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# Protests, Pandemics, and Political Speech: Workplace Implications

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# Political Climate, Social Media, and the Media Make Workplaces Challenging



Some people's idea of free speech is that they are free to say what they like; but if anyone says anything back, that is an outrage.

— Sir Winston Churchill

# Political Speech at Work

- 78% of employees openly discuss politics at work.
- Of those who discuss politics at work, 23% said it led to a “heated exchange” or fight with a colleague.
- 80% of employees believe that it should be illegal for employers to terminate them for political speech.
- Yet, only about 75% of employers have a written policy on political activities.

# Difficulties Handling Political Speech in 2020

- It is difficult to practically manage political discourse—especially this year when things are historically divisive.
- This is compounded by employees working remotely. How do you manage political speech when it is over Zoom, Microsoft Teams, or Slack?
- How do you address situations where a company has taken a “side” on a “political issue”? Think climate change or #BLM.

# Quiz

For which one of these actions could an employer lawfully discharge or discipline an employee?

- A. Placing a “Dump Trump” bumper sticker on his car.
- B. Sending emails to her co-workers soliciting support for a controversial cause.
- C. Hanging political cartoons on his office door.
- D. Writing a blog at home stating her opinions about a political candidate.
- E. All of the above.

Typical lawyer . . .

It Depends!

# Political Speech Protections

- **Actions employers can take depend on:**
  - Whether you are a public or private employer
  - Your jurisdiction
  - Whether the workplace is union or nonunion
- **Other considerations:**
  - Company policies and practices
  - National Labor Relations Act (NLRA)
  - Title VII





What about the  
First  
Amendment ???  
Congress shall  
make no law . . .  
abridging the  
freedom of  
speech, . . . .



# Public vs. Private Employer



- “Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.” N.C. Const. § 14
- The Constitution’s free speech clause limits only the *government’s* ability to suppress speech.
- **Typically**, there is no free speech protection for private-sector employees’ speech.

# Public Employers

- Free Speech for public-sector employers involves a balancing test as to whether an employee's speech is protected. The test balances . . .
  - the employee's interests as a citizen (protected) versus
  - the state's interest in promoting the efficiency of the public services it performs through its workers (not protected).
- Relevant considerations . . . .
  - Whether the speech relates to a matter of public concern,
  - Whether it affects the public and the public entity, and
  - Whether it was made pursuant to the employee's official duties.

# For Private Employers, “It’s a Free Country!” (but not at work...)

- Private employers generally have the authority to control how employees express themselves on the job and may discipline and terminate employees who act unprofessionally or create disturbances (even if the expression at issue is political in nature).
- **BUT** many states have laws protecting employees from discipline, termination, or other penalties based upon their exercise of federal or state constitutional free speech rights.
- The NLRA provides some protection for speech as well.

# What political speech is protected in the private workplace?

## NLRA - Protected concerted activity

- Section 7 grants employees the right to engage in “concerted” activities for the purpose of “mutual aid or protection.”
- Section 7 protection extends to employee political advocacy when there exists a “direct nexus” between the advocacy and the “employees’ interests as employees”.

# What political speech is protected in the private workplace?

## State Laws

- Some states have passed legislation to address adverse action based on political activity.
  - **Colorado, North Dakota, and Utah** prohibit discrimination based on "lawful conduct outside of work."
  - **Connecticut** prohibits discrimination based on the rights guaranteed by the First Amendment.
  - **California and New York** prohibit discrimination for off-duty "recreational activities," which could include attending political events.
  - **Delaware, Florida, Massachusetts, and New Jersey**– prohibit employers from attempting to influence an employee's vote in an election.

# What political speech is protected in the private workplace?

## State Laws

- A handful of states and jurisdictions (**California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, Utah, West Virginia, Seattle (Washington), and Madison (Wisconsin)**) prohibit employers from retaliating against employees for engaging in "political activities."
- **New Mexico** protects employees' "political opinions."
- **New York, Illinois, Washington D.C., Utah, Iowa, Louisiana, Puerto Rico, Virgin Islands, Broward County (Florida), and Urbana (Illinois)** prohibit employers from discriminating against employees based on party membership or for engaging in election-related speech and political activities.

# What political speech is protected in the private workplace?

## State Laws

- **Illinois and Michigan** prohibit employers from keeping a record of employee's associations, political activities, publications, or communications without written consent.
- **Washington, D.C.** prohibits discrimination in employment on the basis of political affiliation.
- If all else fails, an employee can file a claim alleging a discharge was in violation of "public policy."



# Real Life – Day Without Immigrants

Most of the sorters at the Company's assembly plant are Mexican-born immigrants who speak only Spanish. Most of the management team are US-born English speakers. National organizations promoted a call for immigrants to withhold work and "walk off the job" next Friday in protest to the President's more aggressive approach to immigration and to demonstrate the importance of immigrants to the economy.

Management hears that many of the sorters intend to be absent next Friday. Management meets with the sorters and lets the employees know that if they do not show up for work, they will be terminated.

Did the Company violate the NLRA?

# Can an employer prohibit campaigning at work?

- Focus should be on work.
- Enforce non-solicitation policy.
  - Solicitation – non-working time.
  - Distribution – non-working areas and non-working time.
- Denying access to certain websites and social media tools may help with this issue.
- **Key:** Neutral policies, consistently applied.



# Real Life – Teamsters for Brown

A production worker with no customer contact wears a small “Teamsters for Governor Brown” button. Production manager wants it taken off.

Protected?

# Should I be worried about the laws against discrimination?

YES!!!

- Race
- National origin
- Retaliation
- Sex
- Other protected classes

# Discussion of Hot Button Issues Can Have Legal Consequences

- Immigration = National Origin
- Terrorism = Religion, National Origin
- #BLM/Police Shootings = Race
- Me Too Movement = Gender



# Recent Change! NLRB **Rethinks** Workplace Speech

A couple of months ago, in *General Motors, LLC* the NLRB—reversing 40 years of Board law—held that abusive or inappropriate workplace speech by employees engaged in protected concerted or union activity is **not** protected under the NLRA, and that employers may discipline workers for engaging in such conduct, provided, the discipline is not shown to be retaliation for protected conduct.

Previously, such inappropriate and offensive speech was protected because it was viewed as integral to the employees' protected concerted activity and constituted no more than mere “animal exuberance” or impulsive behavior that was not so severe as to strip an employee of their protections under the NLRA . . . even though that same conduct might otherwise be prohibited by other laws banning harassment and bullying from the workplace.

# Recent Change! NLRB **Rethinks** Workplace Speech

- What does this mean for Employers? The NLRB will now utilize the *Wright Line* burden-shifting test for determining whether discipline is retaliatory:
  - Employee must establish a causal link between an employer's adverse action and an employee's protected concerted activity by initially showing that (1) the affected employee engaged in said activity, (2) the employer knew of that protected concerted activity, and (3) the employer harbored animus against the protected concerted activity.
  - Burden then turns to employer to show it would have taken the same adverse action even in the absence of the employee's protected concerted activity. Typically, an employer will make this defense by showing that it has meted out similar types of discipline to similarly situated employees who were not engaged in protected concerted activity.
  - Finally, the burden shifts once more to show that the employer's given reason is pretextual.

# Real Life – Illegal Immigration

Employee: “I like Trump because he wants to cut down on illegal immigration and stop criminals and terrorists from crossing our borders.” And later says: “Trump is right, we have too many Mexican criminals here.”

A co-worker complains that it is making her uncomfortable.

Now what?

- Calling a discussion “political” does not obviate the need to investigate or take prompt remedial action.
- Follow established procedures for employee complaints.
- Ensure political dialogue does not turn into a discussion of protected characteristics.
- Re-issue anti-discrimination and anti-harassment policies.



# Real Life – Too Old?

Mary overhears her supervisor telling others that “a candidate is past his prime, and too old to be President. Its time he retires like others over 65.”

That same supervisor later denies Mary, who is 67, a promotion in favor of a younger employee with less experience. The supervisor contends that Mary was not promoted based on performance issues.

Now what?

- What will Mary’s lawyer point to?
- What will you need to support your case?



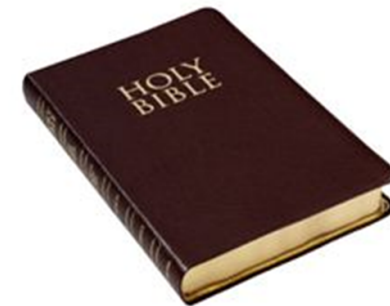


# Real Life - Voting and the Bible

A devout Christian employee displays a Bible on his desk, and strongly urges co-workers to vote for pro-life candidates.

Can the employer take disciplinary action against the employee for displaying the Bible and/or for discussing his politics?

- In the EEOC's guidance, it states that an employee displaying a religious object (e.g. a poster with the message "Jesus Saves!") in his/her private office does not pose an undue hardship.
- On the other hand, if the employee sat in the main lobby through which all employees, visitors, client and vendors must enter and displayed the religious object, it would likely constitute a hardship because it could be perceived as representing the employer's beliefs and viewpoints.



# When the Employer Takes a Stand

Employer posts a LGBTQ+ rights poster supporting same-sex marriage. An employee rips it down. Can/should you discipline?

From a legal perspective, consider . . .

- What is your jurisdiction?
- Can the employee's act be described as political and is therefore protected, or a religious belief that needs to be accommodated?
- What was the employer's motivation? The employee's?
- Are you creating a religiously hostile work environment?
- Is the employer allowing solicitation under the NLRA?
- State laws on destruction of property?
- What do the other employees think about either act?

# How do we deal with social media and blogs?



# Social Media and Speech

## State Laws

- Approximately **half a dozen states** – including **Colorado, New Hampshire, and Vermont** – prohibit employers from requesting that employees change their privacy settings to make information on social media accounts visible to their employer.
- In more than **two dozen states** – including **California, Illinois, Louisiana, Maryland, New Jersey, and Virginia** – employers are prohibited from requesting social media usernames and passwords from employees.

# Social Media and Speech

- The same rules apply whether the employee is at the water cooler or on Facebook.
- Rules that prohibit employers from retaliating against employees also protect employees who blog or post about those issues.
- Those laws that protect employees also apply: NLRA, state laws.



# Real Life - #MeToo

Steve, Paul, Monica, and their co-workers freely discuss current events and hot button political issues. Today, Steve, Paul, and Monica were discussing an article about this year's Sports Illustrated bathing suit edition in which the swimsuit models are posed with empowering and identifying words written on their otherwise naked bodies to align with the #MeToo movement. Steve and Paul were making fun of the models and the magazine.

Monica interpreted Steve's and Paul's comments as being dismissive and disrespectful towards women who complain of sexual harassment. Monica complains to HR.

Now what?



# Does HR need to take any action?

- A. No. Monica was willingly participating in the daily political and hot topic conversations so she can't complain just because someone expressed a view she doesn't like.
- B. No. This isn't about sexual harassment or sex, it's about cultural and political issues.
- C. Yes. The comments may not amount to harassment; however, they are potentially divisive, not in alignment with the Company's mission, and aren't helping the Company serve its customers.
- D. None of the above.

# Best Practices

1. Focus on the Company's mission – work time is for working.
2. Create environment of respect:
  - Remind all employees that all workplace speech, whether political or otherwise, should be respectful.
3. Remind employees that your policies apply – even away from work:
  - Especially social media!

# Best Practices

## 4. Review your policies:

- Harassment prevention and non-retaliation policies
  - Investigate complaints about political issues similar to other investigations of reported misconduct
- Electronic communications – primarily business-related use
- Social media policy
- Solicitation and distribution – none during working time
- Bulletin boards
  - Prohibit all postings, and allow only official Company postings
- Dress code

# Best Practices

5. Train leaders and managers:
  - To identify protected activity under the NLRA
  - To identify speech/conduct connected to a protected class
  - To avoid political discussions with their subordinates
  - To avoid engaging in inappropriate conduct themselves (e.g., favoritism toward employees with similar political views)
  - To report employee complaints
  - To stop inappropriate/disruptive behavior
  - To enforce policies evenly

# Best Practices

6. Review state and local laws regarding political expression and voting leaves.
7. Seek legal counsel before disciplining an employee for political activities.
8. Do not press employees to vote for a political candidate. Never use threats of adverse employment action to influence an employee's vote.
9. Do not allow third party political activity on the premises.

# Best Practices

10. Don't overreact to short discussions among employees. However, do not permit significant distractions during working time. Use progressive steps – beginning with a simple reminder or coaching – to enforce company policy.
11. BUT, be mindful of the National Labor Relations Act
  - An electronic communications or social media policy that prohibits an employee from (for example) criticizing or disparaging or making false or offensive or injurious or negative statements about his/her employer or supervisor electronically, including on social media, etc. is illegal.

# Supervisor Training

- If you want to talk politics, do it after work. Don't discuss politics with subordinates.
- You are not going to change someone's mind when it comes to their political beliefs.
- But you can offend them, create a poor working relationship, and open the company up for discrimination claims.
- If, after work, you want to talk politics, do it face-to-face; it is more productive that way.
- Remind supervisors and front-line employees on company rules on respect and civility.

*An employee may have a constitutional right to talk politics, but he has no constitutional right to be employed.*

- Oliver Wendell Holmes, Jr., 1891 (paraphrased)



# Questions?



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Thank **you.**