

SOCIAL MEDIA, POLITICS, PROTESTS AND FREEDOM OF SPEECH – WHAT IS PROTECTED AND HOW TO RESPOND

I. UPDATE ON LEGAL TRENDS AND LATEST DEVELOPMENTS

A. Employer Control Over Employee Speech

1. Do you, as an employer, have the right to control how your employees choose to express themselves?
 - a. If so, do your rights depend on what your employees are saying, where they are saying it, or who sees them saying it? Perhaps most importantly, even if you do possess such rights, should you choose to exercise them?
2. Under both state and federal law, employers are permitted to regulate the speech of their employees in a wide variety of circumstances.
3. Employers have the right to regulate speech at work and also employee speech away from work.
 - a. When an employer possesses the right to limit the speech of its employees, it may find itself liable for violating non-speech related laws if it exercises those rights in an unlawful or discriminatory manner.
 - b. It is critical for all employers to know what speech related rights they possess, the limits on those rights, and how they should exercise (or not exercise) those rights in response to the actions of their employees.

B. Freedom of Speech Issues Employers are Facing

1. Political Speech
 - a. Can be written, spoken or symbolic actions (*e.g.*, posting photos or signs in a work area).
 - b. Commenting on political ideology, political parties, or actions of politicians.
 - c. Employees involved in political discussions or debates at work that cause disruptions, attending political protests outside of work, or posting political content on social media.

- d. Be aware of your state laws before taking any action. More than a dozen states and jurisdictions prohibit employers from retaliating against employees for engaging in political activities.
 - i. Other states have protections that specifically prohibit employers from discriminating against employees based on party membership or for engaging in election-related speech and political activities.¹
 - (A) Employers need to gauge whether the offensive post is actually related to the employee's political party affiliation. Expressions of racism or harassment is NOT political speech.¹

2. Social Justice

- a. Protesting
- b. Engaging in debates or posting about controversial topics on social media
- c. Cancel culture — the phenomenon of promoting the “canceling” of people, brands and even shows and movies due to what some consider to be offensive or problematic remarks or ideologies.

C. Bullying and Cyber Bullying

- 1. Bullying is a targeted behavior that happens at work or online. It might be spiteful, offensive, mocking, or intimidating. It forms a pattern, and it tends to be directed at one person or a few people.
 - a. Examples of Bullying:
 - i. Targeted practical jokes.
 - ii. Being purposely misled about work duties, like incorrect deadlines or unclear directions.
 - iii. Continued denial of requests for time off without an appropriate or valid reason.
 - iv. Excessive performance monitoring.
 - v. Overly harsh or unjust criticism.

¹ <https://www.natlawreview.com/article/social-media-posts-during-turbulent-times-faqs-employee-rights-and-employer>

- vi. Threats, humiliation, and other verbal or written abuse.
 - b. Objective and constructive criticism, and disciplinary action directly related to workplace behavior or job performance aren't considered bullying.
 - 2. "Cyberbullying is bullying that takes place over digital devices like cell phones, computers, and tablets. Cyberbullying can occur through SMS, Text, and apps, or online in social media, forums, or gaming where people can view, participate in, or share content. Some cyberbullying crosses the line into unlawful or criminal behavior."²
 - a. Examples of cyberbullying:
 - i. Sending, posting, or sharing negative, harmful, false, or mean content about someone else.
 - ii. Sharing personal or private information about someone else causing embarrassment or humiliation.
- D. Maintaining the Privacy of Information
 - 1. HIPPA
 - a. Depending in the industry, companies will have different types of information they will require employees to keep private.
 - i. In the health industry HIPPA protects against the disclosure of private health information.
 - 2. Confidentiality
 - a. Make sure employees are entering into agreements to keep company and customer/client information confidential.
 - b. Consider having employees attest that they will not use or disclose confidential information they learned from a prior employer.
 - 3. Trade Secrets and Proprietary Information
 - a. Consider including restrictions on social media posts in employment-related contracts (*e.g.*, non-disclosure and non-disparagement agreements).
 - b. Confidentiality and privacy policies for proprietary company information.

² <https://www.stopbullying.gov/cyberbullying/what-is-it>

E. Your Professional Reputation

1. Consider professional relations, online reviews, and employer reviews.
2. Employees posting negative content on social media, job review websites and business review websites can have a negative effect on a business.

II. WHAT IS AND WHAT IS NOT PROTECTED SPEECH

A. Regulating Employee Speech

1. Employers should be aware of their responsibilities under the US Constitution and the NLRA and before attempting to regulate an employee's speech.
2. US Constitution – 1st Amendment
 - a. The First Amendment of the US Constitution protects against government regulation of protected speech.
 - b. It does not grant employees the unfettered right to say whatever they want to say whenever they want to say it.
 - c. It merely places limits on the ability of the *federal government* to restrict their speech under certain circumstances.
 - d. Protected speech generally fall into the following categories and receive varying levels of scrutiny when evaluated by the courts: political, social, economic, educational, religious, and cultural ends. Exceptions to protected speech include words that incite or produce imminent lawless action or presenting a clear and present danger.
 - e. Private vs. Public Employers
 - i. Private Employers
 - (A) Private employers are not bound by the First Amendment. This means for employees in the private sector, the First Amendment offers you no protection from being fired on account of what you say.
 - (B) Private employers are allowed to have policies that regulate employee speech – within certain bounds.
 - ii. Public Employers
 - (A) Public employers are not completely prohibited from limiting employee's speech, if a public employee is not speaking as a private citizen and/or is not speaking about a matter of public concern, their

federal employer is free to restrict their speech without violating the First Amendment.

- (B) U.S. Court of Appeals for the Sixth Circuit reversed a decision in favor of the employee who claimed retaliation for exercising her first amendment rights. The Sixth Circuit wrote “[t]o establish a claim for First Amendment retaliation, a public employee must show that: [she] engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against [her] that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by [her] protected conduct.”³

3. State Constitutions

- a. Several state constitutions allow for broader protection of individuals. The Michigan Constitution *could* provide more freedom and protection for individuals related to their speech – but Michigan is not one of these states. The Michigan Supreme Court has held that the freedom of speech clause in the Michigan Constitution – although worded differently than the First Amendment – provides the same amount of protection.

4. National Labor Relations Act ("NLRA")

- a. Many of the free speech rights that employees possess are not constitutional in origin but instead arise from the NLRA.
- b. The NLRA is a federal law that grants employees the right to engage in concerted activities for the purpose of attempting to improve their wages, benefits, or working conditions.
- c. Pursuant to the NLRA, it is illegal for employers to “interfere with, restrain, or coerce employees” not to exercise any rights granted to them under that Act.
- d. Whether a given action qualifies as protected under the NLRA depends largely on whether its primary purpose is to fulfill one of the Act’s stated objectives. Protected actions could include an employee’s complaining to their employer about a lack of diversity in the workplace, an employee’s discussing their wages with another employee of the same company on social media, or an employee’s informing a government agency about their employer’s alleged performance of illegal employment actions.

³ Bennett v. Metropolitan Government of Nashville, No. 19-581

- e. The NLRA does not generally protect an employee's communications to members of the public or an employee's mere "gripes." Instead, in order to qualify for protection under the Act, an employee's speech needs to truly be intended to facilitate the employer's improvement of that or other employee's wages, benefits, or working conditions.
 - f. Whether an employer's policy violates the NLRA depends on: (a) the nature and extent it interferes with the ability of employees to exercise their rights under the Act and (b) the legitimate business justifications for the employer adopting the policy.
 - g. As you can see, it is both the character of the action performed and the circumstances under which the action is performed that determines if it qualifies as protected speech.
5. State and Local Laws
- a. Some states prohibit adverse employment action for an employee's legal conduct outside of work – Michigan does not have such a law on the books and employers are permitted to take adverse employment action against employees based on conduct during and after work time. If you operate in multiple states this is something you should be aware of for other jurisdictions.

B. Employee Speech That is Not Protected

- 1. Illegal Speech
 - a. Hate speech, racial slurs, harassing speech, discriminatory speech, retaliatory speech, defamation, fraud, disclosure of trade secrets, disclosure of proprietary information, and disclosure of most types of confidential information.
- 2. Unprofessional Speech
 - a. Speech that is rude, unprofessional, threatening, profane, insulting, uncivil, or discourteous in tone or appearance.
- 3. Customer Speech
 - a. Speech directed at customers, speech that involves the disclosure of private customer information.
- 4. Gripes
 - a. Speech that consists merely of griping and that is not intended to improve an employee's wages, benefits or working conditions.
- 5. Speech During "Working Time"
 - a. Speech while employees are "on-the-clock."

6. Disruptive Speech
 - a. Speech that affects an employee's job performance or the performance of their co-workers.

III. UNDERSTAND BEST PRACTICES AND THE IMPORTANCE OF TRAINING AND POLICIES

A. What Can Employers do?

1. Understand your obligations under Title VII and what the federal and state protected classes are before making any employment related decision based on an employee's speech (whether in person, online, or through social media).
2. Hiring Considerations
 - a. An employer may view and utilize information about an employee that is available in a public domain. However, an employer must follow other state and federal employment rules such as:
 - i. Antidiscrimination laws
 - ii. Background check laws
 - iii. Off-duty conduct laws
3. Disciplining Employees
 - i. Employers generally remain free to discipline their employees for legitimate business purposes.
 - ii. If an employee is violating a lawful policy that is being uniformly enforced, there is no issue with disciplining or terminating an employee for a violation of such a policy.
 - (A) Attendance, punctuality, civility, non-discrimination, harassment, etc.
- b. Policy Considerations
 - i. An employer who improperly or inconsistently exercises its rights can quickly find itself being sued for violating federal, state, or local laws. For these reasons, choosing not to restrict employee speech might actually be the best policy for certain employers, including those that do not have the time or resources to properly exercise their rights.
 - ii. All other employers should remember to exercise their rights in a legal, non-discriminatory, and non-retaliatory manner.

(A) If you adopt a policy, it should clearly detail the company's expectations regarding the use of social media. It should explain what types of content and online conduct that could create problems, such as bullying, harassing, using discriminatory or offensive language. It should also make clear the right to privacy, if a work provided device is being used.

iii. Consider having training requirements on these policy.

c. Termination Considerations

i. Before terminating an employee for their conduct on a social media platform or other online acts, ensure online evidence is captured and preserved.

ii. Discrimination Considerations

(A) Before you take adverse employment action based on an employee's social media posts of commentary during working time, you have to analyze the risk of a Title VII discrimination claim. This would include the nature of the reason for discipline or termination, whether the employee is a member of a protected class, etc.

iii. Evaluate the impact of the employee's conduct on the company's culture and reputation for condoning offensive comments, both internally and externally, or alternatively, of condoning it.

iv. Consider difficult job market – can this employee be replaced without posing an undue hardship on the company?

B. Monitoring Social Media

1. Can employers take action on a post to a private account that was provided to them by another employee?

a. Employers can conduct an investigation when receiving specific information about an employee's activity on a personal account in order to ensure compliance with the law and workplace rules and policies.

2. Can employers ask employees for passwords?

a. In Michigan, employers may not ask employees (or applicants) for their passwords.⁴

⁴ Mich. Comp. Laws Ann. § § 37.271 to 37.278

3. Can employers ask employees to view private accounts?
 - a. In Michigan, employers cannot request that an employee grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account. ⁴
 - b. Exceptions
 - i. If the employer paid for the device in part or in full.
 - ii. If an account or service is provided by the employer, obtained due to the employment relationship, or used for the employer's business purposes.⁴
 - iii. if an employer receives specific information regarding the unauthorized transfer of confidential, proprietary information, or financial data. ⁴