

It's Election Season! Be Prepared to Deal with Workplace Politics!

By Sam Light, CIRSA General Counsel

Imagine this scenario: *City employee Rick (an equipment operator) is politically active, and his co-workers know it...all too well! Several of them have come to Human Resources complaining that Rick is constantly "cornering" them and "ranting" about upcoming Ballot Issue AAA, which would create a new public employee pension fund. They say Rick often does this while wearing his "Say Yay to Triple-A" t-shirt. And they say he's constantly getting on social media to post "Vote Yes" messages, even posting this tweet: "As a City of _____ (your city) employee myself, I think any public employee would be an idiot not to vote for Ballot Issue AAA." When you ask Rick what's going on, he says he does all of this on breaks and at home "and that's my First Amendment right." But, with a little help from IT, you learn some of the social media posts were made during work hours, on City computers. And one co-worker alleges Rick was copying "Say Yay to Triple-A" flyers on the City's copier. Co-workers also say Rick is "harassing" them about politics and they want to be left alone.*

Ah, what to do?

Here's the thing about politics: Everyone has an opinion! And that's a great thing. But from an employer's perspective, it can be tricky to navigate the issues that arise around political discourse in the workplace. This is particularly true for municipal employers that must be cognizant of public employees' First Amendment rights, as well as the laws that prohibit using public resources for political campaigns and discriminating against employees for lawful off-duty activity, including political speech.

And, beyond these laws, managers must be adept at handling workplace complaints and disruptions that arise from politics in the office. With elections drawing near, we at CIRSA get more frequent questions from members around these issues, and this article is to provide some reminders and tips for handling political activity within your workforce, so that you can successfully address "the Rick situation" and similar scenarios.

Colorado's Lawful Off-Duty Activities Statute

Before turning to our tips, some legal context is helpful. First, employers and supervisors must be cognizant of Colorado's lawful off-duty conduct statute, which is Colorado Revised Statutes (C.R.S.) [Section 24-34-402.5](#). In short, this statute prohibits an employer from terminating an employee for the employee's "engaging in any lawful activity off the premises of the employer during nonworking hours." That extends to political activity. So, firing Rick for his at-home social media posts is not a good plan; it could result in a liability claim for discriminatory employment practices.¹



The lawful off-duty activities statute does contain a few exceptions. The employer can restrict otherwise lawful off-duty conduct where the restriction relates to a bona fide job requirement or is rationally related to job responsibilities of the employee. And an employer can impose restrictions to avoid a conflict of interests with any responsibilities to the employer. Note as well that the statute applies only to termination, not lesser forms of discipline.

But, when it comes to regulating off-duty political speech, those exceptions are not as broad as you might think, so be extremely cautious in relying upon one of these “safe harbors.” For example, Rick’s supervisor may find his tweets galling. But does that activity really interfere with his job responsibilities? Or the City’s interests? Or is any desire to discipline Rick for his tweets instead motivated by general distaste for his views, tone, or tactics? If the latter, the statute provides no protection.² And, even if the proposed discipline is less than termination, you’ll want to be circumspect given constitutional considerations (see below).

The Fair Campaign Practices Act (FCPA)

Municipal employers must also be mindful of the restrictions on political activity under the FCPA. While a full discussion of this law is beyond the scope of the article, C.R.S. [Section 1-45-117](#) generally prohibits municipalities and their employees from spending public funds or contributing public resources to influence the outcome of campaigns for political office or ballot issues. These restrictions extend to all types of resources, such as the use of copiers, vehicles, computers, websites, facilities, telephones, or newsletters. In addition, a municipal employee’s time during working hours is considered a resource, and therefore cannot be used for electioneering (except in very limited circumstances).

Your entity’s employees should be trained on the FCPA to help ensure compliance with its restrictions. Supervisors should also understand that the FCPA regulates the use of public resources but does not extend to employee’s personal activities. Thus, employees should be educated on both sides of this coin; specifically:

- While the FCPA prohibits the use of public funds and resources, it does not prohibit an individual employee from expending personal funds and using personal time for electioneering.
- However, such activities should not be conducted during the employee’s working time or in the offices of the municipality. (The employees themselves are responsible for compliance with other campaign laws, such as applicable reporting of contributions, etc.).
- Employees are free to participate in any political affiliations, activities, and campaigns on personal time and away from the offices of the municipality.
- The FCPA recognizes that even during working hours, it’s okay for employees to respond to unsolicited questions about ballot measures. But, while on the clock it’s best to remain fair and neutral. And, in expressing their personal views in any context, employees should not give the impression that a candidate or issue is endorsed by the municipal employer.

Constitutional Concerns

Beyond the above-noted Colorado statutes, there is always the backdrop that political discourse is a fundamental principle of a democratic society and protected by the First Amendment. But, from an employer’s perspective, this does not mean City offices are or must be treated akin to the public square, where all manner of activity and debate on political issues must be allowed. Rather, a public employer has interests in promoting workplace efficiency, maintaining public trust

and confidence, and avoiding workplace disruptions.

On this issue, the courts have long recognized the need to strike a balance between, on the one hand, the First Amendment rights of public employees to speak freely on matters of public concern and, on the other hand, the public employer's interests. In balancing these interests, and recognizing the employee's nearly unfettered rights off-duty, courts have in specific cases rejected constitutional challenges to reasonable policies that, for example, prohibit political soliciting or wearing of campaign paraphernalia or attire while on-duty. But the key concepts here are that the policies be viewpoint neutral and evenly applied, not limit protected off-duty conduct, and not reach beyond what is appropriate to further the employer's workplace interests. Further, employees and supervisors must avoid any statements or actions that suggest retaliation against an employee for engaging in protected activities, which can give rise to a constitutional claim.

Thus, if your entity has a policy that employees may not wear campaign paraphernalia or attire while on duty, it needs to be prepared to enforce it even-handedly no matter what. After all, if lots of folks are wearing t-shirts with political messages and Rick is the only one called out for his "Vote Yay on Triple-A", t-shirt, he's got good reason to be upset even if no one complained about any other employees. And, whether your entity has a policy or not, framing your approach around respect, tolerance, and civility rather than violations and enforcement—or insistence on a policy that in practice is unworkable—may lead to a better (and less risky) outcome.

Other Legal Considerations

If the above considerations weren't enough, employers must also have their radar on to spot incidents involving workplace politics that can implicate harassment and discrimination policies, including requirements to promptly investigate allegations and take corrective action. Say instead, for example, that Rick's "ranting" is to vote a certain way on a religious freedom measure on the ballot, and some co-workers allege his campaigning is attacking their faith. Has this slightly different scenario triggered your entity's harassment policies, requiring you to conduct an investigation following set procedures in your personnel handbook?

Or say instead, that Rick is running for political office and his activities are limited to soliciting his co-workers for their votes (and a token campaign contribution). When Rick is told, per policy, that he can't do this he says the City is preventing him "from engaging or participating in politics" in violation of yet another state law, C.R.S. [Section 8-2-108](#)³. While restricting such conduct only on-duty should not implicate this statute, these other scenarios illustrate that employers need to be prepared to address a wide variety of legal issues that can arise from political drama unfolding in the workplace.

Workplace Practicalities and Tips

With all the varied interests to consider, it's no wonder dealing with politics in the workplace is a potential minefield. But here are some practical tips to effectively steer these tough situations towards resolution and away from all-out disputes and legal battles.

- **Have a reasonable policy.** If your entity wants to set parameters around what's acceptable in the workplace, it needs to start with a policy. The policy should be clear, concise, on-point and reasonable. It should recognize employee's rights to engage in political activity on personal time with personal resources. It should restrict activities only in view of avoiding workplace disruptions, furthering impartiality, meeting constitutional requirements, and ensuring FCPA compliance. It should be specific, but not overly so, and should be drafted to

elicit buy-in. Some samples can be found [here](#).⁴

- **Be circumspect.** Emotions sometimes run high when politics enter the workplace, even more so during election season. But sometimes workplace concerns over politicking involve no policy violations, or the behavior complained of is so prevalent that imposing discipline will only be perceived as selective enforcement. For example, what if Rick’s only faux pas was talking politics—albeit stridently—in the break room, where everyone’s talking politics anyway! Or his faux pas was one tweet from his workplace computer, but other employees are engaging in similar behavior and your computer use policy allows personal use on an “occasional, limited basis.” In these types of scenario, employers and supervisors should be wary of directing their authority to one employee; rather, some gentle reminders to all about civility, tolerance, and mutual respect is a better approach.

Similarly, employers should be very careful when considering banning t-shirts, hats, buttons, and other clothing and accessories that may convey a political position. By their nature such policies can put supervisors in the position of making content-based determinations, raising serious constitutional concerns. And, if in reality such a policy isn’t being enforced because it’s poorly drafted and/or the issues are too hot to handle, then it’s time to repeal or revise the policy.

- **Be impartial and even-handed and make that part of your organizational culture.** Few scenarios will sow the seeds of discord more than perceptions that supervisors are “playing favorites” or “picking on” employees, particularly if it revolves around personal political views. And, if that’s the reality, legal trouble awaits. Thus, do the groundwork to steer your organization far and wide of such problems. Through your policy, trainings, and “teachable” moments, remind your staff that municipal employees are expected to be nonpartisan and impartial when on-the-clock. Encourage a climate where there is buy-in to these concepts.

And set a good example yourself! Especially if you’re a supervisor, if you’re the one bringing your own political opinions into workplace discourse, then you can expect that everyone else will weigh in with their own opinions. If you then see that your work unit has diverted its attention to its own version of a tv talk show, perhaps you brought it on yourself. Supervisors who are “Ricks” themselves will have little credibility when called upon to address complaints of similar behaviors.

Also, remind employees to be even-handed with citizens, candidates, and outside groups during political season. Whether it’s a request for information or for use of your municipal facilities, the FCPA requires that such activities are not carried out in a manner that constitutes advocacy for a candidate or a particular point of view on a ballot issue.

- **De-escalate explosive situations.** Flare-ups involving workplace politics can become infernos if supervisors make missteps in addressing them. A common misstep is saying or doing something—usually in haste—that doesn’t fix issue but rather just takes it up a notch. For example, telling someone who complained about Rick to “just get over it”—or telling Rick “to stop the BS”—is only driving the issue toward further conflict.

As with any workplace complaint, employees expressing concerns must know that they’ve genuinely been heard, and that management understands their concern. And a soft indictment to correct inappropriate behavior will often achieve better results. After all, if Rick

understands that it is the impacts of his actions—rather than his intentions or views—that are the concern, he’s more likely to buy in to a request that he save politics for his personal time. You can also take steps “in the moment” to avoid flare-ups. At the first sign your staff meeting is veering into politics, steer the conversation towards other topics! “How about them Broncos?” is always a good pivot! Or ask about weekend plans, favorite barbeque recipes, the latest binge-worthy programming on Netflix, etc.! And, lastly, don’t feel like you must hang around if the discussion is making you uncomfortable or angry. It’s OK to detach yourself and do something else.

- **Investigate complaints promptly.** Unaddressed complaints don’t age well. Rather than going away, they usually become even larger elephants in the room. And ignoring a complaint can make investigation and resolution more difficult. Moreover, a practice of ignoring complaints can itself become an indefensible source of liability. Thus, even if a politics-in-the-workplace complaint does not appear to violate a policy, investigation is warranted.

A proper investigation should include, at a minimum, interviewing the complainant, the employee who is the subject of the complaint, and others with knowledge about what occurred. Any related e-mails or other documents should be reviewed. The investigation should be completed by appropriate personnel or, if necessary, an outside investigator. The facts of what occurred should be documented. Depending on the nature of the incident, the investigation need not be elaborate or time-consuming, but it needs to occur. Only after knowing the facts can your supervisors decide on an appropriate course.

Conclusion

According to an October 2019 [survey](#) by the Society for Human Resources Management, 42 percent of the employees polled said they have personally experienced political disagreements in the workplace. And a majority said discussion of political issues has become more common. Will this much political banter going on, it’s undoubtedly occurring in your workplace. And undoubtedly your supervisors will at some point be asked to “talk to Rick” or resolve some similar scenario involving workplace politics.

A lot of legal issues can arise in these situations, but with the proper planning and the right approach, your entity can successfully navigate the challenges of politics in the workplace this election season. And that ain’t just our opinion!

¹An employee who wins such a claim can be awarded lost wages and benefits as well as their attorney fees. C.R.S. Section 24-34-402.5(2).

²The recent decision in *Oranksy v. Martin Marietta Materials, Inc.* is illustrative. In this case, the employer terminated a sales supervisor for leading a protest against a major customer with whom the employee worked. The Court noted the purpose of the statute is “to provide a shield to employees who engage in activities that are personally distasteful to their employer, but which activities are legal and unrelated to an employee’s job duties.” While the court ruled for the employer, it stated that for an exception to apply, the activities must “have an inherent connection with employment and emanate from the duties of the job” or be “in direct conflict with the essential business-related interests of the employer.” *Oranksy*, 400 F.Supp.3d 1143 (D. Colo. 2019) (internal citations and quotations omitted).

³This statute states, in pertinent part that “[i]t is unlawful for any...employer...to make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his employees from engaging or participating in politics or from becoming a candidate for public office or being elected to and entering upon the duties of any public office.”

⁴The linked policies are samples only. Members should consult with their own legal counsel for legal advice on any proposed policy and legal issues arising from any specific workplace situation.