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Employment Law Note

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Free Speech in the Workplace

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With news updates regarding capital rioting, abortion rights, gun violence, and other sensitive topics illuminating our screens on a daily basis, it is likely that the discussion of these topics will find its way into workplace conversations. Whether employees choose to discuss these topics orally or electronically, or display slogans or images on their clothing, through posters, or other means (e.g., bumper stickers in the company parking lot), this raises an important question on what speech may and may not be regulated in the workplace by employers. This article discusses some critical considerations that employers should take into account before attempting to restrict any type of speech.

What is "Speech"? – A Simplified Breakdown

Generally, you may be wondering, what exactly constitutes "speech"? Most people view speech as the spoken word, but, under the law, speech also encompasses other forms of symbolic expression, such as displaying posters or signs, distributing literature, wearing certain articles of clothing, and the like. However, the principle of "free speech" as articulated in the First Amendment of our Constitution focuses primarily on preventing certain restrictions on speech imposed through the government, rather than private actors. Although speech restrictions or impediments imposed by the government could erode our democracy and suppress critical public debate necessary to ensure accountability in our electorate, this public policy concern does not exist with private actors.

Private vs. Public Actors

As such, the first inquiry in determining whether certain speech is or is not protected under the First Amendment (and to what degree) is whether the entity seeking to restrict the speech is public or private.

Generally, private-sector employees have no constitutional right to engage in free speech in the workplace, whereas public, government employers are seen as state actors under the Constitution. Therefore, the actions of these public-sector employers may violate the First Amendment if they inappropriately restrict the freedom of speech in the workplace.

Public-sector employers must consider whether the employee's speech addresses a matter of public concern and then weigh the interest of that speech against the employer's interest in restricting that speech. For example, does the employer's interest in maintaining an efficient workplace outweigh the employee's right to speak freely on the topic in question?

Protected vs. Unprotected Speech

Not all speech is created equal under the law. In most circumstances, speech about politics or hot-button topics of the day is not protected, but speech about working conditions is. All employers are often forced to engage in a careful balancing act between allowing protected speech while preventing speech that results in animus, discrimination, harassment, or hostile work conditions for other employees.

For example, if two employees disagree with one another in the workplace and one begins to use profanity or derogatory slurs during this conversation, the employer has the right to discipline the employee on the basis that this conduct violated its policies.

However, employers must be mindful that the enforcement of these policy violations is applied neutrally to all employees. In other words, the use of company handbook policies to discipline employees does not provide employers with a "golden shield" to wield off any and all claims of free-speech violations. These policies must be applied fairly, equally, and neutrally. And employers must be mindful of additional protections afforded to employees under the National Labor Relations Act ("NLRA"), which confers protections on private sector employees who engage in certain activities for and on behalf of their co-workers..

The National Labor Relations Act

There is an important intersection between free speech and the NLRA that is often overlooked by employers. Section 7 of the NLRA gives employees the right to unionize and engage in other activities for mutual aid and protection (i.e., "concerted" activities), and gives employees the right to refrain from such activities. Importantly, the National Labor Relations Board ("NLRB"), the federal agency overseeing private sector labor relations, can consider some employee speech to be protected, concerted activity.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. So how does this affect freedom of speech in the workplace? If speech in the workplace involves the discussion of wages, benefits or working conditions, this speech would be protected under Section 7 of the NLRA, for private employers, and Washington law governing public employers.

For example, if an employee distributes literature in the workplace supporting a particular political candidate but ties their support to a work-related issue such as improving wages or employee healthcare, this speech may be protected under Section 7.

Similarly, if employees are engaging in conversations related to harassment, discrimination, or bullying, these would fall under "workplace conditions" and would be protected, even though the context of these conversations may carry political undertones.

For those of you thinking that the NLRA only applies to unionized workplaces, think again: the NLRA protects all covered employees, regardless of union affiliation. Non-unionized, private employers can be found guilty of Section 7 violations under the Act.

Seattle Municipal Codes

Importantly, employers must keep in mind that it is not only federal laws at play when it comes to free-speech considerations, but also state and local laws. In Washington, public-sector employees are prohibited from campaigning during company time according to RCW 42.52.180(1). Moreover, in Seattle, the Seattle Municipal Code ("SMC") states that political ideology is considered a "protected class," which means an employee cannot be discriminated against on the basis of their political ideology.

The SMC defines "political ideology" as "any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function, or basis of government and related institutions and activities, whether or not characteristic of any political party or group." This language is fairly broad and therefore likely encompasses most political beliefs. Consequently, even private employers operating within the City of Seattle should be mindful of violating employee free-speech rights by attempting to regulate political speech.

Final Note

As we all continue to navigate our way through these often difficult, nuanced, and complicated conversations in the workplace, we must continue to be mindful of federal, state, and local speech protections. The distinction between protected and unprotected speech is typically highly fact-specific. Therefore, to ensure compliance, we recommend consulting with our office prior to restricting or impeding speech in your workplaces.

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