

When Voting Rights and Politics Enter the Workplace

Salvador Simao and James Davies,

October 2014

A fundamental right of citizens in both the U.K. and the U.S. is the right to vote and to associate with the political party of their choice. Depending on the jurisdiction, employers may be prevented from infringing on these rights in various ways. For example, some jurisdictions require that employees be provided paid time off to vote, whereas others impose no such requirement. Surprisingly, most jurisdictions do not expressly prohibit discriminating against employees based on their political affiliation, which is not considered a protected class in most jurisdictions in the U.S. or the U.K. The article below provides an overview of an employer's obligations when dealing with issues related to voting leave laws and political affiliation.

Voting Leave Laws

Although no U.S. federal law requires employers to give employees time off to vote during the work day, 32 states and Puerto Rico have enacted such laws. The U.K. has not enacted similar legislation.

Most states' voting leave laws require employers to provide employees "necessary" time off to vote, unless polls are open for a period of time before and after the employee is scheduled to work. Depending on the state, this time off may be paid or unpaid. These laws also generally require employees to provide some sort of advance notice to employers of their intention to take time off to vote.

Eighteen states have no laws requiring employers to provide their employees time off to vote. The following charts list the states that mandate some form of voting leave and the requirements of each state's law.

States That Require Employers to Provide Unpaid Voting Leave

Ten states and Puerto Rico require employers to provide unpaid leave or provide accommodations that will allow their employees to vote:

State	What Time Off Is Required?	Is Advance Notice Required?
Alabama	"Necessary" unpaid time off to vote, not to exceed one hour, unless polls open at least two hours before and close at least one hour after regular working hours.	Yes, employees must provide "reasonable" notice.

Arkansas	Employers must schedule work hours that permit employees an opportunity to vote.	No.
Georgia	Up to two unpaid hours, unless polls are open two hours before or after working hours.	Yes, employees must provide “reasonable” notice.
Kentucky	At least four unpaid hours to vote or cast an absentee ballot.	Yes, prior to the election date.
Massachusetts	As to employees in manufacturing, mechanical, or mercantile establishments only, unpaid time off during the first two hours polls are open.	Yes.
Mississippi	Employers may not deny employees time off to vote.	-
Nevada	“Sufficient” unpaid time (one to three hours) to vote if it is impracticable for the employee to vote during the employee’s nonworking hours.	Yes.
North Dakota	Employers are encouraged to provide time off to vote if polls are not open outside regular working hours.	-
Ohio	“Reasonable amount of time” to vote.	No.
Puerto Rico	The day of the general election is a legal holiday. Employers in continuous operation on the day of the election must establish shifts that will permit employees time to vote.	No.
Wisconsin	Up to three consecutive unpaid hours.	Yes, prior to election day.

States That Require Employers to Provide Paid Voting Leave

Twenty-two states require some form of paid voting leave. Additionally, laws in California and New York require employers to post a specific notice of employees’ voting rights at least 10 days before an election, in addition to providing paid time off to vote:

State	What Time Off Is Required?	Is Advance Notice Required?
Alaska	Paid time off to vote, unless polls are open two hours before or after a regular work shift.	No.
Arizona	Up to three hours of paid time off, unless polls are open three consecutive nonworking hours.	Yes, employees must request time off in advance.
California	Two paid hours at the beginning or end of employees’ regular working shift.	Yes, at least two days in advance of the election.

Colorado	Up to two paid hours, unless polls are open three or more nonworking hours.	Yes, prior to the election date.
Hawaii	Up to two paid hours, excluding lunch and rest periods, unless polls are open two consecutive nonworking hours. However, leave time may be recouped if it is later verified that the employee did not vote.	No.
Illinois	Two paid hours, unless polls are open two nonworking hours.	Yes.
Iowa	Such time that will, in addition to nonworking time, total three consecutive hours while polls are open. Time off must be paid.	Yes, employees must apply individually and in writing.
Kansas	Up to two paid hours, exclusive of meal and rest breaks, unless polls are open at least two consecutive nonworking hours.	No.
Maryland	Up to two hours, unless polls are open two consecutive nonworking hours. Time must be paid with proof of vote.	No.
Minnesota	The necessary amount of time to appear at the employee's polling place, cast a ballot and return to work. Time off must be without penalty or deduction from wages.	No.
Missouri	Up to three paid hours, unless polls are open three consecutive nonworking hours.	Yes.
Nebraska	Two consecutive hours, which includes time off (paid) in addition to nonworking hours in which to vote.	Yes.
New Mexico	Up to two hours, unless polls are open at least two hours before or three hours after regular working hours. Time off must be paid to avoid a "penalty" on employees.	No.
New York	"Sufficient time," unless polls are open for four consecutive hours outside regular working hours. If polls are not open for four consecutive nonworking hours, up to two hours paid time off at the beginning or end of the shift.	Yes, employees must provide at least two but no more than 10 days' advanced notice.
Oklahoma	Up to two paid hours, or "sufficient time" if two hours is insufficient, unless polls are open three hours before or after regular working hours.	Yes, the employee must notify the employer orally or in writing the day before the election.

South Dakota	Two paid hours, unless polls are open two consecutive nonworking hours.	No.
Tennessee	Two paid hours, unless polls are open two consecutive nonworking hours.	Yes, before noon on the day prior.
Texas	Employers must permit employees to take time off to vote, unless polls are open two consecutive nonworking hours. It is unclear whether time off must be paid, as employers may not threaten a loss of wages for voting.	No.
Utah	Up to two paid hours, unless polls are open three or more nonworking hours.	Yes, prior to the election day.
Washington	“Reasonable time up to two hours,” excluding meal or rest breaks, unless polls are open at least two hours before or after regular working hours.	No. Additionally, law is not applicable if work schedule is announced sufficiently in advance for employee to obtain absentee ballot.
West Virginia	Up to two paid hours, unless the employee has three nonworking hours in which to vote, and the employee does not vote during that time.	Yes, in writing at least three days prior to election day.
Wyoming	One paid hour, excluding meal times, unless polls are open three consecutive nonworking hours.	No.

Political Affiliation Discrimination

There is no U.S. federal law that protects private-sector (nongovernmental) employees from political affiliation discrimination, and only a few states prohibit such discrimination. Similarly, in the U.K., only Northern Ireland requires that political affiliation be considered a protected class.

The U.S. Legal Perspective: “Free Speech” and Private Employers

While the First Amendment of the U.S. Constitution protects an individual’s right to free speech, this protection only applies to state action—that is, action taken by federal, state or local governments. The First Amendment does not protect employees from action taken by private employers. Accordingly, it would not violate the Constitution to terminate an employee for expressing views contrary to those of the employer. Such actions, may, however, violate other federal laws.

Private employees have some free speech protections under the National Labor Relations Act (NLRA). The NLRA protects the right of nonsupervisory employees to engage in free speech and other protected concerted activities for their “mutual aid and protection.” Generally, this law restricts an employer’s right to limit workers’ communications about wages, hours, and the terms and conditions of employment during

nonwork time in nonwork areas. However, these topics may dovetail with political positions, making it increasingly difficult to draw a line between “concerted activities” and “political activities.” For example, minimum-wage rates or employee health benefits could be seen as both social and political issues.

However, employers generally are free to limit employees’ political speech during working time and in the workplace. Generally, private employers may ban from the workplace any nonwork-related activities, including political activities. For example, private employers generally may prohibit employees from displaying campaign or issue-oriented materials at their workstations, distributing “political” materials or leaflets in the workplace, soliciting support or donations for candidates or issues, wearing political insignia advocating candidates or issues, and using the employer’s computers or communications systems for political speech.

That said, some state laws do protect employees against adverse actions based on political activities, or otherwise limit employers’ conduct directed toward employees’ political activity. The following chart lists these states and describes the applicable law:

State Laws That Protect Employees’ Political Activities

State	Prohibited Conduct
California	Employers may not: take adverse actions against employees because of lawful off-duty conduct; establish policies that limit workers’ participation in politics; bar employees from becoming candidates for public office; or mandate, direct or require certain political action, affiliation or activity.
Connecticut	No person may, within 60 days prior to any election, attempt to influence the vote of any employee by threats of withholding employment or promises of employment, or dismiss any employee on account of any vote the employee has made.
Florida	Employers may not discharge or threaten to discharge any employee for voting or not voting in any state or local election.
Idaho	Employers may not discharge or threaten to discharge any employee to influence the employee’s vote.
Illinois	Employers may not maintain a record of employees’ off-duty political activities.
Louisiana	Employers may not establish rules or policies that prohibit employees from participating in politics or threaten adverse action for an employee’s political activities.
Maryland	In the 90 days prior to an election, employers may not display any threat intended to influence employees’ political opinions or actions.

Massachusetts	Employers may not attempt to influence employees to give or withhold votes or political contributions, including taking an adverse action against the employee or rewarding an employee through higher wages or favorable employment status.
Michigan	Employers may not discharge or threaten to discharge an employee for the purpose of influencing the employee's vote.
New Jersey	Employers may not attempt to influence employees to vote or not vote or to vote for any particular candidate.
New York	Employers may not discriminate based on an employee's "political" or "recreational" activities, including running for public office, campaigning for candidates, or participating in political fundraising activities.
Ohio	Employers may not attempt to influence political action through printing statements on pay envelopes or posting posters or other materials threatening that the establishment will cease if a candidate is elected or defeated, or any other threat to influence voters.

The level of employee protection and the restriction on employers' activities can vary quite a bit, depending on the state. Additionally, certain states broadly protect employees' "off-duty" conduct, including political activities. For example, California law prohibits employers from taking adverse actions against employees because of "lawful conduct occurring during nonworking hours away from the employer's premises," and further prohibits employer policies that limit workers' participation in politics, bar employees from becoming candidates for public office, require workers to adhere to any particular political action or activity, or control or direct political activities or affiliations of employees. In Illinois, employers may not maintain a record of employees' off-duty political activities. New York's "off-duty conduct" law prohibits employer discrimination based on an employee's "political" or "recreational" activities, including running for public office, campaigning for candidates or participating in political fundraising activities.

The U.K. Perspective

Northern Ireland, unlike the rest of the U.K., specifically outlaws discrimination on political grounds. The Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) makes it unlawful to discriminate on grounds of religious belief or political opinion in relation to employment. This law exists because of the sectarian tensions in Northern Ireland, but it does not simply protect Catholics, Protestants, nationalists and unionists.

Under FETO, an individual can complain that he or she has been directly or indirectly discriminated against, harassed or victimized. Direct discrimination occurs when someone is treated less favorably on grounds of their religion or political beliefs. For example, an employer withdraws a job offer because the applicant is a member of Sinn Féin.

Indirect discrimination is when an employer utilizes a provision, criterion or practice that applies to everyone but which impacts disproportionately on a protected group, putting members of that group at a disadvantage. This might happen if an employer with a workforce drawn predominantly from one section of the community does not advertise vacancies but seeks internal recommendations. This could disadvantage potential applicants who are not part of that community. Indirect discrimination is not unlawful if it can be “justified,” in other words, if the employer can show the practice to be a proportionate means of achieving a legitimate aim.

Harassment on grounds of religion or political belief also is unlawful under FETO. Harassment is unwanted conduct that has the purpose or effect of violating someone’s dignity or creating an intimidating or offensive environment for that person. It is not necessary for a perpetrator to have intended to create this environment, provided the conduct had the “effect” of doing so. For example, an individual who tells jokes about “Prods” might well be harassing Protestant colleagues.

Workers are also protected against being “victimized” (retaliated against) because they alleged discrimination, brought discrimination proceedings or helped someone else to do so—or because the employer suspected they had or might do so.

FETO does not apply in the rest of the U.K., but political discrimination is still a potential issue. Under the Equality Act 2010, workers are protected from discrimination on grounds of “religion or belief,” where belief means any “religious or philosophical belief.” The same protection against direct and indirect discrimination, harassment and victimization applies as under FETO. It is not certain to what extent political beliefs fall within this definition. The Employment Appeal Tribunal in the case of *Grainger Plc and others v. Nicholson* held that, although support of a political party is not itself sufficient to qualify for protection, a belief in a political philosophy or doctrine, such as socialism or free-market capitalism, might be. However, a government spokesman has said that it was not the government’s intention to protect political beliefs when it enacted the legislation. Since then, different employment tribunals have reached different decisions as to whether political beliefs are covered.

But irrespective of this, employees do have some protection against dismissal because of political affiliation. This is a result of a decision by the European Court of Human Rights (ECHR) in the case of *Redfearn v. The United Kingdom*. Redfearn was a driver for a local authority in Bradford, a city with a large Asian population. He was also a local-election candidate for a far-right political party, the British National Party, whose membership was limited to white nationals and was committed to reversing nonwhite immigration. There had been no complaints about Redfearn’s work, but his employer dismissed him saying his presence could cause anxiety to his Asian passengers. Redfearn did not have sufficient service for an unfair dismissal claim. He applied to the ECHR, claiming a violation of his rights to freedom of expression and to freedom of assembly under the European Convention on Human Rights. The court

accepted that his rights had been breached and held that the qualifying period for unfair dismissal protection should be not be applied for employees dismissed on account of their political affiliations. The U.K. government has since amended the law.

There is no right to time off to vote anywhere in the U.K. Polling stations are open between 7 a.m. and 10 p.m., and it is also possible to obtain a postal or proxy vote, so no one should need time off from work. But employers should be alert to the risk of discrimination and aware that employees dismissed for political associations can bring unfair dismissal claims from the first day of employment (unlike other unfair dismissal claims, which require two years' service). Employers should have a policy prohibiting all forms of harassment, and managers should ensure that they do not treat employees differently because of their politics. Employers also should consider how their criteria or practices might impact disproportionately on different groups, and whether these criteria or practices are justified. Finally, if contemplating dismissal, an employer should consider whether the behavior of the individual really justifies it. The employer should investigate properly (rather than assume that there will be problems) and follow a fair dismissal procedure, including offering a right of appeal.

Conclusion

Multinational employers should be aware of the jurisdictional requirements related to voting and political affiliation. Generally speaking, there are not many statutory protections associated with voting and political affiliation, which may cause employers to become complacent about these issues. However, as discussed above, some jurisdictions have stringent requirements regarding both voting leave laws and protections associated with a person's political affiliation. Employers should conform their behaviors in these jurisdictions to ensure compliance with any applicable law.

Salvador Simao is a partner in FordHarrison's Berkeley Heights, N.J., office. He focuses his practice on the representation of companies in employment law matters, with a specialization in wage and hour litigation and compliance. He also frequently defends employers against allegations of age, race, national origin, disability and sex discrimination; sexual and racial harassment; and retaliation. He also cochairs the discrimination international practice group of Ius Laboris, the global human resources law firm alliance of which FordHarrison is the sole U.S. member. James Davies is a partner and joint head of Lewis Silkin's employment, reward and immigration department. His particular interests include discrimination law, the role of new technologies in the workplace and international employment law. He is a member of the U.K. Employment Lawyers' Association's Legislative and Policy Committee and chairs a number of its working groups. He is also a member of the European Employment Lawyers' Association. Lewis Silkin is the U.K. member firm of Ius Laboris.

*This article was originally published in **Corporate Counsel** – the online version can be found [here](#).*

