

Social and Political Expression In (and Outside) the Workplace During A(nother) Divisive Election Year

Presenters:

Paul Kehoe, Vice President, Senior Assistant General Counsel, Leidos
Susannah Wright, Associate General Counsel, Chief Employment Counsel, MITRE; and
D'Ontae Sylvertooth, Shareholder, Ogletree (Washington)

Moderator:

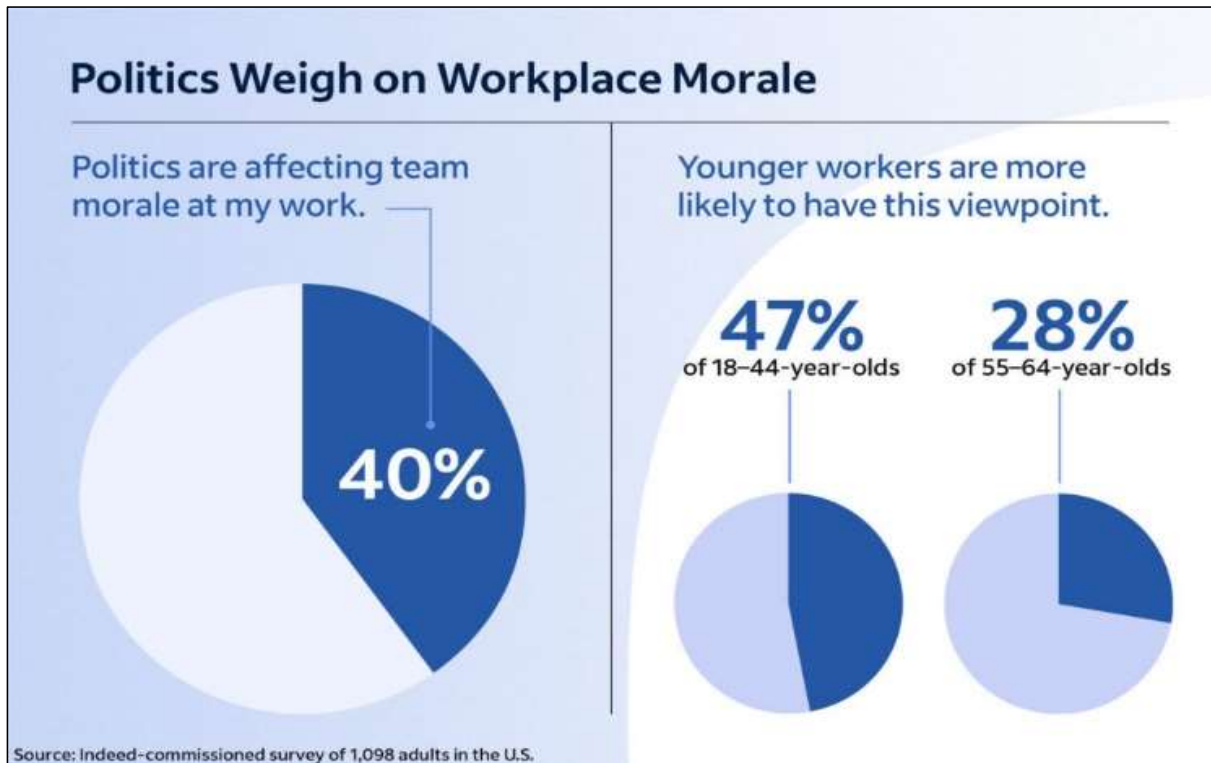
Mike Murphy, Shareholder, Ogletree (Washington)

June 5, 2024

Why Is This Topic So Important?

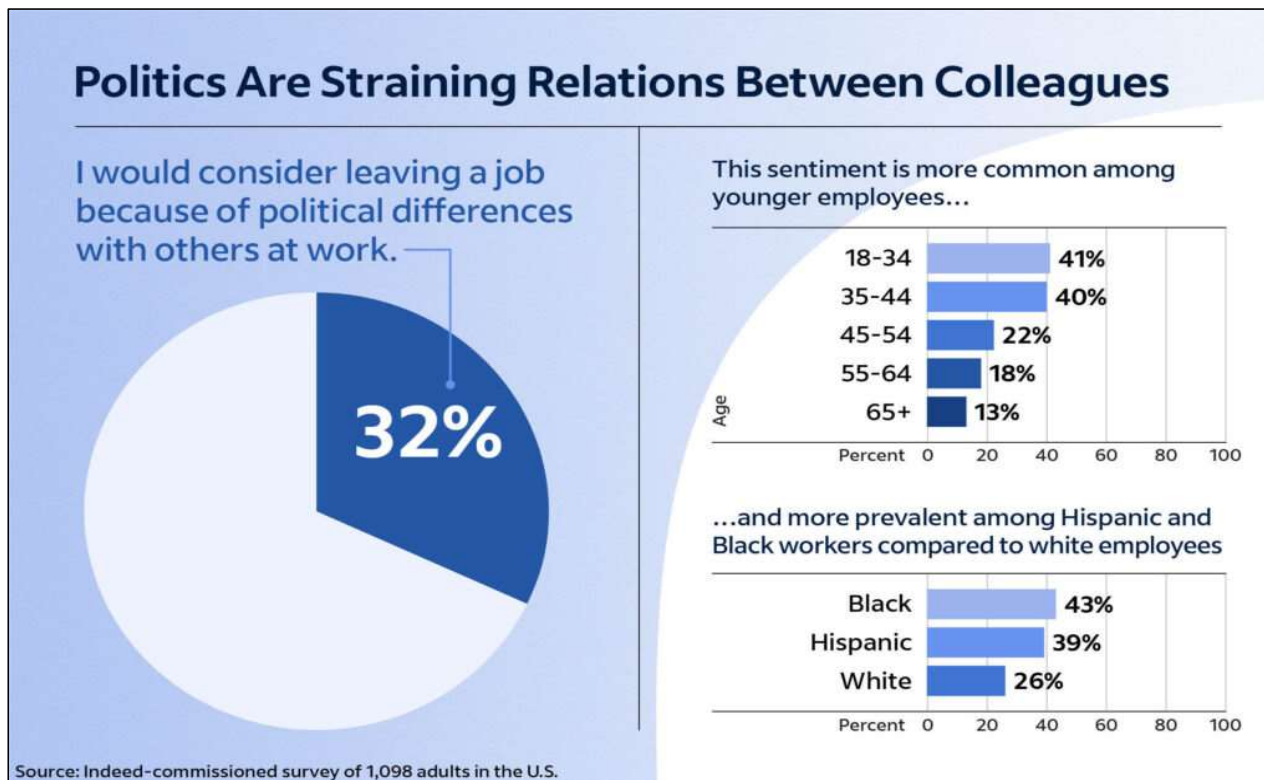
- Our society/communities (employees) are more polarized than ever
 - A September 2023 survey by the Pew Research Center found that nearly 65% of Americans say they always or often feel exhausted when thinking about politics, while 55% say they feel angry.
 - An October 2023 report by the Public Religion Research Institute found that 23% of Americans now agree that political violence may be necessary “to save America” up from 15% in 2021.
 - Politicians are (or at least act like they are) more ideologically polarized with less overlap, or willingness to compromise

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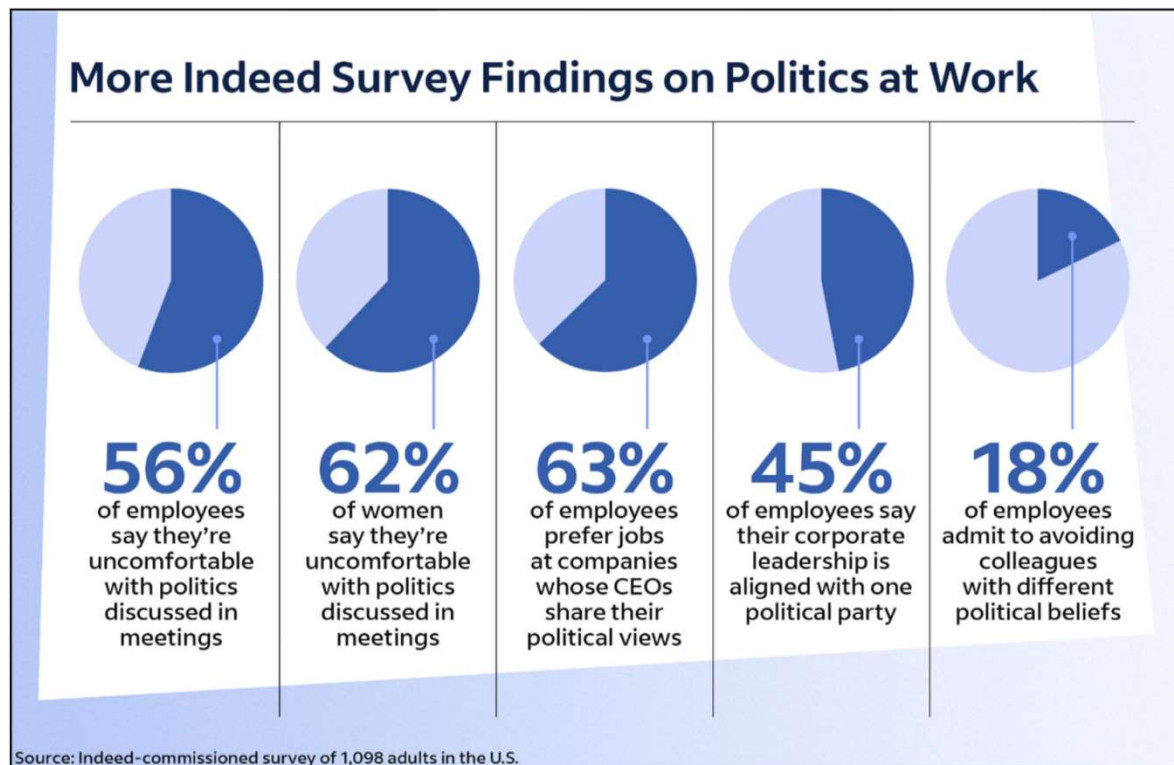
March 12, 2024 Indeed "Lead" Article, "Navigating Politics in the Workplace during a Divisive Election Year," Harris Indeed Survey, January 30-February 1, 2024.

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- Polarization (real or perceived) has consequences
 - People won't talk, much less listen to each other
 - Automatically wrong, stupid, idiot, dumb, etc.
- *Antithesis* of respectful, collaborative, and engaged workforce most companies trying to create and support
- Presents operational challenges, including safety
- Result in policy violations and legal exposure

Why Is This Topic So Important?

“Unfortunately, we’ve seen a real decline in civility when people express their opinions and beliefs, and it’s a barrier to success for employers and their employees. This trend has been fueled by the relative anonymity of social media, and it has spilled into our communities and our workplaces. In today’s climate, people are saying ‘I can’t work with you if you don’t share my views’”

Johnny C. Taylor, Jr. – SHRM President and CEO

The Ties That (Do Not) Bind Us

- Political and Social issues
 - Immigration
 - Guns
 - Reproductive Rights
 - Crisis in the Middle East
 - DEI
 - Presidential Campaigns
- Religion
- Gender, gender identity, and expression
- Race, color, national origin, and ancestry

What's an Employer to Do?

- Today we will cover:
 - The laws that apply (or don't apply) to on-duty or off duty political speech and conduct
 - Best practices on responding in compliance with applicable law
 - Other, non-legal considerations
 - Employee morale
 - Corporate culture
 - Public perception/relations

Free Speech and Private Sector Employees

Poll #1

Does the First Amendment of the Constitution protect private sector employees who engage in a workplace protest and speech to bring attention to a social or political issue?

1. Yes
2. No
3. Maybe

Free Speech and Private Sector Employees

Poll #2

Does the National Labor Relations Act (NLRA) protect private sector employees who engage in a workplace protest and speech to bring attention to a social or political issue?

1. Yes
2. No
3. Maybe

Free Speech and Private Sector Employees

- First Amendment only covers federal, state, and local government employees
- Courts have held that First Amendment protections do not generally extend to the employees of private sector employers
- But the NLRA and the NLRB's caselaw on Protected Concerted Activity may provide some protection (more on that later)
- And some state laws may provide some protection (more on that later)
- Management Rights generally prevail
 - Most states, employment is at-will
 - The at-will doctrine may be altered by contract like an employment agreement or a labor contract that provides for only "just cause" termination
 - Employer Policies
 - Code of Conduct
 - Computer and Email Usage
 - Social Media
 - Intellectual Property, Confidentiality, Trade Secret
 - Anti-harassment and Non-discrimination
 - Health and Safety

Free Speech and Private Sector Employees

Meta bans staff from discussing 'very disruptive' topics including abortion, gun rights, and vaccines in new 'community engagement expectations'

BY [KYLIE ROBISON](#)

December 6, 2022 at 3:20 PM EST



fortune.com

“As Mark [Zuckerberg] mentioned recently, we need to make a number of cultural shifts to help us deliver against our priorities. We’re doing this to ensure that internal discussions remain respectful, productive, and allow us to focus. This comes with the trade-off that we’ll no longer allow for every type of expression at work, but we think this is the right thing to do for the long-term health of our internal community.”

Meta spokesperson to techcrunch.com on December 6, 2022

Free Speech and Private Sector Employees

Poll #3

Does your Company permit employees to discuss controversial social and political issues at work?

1. Yes
2. No
3. Maybe

Free Speech and Private Sector Employees

Poll #4

Does your Company have a code of conduct that establishes standards for respectful speech by and among co-workers at work?

1. Yes
2. No

Free Speech and Private Sector Employees

Poll #5

Does your Company have a code of conduct that establishes standards for the acceptable use of and expression on employer email or other employer communication channels like Slack or Teams?

1. Yes
2. No

Free Speech and Private Sector Employees

Poll #6

Does your Company have a code of conduct that establishes standards for the acceptable use of and expression on social media outside of work?

1. Yes
2. No

Free Speech and Private Sector Employees

Poll #7

Does your Company provide annual training on the code of conduct and provide examples of inappropriate behavior and speech at work?

1. Yes
2. No

Free Speech and Private Sector Employees

Poll #8

Does your Company provide annual training on the code of conduct and provide examples of inappropriate behavior and speech outside of work?

1. Yes
2. No

What About Off-Duty Conduct? Briskman v. Akima (VA)



What About Off-Duty Conduct? **Briskman v. Akima (VA)**

- Ms. Briskman was off-duty and on a bike ride on a Saturday in Virginia in October 2017, when former President Trump's motorcade passed her. She expressed herself as you can see.
- A pool photographer traveling with the motorcade took this picture, and it made headlines all over the Country.
- Ms. Briskman also posted the photo on her own Facebook page.
- Her employer, Akima, a federal government contractor, terminated her employment because the post violated its social media policy.
- She sued in Virginia state court, alleging wrongful termination in violation of public policy.
- In July 2018, the state court disagreed and threw out the suit, finding that the social media post and her personal political expression was not protected under Virginia law.

What About Off-Duty Conduct? Briskman v. Akima (VA)



BRISKMAN GETS THE LAST WORD

Supervisor Juli E. Briskman was elected to represent the Algonkian District on the Board of Supervisors in 2019 and re-elected in 2023. She was elected by her fellow Board members to serve as Vice Chair in 2024.

Off-Duty Conduct Laws

- Nearly half of all states have laws impacting employee off-duty conduct and/or political speech
- Most deal with tobacco use or other “lawful” *products*
- Others simply protect off-duty *conduct*
- *What does this include?*
 - Product = social media platform?
 - Conduct = social media “speech”?

State Laws on Political Speech

- Some state laws protect private sector employee political speech and conduct
 - California, Connecticut, New York, and more prohibit discrimination or adverse actions for an employee's **off-duty political speech as well as activity like voting or working for a campaign.**
 - DC prohibits discrimination in employment based on political affiliation – this may be interpreted to cover off-duty political speech.
 - Maryland has no protections for employee off-duty political speech.
 - Virginia has no protections for employee off-duty political speech

State Law Protections of Off-Duty Political Speech

- **Protections in California**

Section 1102 of the CA Labor Code provides that no employer may "coerce or influence [or attempt to do so] his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

Section 1101 of the CA Labor Code prohibits employers from making any rule or policy that prevents an employee from "participating in politics," or has the effect of "controlling or directing ... the political activities or affiliations of employees."

State Laws Protections on Off-Duty Political Speech

- **Protections in Connecticut**

Connecticut expressly prohibits employers from terminating employees based on the exercise of their First Amendment rights, unless such activity interferes with the employee's job performance or the working relationship between the employer and employee. Conn. Gen. St. Sec. 31-51q.

State Laws Protections on Off-Duty Political Speech

- **Protections in New York**

New York labor law prohibits employers from taking any action against an employee on the basis of that employee's lawful political activities, provided the activity is outside of working hours, off-premises, and without the use of the employer's property. New York Labor Law Section 201-d.

Anti-Discrimination Laws Could Apply to Adverse Actions Based on Off-Duty Speech and Conduct

Law360 (May 29, 2024) -- A former Foley & Lardner LLP summer associate lodged discrimination claims against the firm for pulling its job offer after she made comments supporting Palestine, alleging that the firm let her go because of her religion and ethnicity, according to the suit lodged in Illinois federal court.

Anti-Discrimination Laws Could Apply to Adverse Actions Based on Off-Duty Speech and Conduct

- NY Times (Nov. 24, 2023) -- A prominent doctor is suing NYU Langone Health after he was fired as director of its cancer center over his social media postings about the Israel-Hamas war. Before he was fired, the doctor had reposted a variety of anti-Hamas political cartoons, including two with offensive caricatures of Arab people, and messages on the social media platform X.
- The lawsuit claims that the physician was told his social media posts were deemed to be an “intentional breach” of NYU Langone’s Code of Conduct and Social Media Policy and that he failed to meet “the standards expected of a physician in a leadership role” and had hurt the hospital’s reputation.
- The lawsuit claims that support for Israel is a component of his Jewish identity, and NYU Langone’s decision to punish him for his online posts amounts to religious discrimination.

Controversial Speech or Conduct Outside of Work

Poll # 9

A professional athlete with your team gives a college commencement speech in Virginia, which includes disparaging comments about Pride month and says that there is no higher calling for a woman than to be a wife, mother and homemaker. There is extensive news coverage of the speech. A female co-worker of this athlete, who is gay and is not married and has no children, is so offended by the comments that she complains to the team's HR office under the organization's EEO policy, and HR asks you for advice. Do you tell HR:

- A. Sorry, but there is nothing we can do, since the comments were made solely in a personal capacity at a non-work related event, and HR can take no action.
- B. Counsel the athlete on the team's EEO policy and culture of inclusiveness and mutual respect when at work.
- C. Counsel the athlete as in (B) and issue an internal statement, making it clear that the team is committed to its EEO policy and culture of inclusiveness and mutual respect.
- D. Counsel the athlete as in (B) and issue an internal statement as in (C), and issue an external statement, making it clear that the team is committed to its EEO policy and culture of inclusiveness and mutual respect.
- E. Formally discipline the athlete pursuant to the organization's EEO policy and issue the statements in (C) and (D).

Best Practices for Addressing Controversial Speech or Conduct Outside of Work

- What an employer can and cannot do “depends”
- Investigate
 - *When* did the speech or conduct happen?
 - *Where* did it happen?
 - *Who* engaged in the speech or conduct (e.g., supervisor and above or non-supervisor level employee, more than one employee)?
 - *What* did they say or do?
 - How did they identify themselves? Speaking or acting solely in a personal capacity or did they associate themselves with the Company?
 - Complaints about terms and conditions of employment?
 - Hate speech, or speech or conduct that violates anti-harassment and discrimination policies, a code of conduct, or other policies?
 - Threats of violence, including but not necessarily limited to the company, companies like it or with its policies or “core values,” and employees?
 - Confidential company information?
 - Political subjects like candidates and party positions?

Best Practices Addressing Controversial Speech or Conduct Outside of Work

■ Investigate (*cont'd*)

- *What did they say or do?*
 - Did the words put the Company in a false or bad light?
 - Did the words put customer relationships and the Company's reputation at risk?
 - Witnesses?
 - Source of Report? Co-workers? Public press coverage?

■ Corrective Action

- *Counseling or Discipline or No Action*
 - Involve all key stakeholders – HR, PR/Communications, Executive Leadership Team, Legal
 - Understand applicable laws and protected traits, if any
 - Evaluate potential reaction of workforce and customers to corrective action response
 - Be measured
 - Be consistent – treat similar situations alike
 - Internal Response? Public response?
 - Document

What About “Workers Rights?”



Impact of NLRA on Speech in the Workplace

Political speech or speech about a controversial social subject in the workplace may be protected under the National Labor Relations Act (NLRA) as “concerted activity” if it has a sufficient connection to employees’ working conditions.



The National Labor Relations Act (NLRA) is a federal law that governs the relationship between employers and employees. It provides a framework for the resolution of labor disputes and the protection of employees' rights. The NLRA is administered by the National Labor Relations Board (NLRB). The NLRA is a key component of the labor law system in the United States.

Under the NLRA, you have the right to:

- Organize a union to represent you and your fellow employees.
- Bargain with your employer over wages, benefits, and other conditions of employment.
- Take action, such as striking, to address your concerns.
- Refuse to work under unsafe or unhealthy conditions.
- Participate in activities for the improvement of your working conditions.
- Act as a member, officer, or agent of a labor organization.
- Engage in self-organization for the purpose of collective action.
- Act in concert with other employees for the purpose of collective action.



PCA and Political or Social Issues

Home Depot USA, Inc., 373 NLRB No. 25 (February 2024)

Two member Board majority (over one dissent) held that Home Depot violated the NLRA by insisting that an employee remove a BLM sticker from his Home Depot work apron and causing his unlawful constructive termination when he refused to do so. The Board found that the wearing of the BLM sticker during work was PCA because the associate had raised internal complaints about racial discrimination in the workplace. The Board majority ordered reinstatement and back pay.

The dissenter noted that the employee began wearing the BLM sticker after and in response to BLM protests and before he made any internal complaints about racial discrimination in the work place. The dissenter argued that because the BLM sticker involved a social movement outside of work, it was not PCA.

The case is now on appeal to the 8th Circuit.

NLRA: Protected Concerted Activity (PCA)

- NLRA protects union activity by **non-supervisory employees**
- But also “**concerted activity**” for “**mutual aid or protection**” (even when unrelated to union activity)
- To be protected, conduct must be “both concerted and for mutual aid or protection”
- And must be done in a way that does NOT result in loss of protection

Is the Conduct Concerted?

- “Engaged in with or on the authority of other employees” and “not solely by and on behalf of the employee himself”
 - Historic bright line – Concerted – 2 or more vs. “individual gripe”
- But seemingly individual conduct
 - Only speaker and listener – which seeks to “incite” or “induce group action” – an “indispensable preliminary step to self-organization”
 - Logical outgrowth of group action – individual bringing “truly group complaints to attention of management”
 - Individual complaint made in front of a group
- Core focus – “totality of evidence indicates SOME linkage to group action” – intent to band together to improve working conditions

For Mutual Aid or Protection

- Using an “objective standard” – subjective motives irrelevant
- Requires link between conduct and workplace concern
 - Is there an “effort to improve lot as employees”?
- But includes use of channels outside immediate employee-employer relationship – political activity and social activism
 - Support of employees of other employers
 - Even advocacy on behalf of non-employees (e.g., unpaid interns)

Inherently PCA

- Discussion of “vital categories of workplace life” considered inherently concerted without more
 - Wages
 - Work schedules (hours)
 - Job security
- Focus for current GC – expansion to:
 - Workplace safety and health
 - Racial discrimination – BLM cases
 - Other?

Biden NLRB Tilts the Playing Field in Favor of Employees

Stericycle, Inc., 372 NLRB No. 113 (Aug 2023)

If the GC of the NLRB shows that an employer work rule **could** reasonably be interpreted by employees to chill PCA, then the rule is **presumptively** unlawful **unless** the employer shows a legitimate and substantial business interest **and** the employer is unable to advance the same interest with a more narrowly tailored rule.

In this case, the Board rejected the prior approach that required the GC to show that the rule in question **actually** interfered with Section 7 rights and declined to give equal weight to the employer's legitimate justification in relation to an employee's perception of what the rule prohibited.

Biden NLRB Tilts the Playing Field in favor of Employees

Lion Elastomers LLC, 372 NLRB No. 83 (May 2023)

The Board held that the lawfulness of discipline for abusive speech in the workplace should not turn on the motive of the employer like treating similarly situated employees alike, but rather should be focused on the context in which the abusive speech occurred. So, if the abusive speech arises in a disciplinary meeting, for example, since that meeting may implicate PCA, whether or not the speech loses the protection of the Act depends on several factors, including “whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”

Biden NLRB Tilts the Playing Field in favor of Employees

Lion Elastomers LLC, 372 NLRB No. 83 (May 2023)

Dissent's Warning: “If the past is any guide, the Board will now protect employees who engage in a full range of indefensible misconduct, such as profane ad hominem attacks and threats to supervisors in the workplace, posting social media attacks against a manager and his family, shouting racist epithets at other employees, or carrying signs sexually harassing a particular employee.”

Loss of Protection of the Act?

- Knowingly false or maliciously untrue statements
- Public disparagement of product without link to labor dispute
- Hate speech
- Picket line racial and/or sexual harassment – NLRB/EEOC Inter-Agency Joint Guidance Memo
- The Memo is on hold because EEOC Republican members are demanding a public hearing so all issues can be aired. The Memo is intended to help employers address offensive language against others crossing the picket line that raise harassment concerns, while also potentially qualifying as protected activity under the NLRA.

Tips in light of PCA and Activist GC and NLRB

- Employers should not maintain policies that broadly prohibit *all* political speech in the workplace at *all* times.
- Employers should not selectively enforce policies. Be consistent.
- Employers may maintain policies that promote civility and mutual respect regarding social/political activity and speech *unrelated to workplace*.
- Employers may maintain policies that prohibit discrimination and “unlawful” harassment.
- Employers may restrict political speech to “non-work time,” including meal and rest periods.
- *Remember* – PCA and its protections apply only to non-supervisory employees.

Hypothetical Scenarios

- On Company ABC's internal messaging app, an employee posts the following image and text from someone else's post on X and says **"Justice Alito needs to recuse himself from all 1/6 cases!"**
- An employee sees the post and responds that the **"the Left is on a witch-hunt and are a bunch of snowflakes. Trump must win in November to save our Country!"**
- Other employees see the exchange and complain to HR about both posts, claiming they are offensive and need to be removed.
- All the employees are based in Washington, DC. HR asks you for advice.



Hypothetical Scenarios

- Engineer from Company ABC who works on a U.S. Department of Defense munitions contract travels on the weekend to New York City for a pro-Palestinian protest in Times Square. The protest is heavily covered by the media, and a photo of the engineer holding a sign that says “Aid not Bombs for Gaza” ends up on the front page of the New York Times.
- Other employees of ABC Company see the photo in the Times; some of these employees are Jewish and complain to HR about the protest and the sign, saying the employee is “anti-Semitic” and should be fired.
- What should HR do?

Hypothetical Scenarios

- It is publicly reported by local news outlets that the CEO of Company ABC is holding a fundraiser at his private home in Connecticut on a Saturday afternoon in June to raise money for President Biden's presidential election race. President Biden will be attending.
- Employees of ABC Company who support former President Trump find out. On the afternoon of the event, some of these employees assemble in a public park directly across the street from the CEO's house and quietly walk back and forth in a line carrying signs that say "MAGA" and "Stop the Steal."
- The CEO sees the group and recognizes some of the employees. On Monday, the CEO contacts HR and Legal and says the employees should be fired.
- What do you do?

QUESTIONS

THANK YOU!

michael.murphy@ogletree.com
dontae.silvertooth@ogletree.com