have employees with strong opinions who will seek to voice those opinions in a way that can harm the workplace."

Instituting guardrails about how people speak about DEI may be beneficial if they are framed in a way that makes it clear to employees that the company is trying to ensure a "collegial, professional and inclusive" workplace that is "welcoming for people of all backgrounds and perspectives," he said.

In practice, that might mean asking people not to offer unsolicited opinions about a company's DEI program or DEI in society in company emails, break rooms or discussions with colleagues.

"On the one hand, you don't want to micromanage all communications," Silberman said. "But if you can frame it around ensuring a collegial atmosphere

where everyone is made to feel comfortable in the workplace, regardless of their perspective or background, that tends to be well received by most employees."

--Additional reporting by Anne Cullen. Editing by Abbie Sarfo and Nick Petruncio.