

# SOCIAL MEDIA, POLITICS, PROTESTS AND FREEDOM OF SPEECH –What is Protected and How to Respond

## Overview

- Update on legal trends and latest developments
- What is and what is NOT protected speech
- Understand best practices and the importance of training and policies



# Update on Legal Trends and Latest Developments



## Freedom of Speech Issues Employers are Facing

- Political Speech (can be written, spoken, or symbolic actions)
  - Commenting on political ideology, political parties, or actions of politicians
  - Political discussions or debates at work that cause disruptions
  - Posting political content on social media
- Be aware of your state laws (*e.g.* on retaliation) before taking any action



### Social Justice

- Protesting
- Engaging in debates or posting about controversial topics on social media
- 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





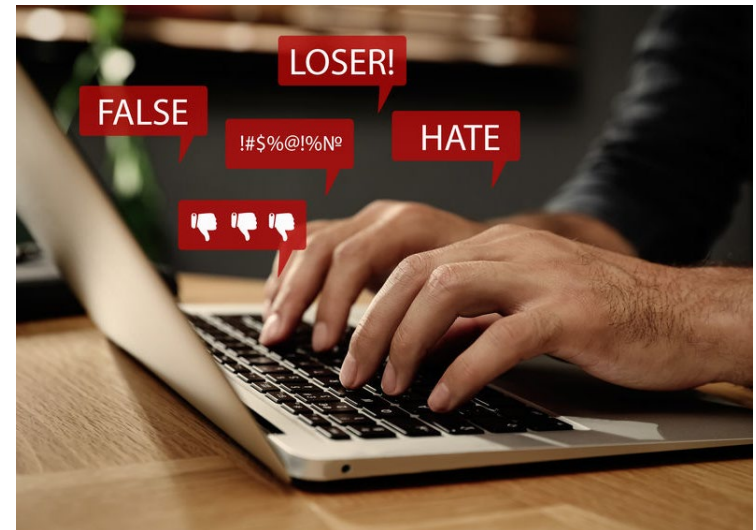
## Bullying

- **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



### Cyber Bullying

- **Cyberbullying** is bullying that takes place over digital devices through SMS, Text, and apps, or online where people can view, participate in, or share content
- Includes sending, posting, or sharing negative, harmful, false, or mean content about someone else; sharing personal or private information causing embarrassment or humiliation
- Some cyberbullying crosses the line into unlawful or criminal behavior
- Unique concerns – persistent, permanent, and hard to notice



# Maintaining the Privacy of Information

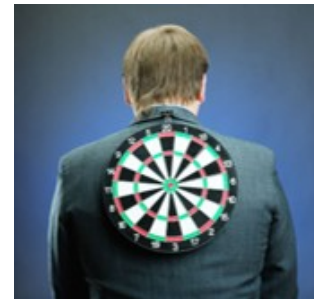
- HIPPA
  - Depending in the industry, companies will have different types of information they will require employees to keep private
- Confidential Company/Client Information
  - Current employer and prior employers
- Trade Secrets and Proprietary Information
  - Consider including restrictions on social media posts (*e.g.*, in non-disclosure and non-disparagement agreements)





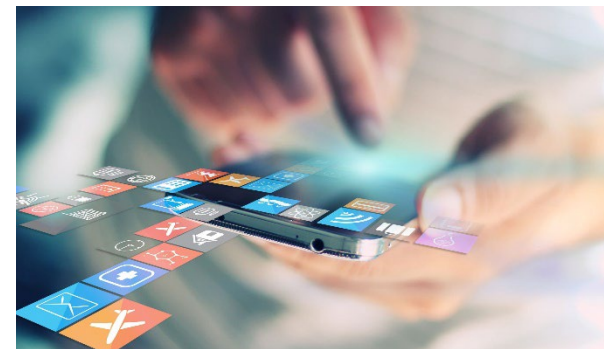
# Your Professional Reputation

- Consider professional relations, online reviews, and employer reviews
- Employees posting negative content on social media, job review websites and business review websites can have a negative impact on your professional reputation



# Employer Control Over Employee Speech

- Do you, as an employer have the right to control how your employees express themselves?
  - Under both state and federal law, employers are permitted to regulate the speech of their employees under a wide variety of circumstances
  - Employers have the right to regulate speech at work, but also some speech away from work (such as when it impacts relationships among staff or clients)

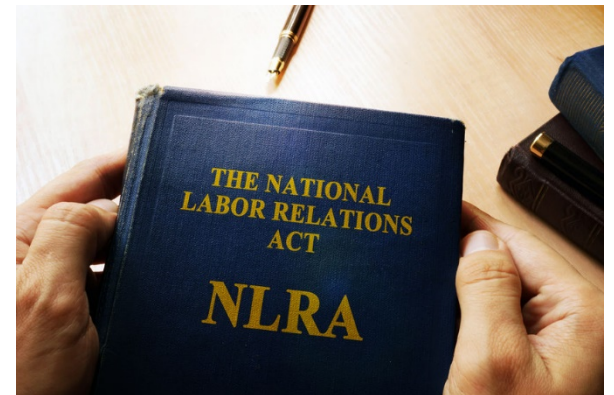


# What is and What is NOT Protected Speech



## Regulating Employee Speech

- Before attempting to regulate an employee's speech, employers should be aware of their responsibilities under
  - US Constitution
  - State Constitution
  - NLRA
  - Title VII
  - State and local laws



## US Constitution – 1<sup>st</sup> Amendment

- Protects against government regulation of protected speech
- Does not grant employees the unfettered right to say whatever they want to say whenever they want to say it
- Merely places limits on the ability of the federal government to restrict public employee's speech under certain circumstances



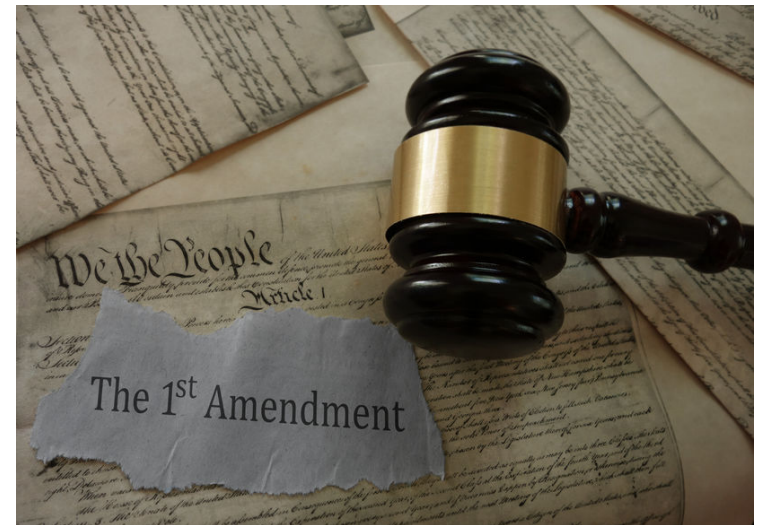
## US Constitution – 1<sup>st</sup> Amendment

- Protected speech generally fall into the following categories:
  - Political
  - Social
  - Economic
  - Educational
  - Religious
  - Cultural ends
- Except: Speech inciting imminent lawless action, clear and present danger, etc.
- Some state constitutions allow for broader protections of individuals



## Private vs. Public Employers

- Private employers
  - Not bound by the First Amendment. This means for employees in the private sector, the First Amendment offers no protection from being fired on account of what they say
  - Private employers are allowed to have policies that regulate employee speech – within certain bounds



## National Labor Relations Act ("NLRA")

- Many of the free speech rights that employees possess are not constitutional in origin – but instead arise from the NLRA
  - **Protected Concerted Activity:** 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 or on social media



# National Labor Relations Act ("NLRA")

- Does not generally protect an employee's communications to members of the public or an employee's mere "gripes"
- Whether an employer's policy violates the NLRA depends on:
  - Whether and to what extent it interferes with the ability of employees to exercise their rights under the Act
  - The legitimate business justifications for the employer adopting the policy



## State and Local Laws

- Some states prohibit adverse employment action for an employee's legal conduct outside of work
  - Michigan does not have such a law. Employers are permitted to take adverse employment action against employees based on conduct during and after work time





# Employee Speech That is Not Protected

- Illegal Speech
  - Hate speech, racial slurs, harassing speech, discriminatory speech, retaliatory speech, defamation, fraud, disclosure of trade secrets, proprietary information, and most types of confidential information
- Unprofessional Speech
  - Speech that is rude, unprofessional, threatening, profane, insulting, uncivil, or discourteous in tone or appearance
- Customer Speech
  - Speech directed at customers, speech that involves the disclosure of private customer information



# Employee Speech That is Not Protected

- Gripes
  - Speech that consists merely of griping and that is not intended to improve an employee's wages, benefits or working conditions
- Speech During “Working Time”
  - Speech while employees are “on-the-clock”
- Disruptive Speech
  - Speech that affects an employee's job performance or the performance of their co-workers



# Understand Best Practices and the Importance of Training and Policies



## What Can Employers Do?

Employers need to be aware of both state and federal protected classes in hiring, disciplining, or terminating employees an employee's speech (whether in person, online, or through social media)

Federal Protected Classes	Additional Michigan Protected Classes
Age Race Sex (gender identity and sexual orientation) Religion Disability National Origin and Citizenship Genetic Information Pregnancy Military and Veteran Status	Height Weight Familial Status Marital Status Misdemeanor Arrest Record

# What Can Employers Do?

- Hiring Considerations
  - Employers can view information online on public domains about employees. However, such conduct presents certain risks, and employers must follow state and federal laws:
    - Antidiscrimination laws
    - Background check laws
    - Off-duty conduct laws – if you are operating outside of Michigan, in a state that has these laws in effect





## What Can Employers Do?

- Disciplining Employees
  - Employers generally remain free to discipline their employees for legitimate business purposes
  - 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



## What Can Employers Do?

- Policy Considerations
  - 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 properly or consistently
  - Other employers should remember to enforce policies in a legal, non-discriminatory, consistent, and non-retaliatory manner
  - Consider having training requirements on these policies



## What Can Employers Do?

- Termination Considerations
  - Preserve evidence
  - Discrimination considerations
    - 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 or retaliation claim
  - Evaluate the impact of the employee's conduct on the company
  - Consider the difficult job market



CLAIMS

### Monitoring Social Media

- Can employers ask employees for passwords?
  - In Michigan, employers may not ask employees (or applicants) for their passwords
- Can employers take action on a post to a private account that was provided to them by another employee?
  - It depends on the circumstances



### Monitoring Social Media

- Can employers ask employees to view private accounts?
  - 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
  - There are exceptions

