

How HR Should Respond to Social and Political Expression at Work

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Employees come to work to perform a job, but they also bring their social, political and personal ideologies, which they may choose to express in conversations with co-workers, on their clothing or in other ways.

"Thousands of Americans are actively engaging in social justice movements and standing up for causes such as Black Lives Matter," said Jolena Jeffrey, an attorney with Katz, Marshall & Banks in Washington, D.C. "Individuals are not only showing their solidarity by protesting but also by displaying apparel with Black Lives Matter messages on the job."

Furthermore, with the upcoming presidential election, employees may want to discuss the candidates or wear messages supporting their political party.

Thus, employers are facing renewed questions about employee rights to display support for a political party or social movement on the job, Jeffrey observed.

Some businesses have approached current events by taking their own positions on social justice issues. Susan Groff, an attorney with Jackson Lewis in Los Angeles, noted that businesses are permitted to support causes, movements or even politicians. However, state laws may place limits on employer activities. For example, under the California Labor Code, employers may not coerce employees to adopt or follow a particular political action or activity.

"Employers should be cautious if their support for one employee cause over another could be seen as indicative of some discriminatory animus," Groff said.

Here are some pointers for employers on navigating political and social expression in the workplace.

Speech on Clothing

As workplaces begin to reopen during the coronavirus crisis, many employees are showing up with face masks and shirts proclaiming Black Lives Matter and other messages, Jeffrey observed.

Can employers support employees who wear social justice messages on their clothing? Jeffrey noted that companies may risk bad publicity, poor employee morale and even protests if they restrict certain forms of expression.

"Changing company policies and allowing employees to assert political messages on their work apparel can create positive public reception," she said.

Still, some employers may fear that allowing employees to display any social or political messages at work will create tension and leave them vulnerable to customer complaints or lawsuits.

Employers should note that they can opt to permit employees to wear clothing with positive messages and still ban obscene or harassing content. "Even if the employer has permitted other types of political or movement statements, if the message an employee is conveying would be classified as unlawful harassment, the employer must ensure it is removed from the workplace," Groff said.

Employers that want to avoid monitoring political and social messaging may want to adopt a blanket policy. "It is understandable that many employers, especially those whose employees interact with the public, will opt for barring all messaging," Jeffrey noted. "That approach may help to create a neutral work environment."

Typically, there is no legal right to wear political clothing or display political images in the workplace, and employers are well within their rights to ban any clothing or bodily displays of political speech, explained Luther Wright, an attorney with Ogletree Deakins in Nashville.

SHRM RESOURCE SPOTLIGHT

Overcoming Workplace Bias (www.shrm.org/ResourcesAndTools/Pages/overcoming-workplace-bias.aspx)

Legal Protections

The First Amendment does not provide on-the-job protection for employees who work for private businesses, but employers should still consult state laws, which may provide some protection for political expression and off-duty conduct.

For example, the California Labor Code prohibits employers from adopting or enforcing any rule or policy that prevents employees from engaging in political activities or directs their political activities or affiliations.

"For this reason, employers should be careful to avoid taking adverse actions against employees for engaging in protected political activities," Groff said. "However, employees who participate in political activities may still be subject to discipline if their conduct violates their employer's legitimate policies."

In addition to implementing dress-code policies that ban all messaging, employers can prohibit employees from posting nonwork-related messages on company bulletin boards or intranets. "Employers should be crafting such policies carefully to avoid infringing on employees' right to discuss their working conditions or wages, which is protected under the law," Groff noted.

The National Labor Relations Act protects employee speech when two or more employees discuss wages and working conditions. However, new guidance from the National Labor Relations Board (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/nlrb-gives-employers-more-leeway-to-fire-workers-for-profane-outbursts.aspx) clarified that employees' speech cannot violate workplace anti-harassment, anti-discrimination or code of conduct policies.

"Employers still have the right to ensure the work is getting done," Groff noted. If employees are spending the entire morning debating the political issue of the day rather than completing their assignments, then employers are within their rights to counsel employees about getting back to work.

"Of course, employers need to be uniform in such counseling and not pick and choose, depending on the political belief espoused," she cautioned.

Be Consistent

The key for employers is to be consistent. "Make sure all workplace policies, including dress-code policies, are clear and up-to-date and have been vetted for bias," Wright recommended. Policies and practices can become problematic when employers allow some political statements but disallow others, he noted.

Employers should be mindful of how they have previously applied their policies, Groff said. For example, if the employer has not been stringent about enforcing its dress code in other circumstances, then enforcing the policy in a particular situation may make an employee feel singled out and potentially discriminated against.

Groff said employers should apply policies evenly to avoid the appearance of discrimination. "Further, while opinions may become heated this fall, supervisors and managers must be careful about taking any action that may suggest favoritism toward one political view over another."

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