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Election 2008: What Private Employers and Their Employees Need to Know About Political Activity In and Out of the Workplace

Amos N. Jones

Campbell University School of Law, ajones@campbell.edu

Daniel I. Prywes

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POLITICS AND THE WORKPLACE

In the wake of the “Super Tuesday” primary elections and amid fierce competition among the presidential front-runners in both parties, 2008 stands to rank as one of the most intense political seasons in decades. Legal limits on workplace political expression by both employers and employees are explored in this analysis by attorneys Daniel I. Prywes and Amos N. Jones, both with Bryan Cave. The analysis examines requirements of federal and state employment laws, as well as federal election law and the rules governing tax-exempt employers.

Election 2008: What Private Employers and Their Employees Need to Know About Political Activity In and Out of the Workplace

By DANIEL I. PRYWES AND AMOS N. JONES*

Election season 2008 is in full swing. With the presidency at stake, and competitive primaries in both parties, 2008 stands to rank as one of the most intense political seasons in decades.

The workplace is not an island that is free of the raging political winds. Employees may seek to engage in political activity in the workplace by various means, such as by distributing campaign literature to fellow employees, sending e-mails, wearing buttons, posting signs in their workspace or in common areas, or simply through conversation. Such activity may distract employees from performing their work functions, especially if the activities stimulate political debates instead of productive work. Political campaign activity in the workplace may also stir friction and acrimony among employees, hindering workplace collaborations and productivity. While most employers do not wish to censor casual conversations in the workplace, many do

wish to limit broader forms of political activity that interfere with productive work.

For their part, employers may wish to express their own views to employees about which candidates would be best for the employer’s business interests and the employees’ job security. Some private employers may even seek to discharge or take other adverse employment actions toward employees who take political stands that are not to the employer’s liking, even if those activities occur off the job.

There are some general legal principles that govern political activity in the workplace. However, to a large extent, private employers are subject to a patchwork of different state laws with differing levels of protection for employees. This article reviews some of these requirements, although it should not be regarded as a comprehensive review of all states’ laws.

Political Activity During Paid Work Hours. Employers are generally entitled to adopt policies to ensure that their employees are working—and not politicking—during paid working hours. An employer should not be expected to compensate employees for engaging in political activities. Similarly, private employers have broad rights to ensure that employers’ own resources and property, including e-mail systems and bulletin boards, are not used for employees’ personal political agendas. Finally, employers have broad rights to limit

**Daniel I. Prywes is a partner with Bryan Cave LLP in its Washington, D.C., office and concentrates his practice on commercial litigation and employment litigation. Amos N. Jones is an associate with Bryan Cave in its Washington, D.C., office.*

those employees who interact with the public from wearing campaign buttons.

These principles, however, leave open many questions about the extent of protection afforded employees for their political activities outside of paid working hours, both at the workplace and elsewhere.

First Amendment. Unlike public sector employees, private sector employees have no First Amendment right to engage in “free speech” in the workplace. The First Amendment protects against the government’s abridgment of speech, but does not apply to private employers that are not engaging in “state action.” Therefore, employees of private sector employers have no First Amendment right to be free of employer-imposed restrictions on free speech.

This principle will come as a surprise to most private sector employees. It may therefore be useful for private sector employers to set out this principle in employment handbooks or other policy statements in order to educate employees that they have no constitutional right to engage in political activity in the workplace.

Federal Law. Federal voting-rights laws prohibit anyone from seeking to intimidate, coerce, or interfere with any person’s right to freely vote as he or she chooses for candidates for federal office. [18 U.S.C. § 594; 42 U.S.C. § 1971(b).] Federal law also prohibits employment discrimination on the basis of many characteristics, such as race, gender, national origin, age, and disability.

State law plays the leading role in demarcating the permissible and impermissible limitations that private employers may place on their employees’ political activities.

However, aside from the rights of unionized employees to engage in concerted activities (29 U.S.C. § 157), federal law provides no protection against employment discrimination by a private sector employer on the basis of employees’ political views, political activities other than voting, or political affiliations. Therefore, state law plays the leading role in demarcating the permissible and impermissible limitations that private employers may place on their employees’ political activities.

State Law Generally. Most states treat employees who lack employment contracts as “at will” employees. Such “at will” employees generally can be terminated for any reason, or no reason at all, unless there is a specific statutory or other recognized exception to the “at will” principle.

As explained below, many states provide statutory limitations on the discharge of employees based on their voting choices, and sometimes on the basis of their participation in other forms of political activity.

In principle, private employers could terminate at-will employees who engage in political activity off the job that the employer dislikes if no state statute provides otherwise. Although relatively rare, such instances do occur. The best known recent case involves

the Alabama woman who was fired in 2004 after refusing to remove a Kerry/Edwards bumper sticker on her car.

State Statutes. In order to mitigate the effects of the “at will” principle as it pertains to political activities, various states have enacted statutes protecting employees from termination or adverse job actions based on their political affiliation or activity. Because these statutes vary widely from state to state, employers that have facilities in different states across the nation will need to customize their practices on a state-by-state basis.

Some, but not all, of the largest states (by population) have enacted statutes providing protection to employees. These vary in their scope:

- *California.* In California, no employer can forbid or prevent employees from engaging in or participating in politics, nor can an employer control or direct the political activities of employees. Employers also may not coerce employees through threats of termination to adopt or refrain from adopting any political activity [Cal. Labor Code §§ 1101-02].

- *New York.* In New York, an employer may not discriminate against employees on the basis of their political activities outside of working hours, off the employer’s premises, and without use of the employer’s equipment or property, provided that such activity poses no material conflict of interest with the employer’s proprietary or business interests [N.Y. Labor Law § 201-d(2)(a)].

- *Illinois.* In Illinois, an employer is not permitted to maintain a record of employees’ off-the-job political activities [820 Ill. Comp. Stat. § 40/9].

- *Pennsylvania.* Pennsylvania law prohibits any threat intended to affect employees’ free exercise of their right to vote as they choose. Pennsylvania also prohibits employers from paying wages in pay envelopes containing any threatening messages intended to influence “the political opinions or actions” of employees. Similarly, employers may not post materials within 90 days of an election threatening or stating that the workplace will close in whole or part, or that wages will be reduced (or other threats), depending on the results of an election, where the purpose of such statements is to influence the political actions or opinions of employees [25 Pa. Stat. Ann. § 3547].

Elsewhere, many states prohibit employers from coercing employees to vote for a candidate, and prohibit the discharge of employees for their failure to vote as the employer wishes. Sometimes, additional protections are provided to employees. For example:

- *Michigan.* In Michigan, it is unlawful for an employer to discharge, or threaten to discharge, any employee in order to influence the employee’s vote in any election [Mich. Comp. Laws § 168.931(1)(d)]. Employers also may not keep records of employees’ political activities, except for records of activities occurring on the employer’s premises or during work hours that interfere with employees’ performance of their duties [Mich. Comp. Laws § 423.508].

- *New Jersey.* In New Jersey, it is unlawful for an employer to threaten any employee with loss or injury to induce the employee to vote or refrain from voting,

to impede the free exercise of employees' voting rights, or to vote for or against any particular candidate. It is also unlawful for an employer to penalize an employee for voting in a certain way. As in Pennsylvania, an employer may not include threats of any sort (direct or implied) on any pay envelope aimed at influencing the political opinions or actions of employees, and an employer cannot post signs within 90 days of an election threatening wage or job reductions in the event a particular candidate prevails [N.J. Stat. Ann. §§ 19:34-27, 19:34-30].

■ *Tennessee.* In Tennessee, it is unlawful to coerce employees to vote for any candidate or to discharge employees for their failure to vote as the employer wishes. It is also unlawful for employers to circulate any statement or report calculated to intimidate or coerce employees to vote or not vote for any candidate or measure [Tenn. Code Ann. § 2-19-134].

■ *Washington.* In Washington state, it is unlawful for an employer to discriminate against any employee on account of the employee's failure to support or oppose a candidate, ballot proposition, or political party [Wash. Rev. Code 42.17.680(2)].

■ *Wisconsin.* In Wisconsin, employers may not seek to coerce employees to support a candidate or to vote in a particular way through threats of adverse employment actions. Wisconsin also has prohibitions on employer threats to close the workplace or reduce wages similar to those in Pennsylvania [Wis. Stat. Ann. § 12.07(3)&(4), § 103.18].

Other jurisdictions have laws that more broadly prohibit discrimination by employers based on an employee's political activities or affiliations. For example:

■ *Colorado.* In Colorado, it is unlawful for an employer to threaten to discharge employees because of their connection to any political party. [Colo. Rev. Stat. § 8-2-102.] It is also unlawful for an employer to discharge an employee due to an employee's lawful activities "off the premises of the employer," except where a restriction can be justified by bona fide occupational requirements or is necessary to avoid a conflict of interest [Colo. Rev. Stat. 24-34-402.5(1)].

■ *Connecticut.* In Connecticut, an employer may not subject an employee to discipline or discharge because of the employee's exercise of free speech rights, provided that the employee's activity does not materially interfere with the employee's job performance or the working relationship between the employee and the employer [Conn. Gen. Stat. § 31-51q].

■ *District of Columbia.* The District of Columbia's Human Rights Act prohibits discrimination in employment based on the employee's political affiliation [D.C. Code § 2-1402.11(a)].

■ *Louisiana.* Louisiana prohibits any employer with 20 or more employees from making or enforcing any

policy (a) preventing employees from "engaging participating in politics, or from becoming a candidate for public office, (b) controlling or tending to control or direct the political activities or affiliations of employees, and (c) or attempting to coerce or influence any employees through threats of termination in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities [La. Rev. Stat. § 23:961].

■ *Mississippi.* Mississippi has a broadly worded statute forbidding any corporation from "interference" with the political rights of its employees [Miss. Code Ann. § 79-1-9].

■ *Missouri.* In Missouri, it is unlawful for an employer to prevent an employee from engaging in political activities, including holding a position as a member of a political committee or soliciting or receiving funds for political purposes [Mo. Rev. Stat. Ann. § 115.637(6)].

■ *North Dakota.* It is unlawful in North Dakota for an employer to discriminate on the basis of the employee's participation in any "lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer" [N.D. Cent. Code § 14-02.4-03].

■ *Puerto Rico.* In Puerto Rico, it is unlawful to discriminate against employees based on their political affiliation [P.R. Laws Ann. 29, § 146].

■ *South Carolina.* In South Carolina, it is unlawful to discharge an employee "because of political opinions or the exercise of political rights and privileges guaranteed to every citizen" by federal or state law [S.C. Code Ann. § 16-17-560].

Some states have statutes, similar to that in Pennsylvania, designed to limit employers from making communications to employees to the effect that the workplace will be closed, or wages reduced, if a particular candidate is elected. For example, such statutes exist in Arizona, Maryland, and Wisconsin as noted above [Ariz. Rev. Stat. § 16-1012; Md. Code Ann. Elec. Law § 13-602(7) & (8); Wis. Stat. Ann. § 12.07(3)&(4), § 103.18].

Some states have enacted or are considering "worker freedom" laws that would prevent employers from forcing their employees to listen, as "captive" audiences, to political, religious, or anti-union presentations. For example, in 2006, New Jersey enacted its Worker Freedom from Employer Intimidation Act, which prohibits employers from requiring their employees to attend an employer-sponsored meeting held for the purpose of communicating the employer's opinion about "religious or political matters" [N.J. Stat. § 34:19-10]. Employers can still make such presentations, but must inform employees that they may refuse to attend or participate without penalty.

The scope of the “public policy” exception varies from state to state, and depends primarily on decisional law by state courts. Many state courts are reluctant judicially to create limitations on “at will” employment unless the public policy at stake is very clearly recognized as fundamental under the state constitution, a state statute, or common law.

In each case, the state statutes present issues of interpretation to determine their application in various circumstances. Common questions of interpretation are whether the respective statutes restrict employers from limiting political activity in the workplace (including during times before or after working hours, or during breaks), and whether employers are required to be even-handed in enforcing restrictions on on-the-job political activity among supporters of different candidates. Careful analysis is necessary on a state-by-state basis of these issues.

Public Policy Exception to At-Will Employment. Employers may also face limitations on their power to restrict employees’ political activities in states that have not enacted specific statutory provisions. As an exception to the at-will principle, many states recognize a tort for wrongful discharge where an employer’s conduct toward an employee violates a clear mandate of public policy.

The scope of the “public policy” exception varies from state to state, and depends primarily on decisional law by state courts. Many state courts are reluctant judicially to create limitations on at-will employment unless the public policy at stake is very clearly recognized as fundamental under the state constitution, a state statute, or common law.

There are relatively few decided cases where state courts have applied the “public policy” exception to prohibit employers from taking adverse actions toward employees on account of their political views or activities. However, a violation of “public policy” is most likely to be found where an employer attempts to force or coerce an employee into voting or other political activity favored by the employer. As noted above, this is exactly the type of conduct expressly prohibited by statute in many states.

Federal Election Law. Federal election law also operates to limit private employers’ activities relating to political campaigns. Corporations are prohibited from contributing money or other value to candidates for federal office [11 C.F.R. § 114.2]. Most (but not all) states have similar laws.

However, under federal law, corporations may solicit managerial and administrative employees for voluntary contributions to their political action committees (technically referred to as “separate segregated funds”)

which, in turn, may make contributions to candidates for federal office. While such solicitations are allowed, it is illegal for employers to secure contributions by threats of job discrimination, financial reprisal, or physical force [11 C.F.R. § 114.5(a)].

Under the federal election laws, corporations have great latitude to communicate on political subjects with the corporation’s “restricted class” (which includes a corporation’s executives and administrative personnel, shareholders, compensated members of the board, and the families of the foregoing). Corporate communications to the restricted class may expressly advocate the election or defeat of federal candidates, and candidates may even coordinate with the corporation on the content of the communication. Corporations can spend money on such communications but are required to report the expenditures to the Federal Election Commission.

There are much tighter restrictions concerning candidate-related corporate communications made to persons outside the restricted class. Corporate communications to such employees generally cannot contain express advocacy, and a corporate employer may not coordinate the message with candidates for federal office.

Finally, individual executives of a corporate employer who are acting in their personal capacity and not using corporate resources may encourage all employees to make contributions directly to federal candidates, provided that no coercion is used and there is no reprisal if an employee declines to contribute. Corporate resources, however, cannot be used to underwrite fundraising activities for federal candidates.

Employers should check the applicable state election laws respecting fundraising and other activities that promote candidates to state elective office. Federal election law also operates to limit private employers’ activities relating to political campaigns.

Tax-Exempt Organizations. Tax-exempt organizations should make sure that their communications to their employees respecting political candidates are consistent with their tax-exempt status. In particular, charitable organizations under Section 501(c)(3) of the Internal Revenue Code are not permitted to support or oppose political candidates [Treas. Reg. § 1.501(c)(3)-1(c)(3); Rev. Ruling 2007-41].

Conclusion. Some employers will choose to be more restrictive than others in limiting the expression of political views in the workplace. At the same time, some employers will choose to be more aggressive than others in their own efforts to encourage employees to vote for political candidates, or engage in other political activity, favored by the employer.

There is a wide spectrum of choices that an employer can make in both respects, but as explained above those choices are not unlimited. Generally, employees’ rights will be least when they seek to engage in political activity on the job and during working hours. By the same token, employers should be very cautious about any actions that could be portrayed as threatening or seeking to coerce employees to vote in favor of a particular candidate or to engage in other political activity favored by the employer.

As a good management practice, employers should also let employees know what types of political activity are permitted and not permitted in the workplace by

publishing a policy or “code of conduct.” Such a policy should address matters such as: use of company facilities, including e-mail and public areas, for political solicitations; anti-solicitation rules in the workplace; campaign buttons; pamphleteering on company premises; compliance with rules prohibiting corporate campaign contributions through use of corporate resources; and guidelines concerning off-the-job political activity, es-

pecially if it is of a nature that may undermine the employer’s business interests.

In those states that prohibit discrimination based on political affiliation, employers should be especially careful to engage in even-handed treatment of employees with different political views. The formulation and adherence to a published policy on political activity should go a long way toward avoiding such claims.