

Election Day and Political Speech: What Texas Employers Need to Know

By Celina Joachim and Jacob Crumrine of Baker & McKenzie – (Nov. 7, 2016) – Texas employers have special obligations under state and federal law when it comes to workers' voting and political speech rights. Violations can carry serious criminal penalties and even draw the attention of regulators.

With Election Day right around the corner, employers should ensure their policies and practices comply with laws related to worker voting and political speech, such as the Texas Election Code and the National Labor Relations Act.

Political Speech Considerations

Though the First Amendment to the U.S. Constitution grants citizens the “freedom of speech,” such a right does not necessarily apply in a private workplace. With this, employers are often tempted to “keep the peace” by prohibiting employees from discussing all inflammatory topics, such as politics. But such wholesale prohibitions could be problematic.



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Section 7 of the N.L.R.A. protects a non-supervisor employee's right to discuss and engage in protected concerted activities which affect the terms and conditions of employment – even in non-unionized settings. As such, there are some limitations to employers' abilities to manage what is discussed in the workplace.

For instance, the National Labor Relations Board would likely consider wholesale prohibitions on communications regarding political matters to be overbroad and in violation of the N.L.R.A.

This could include communications about politics – from right-to-work legislation to candidates who are more friendly or hostile to unions.

If an employer disciplines or otherwise takes an adverse action against an employee based on these types of communications, the N.L.R.B. could hold that the action was wrongful and require the employer to reinstate a terminated employee or change relevant policies. When it comes to political speech issues under the N.L.R.A., employers should remember:

- The N.L.R.B. frowns upon overbroad employer policies that may have a “chilling effect” on employees' N.L.R.A. Section 7 rights.
- It is generally acceptable to maintain certain rules about what happens during working time, such as rules regarding productivity or safety. That said, an employer cannot prohibit employees from discussing union or other protected activity during non-working time, such as meal breaks.
- It is also generally okay to maintain rules prohibiting employees from distributing literature in work areas during working time.
- Employers may also prohibit conduct that is threatening, intimidating or coercing, or that violates anti-discrimination and anti-harassment policies.

Election Day Considerations

When it comes to employee voting, here are some “do's and don'ts” for Texas employers.

Don't prohibit employees from voting. Perhaps this is obvious, but it is unlawful in Texas for an employer to prohibit employees from voting. Under Section 276.004 of the Texas Election Code, it is a Class C misdemeanor >

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for an employer to subject or threaten to subject an employee to a penalty for attending the polls on Election Day. Each Class C misdemeanor is punishable by a \$500 fine, so violations of this provision can add up quickly.



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Don't retaliate against voters. In this especially contentious election season, some people find it outrageous that someone could support one candidate or another. Nevertheless, employers must not retaliate against employees for voting for or against a candidate or

ballot measure, or for refusing to reveal how he or she voted. Voter retaliation is a third-degree felony under Section 276.001 of the Texas Election Code, punishable by imprisonment for 2-10 years and a fine of up to \$10,000.

Do allow employees two hours to vote. If an employee does not have two consecutive hours outside of working hours while the polls are open, Texas employers must allow the employee extra paid time off to vote. Refusing to permit an employee to be absent from work to attend the polls on Election Days is a Class C misdemeanor under Section 276.004 of the Texas Election Code, and each violation carries a \$500 fine. The polls are open from 7 a.m. to 7 p.m. on Nov. 8.

Employees who have not early voted and work from 8 a.m. to 7 p.m. on Nov. 8 would be entitled to paid time off to vote.

Do educate managers about voting laws. Employers should train managers, supervisors, human resources, payroll and other personnel about their obligations under the Texas Election Code, N.L.R.A., and any other applicable laws.

Do research voting laws in other jurisdictions. Many states and local governments have voting rights laws, and the details may vary significantly from Texas law. Employers with workers in different cities and states should look into those jurisdictions' requirements or consult with legal counsel.

Do review voting leave and other policies. Employers should review their handbooks and other policy documents to ensure that their non-retaliation, leave and employee conduct policies comply with Texas law.

Failure to follow these laws can have serious – and expensive – consequences, not to mention the potential for bad press. With Election Day fast approaching, now is the time for Texas employers to take a moment to ensure they are up to speed with their obligations under employee voting and political speech laws.

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