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OPINION: Employee Political Coercion Protections Are Weak


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Law360, New York (October 17, 2016, 12:03 PM EDT) -- In an election season as heated as this one, employers and employees alike may feel compelled to do whatever they can to help their candidate secure a victory in November. What many may be surprised to learn is that protections for employees — and restrictions on employers — are remarkably lax in this area.

Compounding problems — and making this area a particularly unsettled one — is that the law, post-Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), is murky regarding the sorts of activities in which employers may engage to encourage their workers to support their chosen candidate or political party. There are scanty protections against political affiliation discrimination available to employees. Moreover, there is an utter lack of clarity regarding the sorts of activities in which employers may engage to encourage their workers to support their chosen candidate.

At the outset, it is worth mentioning the one group that does enjoy nationwide protections against political affiliation discrimination: government employees. The First Amendment, incorporated against the states by the 14th Amendment, restricts the ability of government employers to discriminate against their employees on the basis of speech, including political speech.[1] Courts have held that such First Amendment political affiliation discrimination claims are evaluated under a burden-shifting approach similar to that used in Title VII and other anti-discrimination statutes:

> In political discrimination cases, non-policy-making employees have the threshold burden to produce sufficient direct or circumstantial evidence from which a rational jury could find that political affiliation was a substantial or motivating factor behind the adverse employment action. At that point the employer must articulate a nondiscriminatory basis for the adverse employment action and prove by a preponderance of the evidence that it would have been taken without regard to the plaintiff's political affiliation.
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> Wagner v. Jones, 664 F.3d 259, 270 (8th Cir. 2011) (quoting Rodriguez-Rios v. Cordero, 138 F.3d 22, 24 (1st Cir. 1998)).

Courts handling First Amendment political affiliation discrimination cases have further held that an "adverse employment action" occurs when the plaintiff suffers a "'material employment disadvantage' such as '[t]ermination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects.'" Okruhlik v. University of Arkansas, 395 F.3d 872, 879 (8th Cir. 2005) (quoting Duncan v. Delta Consolidated Industries, 371 F.3d 1020, 1026 (8th Cir. 2004)).

Thus, government employees responsible for making personnel decisions are proscribed from taking any actions that would result in such a "material employment disadvantage" because of an employee's political activities or affiliations. A recent decision by the U.S. Supreme Court made clear that public employees received such protections even for discrimination based on the decision maker's mistaken beliefs about the employee's political activities or affiliation. See Heffernan v. City of Paterson, 136 S. Ct. 1412, 194 L. Ed. 2d 508 (2016). In other words, if a public employee is terminated because her supervisor thinks she went to a Donald Trump rally — even if her supervisor was mistaken, and she had never attended a political rally in her life — her termination may constitute unlawful political discrimination in violation of the First Amendment.

Unlike public employees, private employees have no federal protections against political affiliation discrimination. In other words, barring some state or local law prohibiting such an action, a private employer could legally terminate an employee because that employee supported a particular candidate.

A small minority of states have passed laws prohibiting at least some forms of workplace discrimination on the basis of political activities or affiliation. In 2012, Eugene Volokh, founder of the Washington Post's "The Volokh Conspiracy" and law professor at University of California, Los Angeles, created a comprehensive rundown of the state political affiliation discrimination laws. See Eugene Volokh, Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation, 16 Tex. Rev. L. & Pol. 295 (2012).

In it, Volokh breaks the statewide political affiliation discrimination statutes into a number of groups, defined by the scope of the employee activity protected by the state political affiliation discrimination statutes:

Activity Protected by State Political Affiliation Discriminate Statute	State(s)
Engaging in Any Off-Duty Lawful Activity	Colorado and North Dakota
Engaging in Activity That Doesn't Create "Reasonable Job-Related Grounds for Dismissal"	Montana
Exercising "Rights Guaranteed by the First Amendment"	Connecticut
Engaging in "Recreational Activities"	New York
Engaging in Political Activities	California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, West Virginia
Holding or Expressing Political Ideas or Beliefs	New Mexico and (to some extent) Montana
Belonging to, Endorsing or Affiliating with a Political Party	District of Columbia, Iowa, Louisiana, Puerto Rico, Virgin Islands
Engaging in Electoral Activities	Illinois, New York, Washington
Signing Initiative, Referendum, Recall or Candidate Petitions	Arizona, District of Columbia, Georgia, Iowa, Minnesota, Missouri, Ohio, Oregon, Washington
Giving Campaign Contributions	Louisiana, Massachusetts, and Oregon
Exercising the "Elective Franchise" or "Suffrage," Which Might Include Signing Referendum or Initiative Petitions	Hawaii, Idaho, Kentucky, Tennessee, West Virginia, Wyoming, and Guam

The table is organized in descending order by the scope of the protections afforded.

What is important to recognize about the above table, however, is that the laws are organized from the perspective of the breadth of protections offered to employees, rather than the breadth of the restrictions placed on their employers. It is this issue which requires greater scrutiny, understanding and ultimately, legislative action.

The states placing the broadest such restrictions on employers are almost certainly California and Louisiana. California law states that no employer "shall make, adopt or enforce any rule, regulation or policy ... Controlling or directing, or tending to control or direct the political activities or affiliations of employees." Cal. Lab. Code § 1101. The statute continues, "No employer shall ... attempt to coerce or influence his employees through or by means of threat of discharge ... to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." Cal. Lab. Code § 1102. Similarly, Louisiana law states that no employer with 20 or more employees shall:

> "adopt or enforce any rule, regulation or policy which will control, direct or tend to control or direct the political activities or affiliations of his employees, [or] ... coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or loss of employment in case such employees should support or become affiliated

with any particular political faction or organization, or participate in political activities of any nature or character."

La. Rev. Stat. § 23:961.

Thus, in California and Louisiana, apart from the protections that exist prohibiting employers from terminating or otherwise retaliating against their employees because of their employees' political beliefs, employees are further provided with a right of action against employers who impose their own political beliefs onto their employees and coerce their employees to act in accordance with their beliefs.

What is shocking about those laws, of course, is not that they exist in California and Louisiana, but that these states are outliers. Laws protecting employees in other states are either weaker or nonexistent. And while federal law does purport to bar coercive political activities by private employers, see 52 U.S.C. § 30118(b)(3), it does not provide employees with a private right of action. Moreover, in the wake of Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) — in conjunction with recent paralysis on the part of the Federal Election Commission — the restrictions on coercive political activities by employers have been considerably weakened.

Most remember Citizens United as the decision that opened the floodgates of corporate political spending. What many didn't realize, however, was that the statute impacted by Citizens United — 2 U.S.C. § 441b, part of the Federal Election Campaign Act of 1971 — prohibited not just financial gifts from corporations, but "anything of value." 2 U.S.C. § 441b(b)(2). Thus, because compensated employee time was a "thing of value," corporations were not permitted to force employees to contribute to campaign activities because that time would constitute a prohibited in-kind contribution by the employer.

Following Citizens United, those restrictions have been weakened considerably, and few of the statewide protections against political affiliation discrimination would prohibit a private employer from requesting that its employees spend their workday making Gary Johnson placards. The Harvard Law Review published an in-depth analysis of this possibility in 2014. Citizens United at Work, 128 Harvard Law Review 669 (Dec. 10, 2014).

While Citizens United may have allowed employers to expend employee time in this way — and while corporations may solicit political contributions from their employees to a separate segregated fund, which in turn is permitted to contribute to federal candidates — federal law still prohibits employers from taking any coercive action in order to induce such a contribution. 52 U.S.C. § 30118(b)(3).

Thus, we turn last to two recent decisions by the FEC relating to a particularly aggressive Republican donor. Many will remember the outcry in 2012 when Robert Murray, Chief Executive Officer of Murray Energy, allegedly forced his employees to attend a rally for Mitt Romney. See generally Coal Miner's Donor, New Republic (Oct. 4, 2012). This prompted an FEC complaint brought by a Democratic-leaning group known as Progress Ohio, which alleged that the actions of Murray Energy constituted a violation of campaign finance laws. See Federal Election Commission Complaint of Brian Rothenberg (Sept. 24, 2012).

In 2015, the FEC deadlocked at 3-3, with the three Democratic commissioners voting to investigate Murray Energy, and the three Republican commissioners voting not to investigate. Accordingly, the FEC dropped its investigation of the company. Two Democratic commissioners later released a

statement lamenting the commission's nonaction, and making clear that they did not agree that corporations now had the right to force their employees to provide financial or other support for the corporation's political activities. See Statement of Reasons of Chair Ann M. Ravel and Commissioner Ellen L. Weintraub (July 23, 2015).

In May 2016, all three Democratic commissioners released a statement condemning yet another deadlock by the commission in yet another case against Murray Energy, this time regarding whether the company coerced its employees to contribute to the candidates of Murray's choosing. See Statement of Reasons of Vice Chairman Steven T. Walther, Commissioner Ann M. Ravel, and Commissioner Ellen L. Weintraub (May 20, 2016). Following a lengthy description of the facts and applicable law, the Democratic commissioners explained the import of the FEC's failure to pursue these allegations:

> This case strikes at the heart of one of key values of the American workplace; that employees should be free to maintain their personal political beliefs and not be compelled to participate or contribute based on their employers' interests. We voted to find reason to believe in this matter because we owe it to all employees to ensure that the workplace is free from political coercion. If the procedural acts which occurred here are scrutinized in any judicial proceeding in the future, it is our hope that the court will determine and clearly declare that, as a matter of law, there is reason to believe that a violation may have occurred as to each allegation of wrongdoing. In the absence of such a finding, corporations will feel they may ride roughshod over the rights of their employees in the manner alleged here.

The Republican FEC commissioners' refusal to investigate facially substantive claims is thus exacerbating the increased potential for coercive activity brought on by the Supreme Court's Citizens United decision. Sufficiently aggressive donors for sufficiently aggressive candidates, neither of whom are held in check by the agencies putatively empowered to restrain them, will make rules of their own, and the rest of us — including employees whose rights to nondiscrimination for refusal to bow down to the political will of their employers are virtually nonexistent — will be left to deal with the consequences.

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[1] Federal government employees are further subject to the Civil Service Reform Act of 1978 (CSRA), which "contains a number of prohibitions, known as prohibited personnel practices, which are designed to promote overall fairness in federal personnel actions. 5 U.S.C. § 2302. The CSRA ... provides that certain personnel actions can not be based on attributes or conduct that do

not adversely affect employee performance, such as ... political affiliation." EEOC, Federal Laws Prohibiting Job Discrimination Questions And Answers, https://www.eeoc.gov/facts/qanda.html (last visited Sept. 16, 2016).