

Podcast

Politics at Work

By Felice B. Ekelman &

October 9, 2020

Meet the Authors



Felice B. Ekelman

Principal

212-545-4005

Felice.Ekelman@jacksonlewis.com

Details

October 9, 2020

In 2020, politics permeates the workplace. The prominence and influence of social justice movements has made political conversations in the workplace more fraught with risk. This podcast will explore the issues employers face in the run up to the 2020 election as well as proactive approaches to keep the workplace harmonious.

Jackson Lewis P.C. - Politics at Work



Takeaways

The intersection between an employer's right to manage its workforce and employees' right to speak their mind about social issues has always been difficult to manage. Politics often brings emotions to the surface as government policies impact intrinsic beliefs and values. With the approaching election being perhaps the most politically charged in recent memory, discussion in the workplace is likely to get tense. Politically charged conversations at work can result in damaged working relationships and decreased productivity. How can employers avoid a toxic, divisive work environment while providing space for civil discourse?

Key Considerations

- Do you have an obligation to let people express their opinions freely in the name of free speech?
- Should you have a policy in place regarding political discussions in the workplace? If so, what specific guidelines are reasonable?
- At what point does expressing a political view cross over into harassment or intimidation?
- Employers have leeway to set and enforce dress codes. How does this ability extend to apparel, backgrounds on company video calls and/or pictures on a desk?

What employers need to know

- Consider the federal and state laws that govern the discussion of politics in the workplace.
- The National Labor Relations Act protects employees' rights to discuss issues that have a nexus to the workplace, including protected concerted activity about wages, hours, working conditions such as COVID-19 safety, health care, layoffs and other issues that spill over from the political campaign.
- In several jurisdictions, political affiliations and political activity are protected categories under anti-discrimination laws.
- Many states prohibit employers from coercing or influencing employees about their political or voting activities.
- Take Election Day voting time off considerations into account.
- Enforcing an outright ban on political discussion is almost impossible to enforce, especially as more and more conversations take place virtually. Prepare for a disruption and think about how your corporate culture fits into the response.
- Remember that opinions are subjective and rarely clear. It is okay for coworkers to see things differently as long as civility and respect are present.

What should you consider doing now?

- Set an example at the top. It's not too late to have conversations with your executive team to go over election-related scenarios, policies and practices. Create a strategic plan that works for you.
- Review policies to ensure corporate position is clearly defined on:
 - Social media;
 - Apparel, buttons, uniforms, etc.;
 - Workplace conduct;
 - EEO/Harassment;
 - Diversity and inclusion;
 - Solicitation and distribution;
 - Voting leave; and
 - Public relations.
- Prepare a response strategy in the event an issue arises including identifying key players, protocols and messages.
- Who will address any complaints?
- Ensure that policies, procedures and training reflect corporate values of tolerance, D&I, social justice, etc.
- Consider D&I/unconscious bias/other training/discussions.
- Remind employees of the policies proactively.
- Ensure that if there is a voting leave policy it meets local requirements; remains neutral and complies with state laws regarding voting time. Employers can facilitate and encourage employees to vote, but not for a particular candidate.

Transcript

Speaker 1 (00:08):

Welcome to Jackson Lewis' podcast We get work™. Focused solely on workplace issues everywhere and under any circumstances. It is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the

issues dominating the workplace and its continuing evolution, and helps answer the question on every employer's mind. How will my business be impacted?

This inaugural podcast of We Get Work™ debuted on October 9, 2020 less than a month before the presidential election. At that time, George Floyd's death, Amy Coney Barrett's high court nomination and a nation gripped by the COVID-19 pandemic were fueling heightened political discourse in the workplace. Almost two years later, as the world tentatively and cautiously emerges from the pandemic, responds to the judicial demise of Roe v. Wade, witnesses the historic confirmation of Justice Ketanji Brown Jackson to the Supreme Court, and grapples with an ongoing gun control debate, this podcast continues to remind us how tenuous the balance remains between free speech and a safe and harmonious workplace.

Phil is a member of the firm's board of directors. He has served as managing principal of the New York City office and as co-leader of the Labor and Preventative Practice Group. He helps clients develop creative, strategic, and proactive legal approaches that achieve a company's goals.

Felice and Phil, the question on everyone's mind today is given everything going on in the world right now, how does political discussion in the workplace impact my business?

Felice (02:01):

It does. It does, because people are talking, and I think employers have to face the reality that people are talking, and that some of that talk can get very emotional. What do you think Phil?

Phil (02:14):

Well, I agree with you, and I think if we think about the context of what's going on in the world today, here we are, we've got the COVID-19 pandemic. We have mass demonstrations and violence after George Floyd's death. We have wildfires out west. We have Ruth Bader Ginsburg's death and Amy Coney Barrett's nomination. People working at home trying to figure out things like unemployment, job security, a variety of issues. In this context, we have pressures that are different, and an emotional and raw feeling that everyone is dealing with. So I agree with you, Felice. I think people are talking, whether it's on social media, whether it's just on Zoom or some other type of platform when they're talking on business. That's what you and I are trying to deal with when we're talking to employers.

Felice (03:03):

Yes, and the question is, should employers care that people are talking? I mean, look. At the very least maybe all this talk is making us a little less productive. At its worst, it's inciting a lot of hostility in the workplace and tension. Then the question is, what is an employer's responsibility in the event these hostilities and tensions break open and create havoc?

We're hearing that employees are tense and that there are situations that can become contentious. I think that now is the time for employers to face up to the fact that this could, if it hasn't already, happened in the workplace and start taking some

steps, I think, proactively to make sure that employees understand what it is that they're supposed to be doing in the workplace given the reality that you can't say no political talk. I mean, I don't think an employer is well served by saying to its employees, "No political talk."

Phil (04:02):

Yeah, and I think if we step back, could an employer say to his or her employees, "No political talk"? Probably the answer would be yes, because they're regulating the environment, forgetting about all the specific laws that we can talk about at some point. Can they do it? I think you and I are both of the opinion that in today's world it's impossible to legislate that, particularly when people are working in home rather than, and obviously there are businesses where essential workers are working and there are also returned to work where people are working live next to each other. But realistically that's a hard thing. For me, some of this is about not being a one-size-fits-all model because you have large employers that may handle it differently. They're international employers, and they may handle it differently than a small employer that has a much closer connection to their workplace. Yet, that's probably a stereotype. So I don't know what you think, Felice?

Felice (05:06):

Well, I don't think employers should be taking a side. I mean, that can create even more attention. Taking a side on issues right now can be problematic. Taking a side on a party is extraordinarily problematic, I would think. But taking a side on an issue that could be related to a political stance is interesting. So if you are an employer that is engaged in sustainability and you're concerned about the environment, you can't stop taking that position because it's an important one to you. Yet, it's interesting to see whether that will provoke responses from employees.

But the fact of the matter is employers really have to decide what they want to do, and I think proactively decide what they want to do now if they haven't been faced with workplace unrest because of this kind of an issue. So you could have it, not just a conversation, but look at all these Zoom calls, and WebEx, and Google Meet's calls that we're all having. Folks have all kinds of interesting backgrounds, which, of course, is entertaining. But what if it's a political background and people are made uncomfortable by that? What does an employer do in the middle of the conversation?

Phil (06:27):

Felice, from my perspective, I think that's right, because if you took it from the macro, which is all employers should at least be deciding what they feel they should do if politics in the workplace, if they're confronted with it, then take it down to the micro level, which is, if you had a backdrop on a call that was a client-related or customer-related, or even an internal call among employees where somebody had a Make America Great Again background, or they had a Biden Harris background, and that bothers some employees because they believe they're politicizing the workplace, should an employer step in because an executive or a manager sees that? Should they wait to see whether or not someone complains about it so that they don't make it a bigger issue? Should they ignore it and say, "We're not going to deal

with that at all." That's a tough call that depends upon a company's culture, even though we can tell you what we think legally and practically.

Felice (07:32):

I agree, and I think that it would be smart for employers to start thinking about these things now, so that if they do come up they have started along the process of deciding what, if any, action they're going to take. The action, as you said, could vary depending on a lot of different circumstances. Same for political t-shirts and buttons in the workplace. We've seen that for years. There are some employers that have uniform policies and these t-shirts and buttons could arguably violate the uniform policy.

But in terms of discourse, because I think that's really the thing that's most likely to come up, and that's what the various surveys that we've looked at say, what should employers say when they get reports or witness employees engaging in heated arguments, whether it's on the phone, in person, on a WebEx or something like that? What should an employer do? I think an employer should intercede and remind employees about civility in the workplace, because most employers hopefully have that kind of a policy in place, and if not, I think should remind employees now that civility in the workplace extends to all manner of conversation.

Phil (08:53):

From our perspective, I know at least from mine, you're always thinking about what would be preventive and proactive. So I think I agree with you. I think an employer should step in under those circumstances. They have employees who are at each other in a way that would be inappropriate in the workplace and trying to ratchet it down so that if you go back to civility and respect for people's opinions you're not trying to change anyone's mind. As an employer, you are not certainly not trying to do that, and you should be trying to say to those employees that they should not be trying to change anyone's mind. That really, if there is going to be any discourse in the workplace about a political issue, we either stop it or people have to treat each other right when they're having those conversations.

Felice (09:40):

I don't think you can stop it, Phil. I think we have to face up to the fact that this is a passionate moment in American history, and most folks have a position, a strong one, either way, about a variety of different issues. So I think we have, in terms of talking to employers and advising employers, I think we have to let employers know that you can't say, "You're not allowed to talk." I think that's just not going to work. So I think what's most important is for managers to recognize that they have a responsibility to break up the fight, so to speak.

Phil (10:17):

So let's take a couple of examples of how do you do that. So here we are five weeks before the election. So it's going to get worse presumably during the next five weeks, and presumably right after the election. Whether it is a contested election afterward, or whether it is settled, there will still be strong opinions right after that. The environment will be the same because people will have a hair trigger tempers

because they're home more, because of all the pressures that they're feeling right now. So we have something that we'd have to do for the next five weeks. Then we have the period and shortly after the election.

We then have the period that's long-term because realistically people talk about politics today more than ever in the workplace. That's going to continue, in my opinion. In the next five weeks, if an employer says, "Should I have a meeting now of my employees to talk about the fact that there will be discussions in the workplace. We recognize that. Here are the ground rules." Or if an employer says, "We're going to try and prohibit it," then that's up to an employer. Or are we better served by letting it come out in some other way that's just a natural conversation that they're having with workers over some issue, and this is more of an, "Oh, by the way, we also want to mention to you that it's important to think about what you say during these times."

Felice (11:41):

Yeah. I think that employers should be proactive. Listen, that's how we practice employment law and labor relations. I think employers should recognize that this is going to happen, and perhaps a beautiful way to present it is to talk about the importance of voting, and to remind employees of whatever rights they have to vote. Because a lot of states have requirements that are on employers that say you have to give employees certain amount of leave. There are some states like New York and California that even require that employers post a notice about leave rights. So I think combining a reminder, "Here are your rights under the law to take time off to vote," again, depending on the state and local regulations, "and by the way, we encourage you to vote, and by the way, we know that the election is on everyone's mind, but let's focus on work to the best we can, and if you're going to have a conversation folks, remember respect your coworkers."

If you combine it all in one, I think it's a nice message. It's a neutral message, and it's one of responsibility, because you're encouraging your employees to vote, plus, depending on your jurisdiction, you have to administer a leave policy. That can be a little confusing in terms of you're allowed X number of hours off before the polls or before work. So I think that if I were to advise an employer, I think that's what I would pretty much say as a starting point and work from there, given the employer's culture and comfort level.

Phil (13:24):

I agree with you. So maybe my question was loaded, but I agree with everything you said in that regard. So if we're talking about this and saying we recommend these discussions to clients, and I think your approach to it is the right one, then what about other areas? So companies have policies on social media, and apparel in the workplace, workplace conduct, EEO harassment, diversity and inclusion, solicitation distribution, public relations comes into this too on the social media context. Do they review those policies now? From my perspective, I think they need to do that too. They need to look at those policies and say, "What would we do in a situation like this where that issue comes up, and do we need to reiterate those policies as well now? If we don't have those policies, do we create them now?" I would say don't create them now. Get them ready, look at them, know what you have and don't have.

But I don't know that you want to roll one out four weeks before the election, rather than trying to see what policies and procedures you have. Be ready so that you're using them appropriately or aware that you can't.

Felice (14:38):

Yeah, that would be tricky, I agree, rolling out new policies right now. But I do think dusting off and rereading these policies in a new light to address this particular issue is pretty important. I really think company leadership has to make sure that their human resources leadership is aligned and that their management is aligned, because you really don't want inconsistent approaches to this kind of situation. You don't want to have a report that one manager is inciting or engaging in political talk in the workplace, and perhaps has articulated a position or a candidate, and then has allegations from employees who beg to differ with respect to those positions, and now or later it comes out that the manager disfavors the worker, allegedly perhaps, because their political opinions are different or were different in this five week period before the election.

So I do think even if it's not the time to have a full-blown all-hands on deck meeting, it is the right time for employers to remind their management team and their leadership team that they have a responsibility towards making sure that employees don't feel disfavored or treated differently because of their political positions. But there are some states that prohibit discrimination based on legal activities. New York is one state that has illegal activities law and I know there are others. But what do you think about reaching out to the management team at this time, even if you don't do an all-hands on deck meeting?

Phil (16:12):

I believe it's important. I think it starts at the top. I think that the concept of good corporate citizenship is critical. If you're an executive who's listening to this podcast, you want to think about things like, what's the positioning of your company that you believe is appropriate and correct? But I think good corporate citizenship, no matter what side of the aisle you're on is important. I think that there's the public relations aspect. There's the government relations aspect of this. There's the social media side of this. So from a top executive standpoint, all of this, shareholders, other key stakeholders, this becomes critical.

I think you then need to ensure that this translates all the way down within your management team and is communicated to your staff as well. That's where I believe that there are organizations that can do management training now, or at least conversations with their management team, so their management team understands what they believe, how they believe it, and what they should do about it right now. So it doesn't have to be formal training, although I believe formal training can be done.

It's a time when you also have diversity and inclusion. You have so many other areas that are important within the workplace that you need to think about as well. So you can do this discreetly on this topic of politics in the workplace. You can tie it in with other topics. It could be a series of conversations. It doesn't have to be formal training, but it's important that you get the guidance because we both believe

proactive is better.

Felice (17:43):

You know, as I listen to what you're saying, Phil, I feel like I have to go out now and talk to all those corporate leaders I talk to on a regular basis and say, "Hey, have you thought about this? Let's talk about a plan because a plan really makes sense. I don't think we want to wait and see some kind of posting, or some kind of crisis, or some kind of a fight, so to speak, an old-fashioned fight in your workplace that gets blown out of proportion and that we could have taken steps to avoid." So I think that's on my agenda for this week, to go out and talk to all those leaders in the workplace and tell them, "There are things you could be doing now, and don't miss this opportunity."

Phil (18:32):

I agree. I think there's a legal side and a practical side to this. Often, lawyers are referred to as Dr. No, because they say you can't do this and you can't do that. Our approach always has been, let's get you to your goal, your business goal that's important. So there's the First Amendment, which is really government versus private. Most employers are private employers, and the First Amendment doesn't apply in those situations. You have in the state laws that might come into play, whether it's the election day voting laws that you mentioned, Felice, or some of the others, which would be, like you mentioned, in terms of political activity outside the workplace, and you can't retaliate against somebody in the workplace because of their political activities outside the work. But you have federal laws, Title VII, National Labor Relations Act, protected concerted activity.

There's a variety of laws out there. But bottom line really is that if you look at the policies, procedures, and you think strategically and you go out and talk, as you're talking about to executives and say, "How are you going to handle this situation now," there are people like us who can help them engage in that conversation, or hopefully from this podcast, you can engage in this conversation internally and say, "There are things we can do now." So if there's a takeaway from this, one of them is just what you mentioned. Your reaching out, or my reaching out, to our executive team to say, "How are we going to handle this?"

Felice (19:57):

Well, I'm glad we agree. We don't have any political issues. We clean house, Phil, that's for sure.

Phil (20:02):

That's right, and by the way, either way, I should give the caveat that we always do, which is, this is not about politics. It's about politics in the workplace and how it impacts a business. But no one should read anything about our political affiliations or our political opinions into this podcast. Hopefully you don't know what they are. Hopefully you just see an alignment between Felice and me in terms of an approach that would work for employers and the business community. That's what we hope you'll take away from this as you're walking or running or doing a business call where you only have to be partially listening or typing something up that you're

doing. Whether you're a top executive, a shareholder, a member of the board of directors, a member of the management team, the supervisor, doesn't matter. Just try and keep this all in perspective. Try and keep it civil with discourse that's appropriate. That's what will work in the next five weeks. That's what will work after the election to keep the workplace the kind of place that you want to work in and you want to manage.

Felice (21:07):

Good luck, everyone.

Phil (21:09):

Thanks for your time.

Speaker 1 (21:11):

Thank you for joining us on We get work™. Please tune into our next program where we will continue to tell you not only what's legal, but what is effective. For more information on today's topic, our presenters, and other Jackson Lewis resources, or to subscribe to our podcast, visit jacksonlewis.com. As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client lawyer relationship between Jackson Lewis and any recipient.

Transcript by Rev.com

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.