

3 Tips For Employers To Dodge Election Day Strife

By Vin Gurrieri

Law360 (November 2, 2018, 8:04 PM EDT) -- With millions of voters primed to pull the lever for their preferred candidates on Tuesday in a hotly contested midterm cycle, employers should be on alert to avoid legal trouble that can bubble to the surface when workers head to the polls on Election Day.

Amid reports of surging early voter turnout among a deeply divided electorate and with a slew of congressional, gubernatorial and local races appearing as if they will come down to the wire, political observers have speculated that far more voters may cast ballots on Tuesday than in previous midterm elections.

For employers, that means more of their workers may be looking to find time to head out to the polls to cast their ballots, creating a trickier puzzle than usual for employers in states that mandate paid time off for workers to go vote.

"I think it's definitely something employers are thinking about ... and frankly it's something that they are now required to think about because the majority of states do have some type of law on the books that will require them [to give workers time off to vote] and there are criminal and civil penalties for running afoul of those laws," said Amanda Carozza of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

Carozza, who practices out of the firm's Boston office, said employers can take different approaches to employee voting, with some electing to give workers a two-hour block to cast their ballots and others staggering workers' schedules.

Here, experts share three tips to keep employers on solid legal ground while ballots are being cast.

Mileage May Vary Across States

Most important for employers, particularly those that operate in multiple jurisdictions, is knowing exactly what is legally required of them in every locale where they operate when it comes to giving workers a chance to go vote.

Rules can vary drastically across state lines in numerous aspects, including whether employers must provide time off, the amount of time workers get, if it must be paid and if workers have to notify their employers in advance that they are taking time off to vote. Some states are silent on the topic and have no legal requirements in place at all when it comes to affording workers time to vote.

As an example, Anne Cherry Barnett, a California-based employment lawyer at Polsinelli PC, said employers in her state are required to post a notice advising workers that they can take a paid two-hour leave to vote in statewide elections.

That notice has to be posted 10 days before an election in a conspicuous location, Barnett said while also cautioning that the paid-time mandate only applies if workers in the state don't have enough time outside their normal working hours to make it to the polls.

"A best practice, and I think this [applies] nationally and not just for California, is to require employees to take the time either at the beginning or at the end of their shift [to vote] ... because usually productivity is a little lower at the start and end of their shift," Barnett said. "It's a good time to have them take off to vote."

Explain Policy in Advance

But whether a California employer has a two-hour paid time off policy, or a business in another state has a policy designed to comply with a different set of requirements, attorneys said it's incumbent on employers to make sure workers know what's happening well before election day, to cut down on potential confusion and problems.

"It's like most employment issues — it's about communication of expectations and everybody being on the same page and understanding what [their] obligations are," said Ed Harold, regional managing partner in Fisher Phillips' New Orleans office.

Up-front talks with employees are an important step for employers to get out in front of any issues that can crop up, Harold said, noting that those sessions offer businesses a chance to make sure workers know what the Election Day procedures will be and provide a forum to encourage workers to make plans for voting that balance the potential for things like long lines with their job responsibilities.

"I think the best practice with all this, regardless of [employers'] state law obligations, is to make sure you're in touch with your employees up front about what your expectations are, and that voting is not an excuse to skip work if you haven't scheduled to be off," Harold said. "You need to talk to them about what you're going to do if you're in one of those places that requires the two hours off for them to vote, you let them know up front, 'This is what it's going to be.'"

Besides just verbal communication, Carozza said it's also important for employers to have a clear written policy in place that falls in line with each state where they operate, noting that many states have quirks in their rules that can easily go unnoticed, like those that require workers who took paid time off to bring receipts to their employers proving they voted.

"It's one thing to have the policy in place, but [another thing] if employees don't know that they have the right or the ability to [take time off]," she said, adding that "it's a good practice for all employers to notify their employees so they can make sure they're using that time" even if their state doesn't have notice-posting requirements like California.

"I think the best middle ground is giving employees some time off but doing it at either the beginning of the day or the end of the day so that you're not disrupting the middle of the workday," Carozza said.

Be Alert to Politically Charged Debates

Beyond knowing and communicating the legal requirements when it comes to Election Day procedures, a broader concern for employers is understanding how to handle situations in which workers bring their political opinions into the workplace.

For example, workers could get into a debate about their preferred candidates or policies that turns into a heated screaming match, or try to raise money from colleagues for favored causes, or simply wear a sticker or button indicating they voted for a particular candidate.

Any of those scenarios and others could become legally perilous for employers if they are mishandled, particularly in situations where political conversation between colleagues goes off the rails, attorneys say.

Harold noted that many instances have arisen over the years — and particularly during the Obama administration — of political conversations that “bleed over” into issues like race, sex and religion and contain content and tone that may violate a business’ harassment policy.

“There’s no general rule that says you have to allow employees to discuss politics in the workplace,” Harold said. “On the other hand, do you really want to involve yourself in your employee break-room discussions? Employers do have the ability to say to their employees, ‘Look, we understand there are lots of people with lots of different views and we feel that these discussions can lead to ill feelings among employees. Please do not have political discussions during working time.’”

While Barnett said employers should generally want to have their workers engaging in any conversation that interests them, employers still ought to approach carefully any incident where workers’ discussions veer into territory that is harassing, discriminatory or otherwise improper.

“As somebody who counsels employers, I would probably tell them to stay out of it unless there’s an issue that comes up and needs to be dealt with,” Barnett said. “Talking about the election isn’t necessarily inappropriate, but if there are particular issues that come up that are sensitive, that may cross the line in terms of what makes employees comfortable or uncomfortable in the workplace, I think you want to treat those conversations in the same way you would anything that doesn’t have to do with the election.”

Carozza said an onus in those situations falls on managers to be “up to speed and be trained on what’s appropriate and what’s not” during election time, and that businesses themselves should also steer clear of communicating overtly partisan messages to their workers.

“Definitely, any discussion coming from an employer should be focused on just encouraging the act of voting and not be partisan in any way,” Carozza said. “The fact that there will be some discussion amongst employees is inevitable, but I think as long as employers have good policies about harassment and workplace conduct, that will hopefully prohibit it from getting out of hand.”

--Editing by Pamela Wilkinson and Alanna Weissman.