

# Office Politics

Presidential election years put politics in the spotlight. Beyond local and regional contests, the attention of an entire nation becomes focused on issues that can be divisive and polarizing. These issues frequently find their way into the workplace, especially in the weeks leading up to the first Tuesday in November and in the immediate aftermath. Some employers shun the debate, some encourage it. Now for the rules:

## **Public v. Private Employers**

Public employers live in a different world than their private sector counterparts. The First Amendment to the U. S. Constitution, which protects a person's freedom of speech from government control, allows the heads of government a limited right to select direct reports and policymakers based on their political affiliation; but that's where the right ends, leaving the vast majority of public employees insulated from job losses tied to their political views. In stark contrast, private sector employers are not subject to the same limitations and can, at least under the Constitution, hire and fire any employee, regardless of the job they perform, based on their political outlook.

## **State & Federal Anti-Discrimination Laws**

While federal employment anti-discrimination laws prohibit private employers from making employment decisions based on a growing list of "protected" characteristics (such as race, color, sex, national origin, age and disability status), political affiliations are not among them. The same can be said of the state anti-discrimination laws on the books in Illinois and Missouri (although some states, such as New York, do go so far as to protect employees and job applicants from "political" discrimination).

To be sure, some Illinois and Missouri employment laws nibble around the edge of politics (for example, both allow for job protected leave if necessary to vote). Still, these state laws leave private employers in Illinois and Missouri with considerable leeway. The idea that these employers could hire and fire employees based on their political views nevertheless seems out-of-step with today's legal environment.

## **The National Labor Relations Board**

The increasing reach of the National Labor Relations Board gives weight to this concern (see *The NLRB's Attack on Employers Continues* in the October 2012 edition of this publication).

The NLRB enforces the National Labor Relations Act, the federal law that prohibits private employers from taking action against employees who seek "mutual aid and protection" in the work-



place, whether they are unionized or not. And when political activities are specifically undertaken to address broad workplace issues, such as immigration, sexual orientation, minimum wage and paid leave rights, the NLRB has made clear that it will seriously consider whether federal law restricts what private employers can do when they disapprove of an employee's corresponding political views.

For example, when workers across the country reported absent for work on May 1, 2006, to join rallies held for immigration reform (known as the Day Without Immigrants), the NLRB's message to employers was that any disciplinary action taken against the absent employees might be charged as an illegal act.

## **Conclusion**

For private employers in Illinois and Missouri, an NLRB charge remains the most obvious threat to decisions tied to the political views of applicants and employees. However, outside the NLRB's reach (which remains controversial and tenuous in this area of law), these employers retain the right to hire and fire employees based on their political views. Imagine that.

*Davis & Campbell law firm, located in Peoria, Illinois, exclusively serves business clients in employment, labor, employee benefits, corporate and tax matters.*