Workplace Speech Policies Limit Legal And PR Risks

By **Michael Sheehan, Michelle Strowhiro and Alex Randolph** (January 25, 2024)

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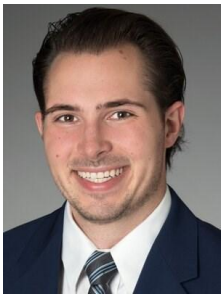

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We have entered a new era of employee management. Social media is flooded with videos of employees arguing — whether with customers or colleagues — over various forms of expression, often political, like wearing buttons, slogans or national flags.

As workers respond to recent world events, including the highly anticipated 2024 U.S. election cycle beginning earlier this month and the ongoing Israel-Hamas war, employers are grappling with challenging decisions about how to address political, controversial or offensive expressions by their employees.

In this era, companies must learn to navigate the complexities of workplace and employee speech, attending carefully to the applicable federal and state laws prohibiting discrimination and, in some cases, political speech repression, while also taking care to protect their employees, customers and brand.

Legal Considerations

While some employees may believe that their speech — no matter how offensive — is protected by the First Amendment, this is often not the case. The First Amendment applies only to the U.S. government's restrictions on speech, not to the actions of a private company, and therefore private, nongovernment employers are not bound by the First Amendment.

That said, many employers believe that they are safe to terminate an employee for any reason — including for the employee's speech — given the at-will nature of employment in the U.S. generally. Practically, however, this is also often not the case, at least not without the risk of protracted and costly litigation.

Employees enjoy various protections under federal and state laws that prohibit discrimination and retaliation, laws that protect employees' rights to engage in concerted activity, and some state laws that specifically protect political speech or conduct. Terminating an employee in violation of these laws, or in a manner that could be perceived as a violation, can itself create legal and public relations exposure and negatively affect remaining employees' morale.

Under federal law, discrimination is strictly prohibited on the basis of race, color, religion, sex, national origin, age, disability or genetic information. This encompasses various statutes such as the Age Discrimination in Employment Act, the Americans with Disabilities Act and Title VII of the Civil Rights Act.

Furthermore, federal protections extend to safeguarding an employee's right to express speech related to exercising these protected rights, including requests for workplace accommodations due to disability or religious beliefs. Retaliation against employees for engaging in such protected activities is also forbidden.

Additionally, the National Labor Relations Board ensures that nonmanagerial employees can engage in concerted activities — including speech — concerning wages, hours and working conditions without facing adverse employment consequences. For example, the NLRB has been stepping up enforcement against employer policies restricting speech in the workplace — even facially neutral ones — and taking an incredibly expansive approach in favor of employees.

In an employee speech case decided in May 2023, the NLRB found that Fred Meyer Stores, a grocery store, illegally disciplined workers for wearing Black Lives Matter buttons.

The NLRB held that prohibiting workers from wearing the BLM logo violated their rights listed in Section 7 of the National Labor Relations Act to voice their opinions about working conditions and thus qualified as legally protected concerted activity. Specifically, the administrative law judge found that "by collectively displaying the 'Black Lives Matter' message on their work uniforms, the employees in this case acted to advance their interest — as employees — to an affirmatively anti-racist, pro-civil rights, and pro-justice workplace."[1]

Moreover, certain additional speech protections are enshrined in many state laws. Increasingly, courts are interpreting these protections as including speech that takes place off-hours and around political speech and affiliation.

For example, the California Labor Code prohibits employers from preventing or punishing an employee's political activity.[2] In Ross v. Independent Living Resource of Contra Costa County in 2010, the U.S. District Court for the Northern District of California stated: "The California Supreme Court has cautioned that the statute 'cannot be narrowly confined to partisan activity,' as the 'term "political activity"' is much broader, connoting 'the espousal of a candidate or a cause, and some degree of action to promote the acceptance thereof by other persons.'"[3]

The U.S. District Court for the Eastern District of California case of Napear v. Bonneville International Corp. also dealt with employee political activity. In 2020, while off shift and outside his workplace, longtime Sacramento radio show host Grant Napear tweeted "ALL LIVES MATTER" in response to being asked about his "take on BLM." He was then terminated for cause.

Napear brought a claim against his former employer under the foregoing sections of the California Labor Code, and in July 2023, the court held the radio host's tweet could be interpreted as political speech and therefore permitted the case to go forward.[4]

While this is not yet a finding that the employer violated the law, the claim surviving the motion to dismiss stage is a strong indicator of how California courts will interpret this law going forward.

And California is not alone, with Nevada, Utah, New Mexico, Montana, Colorado, Nebraska, North Dakota, Minnesota, Missouri, Louisiana, South Carolina and West Virginia each providing some protections for employee political speech or activity.

State laws on these topics vary widely, and the law of the state where an employee lives and works will almost certainly affect a company's decision making as it assesses the unique risk profile for its options to take action.

That said, even in states where employees enjoy political activity protections, these protections do not extend to permitting employees to violate other required company policies, such as harassment and discrimination policies, and employers have an obligation to protect their workforce from such unlawful conduct.

Messages that contain intolerant or discriminatory statements, even if done off the clock or off-site, can permeate into the workplace, where the message creates a hostile environment for employees who may have seen the post. That type of situation would impose an obligation on the company to act.

An employer's policies will be at the forefront of any challenge to an employer's alleged unlawful action. The U.S. Court of Appeals for the First Circuit's 2022 ruling Frith v. Whole Foods Market offers an important reminder of how a well-written and well-executed policy can be a valid defense against a lawsuit.[5]

In 2020, Whole Foods required all employees to wear a face mask at work due to the COVID-19 pandemic. Whole Foods also required that the masks comply with the employee dress code, which prohibits "wearing clothing with visible slogans, messages, logos, or advertising that are not company-related."

A group of Massachusetts employees were terminated after refusing to replace their BLM masks. The employees then sued Whole Foods, alleging racial discrimination and retaliation in violation of Title VII.

Whole Foods prevailed at the pleading stage and its victory was affirmed by the First Circuit. The court held that Whole Foods applied its dress code policy consistently, irrespective of political cause.

This case and the Fred Meyer NLRB case also represent examples of how different enforcement entities can rule differently on substantively similar facts. Accordingly, the venue in which the litigation occurs is another consideration for employers when determining how best to confront the issues before them once litigation has begun.

While the realm of employee rights and employer duties is complex, a clear emphasis emerges on understanding federal and state laws. Employees have growing protections for their expressions, yet employers must ensure a discrimination-free workplace. The Firth case in particular underscores the value of good policy and consistent application. As laws evolve, both employers and employees must stay informed and proactive to maintain a balanced and fair work environment.

Practical Considerations

Employers are facing a new era of pressure from clients, customers, employees and the public at large to adopt and publish positions on social and political issues and to stand by those positions.

These pressures present a dilemma for employers, as some may find that the law may require a response in conflict with the company's public stance on an issue,or the public's demand for action. In such cases, employers must evaluate all business factors and take action that best aligns with their goals.

The legal industry is not immune to these pressures. This past fall, both Davis Polk & Wardwell LLP and Winston & Strawn LLP publicly rescinded job offers to law students due to

the students' public statements and position on the Israel-Hamas war. In the Winston & Strawn instance, the student was identified online, and the firm was tagged by countless social media accounts pressuring the employer to rescind the student's offer.

In these situations, employers must balance the potential risks of employment litigation from the job candidate, the impact of any decision on employee morale and company culture, and the PR implications of employing someone who takes a public stance contrary to the company's values or of withdrawing their offer, whether privately or publicly.

After understanding what laws govern the company's right to take action, the company must assess its own position on the topic; the risk of deciding not to hire an applicant, or taking action to discipline or terminate an existing employee; and the anticipated impact on employee and client relations.

Some companies will opt to take no action, while others will take some legal risk to do what they deem the right thing — but these educated decisions can only be made after a thorough analysis of the legal and PR issues at stake.

In light of evolving legislation and litigation, employers must remain vigilant about the boundaries of political speech within the workplace and adapt their practices accordingly.

Action Items

In light of the legal and reputational considerations identified above, and with employers in the U.S. preparing for perhaps the most contentious election cycle in modern history, human resources and legal teams should consider the following steps to prepare their workforce and management team to handle potential viral moments.

Conduct, Dress Code and Social Media Policies

With the election on the horizon, companies should take proactive steps to review and potentially revise their workplace conduct, dress code and social media policies now.

Establishing a plan and a policy for addressing disputes related to employee speech will allow companies to manage their employees within the confines of the law while also staying consistent with their values.

Harassment Policies

Employers must ensure that they have strong policies in place that prevent harassment and retaliation, including concerning workplace speech issues. This includes policies that prohibit retaliation against employees that report company policy violations.

Additionally, employers should implement policies that prohibit employees from making statements that might be mistakenly perceived as representing the company without explicit authorization from the company.

Training

The most effective way for employers to ensure their policies are reviewed, understood and followed consistently is to invest time and effort in training the workforce — particularly management employees. A brilliant policy does no good as a PDF uploaded to an intranet that no one knows about.

Companies should proactively and regularly train employees on their policies, incorporating them into regular harassment prevention trainings and manager 101 trainings.

Consistent Application

An employers' best defense is a great offense: a strong policy that is consistently applied.

Employers must apply their policies neutrally. Looking back at how courts across the country have ruled on the BLM cases, for example, the clear trend is that employers fare better in litigation when they treat their policies on political and ideological statements in the workplace as neutral, both as written and as executed.[6]

Conclusion

The laws on workplace and employee speech, their interpretation, and their enforcement are evolving by the minute.

Now more than ever, it is imperative that companies weigh all legal and business factors and chart a course to achieve their ultimate goals for their customers, their workforce and their brand.

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[1] Fred Meyer Stores Inc., 19-CA-272795 and 19-CA-272796 (NLRB 2023).

[2] Cal. Lab. Code, Section 1101-1102.

[3] Ross v. Indep. Living Res. of Contra Costa County, No. 08-cv-00854-TEH, 2010 WL 2898773, at *9 (N.D. Cal. July 21, 2010) (quoting Gay L. Students Ass'n. v. Pac. Tel. & Tel. Co., 24 Cal.3d 458, 487 (1979)).

[4] Napear v. Bonneville International Corp., No. 2:21-cv-01956-DAD-DB (E.D. Cal. July 5, 2023).

[5] Frith v. Whole Foods Market, No. 21-1171, 2 (1st Cir. Jun. 28, 2022).

[6] See Frith v. Whole Foods Market, No. 21-1171, 2 (1st Cir. Jun. 28, 2022); Home Depot, 18-CA-273796 (NLRB 2022) (discussing evidence that a supervisor who requested employees to remove BLM insignia as a violation of the dress code policy also requested that a different employee remove "Thin Blue Line" messaging from their clothing).