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Demonstrators in the Midst? Handling Political Activity in the Workplace

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Introduction

While political expression has always been part of the workplace, a number of evolving factors have amplified the challenges for both employers and employees. First, social media, the remote workplace, and changing societal norms have blurred the lines between the workplace and "private lives." Second, there is little doubt that we have become a more polarized society, with each political party calling for more activism, with fervor. Debate, discussion, and political expression occur in the workplace-and in social media and demonstrations outside of work. While most employees can maintain and express their beliefs without necessarily impacting the workplace, other employees' conduct may interfere with work, productivity, the civil rights of fellow employees, morale, brand, and even safety.

For example, employees may attend rallies, political protests, campaign for certain politicians or political causes, or blog about their political and social beliefs. In doing so, they may link such activism with publicly criticizing their employer or its leaders. How employers deal with these situations is complicated, as it involves reviewing and assessing pertinent federal and state laws and company policies, applying good policies consistently, and exercising good judgment.

I. Ability to Regulate Depends on Type of Employer

The starting point for addressing employee political behavior depends on whether the employer is public or private. In most states, employees of private companies are not protected from discrimination based purely on political affiliation or activity. In contrast, public employees generally are protected by state and federal constitutional provisions, including the First Amendment, which protects political speech, and the Fourth Amendment, which prohibits unreasonable searches and seizures. However, even for public employees, if the speech is not of a public concern, it is not protected. Even if it is of public concern, courts will balance factors including whether the speech interferes with the employee's workplace duties, creates a conflict, or undermines public trust and confidence.

For private employers, which are the focus of this article, generally, we start with the assumption that employees are presumptively "at-will," meaning their employment is terminable at the will of the employer or the employee, for any reason or no reason at all. Lytle v. Malady (on rehearing), 458 Mich. 153, 164, 579 NW2d 906 (1998). In at-will situations, restrictions on the ability to discipline employees for political activities rest upon statutory and common law rights. In contrast, when an employee is employed pursuant to a contract, or is represented by a union and governed by a collective bargaining agreement, adverse action based upon political expression is also a matter of contract.

II. Applicable Laws and Statutes

There are many sources of law that may be implicated in regulating employee political speech and activity. A variety of federal and state statutes address discrimination in the workplace, including Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Michigan Elliott-Larsen Civil Rights Act (ELCRA), and the Michigan Persons With Disabilities Civil Rights Act, which respectively prohibit discrimination and retaliation based on an individual's race, color, sex, age, religion, national origin, disability, height, weight, or marital status. Other statutes like the National Labor Relations Act (NLRA), 29 U.S.C. §151 *et seq.,* protect certain concerted activity by employees related to the terms and conditions of employment. The NLRA protects both union and nonunion employees who engage in concerted activity. Section 7 of the NLRA provides that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The NLRA also might protect employee speech where it concerns the terms and conditions of employment under the 'mutual aid or protection' clause. *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 566-69 (1978).

Retaliation for engaging in activity which is purely political, without a nexus to employment-related issues, is not likely covered by Title VII, the ELCRA, or the NLRA. However, certain types of political speech-such as comparing "me too" harassment described in the media with the employees' work environment, or advocacy for better wages in connection with political activity-may constitute protected activity and trigger statutory protection. Also, employers may be required to stop certain types of "political" speech if it creates a hostile environment for, or indicates animus towards, other employees in a protected class.

Additionally, some states have passed legislation to address adverse action based on political activity. For instance, Colorado, North Dakota, and Utah prohibit discrimination based on "lawful conduct outside of work." Connecticut goes even further and prohibits discrimination based on the rights guaranteed by the First Amendment, even for private employers so long as the activity does not substantially interfere with the employee's job performance. Other states, such as California and New York, prohibit discrimination for off-duty "recreational activities," which could include attending political events.

A handful of states and jurisdictions, including 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." Colorado and North Dakota ban employers from firing employees for any off-duty lawful activity, including speech. Finally, other states and jurisdictions, including New York, Illinois, Washington D.C., Utah, Iowa, Louisiana, Puerto Rico, Virgin Islands, Broward County (Florida) and Urbana (Illinois) specifically prohibit employers from discriminating against employees based on party membership or for engaging in election-related speech and political activities. Thus, it is very important to consider all state authority that might

impact employee conduct related to demonstrations.

Federal and state whistleblower laws may also be implicated by employee speech or conduct. Additionally, while they are difficult to establish, if all else fails, employees may bring a claim asserting that discharge based on certain employee conduct or speech violates "public policy."

III. Employer Rules and Handbooks

Most employers have workplace rules that define permissible employee conduct, including workplace conduct, attendance, dress and grooming standards, codes of conduct, and other rules, such as social media policies, and confidentiality obligations.

Under the Obama administration, the NLRB closely examined company rules and handbooks and concluded that they violated the NLRA if they had a chilling effect on protected-concerted activity. However, under the Trump administration, the NLRB has shifted course and changed the test for evaluating workplace handbooks and policies. *See The Boeing Co*., 365 NLRB No. 154 (Dec. 14, 2017). To provide greater clarity to all parties, the Board's majority announced that, in the future, it will analyze the legality of workplace policies based on three categories:

- **Category 1** includes rules that the Board considers lawful, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights, and thus no balancing of employee rights versus employer justification is warranted; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. An example would be a rule that requires employees to be civil with each other, and overruled previous cases that held to the contrary.

- **Category 2** includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

- **Category 3** includes rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 policy is one that prohibits employees from discussing wages or benefits with each other.

Thus, in light of this new guidance, employers have greater flexibility to implement rules that prevent employees from making disrespectful comments about managers or Company leaders and other reasonable workplace directives.

IV. Type of Activity

In analyzing whether to discipline employees related to speech, protests and demonstrations, it is necessary to consider the individual conduct at issue and its impact. Practically, the employer must determine whether the conduct violates a company workplace rule, whether the conduct is consistent with the employer's reasonable and legitimate expectations for the workplace, and whether it implicates protected activity.

a. Attendance

Companies have a right to enforce their reasonable attendance policies. While the NLRA prohibits retaliation against an employee who engages in “protected concerted activity,” e.g., complaining about wages, benefits, or other terms and conditions of employ ment, employees generally must comply with the employer’s attendance policy.

Under the NLRA, employees have the right to solicit union interest (hand out union cards, talk about organizing efforts) during non-work time (breaks, lunch, etc.). Employees also may engage in organizing efforts on company property while off-duty, but only if outside working areas. Employees also may discuss issues relating to working conditions and pay, even if the solicitation or discussions occur during regular work/shift hours, but the employees generally must be at their assigned work areas and performing work, absent some emergency scenario.

Thus, in the context of participating in political rallies and demonstrations, the analysis is relatively simple if an employee misses work to attend the rally. The employer can enforce the attendance policy and discipline the employee accordingly.

In contrast, the analysis is more complicated if the rally or protest is not during scheduled work time because it would not necessarily impact the employer’s attendance policy. As stated above, different jurisdictions have statutes regarding regulating off-duty conduct and political expression. Employers should determine whether there is really an impact to the business as a result of the conduct, and determine whether any state or local statutes might apply. Companies normally should not discipline or fire an employee for engaging in lawful off-duty conduct such as supporting a political cause (i.e., gun control, abortion rights, etc.) or supporting a particular candidate when not at work or volunteering in political campaigns.

Finally, some labor unions are politically involved and applicable collective bargaining agreements may contain language that prohibits discrimination against union workers because of their political activity.

b. Employee Speech in the Workplace

1. Religious and Political Speech

Like attendance policies, companies generally have an obligation under Title VII and various state statutes to prevent discrimination and harassment in the workplace by taking prompt remedial action when they become aware of employee complaints or situations that violate the policy. Situations where employees express themselves about politics, religion, and other controversial subjects implicate these policies.

As stated above, in private workplaces, the First Amendment generally does not apply and employers have wide latitude to limit speech that might be offensive to other employees. Even in states that protect political speech, however, the employer can discipline or discharge an employee for legitimate, business-related reasons. The key is to evaluate whether the political expression interferes with the business, disrupts others, or affects the company’s productivity. Employers should ensure that they are handling these matters consistently to avoid claims of disparate treatment. For example, an employer could face a lawsuit if it disciplines an employee for displaying the Koran at work, while allowing other employees to exhibit the Bible.

When it comes to political speech in the workplace, employers also have discretion to ensure that its policies are enforced, including its non-solicitation policies. Employers may discipline employees who

are not performing their jobs, and instead focusing on political activities. Case in point is the recent firing of two employees of the Cheesecake Factory who allegedly taunted a Trump supporter who was eating at Cheesecake Factory's Miami restaurant in May 2018. The patron, who was wearing a red "Make America Great Again" hat, received unwanted gestures and threats from two employees who apparently did not agree with the customer's political leanings. The employer clearly had the right to enforce its policies and ensure that employee conduct towards customers satisfied its legitimate expectations.

Employees' participation in politics could be protected if it relates to labor or working conditions, or is otherwise protected by the NLRA. For example, an employee may be protected from retaliation for testifying before Congress or protesting wages, even if outside the workplace. On the other hand, speech without a nexus to the workplace, such as the NFL protests, is not likely to be protected under the NLRA. Additionally, just recently, on August 15, 2018, the NLRB's Associate General Counsel issued a memo stating that a group of Latino employees who skipped work to attend a rally called "A Day Without Immigrants" were protected under the NLRA because the employees had previously complained to their employer about mistreatment and their work complaints were linked with the protest. Despite the fact that in 2006 the NLRB had concluded that a similar protest was not protected, the advice memo that the workers were protected because their strike was aimed at bringing attention to grievances specific to their workplace.

Religious speech can also be a divisive topic in the workplace. Discrimination on the basis of religion is prohibited under Title VII and the ELCRA. In addition, an employer must reasonably accommodate an employee's religious practice absent an undue hardship. According to the EEOC, an employee displaying a religious object in his/her private office does not pose an undue hardship. In contrast, an employee proselytizing or handing out leaflets at work would potentially disrupt the workplace and create a hardship upon the employer. An employer can also restrict employees from harassing their co-workers regarding their religious beliefs, if those views are pervasive and unwelcome.

Employers should remind all employees of their discrimination and harassment policies. Employers should also treat all complaints seriously and investigate all employee complaints.

2. Speech Critical of the Employer

Employees also sometimes face situations where employees criticize their own employers. For example, last year, a Google employee published a controversial memorandum critical of Google's diversity policies, basically claiming that Google discriminates against white males by promoting diversity. Google terminated the employee, and the employee filed an NLRB charge claiming that he had engaged in protected concerted activity under the NLRA. The employee also could have claimed that Google's conduct violated Title VII because he was discriminated for challenging sex discrimination (even if his view was unpopular). If an employer disciplines an employee for speech that is critical of the employer's hiring and promotion practices, the employee may claim he was disciplined for opposing an "unlawful employment practice." 42 USC § 2000e-3(a).

Employers can also prohibit protected political speech that is profane, defamatory, or malicious against the company or its managers. *See e.g., N.L.R.B. v. Honda of America Manufacturing, Inc*., 73 Fed. Appx. 810, 814-815 (6th Cir. 2003). However, especially in the protected concerted activity zone of the NLRA, employees typically are afforded some latitude in how they express their views and the line can be cloudy.

c. Social Media Political and Disparaging Comments

Blogging is a personal on-line diary, and permits comments to be added. It may combine text, photographs, videos and links to other blogs or websites. Blogs are generally accessible by anyone and few laws regulate their content.

Companies should be concerned about blogs and other forms of social media for various reasons. First, employees have the ability to disclose trade secrets and other confidential information. In addition, as employees use their phones to go on-line, employees could be spending work-time focusing on these extra-curricular activities rather than work. Employees also do not have the right to engage in defamatory or libelous speech in making comments about their employer. *Klehr Harrison Harvey et al v JPA Development, Inc.,* 2006 WL 37020 (Pa. 2006). However, again, employers have to be careful in assessing the speech. For example, complaints that the employer is cheap because it pays substandard wages, or allows a hostile environment to exist in the workplace, may be disparaging but still protected.

In addition, companies have to be concerned that employee comments on social media could expose the company to liability. *Blakey v. Continental Airlines, Inc.,* 164 N.J. 38 (2000) (Company liable for comments posted on computer bulletin board suggesting a pattern of harassment).

Practically, employers should determine whether blogs or social media posts violate company policies. Does the expression violate the no-harassment policy? Does it disclose confidential information? Also, does the speech implicate the NLRA? On a case-by-case basis, the employer should analyze whether the speech is protected (e.g., is the employee complaining about violations of the law and therefore entitled to Whistleblower protection?) and whether it raises these other implications.

All employers should implement an electronic com muni cations policy that expressly mentions that the employer's computer system, including its internet and social media policies, is company property. Policies provide a basis to discipline employees for violating company policy. Employers must also consistently enforce their harassment and discrimination policies.

d. Dress and Grooming

Companies also have a legitimate interest in promoting certain dress and grooming standards, especially in hospital and retail establishments where there is contact with customers and patients. Employees may be vocal and passionate about topics such as the #MeToo Movement, gun control, abortion, and other topics and may attempt to wear shirts and buttons that reflect their position on these topics.

Some federal and state laws could apply. For example, the NLRA protects an employee's right to wear union or organizing buttons or insignia, unless there are special circumstances related to production, discipline or customer relations. Under the NLRA, employees lawfully can display labor union insignia, even if it has a political message. Certain statutes such as ELCRA, prohibit discrimination based on weight, and other cities have ordinances that prohibit discrimination based on physical appearance. *E.g*., Milwaukee Ordinance MEOO 3.23.

Nonetheless, an employer can implement dress code policies prohibiting employees from displaying political buttons and logos, provided it is consistent with other types of non-political speech. Employers might have a policy, for instance, that restricts campaign signs and solicitations in the workplace.

Conclusion

The challenges presented by the hyper-partisan nature of American society, the passions of today's employees, the different tools available to express opinions, and the myriad of workplace laws that may protect certain speech, are real. Employers can certainly restrict political speech and should employ a policy that does so while providing appropriate carve-outs for protected speech. However, attempting to shut down all such speech and activity is unwise and unlikely to be effective. In fact, open dialogue and civil discourse is welcome at most workplaces unless it creates disruption, discredits the product or service, or impacts safety. Therefore, in confronting these challenges, employers should cultivate a culture of mutual respect, employ a reasonable policy, apply the policy consistently, and exercise good judgment.

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