

Politics in the office

Attorney warns of the dangers inherent in employees expressing political views

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The Enterprise

Have some employees feeling the Bern? A few others who want to see America great again? Is there a handful hankering for Hillary?

Want to ban a worker from wearing a "Vote for Trump" button in the workplace? The law likely is on your side. But if the button says, "Vote for Hillary Because She's a Woman," the issue becomes murkier than the proverbial smoke-filled back room.

Dealing with political speech in the workplace is a legal briar patch, one that's getting thicker by the moment with this year's hyper-divisive, ever-devolving presidential race.

"We all think there's a lot of heated rhetoric on both sides, regardless of what the campaigns are," attorney Dylan A. Eaton said at the recent 29th annual Employment Law Seminar, presented by Parsons Behle & Latimer.

"And there's the local politics and campaigns at the state and nationwide, but

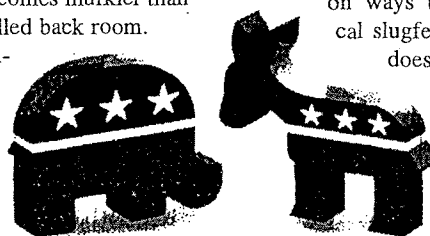
it seems a little more so, at least to me, this year, and there's a lot of topics such as immigration, topics about increasing the minimum wage and those kinds of things that are not only important to the politicians, but they're also controversial and potentially can cause issues in the workplace if employees are talking about it."

Eaton, who works in the firm's Boise office in the litigation department and chairs its employment and labor law section, tried to guide the seminar audience on ways to ensure that political slugfests among candidates

doesn't prompt employees' water cooler conversations to boil over.

"Some entities may be a little more geared toward being political,

but, generally speaking, you've got a job to do and you want to get that job done, and it's trying to figure out how to balance out with employees and managers and supervisors and owners that may be talking politics," he said.



see POLITICS pg. 4

POLITICS

from page 1

Eaton figures that a CareerBuilder 2012 survey about politics in the workplace is still relevant today. It showed that 36 percent of workers discussed politics at work and about 23 percent of that group said it had led to a

heated exchange or fight with a coworker.

"So you have your work cut out for you with people talking politics in the workplace," Eaton said.

A recent study by Joseph Grenny and Davis Maxfield, co-founders of Provo-based VitalSmarts, indicated that nine

out of 10 people feel the 2016 elections are more polarizing and controversial than the 2012 elections. One in three respondents in their online survey reported having been attacked, insulted or called names, and one in four say they've had a political discussion hurt a relationship.

The poll of 1,866 people showed that 28 percent of their heated political discussions take place in the workplace. Many people try to avoid talking politics at all — 79 percent said they most avoid such conversations with coworkers.

So, with all the potential tangles from workplace political talk, what is an employer to do? The legal system actually gives companies great latitude in restricting political talk among employees, especially when it comes to supporting or trashing individual candidates.

Employees might contend that their First Amendment right to free speech is being trampled by bosses who do not like their political speech. Too bad, Eaton said, noting that the First Amendment is about government's — not private companies' — restriction of free speech.

If an employer doesn't like a political bumper sticker on a worker's car and threatens to fire the worker if it's not removed, "well, under the First Amendment, if it's a private employer, they very likely can do that," Eaton said.

The First Amendment does not limit private employers from regulating employees' communications in the workplace. "Said another way, there's no general right of free speech in the offices and factories of private employers under the First Amendment, and a lot of people are surprised by that," Eaton said.

Where everything gets "much more tricky" is when political discussions overlap into areas protected via anti-discrimination laws, including race, national origin, religion or sex. That's where the "Vote for Hillary Because She's a Woman" button becomes trouble-

some from a liability standpoint.

"A seemingly neutral conversation about something can easily turn into talking about gender, race, religion — those kinds of things," Eaton said. For example, a discussion about a particular candidate could lead to talk about the candidate's immigration policy and eventually to race or national origin. An employee demoted or fired might think the cause was his or her talk about those protected areas if they believe the boss has a different view on those issues.

"That may or may not be true, but if there were comments and political conversations at a workplace about these issues, that's definitely a risk and potential liability for an employer," Eaton said.

One seminar audience member asked Eaton about a Clinton bumper sticker scenario. An employer may ask an employee to remove it, but the employee may counter by saying the employer is discriminating against the employee because Clinton is a woman. "You're highlighting one of the issues," Eaton said. "That's why this is trickier than it first seems."

Likewise, companies can be hamstrung by the National Labor Relations Act's protections of "concerted activities." The NLRA restricts employers' rights to limit workers' communications about such things as wages, hours and terms and conditions of employment during non-work time and in non-work areas.

"Things get kind of tricky all of the sudden because you generally may be able to restrict what an employee is talking about at work if they're talking about supporting a candidate, but what if they're talking about minimum wages or talking about healthcare options for employers? Those are likely protected by the NLRA," he said.

"What if somebody wears a button [saying], 'Vote for Smith'? Can the private employer preclude the employee from wearing that? Potentially, yeah. ... What if the button says, 'Vote for Smith — She'll Raise the Minimum Wage'? See? There are a lot of nuances

here. ... I would say that this is probably protected under the NLRA."

An employer likely could keep workers from sporting hats or buttons supporting, say, a ballot proposition calling for increases in speed limits, but the NLRA could allow them to wear materials supporting, for example, a proposition strengthening workers' rights.

Complicating the issue further is that companies with offices in other states should be aware of any state limitations. Generally speaking, Utah has no restrictions on employers precluding political affiliation or activity. But California and some other states have broader limitations on companies, he said.

In many ways, employers are granted more freedoms regarding political talk than their workers have. Under federal law, employers may be able to prohibit employees from displaying campaign or other materials at workstations, distributing political materials in the office, soliciting support or money for candidates or issues, wearing shirts advocating candidates or issues, and using employers' computers to express their thoughts on social media. Companies also can ask — not require — employees to contribute to a corporate political action committee and may encourage workers to vote for or against particular candidates.

For companies that do allow political conversations, Eaton suggested that the company remind employees that the company insists on respectful treatment of all workers; does not tolerate discrimination, harassment or retaliation; and believes that all workplace speech should be respectful and tolerant of others' views.

But written policies banning all workplace political activity is always an option, with the understanding that there are exceptions due to the NLRA and possibly state law.

"There are a lot more restrictions than you might think," Eaton said, "and it probably is advisable then that you write these restrictions into your policies."