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EXECUTIVE SERIES: LABOR & EMPLOYMENT



Politics in the Workplace: Guardrails and Best Practices

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1

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Overview

- Ruth Rauls represents management in employment disputes before federal and state courts, as well as federal and state agencies. Her extensive litigation experience includes cases at the trial and appellate levels in New Jersey and New York, as well as in private mediations and arbitrations. She litigates claims arising under the New Jersey Law Against Discrimination, and various other statutory and common law causes of action.
- Ruth draws on her litigation experience to help large and small companies alike identify potential legal issues and to provide support for internal decision making that affects their business operations. This includes advice on preventative practices to minimize workplace disputes, including accommodation and harassment issues.

Degrees

- J.D., Rutgers University School of Law – Newark
- B.A., B.S., Saint Louis University

Jacob Tosti, Esq.

Associate | Labor & Employment Group



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Overview

- Jacob Tosti is a litigator and employment lawyer with broad experience representing businesses, educational institutions, non-profit organizations, and high-level executives involved in complex commercial disputes and labor and employment issues.
- Outside of the courtroom, Jacob advises clients in employment law matters, including hiring, termination, employee discipline, leaves of absence and accommodation requests, wage and hour and workplace safety compliance, and internal investigations. In addition, clients look to Jacob to draft and review personnel policies, employment contracts, separation agreements, and other employment-related documents.

Degrees

- J.D., Suffolk University Law School
- B.A., Tulane University

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2

Program Outline

- I. “Political” Expression and Conduct at Work
- II. “Political” Expression and Conduct Outside of Work
- III. Best Practices



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Ground Rules

Overview

- The First Amendment’s protection against government regulation of speech does not extend to private employers*
- There is no federal law that prohibits discrimination based on political activity or affiliation. **HOWEVER...**
 - There are other laws that have a bearing on employee’s political expression
 - There are state laws that address employee political activity
 - Voting rights are different

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Political Expression and Conduct at Work

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Federal Law Impacting “Political” Expression

The National Labor Relations Act (NLRA)

- Unionized and non-union EEs covered
 - “Concerted activities”
 - “Mutual aid and protection”
- Restricts ER’s right to limit communications about terms and conditions of employment

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Federal Law Impacting “Political” Expression

National Labor Relations Board - Enforcement Trends

- **March 2021** – Memo from NLRB Acting General Counsel
 - EE political and social justice advocacy can be protected when it is
 - **(1)** concerted, and;
 - **(2)** there is a connection between the advocacy and terms and conditions of employment under ER’s control
 - “Going forward, employee activity regarding a variety of societal issues will be reviewed” and will be an enforcement priority

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Federal Law Impacting “Political” Expression

NLRB Enforcement Trends

- **February 2024** – *Home Depot USA, Inc.*, 373 NLRB No. 25 (2024)
 - EE terminated for refusing to remove “BLM” from work apron
 - “Concerted” = “logical outgrowth” of prior complaints by others in workplace
 - For “mutual aid and protection” = racial discrimination pertained to working conditions

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Anti - Discrimination Laws

Overview

- “Political” expression that impacts workplace may implicate laws that prohibit discrimination (e.g., Title VII)
- Consider impact of EEs in the workplace



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Anti - Discrimination Laws

Case Example

- *Brzychalski v. Digital Guardian, LLC* (Mass. Sup. Ct. 2022)
 - EE brought claim based upon religious-based hostile work environment
 - ER's only response: separate EE from offending EEs by having him work on another floor
 - “Under these circumstances, [EE] has alleged sufficient facts to show [ER] knew of the alleged discriminatory treatment and failed to take adequate remedial action.”

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Political Expression and Conduct Outside of Work

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Employee Voting Rights

- ERs cannot interfere with an EE's voting rights
- Be cognizant of state laws that require time off to vote (paid or unpaid)
- ERs cannot be selective about granting time off or other leave requests that could be viewed to impact an EE's ability to vote



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State Laws and Political Expression

Some states have laws that prohibit ERs from taking action against EEs for engaging in lawful off-duty political expression and conduct

- **Example: California**
 - ER cannot forbid or prevent an EE from engaging or participating in politics, and cannot “control” or “direct” an EE’s political activities or affiliations
- **Example: Colorado**
 - Cannot terminate EE due to their connection with political party

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State Laws and Political Expression

- **Example: New York**
 - “[I]t shall be unlawful for an employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of . . . an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal . . . ” N.Y. Labor Law § 201-d

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State Laws: Off-Duty Political Activity

- *Greco v. City of New York*, 686 F. Supp. 3d 191 (E.D.N.Y. 2023).
 - Former police officer was investigated and fired for his participation in January 6, 2021 attack on the United States Capitol and his association with others who were involved in attack
 - EE claimed he was fired “due to his personal ‘familial’ and ‘political’ relationships” with individuals who supported former President
 - Court dismissed claim under N.Y. Labor Law § 201-d: EE did not allege that he was fired because he “ran for office, campaigned for a political candidate, or engaged in political fundraising”

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Social Media

Considerations

- Conduct online and on social media **can be** considered discrimination or harassment, even if it occurs off the clock or off-site
- NLRA may be implicated depending on content of public post
- State Laws that prohibit ERs from accessing non-public social media posts



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Social Media

Examples

- *Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024)
 - Co-worker's social media posts could be considered in support of EE's hostile work environment claim
- *Espinoza v. Orange County*, 2012 WL 420149 (Cal. Ct. App. 2012)
 - "Anonymous" blog posts by co-workers could be considered in support of EE's hostile work environment claim

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Policies and Best Practices

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Internal Policy Considerations

- **Develop Clear Policies**
 - Create and communicate clear policies regarding political expression in the workplace, taking into consideration applicable labor and employment laws
 - Outline acceptable behavior/unacceptable behavior
- **Apply Policies Consistently**
- **Training and Education**
 - Train EEs and managers on how to handle “political” discussions

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Best Practices

Playbook

1. Evaluate the context and nature of the expression or conduct

- ☐ Is issue purely political? Or are general conduct policies implicated? Anti-harassment/discrimination policies?
- ☐ Any possible concerted protected activity (NLRA)?
- ☐ Any state law protecting political activity?

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Best Practices

Playbook

2. Evaluate impact on the workplace

- ☐ Has the expression or conduct caused disruption, including strained relationships between EEs, reduced productivity, or threats to EE safety?

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Best Practices

Playbook

3. Decide on appropriate action

- ☐ **Possible Solutions:** Consider both non-disciplinary and disciplinary actions based on the severity of the conduct
- ☐ **Consistency:** Review how similar cases were handled in the past to ensure fairness and avoid the appearance of bias or discriminatory treatment
- ☐ **Document the decision**

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