

# Debating Politics at Work: From Elections to DEI

By Samia M. Kirmani, Michael D. Thomas & Michelle E. Phillips

October 10, 2024

## Meet the Authors



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## Details

October 10, 2024

Politics is a hot topic at any time, especially during an election year when discussions ranging from candidates' qualifications to DEI spill over to the workplace. This prompts employers to think critically about the rules and regulations they implement to maintain a productive and inclusive environment.



## Transcript

Recorded 09.10.24

### *INTRO*

*For employers, having employees discuss politics in the workplace is fraught with potential pitfalls anytime, but especially in an election year when thorny issues can run the gamut from candidates' qualifications to DEI. Employers should think critically—are carefully—about the rules and regulations they implement to maintain a productive and inclusive environment.*

*On this episode of We get work™, we start by acknowledging that employees often, and unsurprisingly, bring their unique worldview into the workplace, but then focus on how employers can address the potential challenges as well as the legal guardrails and policies employers can implement to limit such discussions in the workplace.*

*Our hosts today are Samia Kirmani, and Michael Thomas, principals, respectively in the Boston and Orange County office, and leaders of the Corporate Diversity Counseling Practice Group, and Michelle Phillips, principal in the White Plains office and group member.*

*Samia, Michelle, and Michael, with the presidential election being at the top of everyone's minds inside and outside the workplace, the question on everyone's mind today is how do we define, and talk about, politics in the workplace and how does that impact my business?*

### CONTENT

#### Samia M. Kirmani

*Principal; Board of Directors Member; Workplace Training Group and Corporate*

*Diversity Counseling Groups Co-Leader*

Tonight's a big debate between Vice President Kamala Harris and former President Donald Trump. What do we think? Are people talking about it? I think they might be. And are employers doing anything about it? Are they saying things like “no politics at work, no discussion of politics at work?”

What does that even mean? And then why are employees talking about it at work? Michael and I were talking earlier today about the fact that people are coming to work and bringing what they're thinking about — and they're having maybe anxieties about — to the workplace. So, let's talk about what questions even *are* about politics.

**Michael D. Thomas**

*Principal; Corporate Diversity Counseling Group Co-Leader*

Thanks Samia. Politics of the workplace is obviously top of mind for a lot of employers right now — and it's going to be top of mind for lot of employers going up to the election. One of the questions that we're getting about politics is whether DEI is actually considered politics in the workplace. Some of that discussion about whether DEI is politics is because DEI often involves discussions about protected categories, and so it's a conversation about race or gender or sexual orientation. Is that considered politics in the workplace? Employers, to your point, Samia, really have to think very critically about the rules and regulations that they're implementing in the workplace and what is actually considered politics.

**Michelle E. Phillips**

*Principal*

And on what impact that might have on people, particularly marginalized people in the workplace. What might be a political conversation about a particular pending bill or an amicus brief of a court case — whether it's DEI, whether it's race, whether it's sexual orientation or gender identity, These are all deeply ingrained parts of employees' identity. So, *is* it politics or is it really a discussion of a protected group which directly relates and touches many of us?

**Kirmani**

Yes. It's really potentially everything, right? And so, we're getting a lot of questions from our employer clients about: “Can we ban clothing?” “Can we ban certain logos?” “Can we ban all logos?” “Can we ban posters or can we have certain requirements?”

This is really tough stuff. The fact is even a really casual conversation can quickly turn into a heated argument. It can impact the way people work together; the kinds of respect people have for each other and their interactions. These issues can challenge employers to ask “What are we going to do about it and how are we going to take actions and issue rules that are consistent with our values?”

We should start where we always start, which is: What are the legal guardrails and what legal guardrails should we be thinking about? Most of our listeners are those

who are in some way responsible for managing people issues and advising organizations of legal and employee relations and business risk, and risk mitigation.

So, Michael and Michelle, let's get these guardrails out there. The first thing that comes to my mind is the First Amendment. Does it even apply, Michael?

### **Thomas**

We are talking about speech, so the First Amendment probably will come up. The First Amendment protection against government regulation of speech does not extend to private-sector employers, leaving them actually with a decent amount of flexibility in regulating political speech and expression in the workplace. For example, a private non-governmental employer generally can fire or take other actions against an at-will employee because of their political view or political opinion.

Now that flexibility is tempered against a whole host of other laws and regulations that are going to apply to that workplace, that are going to apply to that private sector employer. Some of those laws come from the National Labor Relations Act. Some of those laws come from different state regulations on speech within the workplace. And some of those laws concern off-duty conduct. Employers have to be aware of all of them.

### **Phillips**

Specifically in New York, there is the legal activities law, which prohibits an employer taking action against an employee for its lawful recreational activities outside the workplace. So, if I decide to march in a rally or I decide to put a flag on the back of my SUV — which I've seen a lot of lately for some reason — I can't have a negative action taken against me for the expression of my political speech.

On the other hand, in the workplace, the employer has significant abilities to take restrictive actions against regulating political speech in the workplace. I often refer to the workplace as a benevolent dictatorship, at best. And there's many ways that the employer can regulate political or any speech in the workplace. We set when you arrive, we set when you leave. We have a harassment policy, we have a political contributions policy, we have a gift policy, we have a reimbursement policy. There's many, many, many policies out there which give an employer that latitude to restrict political speech as well as other types of speech.

### **Kirmani**

We can't, can't, can't forget about state law. Many states and DC, for example, have laws that prohibit employers from taking employment actions against employees for expressing their views, their political views or their political affiliation. Some state laws even protect speech that goes beyond what we think of. Michael, I can only imagine . . . California. I bet you California has one, am I right?

### **Thomas**

Well, you don't have to imagine it because California does. Even within California,

speech can be defined very broadly. California actually has a law that protects employees' rights to be addressed by their chosen name. Now that corresponds to their gender identity and gender expression, and so refusing to use the employee's chosen name and pronoun on a shift schedule or their name tag or an Instagram messaging account or on their work ID could actually be considered harassing or even discriminatory.

And to your point, Samia, some states do have laws protecting different forms of advocacy. California courts have ruled that advocacy for certain rights or for disabled individuals constitutes political speech and that's protected by statute. Connecticut actually has a similar regulation.

**]Kirmani**

We're talking about guardrails, so we can't forget about Section Seven. We can't forget about the National Labor Relations Act — here's where our labor partners, if anyone's listening, they're going to be mad that I'm dabbling. The National Labor Relations Board has views on the National Labor Relations Act, on what limitations are placed on employers. You know, those restrictions are out there.

**Thomas**

Yes, and it gets even more complicated because it's not just what an employer can restrict. It's also about the guardrails around what employers can actually engage in — so employers' political speech or their political activity. For example, a lot of employers within California will advocate for different ballot propositions. You might even see different employers advocate for a certain candidate. So, employer advocacy also has guardrails around employer expression. What are some of those guardrails?

**Kirmani**

They do it all the time, right? They can talk to their employees and the public about their support or opposition to things happening in the world, laws and movements and issues. But the guardrails are, they can't interfere with somebody's ability to vote for somebody or coerce them to vote a certain way. They can't bribe. They may not be allowed to, by state law, gather or keep records on an employee's political activities or associations.

They have a lot of latitude, but there are some restrictions, right? And so, the question is: should they be engaging in that kind of expression? Should they?

**Phillips**

Well, before we get into whether they should, let's talk about where the law restricts their ability. Can they? And then, should they?

So, if employers advocate for a particular bill or employers sign on to an appellate brief, those positions might necessarily relate to someone's protected group status, whether it's the anti-trans legislation that we're seeing across the country or whether it's, as Michael mentioned, someone's chosen names or relating to someone's gender identity or pronoun, or relating to someone's religious beliefs or

convictions, right?

There's that tension on both sides of it. What's clear under the law is that you cannot take an action based on someone's protected group status. If by virtue of engaging in political speech, it necessarily runs afoul of a protected group status, that's where I think the line is. For example, I had one situation that I was dealing with where we had two different employees who, by the way, happened to be good friends for many years, but they were on opposite sides of the political spectrum. When they chose to express their beliefs in the workplace on opposite sides of the political spectrum, what started out as just a political debate actually turned into jabs against each other based upon their race, based upon their gender, and then ultimately almost came to blows between the staff and violation of the workplace violence policy.

So, we need to put in these guardrails earlier, so what looks like political speech doesn't turn into either an outright fight or violation of someone's protected status.

### **Thomas**

That's a great point, Michelle. And I think ultimately what you're really talking about is that employers are going to face and are facing some very challenging situations. And they're going to face a lot of challenging questions.

*Glassdoor* reports show that many employees are already talking about politics in the workplace. And many employees actually expect their employer to take stances on different political issues. So, an employer might be asked to make a statement about a court decision or about a political opinion that actually comes out. In many ways, these are as much legal issues as they are issues about an employer's values and who an employer actually is.

And so when you're thinking about having policies or drafting policies about speech, conduct or dress, you have to also think about consistency and consistency in the enforcement. You have to make sure that you're training your HR people, that you're training supervisors, and you're training managers on your values and your expectations.

### **Phillips**

Also this whole concept of identity politics, right? Some people's politics are enmeshed with their identity and there's single-issue politics. So, if an employer is going to take a stand, how is that going to necessarily correlate to that individual's identity?

We have to be careful. And, Michael, to your point, the whole issue of values, of what does a company stand for. Where is a company prepared to take a stand?

### **Kirmani**

I feel like we've laid out all these problems, but what should an employer do?

We have to go back to what we know, right? We need to have policies — and *wecan* have policies that generally prohibit political speech and activities at work. And then we have to consider enforcement and what that means in light of particular

situations and think about consistency. So, when we're talking about policies, I think we're thinking broadly. Like we know about our policies against harassment and discrimination. But we also have to be thinking about social media policies, our codes of conduct. And often, situations implicate those policies more than they would a "politics at work" policy, right?

So, Michelle, in your situation where people are almost coming to blows, the issue there is: Are they violating our policies of our code of conduct, how people should interact? We have to think about policies broadly.

### **Phillips**

Also the supervisor in that situation failed to act. If you think about the corporation's values, a supervisor shouldn't let a political discussion get into a race-based conversation or a conversation based on someone's sexual orientation or ultimately a violation of the workplace violence policy. And with regards to supervisors, we have more leeway in terms of what an employer can do in the workplace.

### **Kirmani**

Yes, yes, yes. Also, going back to this issue of policies, we have to be thoughtful about that. Michael, what specifically should an employer do with respect to its policies? We keep talking about policies.

### **Thomas**

Well, we're lawyers, so you know what part of our answer is going to be. Those policies have to be very carefully drafted — and enforced. And proper training has to be done on those policies. And if you are going to take any form of action based on those policies, you actually have to weigh the benefits versus the risk of it being perceived that you're actually suppressing some form of speech.

Employers have to be aware of employee rights and the limits that they can impose on those rights. But as we talked about before, in general, employers can regulate employee speech in the workplace. But you have to keep in mind the NLRA, state law rights, anti-discrimination statutes, all the things that we just talked about.

One thing that we haven't spent a ton of time on that becomes incredibly important is — Samia, you touched upon this very early on — the employers have to be mindful of certain realities of the workplace, and that's really how most of your employees are showing up.

Most of your employees are experiencing different forms of anxiety from hearing about politics all the time. They're showing up with some form of anxiety based on potentially their identity being attacked. They could be showing up with some form of anxiety because we're seeing and exposed to more violence in the workplace. Kids are going back to school and there's more violence in the schools and parents are showing up thinking about that. And one of the things that they're looking for from employers is actually a place of safety, a place of trust. And so, when you're thinking about the policies that you draft and how you enforce those policies, thinking about consistencies in your values become incredibly important. Because



to your workforce, that communicates trust, that communicates that sense of belonging, that communicates a sense of wellness that actually becomes incredibly important in terms of how you create your workforce.

**Kirmani**

Such a good point. It brings me to my last point I wanted to make, which was, you know, we said it goes back to what we've always known that this is about employee relations. And when we're talking about employee relations, we have to make sure that we're engaging all the right stakeholders.

It's not just HR. It's not in a silo, it's not just DEI in a silo, it's kind of the business leaders when we're thinking about corporate values, are we thinking about the expression of those and are we engaging our communications team, right? Making sure we have the right stakeholders in the decision. And don't forget about legal because those guardrails are there, there are local and state restrictions.

When an issue comes up, it's important to take issues seriously. Going back to what we've always known, doing the investigations and looking into employee concerns. Then when we decide we're going to take action, what are we basing that on? And are there any limitations on that?

We touched on a whole host of issues. Suffice it to say that it's a challenging time. We can always rely, usually, on our carefully drafted policies and that we're being thoughtful about what laws apply to us in a particular situation. So, we *can* do this, right?

**Thomas**

We can do this.

**Phillips**

We can do it.

**Kirmani**

All right. Thank you

**OUTRO**

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