

Wearing Politics On Your Sleeve Is Not A Good Idea In The Workplace

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As the United States approaches Election Day on November 8, and an already heated and intensely followed presidential race enters the home stretch, many people may find it very difficult to avoid political discussions at work or in professional settings where politics is generally avoided. This can present obvious possible problems regarding someone's relationships with coworkers, supervisors, clients or others, particularly in the age of social media when political passions, issues and arguments seem more personal, and sometimes (unfortunately) vulgar, as ever. How should people best try to avoid or navigate this amped-up environment, which likely will stay with Americans to some degree even after Election Day?

There is a great misconception that the protection of the First Amendment, which protects freedom of speech against government action, extends to the workplace. The reality is, however, that most employees in the United States are employees at will, and (depending on where they work) can be terminated for any reason that is not specifically prohibited by law, including for expressing [political speech, activities or opinions in or outside the workplace](#). So, the potential consequences carefully before you head to work wearing a button in support your candidate of choice, or ready to unleash your latest bunch of fact-checked arguments in the lunchroom, or even before posting your opinions on social media like Facebook (on which work colleagues may see your efforts at political satire). At all times, employees must keep in mind the need to be professional and respectful in work situations, and should avoid conduct that could be seen as harassing or discriminatory based upon insensitive or offensive language or attitudes relating to gender, race, religion, disability, LGBT status, national origin, citizenship or other protected characteristics such as veteran's status.

Say it isn't so – I can be fired for discussing politics?

In many states, yes, there is no law forbidding employers from firing employees for it. Over the years, people have been fired for expressing political opinions that were not shared by a disapproving employer, or because they did so in a work setting. Some of these incidents have been highlighted in the media as cautionary tales:

- Bumper sticker incident – [In 2004, Lynne Gobbell was fired](#) from her job with Enviromate located in Moulton, Alabama for refusing to remove a Kerry/Edwards bumper sticker from her car. Unbeknownst to Gobbell, Phil Geddes (her employer and owner of the company) was a passionate supporter of George W. Bush. When Geddes asked that she remove the bumper sticker from the car or leave, she assumed this was a misunderstanding. Once it was clear that Geddes was giving her an ultimatum, Gobbell refused to oblige to his request and was fired.
- Accessory debacle – [In 2011, Megan Geller](#) was working as a waitress at Outback Steakhouse in Illinois and was wearing a "Don't Tread on Me" bracelet her mother gave her after attending a Tea Party

event. After a dining couple put in a complaint about her bracelet, she was fired. Despite her employer stating that she was fired for other, unrelated employment-based reasons, Ms. Geller attributed her firing to her choice of accessories that day.

- Heated coworker discussion – In [2012, two employees working at a large energy company were fired](#) after they got into a heated politics discussion that led to a physical altercation over incendiary remarks made by Missouri congressional Representative Tod Akin, regarding how victims of “legitimate rape” were unlikely to get pregnant.

Navigating the Employment Laws Relating to Political Speech and Activities

Whether there are any laws that would protect you from being fired for expressing your political views, generally depends on certain factors, including:

- status as a public (that is, government) or private (non-government) employee;
- status as a union or non-union employee; and,
- the state in which you work.

Are you a private employee?

According to the New York Times, [about 85% of the U.S. workforce is composed of private employees](#), whose employment is usually, by default, “at-will.” Unlike some countries, where an employer often can only terminate an employee for “just cause,” in the U.S. an employer can terminate an employee at any time for any reason, unless the reason is one prohibited by law. For example, under federal law, [Title VII of the Civil Rights Act of 1964](#) (“Title VII”) makes it unlawful for an employer to discriminate against an employee based on race, color, religion, national origin and sex. This means an employer can fire you for any reason, including anything you say while at work, outside of work, and even anything you’ve posted on social media (such as Facebook or Twitter), and there wouldn’t be any legal repercussions. Of course, certain political discussions by their very nature may relate to an employee’s gender, race, disability or other legally protected characteristics – which raises a bunch of other issues we discuss below

Who is a “public” employee?

[Public employees](#) are employed by the government, whether it is the federal, state or local government. Public employees are protected by the [First Amendment](#), which [prohibits the government](#) from regulating the content of speech, [with certain limited exceptions](#) such as obscenity, child pornography and commercial speech (e.g., advertisements). Over the course of time, the “freedom of speech,” has also come to include “freedom of expression.” In general, public employees are protected by the First Amendment, as long as public employees’ actions don’t equate to a disruption in the workplace.

If you are a [federal employee](#), you can look to the [Hatch Act](#) which can provide guidance as to what types of political activities may be restricted. Federal employees are put into two categories: “Further restricted employees” and “less restricted employees.” Most federal employees fall within the “less restricted” category. There are [five basic political restrictions and prohibited activities for less restricted employees](#), including that they may not be politically active while they are working, working in a federal building, wearing a uniform or official insignia or using a federally owned or leased vehicle.

Unions

When an individual's employment involves representation by a union, whether or not the employee has joined the union, employees will often be protected by the terms of the applicable [collective bargaining agreement](#) ("CBA") between the union and the employer (you should familiarize yourself with the terms of your CBA if you are a union employee). Under a collective bargaining agreement or CBA, employees will often be protected from termination except for established job- or company-related reasons and/or "just cause." Typically, an employee's political affiliations and activities will not qualify as a "just cause" reason for termination.

Pockets of Legal Protection for Political Speech, Affiliation and Activities

The National Labor Relations Act – Concerted Activity

Under the [National Labor Relations Act](#) ("NLRA"), employees have the right to organize and work together to improve working conditions and wages, whether or not a union has been established. This protection extends to "[concerted activity](#)," in which two or more employees take actions focused on improving or protecting the terms or conditions of their own and colleagues' employment. The NLRA protects most private employees, and excludes a number of employees under specific terms of employment, including public employees and independent contractors, among others.

A Limited Number of States Provide Some Protection for Political Affiliation or Activities.

[New York, California, Colorado and North Dakota](#) have state laws that prohibit employers from discriminating against employees based on their political activities or affiliation (at least so far as those activities occur outside the workplace).

In [New York](#) for example, state law prohibits an employer from discriminating on the basis of an employee's "political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property." It is important, however, to note that these various state laws sometimes have narrow definitions or interpretations of which "political activities" are protected. For instance, [Section 201 of the New York Labor Law](#) defines political activities as:

1. running for public office; or
2. campaigning for a candidate for public office; or
3. participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group.

It is important to note that this definition of political activity excludes or fails to mention an individual's political belief or expression on its own. What this means is that, in New York, an employee seemingly could be fired just for, say, voicing support Donald Trump or having a "Vote for Hillary Clinton" screen saver, simply because their employer or supervisor supports another candidate or viewpoint. There is nothing under New York state law that would make such a firing an unlawful discriminatory employer action on which legal action could be based. That is, unless the firing was carried out on an unequal or discriminatory basis that suggested that a protected characteristic (again, such as race, gender, religion, etc.) also played a role in the firing decision.

Other situations where the protection of New York law not apply include:

- “where the political activity creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest;” or
- if such activity would be in violation of a collective bargaining agreement with regard to ethics, conflicts of interest, potential conflicts of interest or the proper discharge of official duties; or
- individuals working under a professional services contract.

As a further example, [Montana](#) does not subscribe to an at-will employment doctrine. In Montana, after a six-month probationary period, employees may only be terminated for “good cause.” Good cause is defined as “an employee’s failure to perform in a satisfactory manner, the disruption of the employer’s business operations, or any other legitimate business reasons.”

Moral of the Story – Employee “Do’s”

Leading up to and in the wake of Election Day, employees’ would do well to avoid discussing politics at work to the greatest extent possible, and should exercise caution in wearing or posting anything that would quantify political expression that might be seen by coworkers who could take offense. As always, employees at all levels, from the highest executive on down, should be respectful and professional in discussions with others at work, and should think twice about how or whether to express political or social opinions. Again, this includes social media postings, which pose a strong temptation and, as we all have repeatedly seen, are almost impossible to fully erase and can get someone into far more trouble than any number of retweets or new followers is worth. Find out if your employer has a written policy that might touch on these issues, and follow it.

By all means, participate in political activity, dialogue and process, register to vote, and be first in line to vote on Election Day. In fact, most states also have [state laws regarding taking time off from work to vote](#).

If, like so many other Americans, you have been swept up by election fever, pursue that passion and study up on the related laws. In the event you believe you have suffered discrimination, however, on any such basis, or need assistance navigating the applicable labor laws, consult an attorney to help determine the potential legal implications.

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