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Controversial Commentary

Guidance and Guardrails for Employers

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Disclaimer

This presentation has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice.

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Attorney Advertising.

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Controversial Commentary

The Legal Context: Laws That May (or May NOT) Apply

Laws That May (or May NOT) Apply



All the Laws that Matter: The Legal Context

- ➔ Constitutional protections
 - U.S. Constitution
 - State constitutions

- ➔ Federal law
 - National Labor Relations Act (NLRA)
 - Anti-discrimination/harassment/retaliation laws

- ➔ State and local laws
 - Off-duty conduct protections
 - Social media / privacy statutes
 - Laws against discrimination, harassment, and retaliation
 - Voting rights legislation
 - Captive audience bans

Constitutional Protections



Free Speech and Private Employment

- ➔ Do free speech rights protect employees from adverse action by private employers?

- ➔ Generally, **no**. Constitutional guarantees of freedom of speech protect the individual against action by governmental authorities, not by private persons or entities.

- ➔ But be aware of state law:
 - Connecticut expressly protects free speech in private employment, so long as the activity does not substantially or materially interfere with job duties or working relationships.

Constitutional Protections

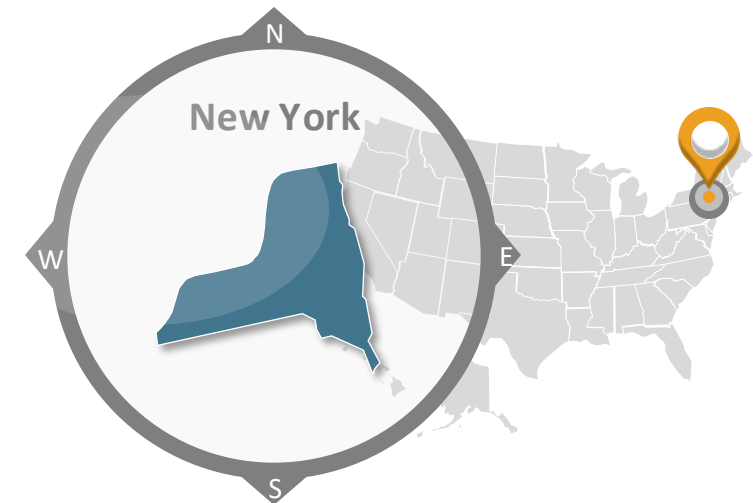
Free Speech: State Constitutions

Most state constitutions also protect free speech. For example:



California: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” Cal. Const. art. I, § 2.

New York: “Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press” N.Y. Const. art. I, § 8.



But What About Executive Orders?



Impact of Trump Administration's Executive Orders

- ➔ In the first 100 days, 142 executive orders

- ➔ Most executive orders do not impact private employers. However, private employers who are federal contractors are impacted by the EOs, particularly those relating to DEI policies and programs, gender identity, and affirmative action.

- ➔ Executive Orders signal administration and Agency priorities
 - EEOC Guidance on Anti-American national origin discrimination
 - English as national language Executive Order
 - EEOC/DOJ Guidance on DEI-related discrimination
 - Disparate impact claims

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Controversial Commentary: Case Studies

Situations and Scenarios



In June, your company added a temporary banner to its intranet home page that featured a rainbow flag and the word “Pride” with a link to its diversity, equity, and inclusion resources. An employee reacted by posting the following to a company-wide message board: “God revealed the rainbow to Noah as a symbol of hope for everyone. Using it to promote sin is an abomination.”

What would you do?

Legal Considerations

Anti-Discrimination, Anti-Harassment, and Anti-Retaliation Laws



→ Does the post constitute unlawful discrimination or harassment of another employee?

→ Does the post complain about discrimination, harassment, or retaliation?

→ Be mindful of creating a discrimination claim by taking adverse action against one employee for making a post but not against another for making a similar post, especially if one of the employees is in a protected class.

Lessons for Employers

Learning from Recent Case Law

Lesson: Employers don't have to tolerate intolerance but should respond to employee behavior problems in a measured way.

→ *Snyder v. Arconic Corp., Case No. 23-03188 (8th Cir., Aug. 14, 2024)*

The employee used language objecting to the employer's use of a rainbow flag during Pride Month with commentary posted on the company's intranet. The public nature of the post was accidental.

After the employee was terminated, he sued, alleging religious discrimination.

The EEOC sided with the employer, filing an amicus brief arguing that employers do not have to accommodate religious expression that violates anti-harassment policies.

The employer prevailed on summary judgment, and the Eighth Circuit affirmed.
The SCOTUS denied review despite Circuit split.

Lessons for Employers

Snyder v. Arconic

What the employer got right in this case:

Maintaining clear written policies

The employer had both a diversity policy and an anti-harassment policy consistent with applicable law, and a clear policy about acceptable content to post on the company intranet.



Following the policies and attendant procedures

The employer first suspended the employee, then conducted a thorough investigation, and only after that made a determination based on the investigation's findings and the employee's record.



Documenting personnel issues

The employee had a history of disciplinary problems.



Situations and Scenarios



You learn that an employee is posting unauthorized TikTok videos while wearing a company insignia.

Can you intervene?

Legal Considerations

Social Media Privacy Laws



More than two dozen states have laws addressing employer access to employees' social media accounts, including California, Connecticut, Delaware, Illinois, Michigan, Nevada, New Jersey, and New York.



These laws generally prohibit employers from asking employees *and applicants* to provide usernames and passwords to personal accounts.



Employers are also prohibited from retaliating against employees or applicants based on their refusal to disclose personal social media information.



Some have carveouts for specific scenarios, including:

- accounts used for business purposes,
- employer-funded devices, and
- court orders.

Social Media Privacy Laws



Typical Exceptions:



Requiring or requesting an employee to provide social media access information the employer believes to be relevant to an investigation of allegations of the employee's misconduct or violation of laws or regulations.



Accessing information that is in the public domain or that is provided directly to the employer from an employee or third party.

Situations and Scenarios



You find the TikTok videos reposted in a publicly visible Facebook group and see that the employee is criticizing the company and its products. Other employees have been adding comments.

Can you take disciplinary action?

What if the criticism is about . . . pay practices?

Legal Considerations

NLRA

Employer policy should not restrict “Section 7 Rights”

Section 7 of the NLRA provides:

- ➔ “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

Protection of concerted activity

- ➔ Protection of concerted activity
 - Applies to union and non-union workers
 - Does not apply to supervisors, managers, or independent contractors

Legal Considerations

NLRA



NLRB's Views on Social Media Use by Employees

National Labor Relations Board (NLRB) policy reiterates an emphasis on protecting concerted activity:



Guidance advises about “the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media.”



“But just individually griping about some aspect of work is not concerted activity: what you say must have some relation to group action, or seek to initiate, induce, or prepare for group action, or bring a group complaint to the attention of management.”



“Such activity is not protected if you say things about your employer that are egregiously offensive or knowingly and deliberately false, or if you publicly disparage your employer's products or services without relating your complaints to any labor controversy.”

Lessons for Employers

Learning from Agency Decisions

Lesson: Be careful about disciplining employees for communications that could be deemed protected activity, such as whistleblowing or organizing.

→ *North West Rural Elec. Coop.*, 366 N.L.R.B. No. 132 (July 19, 2018)

An employee posted to a Facebook page, which coworkers followed, raising concerns about workplace safety and soliciting ideas. More than 100 people added comments and engaged in an online discussion.

The employee was later terminated. The employer contended that the worker was fired because he did not get along with others, but the employee maintained that he was discharged because of the Facebook post.

An Administrative Law Judge was persuaded by the employee and further found that the Facebook post was protected concerted activity and that the criticism of the employer was not so egregious as to justify the employer's decision to terminate.

The NLRB affirmed the decision and held that the employer's policies that prohibited workers from discussing employment on social media were unlawful.

Legal Considerations

Whistleblowing

More than 20 Federal laws protect whistleblowers against retaliation



- Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A

- Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

- Occupational Health and Safety Act Section 11(c)
 - A surprising number of anti-retaliation provisions in federal statutes are investigated or enforced by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) through its Whistleblower Protection Program, including the Clean Air Act, Affordable Care Act, SOX, tax fraud, etc.

State examples:



- New Jersey Conscientious Employee Protection Act

- California Labor Code Section 1102.5

- Delaware Whistleblowers' Protection Act, 19 Del C. § 1703

- New York Labor Law Section 740

Situations and Scenarios



An employee has come to you complaining that an Instagram account run by another employee has numerous posts that target her with severely harassing content. She shows you screenshots and claims that the posts and many comments made by anonymized usernames (which are vile) were actually made by coworkers.

What would you do?

Situations and Scenarios



After investigating, you determine that the account is followed by dozens of employees, and that many of the comments were indeed made by the complainant's coworkers. Worse, the account was created by the complainant's supervisor. However, none of the content was created using company resources or equipment, and all posts and comments were made only during non-working hours.

Since the behavior was off duty conduct, is it your problem?

Legal Considerations

Off-Duty Conduct Laws



Overview



- At least 29 states have enacted laws protecting employees from discrimination or retaliation for their engagement in lawful off-duty activities.
- Protected off-duty activities usually fall into three categories:
 - Tobacco use, expressly protected in more than a dozen jurisdictions, including the District of Columbia, Connecticut, New Jersey, and Oregon
 - Other lawful use of consumable goods protected in eight states, including Illinois, Minnesota, Missouri, Nevada, North Carolina, and Tennessee
 - Political activity (definitions vary by state): California, Nevada, New Jersey, and New York
- California, Colorado, New York, and North Dakota have **broader** protections

Lessons for Employers

Learning from Recent Case Law

Lesson: Off-duty and off-site conduct—including social media posts—CAN be the basis for a lawful adverse employment action.

→ *Okonowsky v. Garland*, 109 F. 4th 1166 (9th Cir., July 25, 2024)

An employee created an anonymized Instagram account, followed by more than 100 coworkers, including the HR manager and union president.

The account contained hundreds of overtly sexist, racist, antisemitic, homophobic, and transphobic memes that explicitly or implicitly referred to the workplace and employer. The Ninth Circuit panel said that most were too graphic or disturbing to even describe.

“... offsite and third-party conduct can have the effect of altering the working environment in an objectively severe or pervasive way” because “even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee’s working environment.”

Legal Considerations

Discrimination Based on Political Beliefs or Affiliation

Many jurisdictions prohibit employment discrimination based on political ideology and retaliation because of political activities, beliefs, or affiliations.

There are, however, nuanced differences among these laws—some create a protected class within equal employment opportunity laws



- Madison, WI – “political beliefs”
- Seattle, WA – “political ideology”
- Washington, DC – “political affiliation”

No federal law expressly addresses this.

But don't forget the NLRA: A political discussion could relate to protected activity if the discussion extends to issues such as labor protections, terms and conditions of employment, or union busting.

Lessons for Employers

Learning from Recent Case Law

Lesson: State law may restrict an employer's ability to respond to actions they find disturbing.

→ *Snyder v. Alight Solutions LLC, et al., No. SACV2100187CJCKESX, (C.D. Cal. May 5, 2021)*

An employee posted selfies to a private Facebook page showing her at the Capitol on January 6, 2021. These were reposted to the employer's Facebook page captioned "Alight employee storming the capital" (sic).

Two days later, she was fired for "criminal trespass."
She sued, alleging that her dismissal was politically motivated in violation of California laws and public policy protecting political activity.

Court did **not** grant motion to dismiss or for summary judgment. Plaintiff pled sufficient facts to get to a jury.

What did this employer do wrong?

Lessons for Employers

Snyder v. Alight Solutions

What the employer got wrong

Failing to follow policies consistently

The plaintiff argued that her opposing views of a political event and politician were condemned despite policies celebrating diversity.



Not investigating the employee's complaints

Instead of investigating both the employee's complaints about cyberbullying, the employer quickly fired her.



Reacting too quickly

The employer discharged the employee within just 48 hours of learning about her participation in the protest.



Situations and Scenarios



An employee wants to form a new Muslim affinity group.

How should HR approach the request?

Legal Considerations

Spot the Issues



- What laws might you think about if employees want to create a nexus between religion and their workplace?
- Can the employer say “No”?
What if there is already a Christian or Jewish Group? Can the employer still say no?
- Can the employer require that the group be open to non-Muslims?

Lessons for Employers

Learning from Recent Case Law

Lesson: Employers need not allow religion at work, but if they do, they need to treat all religions equally.

→ *Moranski v. Gen. Motors Corp.*, 433 F.3d 537, 541 (7th Cir. 2005)

An employee asked to form an affinity group for Christians at a company that had other “social identity” affinity groups based on race, color, sex, and national origin. The employer said no.

Its written Affinity Group guidelines explicitly stated that it does not allow groups that promote or advocate political or religious positions. The employee sued, alleging religious discrimination under Title VII.

The court found that the company’s decision to exclude **all** religious affinity groups is not discrimination under Title VII.

The employer’s written guidelines and explicit company policy were a key factor to the court’s decision.

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Controversial Commentary Practical Strategies

Best Practices

Steps Employers Should Take *Before* Controversy Erupts

Set policy

01

Train regularly

02

Enforce consistently

03

Investigate thoroughly

04

Document *everything*

05

Best Practices

Steps Employers Should Take *Before* Controversy Erupts

Set policy

01

- Consider your company's culture and the law.
- Develop comprehensive policies that reflect the company's values and the regulatory environment.
- Communicate expectations clearly with a well-written handbook or code of conduct.
- Review policies regularly! Laws (and society) change constantly. Even the best handbooks need periodic updates to stay compliant.

Best Practices

Steps Employers Should Take *Before* Controversy Erupts

Train regularly

02

- Employees (and managers) cannot follow rules that they do not know.
- Develop an onboarding process that includes providing written policies, whether in printed or electronic form and explaining those policies.
- Ensure that managers understand their role in implementing and enforcing policies.
- Communicate a clear process for handling complaints or grievances.
- Provide refresher training regularly—even where the law doesn't require it, but especially where it does!

Best Practices

Steps Employers Should Take *Before* Controversy Erupts

Enforce consistently

03

- Disparate treatment may be unlawful discrimination.
- Determine if other employees engaged in similar conduct.
- Ensure that there's no "playing favorites" or exceptions.
- Differences in treatment must be justifiable based on the totality of circumstances.

Best Practices

Steps Employers Should Take *Before* Controversy Erupts

Investigate thoroughly

04

- Allegation of a policy violation should be examined by a neutral, unbiased investigator.
- This can be a designated employee or company department or counsel.
- Sometimes hiring an independent, trained investigator is warranted—consider the advantages and limits of privilege if using an attorney.
- Complainants and all related parties, including any fact witnesses and the individual(s) suspected of wrongdoing, should be interviewed.
- Sometimes, a “litigation hold” may be necessary.

Best Practices

Steps Employers Should Take *Before* Controversy Erupts

Document EVERYTHING

05

- Having a paper trail can help an employer.
- Maintain personnel files that include records of employee receipt of handbooks, policies, codes of conduct, etc., and training on them.
- Memorialize any performance issues or behavior concerns in a timely manner.
- Remember obligations under federal and state law related to personnel files.