Breakout Sessions – Series 1

INTERNET IRE

SOCIAL AND POLITICAL EXPRESSION IN THE WORKPLACE

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I. Introduction

Today’s social and political discourse can often spark heated debate, which can spill over into the workplace and cause challenges for employers. Our internet life and 24-7 news stream have amped up the problem. Many employees express their views on political and social issues on social media or in comments to news stories. Many employers have taken public stances on political and social issues. Some employers and employees want to express themselves, but are not sure of the legal limitations. And some others have taken it too far.

With the polarization of politics in America, we all have opinions. Many of us express them in workplace, even if we do our best to avoid the debate.

The savvy employer takes proactive measures to build a productive and dedicated workforce while also respecting employees’ expression of their views on topics of importance to them. Employers need to know:

- What forms of political and social speech, expression, and action are protected in the workplace, and what forms are not?
- Can and should employers limit employees social and political expression inside and outside of the workplace?
- What are the limitations on employers taking a stance on social and political issues?
- What are the boundaries on social and political expression, and when is discipline or separation of employment appropriate?

The following materials summarize the legal issues that form the boundaries of social and political expression in the workplace and suggest practical strategies for employers.

II. How the Law Impacts Speech and Expression in the Workplace

Federal and state laws may affect an employer’s ability to regulate employee speech and expression in the workplace and outside the workplace, including on social media. In addition to the U.S. Constitution and the National Labor Relations Act, many states have enacted laws that limit an employer’s ability to act upon employee speech and expression. The outline below summarizes applicable legal authorities that employers should consider when evaluating how to handle employee expression.

- The First Amendment of the U.S. Constitution (Public Sector Only). The First Amendment’s protection of freedom of speech applies to public sector employers (in addition to many of the other laws discussed below)
- State laws prohibiting discrimination based on political activity or beliefs. Examples of states with such laws include: California, Louisiana, Missouri, Nebraska, New Mexico, and South Carolina.
- State laws treating political affiliation as a protected characteristic. Examples of states with such laws include: California, Colorado, Louisiana, and Washington. Washington, D.C. also protects political affiliation.
- The National Labor Relations Act: The NLRA protects an employee’s ability to engage in political activity that relates in some way to employees’ terms and conditions of
employment. This may include a work stoppage if it relates to matters within their employer’s control. Some additional NLRA-related issues to consider:

- If employees are having discussions about political matters that relate to their employment during working time, and if the employer has a consistently-enforced prohibition of non-work-related discussions because employees are unable to discuss non-work-related matters and still get their jobs done, the employee can be disciplined.
- Employees may have the right under the NLRA to wear buttons or pins with political messages that relate to employees’ terms and conditions of employment, unless special circumstances are present.
- Employers also have the ability to enforce rules on solicitation, distribution, discrimination, harassment, electronic communication, and social media.

- **State and Federal Non-Discrimination Laws**: Employers should be careful not to discipline employees who are members of a protected class for engaging in political expression if the employer has not disciplined employees outside that protected class for similar activity.

While issues involving *employer* expression are less common, there are laws that must be considered when evaluating whether an employer can or should engage in political expression. The outline below summarizes some of the laws that may be applicable to political speech by employers.

- **State laws prohibiting voter influencing, intimidation and/or coercion.** States with such laws include Alabama, California, Connecticut, Idaho, Indiana, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, and Wyoming.
- **State laws prohibiting paycheck stuffers.** States with such laws include Arizona, Colorado, Indiana, Maryland, New Jersey, Pennsylvania, Rhode Island, South Dakota, and Utah.
- **State laws prohibiting captive audience meetings on political issues.** New Jersey and Oregon have state laws prohibiting captive audience meetings to discuss political issues.
- **Wage payment laws.** If a Company plans on closing one or more locations for the day, open late, or close early to allow employees to participate in demonstrations or as a sign of solidarity with protesters, the Company should ensure compliance with the Fair Labor Standards Act, state and local wage and hour laws, reporting pay laws, and predictive scheduling laws.

### III. Practical Strategies

Following is a checklist of practical strategies for addressing social and political expression at work:

- Determine what laws apply to your organization.
  - Public versus private entity
  - U.S. Constitution
  - State Constitution
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- Federal Anti-Discrimination and Harassment Statutes: Title VII, Section 1983, Americans with Disabilities Act
- The National Labor Relations Act
- State laws
- International law implications for multi-national businesses

- Draft or revise key policies
  - Consider a “Respect in the Workplace” or “Work is for Work” policy that directly addresses social and political expression
  - Add language on social and political expression to your unlawful discrimination and harassment policies
  - Dress-code policy
  - Use of bulletin boards
  - Non-solicitation and distribution
  - Electronic communication policy, including email, internet use, social media
  - Representations on behalf of the Company
  - Off-duty conduct policy

- Training
  - Include in annual training
  - Hold separate training for managers and non-managers
  - Consider including this topic in your annual unlawful workplace harassment training program.
  - Consider a “Respectful Workplace Training” program that includes:
    - Unlawful Harassment
    - Discrimination
    - Social and Political Expression
    - Civil Debate and Discourse
    - Bullying
    - Workplace Violence

- Build a Culture of Respect and Civil Debate and Discourse
  - Executives and managers must model respectful behavior
  - Promote civility and respect
  - Promote workplace boundaries
  - Tenets of Civil Discourse
    - Ask questions
    - Seek to understand
    - Be respectful of others view and their right to have views that oppose yours
    - Be open-minded
    - Don’t vilify, villainize, or demonize
    - Remove your own emotion, ego, and need to be right from the discussion
    - Recognize when to disengage
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Off-the-Clock Conduct
Facebook Comments
Comments and Reactions to Local News Stories

Opinions on social issues
Blogs and Blog Commenters

Instagram Posts
Perceived Anonymity on Social Media

TWEETS
Political affiliation
Talking Politics at Work

- More than half of workers do it
- 40% say it affects productivity
- It “stresses out” workers and makes them feel cynical and negative during work

– 2017 American Psychological Association Study

Is there such a thing as free speech in the workplace?
1 Whose speech? Employer or employee

2 What laws apply?

Employees Engaging in Political Speech

- Type of speech
  - Verbal
  - Nonverbal

- Timing of speech
  - While at work
  - Missing work to engage in protests/strikes
  - During non-work hours

- Location of speech
Employee Speech – Laws That May Be Implicated

- Laws prohibiting discrimination, harassment, or retaliation on the basis of political affiliation, activities, or expression
- Title VII, ADA, ADEA, etc.
- National Labor Relations Act (NLRA)
- Lawful off-duty conduct laws
- Public policy/retaliation/wrongful discharge

What about the Constitution?
The First Amendment

“Congress shall make no law . . . abridging the freedom of speech.”

- Generally, First Amendment free speech rights apply:
  - To public employers.
  - If the speech is not pursuant to the employee’s official duties.
  - If the speech involves a matter of public concern and the employee’s interest to speak as a citizen outweighs the employer’s interests in promoting the efficiency of the public service it performs.

Section 7 of the National Labor Relations Act

- Section 7 of the National Labor Relations Act gives employees the right “to engage in ... concerted activities for the purpose of ... mutual aid or protection”
  - Section 8(a)(1) of the NLRA prohibits employers from interfering with employees’ Section 7 rights
Seminal Court Decisions

- A teacher’s letter to the editor
  - *Pickering v. Board of Education* (1968)

- A “mini-insurrection”

- Are you on “official” business?

Balancing Test

1. **Threshold Questions:**
   - Is the speech made as part of *official duties*?
   - Does speech address a matter of *public concern*?

2. Then **Balance:**
   - Employees’ free-speech interests
   - Employer’s efficiency interests
Let’s play

Fired OR Not Fired

PROTECTED OR NOT PROTECTED
Sociology Professor

- Facebook post 1: “Does anyone know where I can find a very discrete hitman? Yes, it’s been that kind of day . . .”

- Facebook post 2: “Had a good day today, DIDN’T want to kill even one student. 😊 Now Friday was a different story.”
Employee notifies you he is missing work to attend a “Day Without Immigrants” protest
Employee attends a “Fight for $15” rally and posts a picture of himself with a picket sign bearing your company’s logo

- Patrons left waitress a $5 tip after a 3-hour dinner that forced her to work an hour late.
- Vented on Facebook: “Thanks for eating at Brixx Pizza you cheap piece of shit camper.”
Comment to Employer:

😊 Hello – your employee is making racist comments online. Wondering if her racism impacts her (and your) ability to serve POC. In case you don’t get it – her comment is contributing to the stereotype that black people are lazy, criminals, and do not work.

Yes – I do expect a reply.

Employer Speech

- “What CEO Activism Looks Like in the Trump Era,” Harvard Business review article, October 2, 2017
- “A running list of companies that have cut ties with the NRA, because it matters where we spend our money,” Hello Giggles article, February 24, 2018
- “Companies Can’t Avoid Politics – and Shouldn’t Try To,” Harvard Business Review article, March 7, 2018
Employer Speech

- Targeting employees
- Targeting customers/consumers
- Public stances

Employer Speech – Laws That May Be Implicated

- NLRA
- Captive audience laws
- Voter intimidation laws
- Paycheck stuffer laws
- Shut-down/voter referendum threats
- Title VII, ADA, ADEA
- FLSA
The CEO passes out MAGA hats and is outspoken on Facebook

Boss forcefully seeks employee contributions to a PAC that supports pro-choice candidates for public office
Practical Strategies

- Determine what laws apply to your organization
- Draft/update relevant policies
  - “Work is for Work”
  - Observe boundaries
- Address issues as they arise and do so dispassionately
- Enforce policies – be consistent
- Develop and communicate political speech strategy to ensure cross-departmental collaboration

Practical Strategies

- Use of bulletin boards and other company property and equipment
  - Prohibit use of company bulletin boards
    - Exceptions for certain posts by employees, as approved by management?
  - Prohibit personal use of Company facilities such as copy machines, fax machines, scanning machines, etc.
  - Purple Communications – Issues related to the use of Company email
Practical Strategies

- Review non-solicitation/non-distribution rules
  - Normally instituted as a barrier to union organizing efforts
  - Applies equally to matters related to political speech and political efforts in the workplace
  - Neutral application of policy

Practical Strategies

- Implement social media policy
  - Address speaking on behalf of the Company
  - Address harassment, discrimination, and bullying
Practical Strategies

- Train managers
- Train employees
- Include as part of annual training program

Practical Strategies

- Tenets of Civil Discourse
  - Ask questions
  - Seek to understand
  - Be respectful
  - Be open-minded
  - Don’t vilify
  - Remove emotion, ego
  - Disengage
Practical Strategies

- Change the Culture
  - Civility and respect
  - Civil discourse training
  - “Modeling” civil discourse
  - Teach about influencing others’ political opinions

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