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Employee Benefit Plan Review

Dealing with Controversial Commentary? Some Guidance and Guardrails for Employers

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The Israel-Hamas war. Antisemitism and Islamophobia. Ukraine versus Russia. Black Lives Matter. #MeToo. Mass shootings and "Well Regulated" versus "Shall Not Be Infringed." Vaccination and mask mandates. Politicians and presidents. Culture wars. Doxing.

Difficult issues and painful news stories that spur debate and heated discourse seem relentless. Perhaps that has been true throughout the ages, but now, with wars raging and campaigns for the 2024 elections kicking into high gear, the potential for harmful words and strong feelings to be amplified may be greater than ever. Today, personal recording devices are available to every person who carries a smartphone, and social media platforms disseminate not just words but images, videos, and even artificial-intelligence-generated content that can be readily shared with a worldwide audience in real time.

As has been widely reported, amid on-campus protests, some student activities in response to an ongoing international crisis recently led a few employers to rescind job offers to students whom the employers deemed to have made or supported antisemitic remarks and/or conduct. Given the increased targeted violence and harassment on campuses, numerous law firms (including the authors' firm) joined in a November 1, 2023, letter to law school deans condemning "anti-Semitism, Islamophobia, racism or any other form of violence, hatred, or bigotry" and urging the schools to take a likewise "unequivocal stance."

It is not the first – and probably not the last – instance of employers making news with their public responses to various controversies. One employer upheld its policies against harassment by terminating an employee's employment after her treatment of a Black man in a public park went viral (leading to criminal charges). Others publicly announced support for access to reproductive health care by offering travel benefits for employees seeking abortions after the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*,[1] overruling *Roe v. Wade*. Many companies issued statements following the October 7, 2023, Hamas terrorist attacks on Israel.

When significant news arises and tensions run high, employers often wonder how – and if – they should respond, whether by taking a formal position on the controversy du jour or by responding to employee reactions that have come to their attention. This article provides legal and practical considerations that may be applied, no matter the issue.

Taking A Corporate Stance

Typically, although there are certainly exceptions, whether an employer takes a position on a divisive issue – and what that stance will be – is more of a business decision than a legal question. Those determining an organization's public position are well advised generally to consult the appropriate stakeholders and also consider how any public statements, including internal ones, could affect employees as well as external audiences, including shareholders, investors, clients, and customers. Prior to the issuance of any communiqué, regardless of the medium, an employer will want to ensure that its statement is consistent with its own internal policies as well.

Depending on the issue, the nature of the organization, its industry, and other factors, the lack of a statement could also be subject to interpretation (or criticism!). Still, hastily dispatched or, worse, misfired messaging can be damaging, so those with authority to speak on an organization's behalf should do so thoughtfully.

Managing Outspoken Employees

Although responding to current events with a statement or policy may be more of a public relations strategy or other business decision than a legal strategy, responding to employees' provocative behaviors or controversial communications is a workforce management challenge that can have legal implications. When an employee commits actions or expresses opinions that are at odds with the employer's interests, values, or policies, it may be appropriate for the employer to intervene. Certainly, corrective action is warranted when an employer is made aware of behavior that is hostile, threatening, or discriminatory to other employees. When facing such situations, employers must respond in a manner that is legally sound, consistent with their own policies (considering past practices), and appropriate based on the specific circumstances.

Applicable Federal Law

Often, the first legal principle that comes to many minds is that the First Amendment to the U.S. Constitution provides "freedom of speech." What is frequently misunderstood, however, is that the First Amendment is a restraint on government, not on private actors. The First Amendment does not apply in the context of private employment. But even if it did, the rights it confers are not limitless. As Justice Oliver Wendell Holmes famously noted, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[2] Still, those who commit verbal assault with reprehensible speech can find haven under the First Amendment's umbrella in some contexts, as the U.S. Supreme Court held in *Snyder v. Phelps*.[3]

But, in general, the First Amendment does not guarantee or protect employment. In the United States (except for Montana), absent a collective bargaining agreement or other employment contract that requires discharge for cause, most employment relationships are governed by the principle of at-will employment, which allows employers to terminate employment for any reason that is not unlawful (such as illegal discrimination or retaliation).

Broadly speaking, Title VII of the Civil Rights Act of 1964, as amended, and other federal laws require covered employers to maintain a workplace that is free from discrimination and harassment based on certain protected characteristics, such as race, religion, national origin, sex, and sexual orientation; there are many state and local laws that echo and expand on federal law. Tolerating behaviors that create or contribute to a hostile work environment can place an employer in jeopardy of liability under such equal employment opportunity (EEO) laws, providing reason alone for corrective actions if an employee's speech or actions are defamatory, threatening, or otherwise harmful to co-workers, customers, or the employer itself.

Before taking such actions, however, employers may want to consider the currently expansive view of the National Labor Relations Act (NLRA), as shown last year when the National Labor Relations Board (NLRB) decided *Lion Elastomers, LLC*,[4] which reinstated a rule elucidated in the 1979 *Atlantic Steel* matter.[5] Under the *Atlantic Steel* standard, the NLRB took a position that suggests employers exercise caution when disciplining workers for outrageous, generally inappropriate speech and/or behavior, if that activity was connected to "protected concerted activity." The NLRB policy urges that latitude should be provided to those who carry out their organizing activities with fervor, even if their enthusiasm crosses commonplace standards of civility. It bears reminding that, although its worker protections do not apply to managers or supervisors, the NLRA's coverage is not limited to unionized workplaces.

The Patchwork of Relevant State Laws

Notwithstanding the general rule that the First Amendment of the U.S. Constitution does not apply to private-sector jobs, a Connecticut statute[6] endeavors to protect employees – including those in the private sector – from discipline or discharge on account of their exercise of First Amendment rights "provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer." Although this law has not been vigorously litigated in the private-sector context, in *Mumma v. Pathway Vet Alliance, LLC*,[7] a district court in Connecticut recently denied an employer summary judgment on a claim brought under the statute by an employee whose employment was terminated after posting on social

media a meme that some co-workers found "hateful" and "derogatory." The court concluded that a jury could reasonably conclude that the plaintiff's employment was terminated because of the content of the actual speech (the social media post) and not because of the disruption caused by that speech, as required under the balancing test the U.S. Supreme Court set forth in *Pickering v. Board of Education*.[8]

But the Connecticut statute appears, at least for now, to be an outlier. In most states, courts seem more likely to side with an employer that decides to distance itself from people whose values do not align with the employer's interests, particularly when they share offending comments on public social media platforms. For example, in a 2022 decision, *McVey v. AtlantiCare Medical System Inc.*,[9] a New Jersey court reiterated that a private employee whose employment was terminated by her private employer may not rely upon the freedom of speech provisions of the U.S. and New Jersey Constitutions in a wrongful termination claim, and further noted that "racist remarks are not protected by the First Amendment" or its state analog.

Some states – including California, Colorado, and New York – have laws to protect employees from adverse employment actions based on their lawful off-duty conduct. Many more prohibit interference with political and/or religious activities (or conscience) or discrimination based on political affiliation. Although the limits of these protections have yet to be rigorously tested, and it is unclear how far an employee could take a claim under such laws, at least one recent case demonstrates that employers cannot take them lightly. Specifically, in *Napear v. Bonneville Int'l Corp.*,[10] a federal judge found that allegations about an employer's swift termination of, and subsequent public statement about, an employee who had posted a tweet remarking on the Black Lives Matter movement were sufficient to support a plausible claim of retaliation in violation of California law.

Finally, state legislatures[11] are starting to catch up with the 21st-century phenomenon of social media by enacting laws protecting the privacy of employees' and applicants' private online accounts and prohibiting employers from demanding access to such accounts. Such a law[12] exists in New York, but even this statute provides employer-friendly carveouts. For instance, the new law protects employers' rights to maintain certain control over their networks and devices for which they pay, as long as particular requirements are met, and recognizes that employers may access and use information posted publicly or shared by a third party (such as screenshots) for purposes of reporting misconduct, provided that the particular employee has voluntarily given access to the third party. Moreover, as a general matter, a number of state constitutions, including those of Arizona, California, Florida, Montana, and Washington, protect an individual's right to privacy.

Using Policy to Set Parameters

Ideally, employee handbooks or other documents contain an array of policies that place employees on notice as to the employer's legally permissible expectations with respect to behavior, civility, and a workplace environment that is conducive to the attainment of the organization's goals. Employers should consider having written policies on the following topics, among others:

- EEO / Discrimination and Harassment Prevention;
- Procedure(s) for Employee Complaints;
- Whistleblowing;
- Code of Conduct / Bases for Disciplinary Action;
- Workplace Searches / Expectation of Privacy;
- Technology Usage Policy / Expectation of Privacy;
- Bulletin Boards / Intranet Use;
- Social Media;
- Public Relations (Authority to Represent the Employer's Views);
- Workplace Violence;
- Dress Code; and
- Termination of Employment (At-Will Affirmation).

Specific statutory restrictions on employer policies may differ from state to state. For example, laws vary greatly with respect to rules about firearms. Employers with multistate operations are wise to consult with counsel about how to tailor policies to comply with the requirements of various state and local jurisdictions.

Factors to Consider

When confronted with a situation in which an employee has done or said something offensive, an employer should proceed with an assessment of the conduct and the impact – or potential impact – of its response (or non-response). Among the questions to ask in making this assessment are:

- Who is the employee, and what is that employee's influence/reach?
  - Is the employee authorized to speak for the organization?
  - What is the employee's role? (An employee who is a high-ranking corporate officer may be perceived as "speaking for the organization" even if the employee is not authorized to do so.)
- What was the subject matter?
  - Did any employee find the speech harassing, discriminatory, or offensive? (Was there a complaint about the speech?)
  - Could the speech be interpreted as political or religious? If yes, does an applicable law protect such speech?
  - Is there a nexus between the speech and protected activity under the NLRA?

  - Is the speech otherwise protected under applicable law?
- Did the speech or activity violate applicable law or an established employment policy?
- Is the employer required under applicable law to take action?
- How severe was the employee's conduct/speech?
  - Did the conduct/speech cause – or have the potential to cause – a substantial disruption to the employer's operations?
  - Could the conduct/speech constitute hate speech?
  - Does the conduct/speech encourage violence?
  - Did the conduct/speech harm the organization's reputation?
- What are the potential ramifications (in terms of public relations, morale, and workplace culture) of acting – or not acting?
- Where was the conduct/speech performed/felt?
  - Was the conduct/speech done outside of work or during working time?
  - Was the conduct/speech done on employer-provided equipment, via the employer's communications system(s), or through the employer's social media channel(s)?
  - Was the employee wearing a company logo or uniform while engaging in the conduct/speech?

This list is certainly not exhaustive, and answers may not be readily apparent. In some cases, a workplace investigation may be warranted to ensure there is an informed and equitable determination.

What About Applicants and New Hires?

It is certainly no secret in 2023 that public social media posts can be fair game for admissions officers as well as employers, so prospective employees should not be surprised that their online activity can influence their career path. Although ban-the-box laws and other background check restrictions can serve to limit what information employers may use to ascertain applicants' criminal and credit histories, and, more recently, jurisdictions are starting to limit the use of technology to screen candidates, there does not appear to be any law that prohibits a prospective employer from conducting an internet search that sheds light on a potential colleague.

Where caution is warranted, however, is in the use of such searches in a manner that might lead to a biased selection process. Employers seeking to review social media as part of the hiring process should consider creating a disciplined process to avoid bias. Just as listing dates of birth on job applications and attaching photographs to resumes are practices of a prior era, so, too, might indiscriminate searches become passé as a way to avoid inferences of discriminatory hiring choices.

That said – provided that the employer does not violate applicable law – it remains the case that an employer is within its rights to build an inclusive workplace culture that is intolerant of bigotry and racism by employing qualified individuals who share the employer's values.

What Employers Should Do Now

Although the choice to respond publicly to an issue remains a business decision, the optimal workforce management response to employee misconduct, such as disruptive behavior or threatening messages, will be grounded in thoughtful consideration of this possibility *before* a crisis arises. Employers will do well to anticipate that the next social upheaval or divisive topic can arise at any time and to be prepared by taking some actions, as appropriate, now. For example, employers may need to do the following:

- Review employee handbooks and other policy statements – including onboarding materials – to ensure that they set clear expectations and comply with applicable law.
- Conduct training, not only for new hires but also for all employees, to provide refreshers about the organization's EEO, social media, whistleblowing, and other policies and procedures.
- Create a procedure for reviewing social media to the extent that such content is reviewed as part of the background check process.
- Confirm that leadership is aware of potential risks before it makes public statements, circulates emails to all employees, holds town hall meetings, or instructs managers to take action in response to the latest controversial topic.
- Ensure that a contingency plan exists in case of a crisis. Such a plan should identify personnel that may respond to controversial commentary and complaints, conduct investigations, and communicate with internal and external audiences, as appropriate. It should advise stakeholders about their duties and obligations in the event of a concerning situation.
- Have a public relations plan, as well as public relations professionals, on deck to address the inevitable issues that may arise in this area.
- Consult with counsel to ensure the policies, training, and plans comply with applicable laws.

Notes

1. https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.
2. https://tile.loc.gov/storage-services/service/ll/usrep/usrep249/usrep249047/usrep249047.pdf.
3. https://tile.loc.gov/storage-services/service/ll/usrep/usrep562/usrep562443/usrep562443.pdf.
4. https://apps.nlrb.gov/link/document.aspx/09031d4583a42c17.
5. https://apps.nlrb.gov/link/document.aspx/09031d458002df80.
6. https://www.cga.ct.gov/current/pub/chap_557.htm#sec_31-51q.

7. https://ecf.ctd.uscourts.gov/cgi-bin/show_public_doc?2020cv0926-62.
8. https://tile.loc.gov/storage-services/service/ll/usrep/usrep391/usrep391563/usrep391563.pdf.
9. https://www.njcourts.gov/system/files/court-opinions/2022/a0737-20.pdf.
10. https://scholar.google.com/scholar_case?case=4273122422501698829&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
11. https://www.ncsl.org/technology-and-communication/privacy-of-employee-and-student-social-media-accounts.
12. https://www.nysenate.gov/legislation/laws/LAB/201-I.

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