YOU WON THE ELECTION – NOW WHAT?
With 1st Amendment Rights of Employees
CONGRATULATIONS!

YOU WON THE ELECTION: NOW WHAT?

You want your own administration

QUESTIONS?

Who stays? | Who goes?
If you’re not sure if you can dismiss an employee...

Talk to your attorney or your HR Director before taking any action.
Can you fire anyone you want when setting up your administration?
Can you fire anyone you want when setting up your administration?

NO!
The First Amendment protects most public employees from being terminated for political reasons.
THE GENERAL RULE

If you dismiss an employee because of their:

- Political Activity
- Political Affiliation
- Speech

You can be liable for violating their Constitutional rights under the First Amendment.
The clearest example of a First Amendment violation is when a new administration dismisses everyone hired by or known to support, the former administration.  

Dismissing a **GROUP** of employees is compelling evidence a new administration is weeding out supporters of an opposing political party.
A reorganization which causes some eliminated positions is OK, provided it wasn’t a PRETEXT for getting rid of employees for political reasons.
An employee can be discharged for a good reason or no reason, as long as it’s not an ILLEGAL reason.

If you fire someone because of their political affiliation, activity, or speech, you can be liable for violating their Constitutional rights.
CAUTION:
Dismissed employees may claim the reason for their dismissal was because of their support for the other political party.
In order to win their case, a terminated employee must demonstrate:

1. His or her conduct was constitutionally protected,

2. The conduct was a SUBSTANTIAL or motivating factor in the employment decision.
THE GENERAL RULE: CAUTION

If a fired employee attended rallies, fundraising activities, or other campaign events for an opponent, that conduct is protected.

The employee must prove the new official KNEW about the activities.

The mere fact the employee was registered to vote for the other party is not enough to show the discharge was politically motivated.
THE GENERAL RULE: CAUTION

Even politically neutral employees can show they were discharged for political reasons with evidence they were fired for refusing to support the winning candidate.

Usually, someone who is NOT politically active or affiliated with the opposing party CANNOT show that political motivation drove the decision to fire them.
THE GENERAL RULE: RISK MANAGEMENT

TO AVOID LAWSUITS:
Document the non-political reason the employee was dismissed.

If an employee demonstrates that political affiliation was a factor for discharge, the burden shifts to the EMPLOYER to prove the dismissal was for a legitimate, non-political reason.
If you can’t provide a good explanation why the employee was dismissed, the evidence of political motivation is more likely to gain a foothold toward proving a First Amendment violation.
What about policy making positions?
EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS

High-ranking public officials who provide meaningful input into developing policies and goals can be dismissed, *even for political reasons*.
EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS

When the employer can demonstrate that political loyalty is an appropriate requirement for the effective performance of the public office involved, the general rule does not apply. ²

Purpose:
To facilitate implementation of the new executive’s policies, goals and direction.

After all, that’s why the voters elected you!
Employees who are policymakers and political enemies of a new administration could undermine the newly elected official.

The difficult question is whether or not the employee is a policymaker.
EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS

Does the position authorize, directly or indirectly, meaningful input into decision making on issues where there is room for principled disagreement on goals and their implementation?
EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS

Examples:
• A police or fire chief
• Directors of departments who answer directly to the mayor
• Officials appointed by the previous mayor
EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS

The specific nature of the position determines whether it involves policymaking.

• Employees’ own descriptions of day-to-day work are usually not relevant if there is a job description to the contrary.

• If no job description, testimony about the job is relevant to the question of policy maker status.
What about employees in confidential positions?
An employee who holds a confidential and trusted position can be dismissed even for political reasons.

3. Faughender v. City of North Olmstead, Ohio, 927 F.2d 909 (6th Cir. 1991). See also, Soderbeck v. Burnett County WI., 752 F2d 285 (7th Cir.1985) and Meeks v. Grimes, 779 F2d. 417 (7th Cir. 1985)
Example: a mayor’s secretary, who is trusted with confidential and sensitive information. While not a policymaker, someone in this position could undermine the new mayor’s ability to manage effectively.
EXCEPTION TO THE GENERAL RULE # 2 – EMPLOYEES IN CONFIDENTIAL POSITIONS

As one court explained:
“"A mayor’s secretary must undertake those functions in relation to the flow of information, whether by writing, speech, or personal visit, to and from the mayor’s office that the mayor wants the secretary to perform."”

3. Faughender v. City of North Olmstead, Ohio, 927 F.2d 909 (6th Cir. 1991). See also, Soderbeck v. Burnett County WI., 752 F2d 285 (7th Cir.1985) and Meeks v. Grimes, 779 F2d. 417 (7th Cir. 1985)
EXCEPTION TO THE GENERAL RULE # 2 – EMPLOYEES IN CONFIDENTIAL POSITIONS

A particular secretary’s duties may be limited, but the function of the office is constant.

As political action cannot occur without communication, a position that controls the lines of communication of a political actor must be inherently political.

3. Faughender v. City of North Olmstead, Ohio, 927 F.2d 909 (6th Cir. 1991). See also, Soderbeck v. Burnett County W.I., 752 F2d 285 (7th Cir.1985) and Meeks v. Grimes, 779 F2d. 417 (7th Cir. 1985)
A mayor’s secretary is clearly the type of position that involves access to confidential and political material, and political loyalty, whether partisan or personal, is an essential attribute of the job.\(^4\)
WARNING!

Because these claims are almost always litigated in federal court, a successful plaintiff can collect attorney’s fees which are often more than the compensatory damages.
Duties Defined by Statute
Sometimes duties are defined by statute.

A deputy county auditor was a policymaking employee under the statute governing deputy auditors and other deputies of county office holders. 5

5. Kline v. Hughes, 131 F.3d 708 (7th Cir. 1997).
Duties Defined by Statute

Indiana Code 36-2-16-3(a) allowed an appointed deputy to perform all the official duties of the appointing officer and is subject to the same regulations. *Id.*

The statutes used to reach this conclusion would apply to a deputy treasurer.

Indiana Code 36-2-16-4 allows specified officeholders, including the auditor, to appoint first deputies and other deputies of her choosing. *Id.*

The court concluded the statutory scheme resulted in a deputy auditor having inherent policymaking authority as a matter of law.

LAWSUITs by employees alleging adverse employment actions because of their political activities or affiliation can CRIPPLE New Administration TIE UP RESOURCES COST HUGE AMOUNTS OF $
If you’re not sure if you can dismiss an employee...

Talk to your attorney or your HR Director before taking any action.
THANK YOU!
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