Top 10 Tips for Addressing Social and Political Issues in the Workplace

National Retail Federation, Employment Law Committee

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1. **Develop Policy Framework**
   - Prepare written policy that addresses communication about social and political issues
     - Scope of policy
       - Consider ability to discipline misconduct inside vs. outside the workplace
       - Consider whether conduct occurs during working time or not, even if in the workplace
     - Consider legal limitations
       - Lawful off duty conduct laws may restrict the reach of employers
       - Ensure policy is compliant with NLRA
   - Review existing policies that dictate behavioral expectations and incorporate by reference
     - E.g., Code of Conduct, anti-discrimination/harassment
   - Consider resources for employees to assist in compliance
     - Training for handling incidents involving colleagues/customers
     - EAP or other resources to provide support

2. **Avoid Unlawfully Overbroad Language**
   - Ensure that written policy does not contain unlawfully overbroad language
     - Explicitly restricting protected concerted activity (e.g., banning union activity)
     - Even if policy does not explicitly prohibit protected concerted activity, a rule might be unlawful if:
       - Employees would reasonably construe rule’s language to prohibited protected concerted activity; or
       - Applying rule to restrict exercise of protected concerted activities
     - Rules frequently litigated include
       - Confidentiality
       - Professionalism
       - Trademark
       - Photography/recording
       - Media contacts
   - Include exceptions for statutorily protected activities
   - Consider how individuals will perceive policy if published or made an exhibit at a hearing or trial
3. **Train and Provide Reminders Regularly**
   - Train employees so they have a clear understanding of policies and expectations for conduct
   - Periodically remind employees about policy so topics remain top of mind
   - Provide practical guidance to help employees understand policies in application
   - Ensure consistent message around the importance of topics, from senior management down

4. **Reserve Right to Monitor**
   - Reserve right to monitor workplace and online activities for policy violations
   - Expressly disclaim any expectation of privacy in the workplace or company-provided electronic communications equipment
   - Be aware of laws prohibiting or limiting surveillance
     - National Labor Relations Act
     - State laws
     - Common law expectation of privacy
   - Provide notice of monitoring
     - Providing notice helps eliminate any expectation of privacy
     - Some state laws, such as in New York, require employers to notify employees when monitoring electronic communications
   - Consider monitoring only upon notice of policy violations

5. **Evaluate Various Sources of Scrutiny and Pressure**
   - Legal risk
     - Individual claims, e.g., unlawful discrimination, retaliation, or discharge
     - Class claims, e.g., national origin discrimination
     - Regulatory scrutiny, e.g., National Labor Relations Board
   - Reputational risk
     - Topics lend themselves to increased possibility of employees/customers publicly airing grievances
     - Customers are increasingly using buying power as leverage with respect to social and political issues
   - Competitive risk
     - Employers may feel pressured, by employees, customers, or other stakeholders, to take a position alongside their peer organizations
     - In competitive market for talent, employers’ response to social issues has potential to attract/deter candidates
6. **Consider Employee Morale**
   - Advise employees that others may focus on impact, not intent, of their communications
   - When in doubt, follow the “golden rule”
   - Identify resources, such as leadership or EAP, for support

7. **Provide Outlet for Expression**
   - Create forum or space for facilitated dialogue on challenging topics:
     - Intranet
     - Company blog
     - Voluntary “town halls”
     - Small group meetings
   - Consider compromise (e.g., t-shirt v. small bracelet)

8. **Limit Liability**
   - Consistently apply policy, investigate alleged violations, and reprimands
     - Careful not to pick “winners” and “losers” amongst competing issues
   - When responding, consider whether subject of employee’s advocacy has a direct nexus to terms and conditions of employment

9. **Identify Corporate Priorities**
   - Consider impact of policy on company culture
   - Consider impact of policy on recruitment and retention
   - Be aware of allegations of “performative allyship” and “corporate hypocrisy”

10. **It’s Your Company**
    - At the end of the day, it is your company, so it is your choice
    - Consider all factors above
    - Make sure to think about all stakeholders, including employees, officers, shareholders, and the community
    - Be consistent