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Is Politics at Work Business as Usual? What New York Employers Need to Know as the Elections Approach

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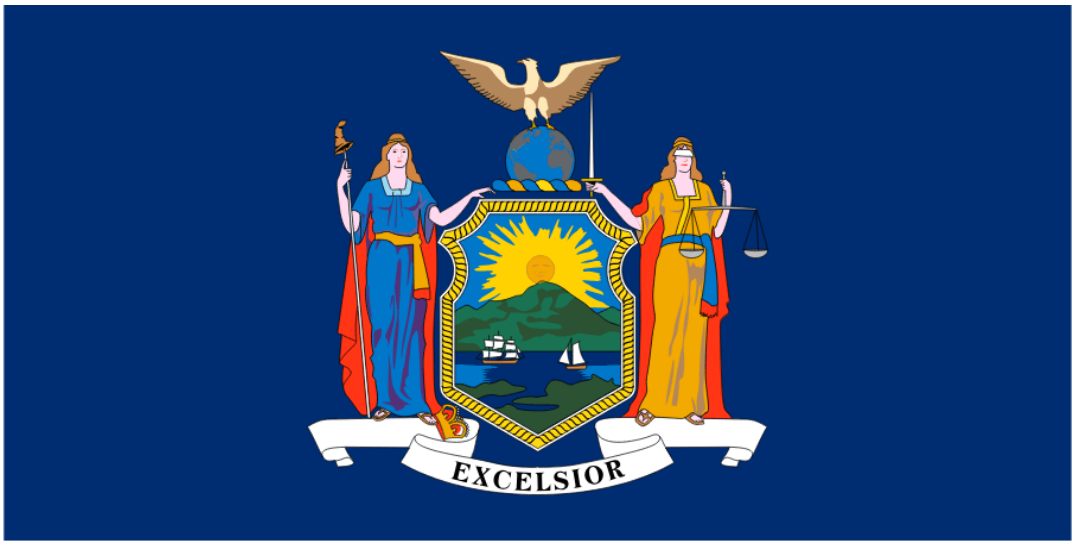
By Jamie Haar and Kelly M. Cardin

The year 2020 has certainly come with its share of new challenges. Now, with the presidential election less than a month away, heightened tensions around the country, new remote work environments, videoconferences offering a window into employees' personal lives, face masks with political slogans, and so much more, New York employers might want to start thinking through what employee political conduct they can and can't regulate this election season.



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As we head into the election season's final stretch, New York employers may want to keep in mind the legal implications of monitoring and regulating employee political activity, political expression, debate, and discussion—whether in the workplace, on social media, while telecommuting, or off-duty.

New York Labor Law

In some cases, whether employers can regulate employee political conduct will depend on whether it occurs on- or off-duty. Section 201-d of the New York Labor Law (NYLL) prohibits employers from discriminating against employees for off-duty and legal "political activities" and "recreational activities."

The law defines "political activities" to include:

running for public office,
campaigning for a candidate for public office, or
participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group.
While this is a fairly narrow set of activities, the lack of significant interpretation of the law leaves employers to have to guess precisely what conduct might satisfy each category.

Section 201-d also prohibits discrimination only related to activities that occur "outside of working hours." That is, it protects only conduct that occurs when an employee is "off of the employer's premises and without use of the employer's equipment or other property" and where the employee is not "suffered, permitted or expected to be engaged in work" or "actually engaged in work." While in years past the distinction between on- and off-duty might have been somewhat clear, employers may want to be cautious when assessing what conduct counts as true "off-duty activities" in a remote work environment where employees are, in some cases, working odd hours and using their personal devices for business purposes.

The law also provides an exception for conflicts of interest and does not protect activity that "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest." In addition, the NYLL does not protect an employee's actions that "were deemed by an employer or previous employer to be illegal." Should the off-duty activity result in an arrest or a criminal conviction, however, employers may want to be aware that New York law prohibits employers from taking adverse employment action due to an employee's arrest record or conviction record in most cases.

National Labor Relations Act

While Section 201-d of the NYLL does not safeguard political activity or expression occurring on the job, federal and other state laws might offer protections. For example, employers could find themselves in violation of the National Labor Relations Act (NLRA) for taking actions that chill the exercise of "protected concerted activity" or "Section 7 rights." The National Labor Relations Board (NLRB) clarifies a worker's

Section 7 rights as follows: "A single employee may … engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action."

Section 8(a)(1) of the NLRA makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In other words, an employer might be in violation of the NLRA if it maintains workplace procedures or policies or takes an employment action that would reasonably tend to have a chilling effect on employees' exercise of their Section 7 rights—even if those activities touch upon politics or have a political angle. Because employers cannot generally prohibit employee communications regarding wages and other work conditions, political messages intertwined with communications about work conditions might be protected by the NLRA.

Additionally, employers may want to be mindful that a workforce need not be unionized for employees to have Section 7 rights, so nonunionized employers may also want to be aware of the NLRA's protections.

Antidiscrimination Laws

Finally, New York employers generally have an obligation under federal, state, and local antidiscrimination laws to prevent discrimination and harassment in the workplace. Situations where employees express themselves about politics and other controversial subjects could implicate these laws. For example, the New York State Human Rights Law and/or the New York City Human Rights Law protect employees from discrimination and harassment based on their religion/creed, sexual orientation, gender identity, immigration or citizenship status, and reproductive health decision making. Therefore, employers may want to maintain neutral policies and ensure that they are handling political communications in the workplace consistently to avoid any claims of disparate treatment.

Conclusion

In the weeks leading up to the presidential election, New York employers might want to consider:

- reviewing their employee handbooks and policies, specifically, their anti-harassment and antidiscrimination policies, social media policies, and dress-code policies to ensure that they are applied consistently and on an evenhanded and nondiscriminatory basis;
- updating policies to account for the increase in telecommuting and remote work; and
- training supervisory and managerial employees, as well as human resources professionals, on the applicable laws and the nuances of the remote work situation.

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