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Restricting political activities of employees: intersection between political and labor laws

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There is an old adage that in polite company, one does not ask about another person's politics or religion. However, with the advent of pay-to-play rules, such as various federal rules covering certain financial institutions (e.g., SEC Rule 206(4)-5 for investment advisers) and a plethora of state and local laws, a company now has to restrict covered employees from making or soliciting certain political contributions if it wants to continue doing state or local government business.

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Pay-to-play laws automatically ban a company from entering into contracts or business relationships with a state or local government, in many cases lasting several years, if its covered employees or board members make or solicit certain political contributions in that jurisdiction.

The federal pay-to-play rules have garnered particular attention this cycle since Vice President Kamala Harris selected Minnesota Governor Tim Walz — a covered official under the federal pay-to-play rules — as her running mate, making contributions to their campaign subject to the ban under those rules. In addition to pay-to-play considerations, conflict-of-interest and even campaign finance rules can raise issues when an employee is running for, or elected to, government office.

Because of these complex rules and their potentially severe consequences, most companies have established policies under which all or some employees need to pre-clear their political activity.

As we come to the end of this contentious election cycle, many companies will soon be taking stock of such policies and considering what did and did not work this year, especially in light of the ever-increasing passion and polarization around politics. Exhausted compliance departments may be tempted to throw up their hands and say, "Let's shut it all down! No more political activity by employees." Tempting as that may be, any restriction on an employee's political activity must be carefully calibrated to comply with applicable labor laws.

Indeed, many state laws expressly protect an employee's right to engage in political activity. For example, Section 201(d)(2) of the New York Labor Law generally protects employees from adverse actions taken by employers because of their "political activities," which include (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party, or political advocacy group.

But what is a company to do if it has to restrict employee contributions to continue doing business with a state? New York has an exemption for employers acting in the belief that their actions were required by statute, regulation, ordinance, or other governmental mandate, but many other states do not.

For example, California Labor Code § 1101 broadly prohibits employers from preventing employees from engaging or participating in politics or from becoming candidates for public office. Although there is no statutory exemption for restrictions imposed to comply with other laws, a district court found, and the 9th U.S. Circuit Court of Appeals affirmed, that an employer had a legitimate, non-political reason for discharging an employee who was sworn into an elected position.

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In that case, the court found that the employer discharged the employee lawfully because the employer was acting for non-political reasons: The employee could not work both as a full-time employee and a full-time elected official.

Although the application of these labor laws to pay-to-play preclearance programs has generally not been tested, a policy that is reasonably drawn to comply with legal requirements and implemented consistently should be permissible even in states without a New York-style exemption.

In contrast, if a pay-to-play policy is overly broad and applied on a partisan basis, it could run afoul of these laws. A policy prohibiting all employees from making any political contribution could raise questions under these laws. Short of such outright bans, the question

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is how narrowly should one tailor the policy to the applicable pay-to-play rules? For example, under the federal pay-to-play rules, significant resources must be used to analyze whether a particular state or local official is covered.

As a result, financial institutions subject to such rules generally assume that all state and local officials are covered when implementing their preclearance programs. With politics becoming a more important issue for employees, we have seen increased pressure on companies to further tailor their preclearance policies by taking on this and other burdensome analyses.

Similar to political contributions, an employee running for or holding public office may also create legal problems for their employer. An employee could cause a company to make a prohibited in-kind contribution by campaigning during working hours (or, for a salaried employee, campaigning so extensively that it cuts into the employee's performance of work duties) or using company personnel or facilities, such as office space or technology, for their campaign. If the employee is elected, conflict-of-interest rules, such as the one in California, can prohibit companies from doing business with government entities on which their employee sits.

Although these conflict of interest laws are intended to protect against biased decision-making, the import for companies is they may need to prohibit employees from occupying such public office. When it is necessary to deny an employee's request for such non-political reasons, employers may want to ensure they are doing so consistently and carefully documenting the legitimate reason for rejecting the request.

The potential impact of an employee's political activity is not limited solely to potential legal violations. In this extremely contentious political environment, outspoken employees may alienate customers, clients, or colleagues with their political speech — in and out of the office. The First Amendment does not regulate the conduct of private employers, so employees of private employers generally cannot assert First Amendment rights when subject to employer discipline for their speech.

For example, in 2017, an employee was fired from her job at a defense contractor shortly after a photo of her giving the middle finger to the President's motorcade went viral on social media. In justifying her termination, the company asserted that the employee's actions violated its social media policy. The employee challenged her termination on First Amendment grounds but lost in Virginia state court on the basis that private employers can fire at-will employees without violating their First Amendment rights.

However, in other cases, employees have found protection for their political speech under labor laws. Earlier this year, the National Labor Relations Board ruled that an employer banning employees from wearing BLM insignia on their uniforms at work violated the National Labor Relations Act because such expression amounted to a group of employees engaging in a concerted action for mutual aid or protection, a right protected under the Act.

Similarly, courts have held that state laws, such as those in California and New York discussed above, protect employee speech, including protest activity. Not all political speech is protected, though. Speech that is abusive, discriminatory, harassing, intimidating, or speech or activity that may jeopardize employee safety, machinery, or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, among other types of speech, would generally lose protection under federal and state labor laws.

As is the case in so many other areas, political law and business interests must be weighed against labor laws in order to arrive at the right balance.

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