POLITICS AND RELIGION IN THE WORKPLACE

A Toolbox for Handling Employee Expression in Difficult Times

Issues surrounding employee political and religious activity in the workplace are ever-present, but in 2020, employee expression is a front-and-center challenge for many employers. The explosion of social media and remote workspaces only enhances the difficulty. Employers are stuck between trying to support the expression and maintaining order and taking care of business.

There are limits to what employees may say or wear or do in the workplace. Understanding the legal boundaries and how they balance with your organization's culture and values is critical.

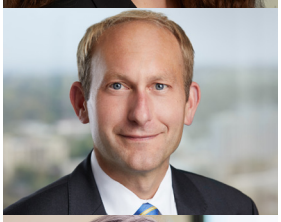
Public (i.e., government) employers have greater restrictions on actions that they can take, and the last section of these materials addresses public-employer issues. But private employers also encounter legal issues surrounding employee expression and religious activities. Thus, we begin with those applicable rules.

POLITICAL SPEECH AND SOCIAL JUSTICE IN THE WORKPLACE

Imagine this: Employees are socked in at home because of pandemic restrictions, utilizing company laptops in their dining rooms, attics, and off-to-college children's bedrooms. Night falls, and the employees begin doom-scrolling on their phones, perhaps with some hot tea or other calming beverage. One employee posts a Blue Lives Matter meme on Facebook, where a dozen or so other employees are her "friends." Another employee finds the post offensive to people trying to advance racial justice, and yet another employee adds that her cousin is in law enforcement; she has strong views on the issue.

The next morning, a manager wishes the employees "good morning" at their remote meeting. An employee posts: "I'd have a good morning if I wasn't distracted by the hate." When the manager follows up, the employee threatens to quit if the company doesn't fire the employee who posted that Blue Lives Matter.

Federal, state, and local laws all present legal concerns relating to employee speech.



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Federal laws

First Amendment

Many employees believe they have full First Amendment speech rights in the workplace. But employees in the private sector do not have any such rights in the workplace, because the First Amendment applies to government actions. Public-sector employees have some limited First Amendment rights when speaking "as a citizen on a matter of public concern," but generally not if the speech relates to the employee's official duties.

Employers do not have to allow unlimited political activity or expression of political beliefs in the workplace. Rather, they have the right to establish reasonable workplace policies, as long as implementing them does not have the effect of discriminating against employees based on protected classes. For example, an employer that implements a workplace policy prohibiting political discussions while working but enforces it against an individual in one protected class but not others

in the majority could find itself facing claims of discrimination. This most likely would play out if a manager engaged in selective enforcement of the policy.

Labor laws and employee-protected concerted activity

Section 7 of the National Labor Relations Act (NLRA) protects certain concerted activities, ensuring job protection for groups of employees to gather and discuss topics "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. While many NLRA provisions apply only in unionized workplaces, both union and nonunion employees are covered by the concerted activities protections guaranteed by Section 7.

The NLRA can come into play when employee speech about a workplace crisis flows out of the workplace and onto social media or other public spaces. The employer may be tempted to restrict employee comments, and in some instances may be entitled to do so, but the employer should be careful to evaluate whether employee statements are protected under the NLRA because they are made for their own "mutual aid and protection." This generally means more than just the employee's personal interests and complaints. In our hypothetical above, a private employer theoretically could take action about the postings on Facebook, but at what cost? Many of these issues are best resolved through good human and personnel relations work, not discipline. In fact, discipline may only throw gasoline on the flames.

Title VII, ADEA, ADA: Employee "political" speech can create a hostile work environment

Under Title VII, the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA), and typically under state law, employers must take action to prevent and ameliorate a hostile work environment based on protected class. A hostile work environment exists where "the [offensive] conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive." EEOC, Harassment, http://www.eeoc.gov/laws/types/harassment.cfm.

Employee speech can constitute a hostile work environment based on a protected class when:

1. The conduct is based on a protected category, either:
    - Overtly—such as using racially derogatory terms, jokes belittling religious beliefs, telling someone to "go back where you came from," or displaying offensive photos, cartoons, or symbols.
    - Not overtly—this is where our hypothetical really comes into play. The more the social media posting and discussion impacts the workplace, the more likely it is that the employer will be obligated to at least look into and evaluate the assertion of a hostile work environment.
2. The conduct is subjectively and objectively unwelcome in that:
    - The affected employee finds the conduct undesirable or offensive; and
    - A reasonable person in the employee's position would also find the conduct unwelcome.
3. The unwelcome conduct is severe or pervasive enough that it unreasonably interferes with job performance and thus creates an intimidating, hostile, or abusive working environment. Keep in mind that working environment can encompass activity occurring outside normal working hours, or away from the normal workplace if it is related to the workplace (read: company-sponsored chat platforms, work-related e mails, and Zoom calls).

Even when an individual instance of harassing conduct does not itself create a hostile work environment, employers are prudent to pay attention and resolve the issues before it worsens into a hostile work environment.

Some real-life examples illustrate how employee speech can create or contribute to a hostile work environment. For instance, *Guardian Civic League v. Phila. Police Dep't* involved a hostile-work-environment claim based on employee speech on a separate website. There, white police officers operated a racist website and posted while on duty and off duty. One of the postings on the website was a poster showing pictures of white police officers and mug shots of Black men, which read, "Guns don't kill people, dangerous minorities do. How much longer can you ignore this?" This is a clear example where the employer would have the ability to take action and, in fact, a duty to do so, as long as information about the site seeped into the workplace. The case settled for $152,000. No. 2:09-cv-03148-CMR (E.D. Pa. filed July 15, 2009).

Even a single social media post can contribute to an unlawful hostile work environment, particularly

if the employee has experienced other discrimination at work. For instance, in one EEOC matter, an employee's Facebook post contributed to a hostile work environment. In *Knowlton v. Fed. Aviation Admin.*, EEOC Appeal No. 0120121642, Agency No. 2012-24254-FAA-05, 2012 WL 2356829 (EEOC June 15, 2012), one employee was apparently upset about his coworkers' choice to get Chick-fil-A for lunch for a group of employees, because the employee felt that the restaurant was anti-gay. That employee posted about the Black coworker who had picked up the food, saying that the posting employee "would make the next food run to a racist restaurant and see if his Black ass wants to complain. If he does, I will laugh in his face." This contributed to a hostile work environment for the Black coworker.

State and local laws

Protections against political speech

Some state laws protect employees *from* certain political speech. So, if the employer has a strong view about Facebook posts and wants to make its stance on political issues known, it could unlawfully to unduly influence employees in certain instances. State laws also prohibit discrimination and regulate how an employer may use an employee's social media.

Oregon law

In Oregon, employers may not use undue influence to directly or indirectly induce an employee in the following areas:

- Voting: registering to vote or refraining from registering, voting or not voting, or voting in a particular manner.
- Support: contributing or not contributing, or rendering services to or not rendering services to any candidate, political party, or political candidate.
- Initiatives: signing or refraining from signing a prospective petition, initiative, referendum, recall, or candidate-nominating petition.
- Candidacy: be or refrain from being a candidate for office. *See* ORS 260.665(2)(a)-(i).

"Undue influence" includes "loss of employment or other loss or threat of it" and promising to give employment. ORS 260.665(1). It is a class C felony to violate this statute.

Oregon law also prohibits employers from requiring an employee to attend an employer-sponsored meeting about the employer's opinion on religious or political matters, taking or threatening to take adverse action against employees for failing to attend such a meeting, or retaliating against an employee for reporting that such activity occurred. See ORS 659.785(1)(a) (c).

Washington law

Washington has similar prohibitions. It is a misdemeanor in Washington for anyone to interfere with or intimidate any voter in signing (or not signing) or voting for or against any initiative or referendum. RCW 29A.84.250. Both employers and unions are prohibited from discriminating against employees based on "(a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee." RCW 42.17A.495.

Many municipalities have ordinances that provide even greater protections. For example, Seattle prohibits employers—public and private—from discriminating against employees on the basis of "political ideology." SMC § 14.04.020(A). "'Political ideology' means 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 term includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not interfere with job performance." SMC § 14.04.030. Employers may not treat employees differently based on membership in any political party or group, or on the employee's political ideas or beliefs. See SMC § 14.04.040(C).

Nondiscrimination laws

State nondiscrimination laws may also apply to speech. Both Oregon and Washington prohibit discrimination in the workplace. When speech constitutes discrimination based on a protected class, it can run afoul of these laws, in addition to federal laws. *See* ORS Chapter 659A; RCW Chapter 49.60.

Social media

While not all political speech involves social media, much of it does. Accordingly, employers must remember that Oregon and Washington restrict employers from certain intrusions into social media. Laws may restrict how employers learn about an employee's social media presence, or restrict the use of information discovered in social media. Your HR teams should become

familiar with the laws specific to your jurisdiction, but the short of it is: is it publicly available or did someone bring you the information? It's ok to use it. Did you require someone to give you a password or did you create a fake account to friend the employee to see what the employee is up to? That's trouble!

Because state laws may have slightly different requirements than federal laws, employers should keep these in mind before taking an employment action based on speech.

Wrongful discharge

Wrongful discharge is a state common-law claim in both Washington and Oregon. It may be available to employees when a court perceives that an employer has wrongfully discharged an employee in violation of a public policy, but the employer's conduct is not covered by a statute, rule, contract, or collective bargaining agreement. This doctrine is used somewhat sparingly, but since it is court-made is prone to develop over time. Employees may be able to raise wrongful-discharge claims concerning employee speech and expression if they are not already protected by statute, rule, or contract. Additionally, an employee who is discharged for exercising the employee's right *not* to speak might raise a wrongful-discharge claim. For instance, in one case, the Oregon Court of Appeals determined that an employee was wrongfully discharged for refusing to make a false accusation of sexual harassment against a coworker. *Thorson v. State*, 171 Or. App. 704, 709-12, 15 P.3d 1005 (2000). Another wrongful-discharge case involved a bank employee who was fired for refusing to disclose a customer's confidential information. *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or. App. 371, 379 80, 879 P.2d 1288 (1994). Because this court-made doctrine may develop over time, it remains an open question whether this would apply to other types of employee speech or expression.

RELIGION IN THE WORKPLACE

In some instances, religion is part and parcel of political discourse, and in others religious issues stand on their own. Generally, religion presents two legal issues in the workplace: discrimination and accommodation.

Discrimination

Federal and state laws prevent discrimination based on religion. *See, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981; ORS Chapter 659A; RCW Chapter 49.60. In general, religious antidiscrimination is similar to other forms of antidiscrimination. Employers should make sure employees know not to discriminate based on religion, and to raise a complaint if they believe they are subjected to discrimination or harassment based on religion. Employers should take such complaints seriously.

Religious expression can get tricky. For example, in remote workplaces, conversation may be casual, and employees may use a variety of background pictures. What if an employee uses a religious backdrop? And another employee believes the picture displays intolerance to their own religion?

Private employers have two primary options for responding to this issue: (1) prohibit all backdrops or (2) prohibit backdrops with expressive activity of any type. A private employer may be able to use a third strategy: prohibit religious backdrops. However, there is some risk in this strategy. Prohibiting religious backdrops may not be a legally discriminatory action, because its effects likely do not rise to the level of a legally cognizable employment action. However, the action is risky, because employees might cite the prohibition as evidence that other employment actions were discriminatory.

Public employers have additional restrictions that might cause them to evaluate the scenario differently, as described more fully below.

Accommodation

Federal and state laws require employers to make reasonable accommodations for an employee's religious practices, but the standards differ from "reasonable accommodations" in the more commonly known disability context.

Federal law

Under federal law, an employer needs to accommodate an employee's religious practice if the belief is "bona fide" and the impact on the business is "de minimis."

To sort through these issues, employers may want to consult the Equal Employment Opportunity Commission's Questions and Answers: Religious Discrimination in the Workplace, which states the EEOC's position on many religious-accommodation issues. This includes assessing whether the religious belief is "bona fide." "Investigating" the validity of a religious belief is risky, and an employer should seek legal counsel before challenging whether someone's religious belief is valid.

The EEOC's Q&A also addresses the "de minimis" standard, and clarifies that it takes very little to create a burden on the employer that is more than "de minimis." For example, consider the following questions and answers:

> Q: What if coworkers complain about an employee being granted an accommodation?
>
> A: If it infringes on others' ability to perform work or would create a hostile work environment, that is an undue hardship, but general resentment, disgruntlement, or jealousy doesn't count.
>
> Q: Does an employer have to provide an accommodation that would violate a seniority system or collective bargaining agreement?
>
> A: No, but consider whether a different accommodation is available that won't disrupt seniority or violate a collective bargaining agreement.
>
> Q: Can a requested accommodation be denied due to security considerations?
>
> A: Yes, but additional analysis may be required if the security consideration is an employer policy and not legally mandated.

The Q&A also includes other examples that may be analogous to many situations that an employer may face. To determine whether an accommodation's burden is de minimis, an employer should consider the examples and carefully evaluate the request and impact on the business.

Employers should also keep in mind the difference between a personal preference and a religious accommodation. For example, if an employee's religion requires a certain practice, but it is clear that the practice can be done any time of day, the employer may have a basis to deny the employee's request for time off to engage in the religious practice. While the religion requires the practice, the employee's preference is dictating that it must occur during work hours. This is a nuanced and fact-specific area, and it is best evaluated in partnership with counsel.

State laws

Washington and Oregon laws also require employers to accommodate religious practices under certain circumstances.

Washington tracks federal law, in that it "includes a duty to reasonably accommodate an employee's religious practices." *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 506, 325 P.3d 193 (2014). The Washington Law Against Discrimination (WLAD) mirrors the federal standard with respect to reasonable accommodations.

By contrast, **Oregon** law specifies that employers must make specific accommodations unless they pose an "undue hardship" as defined under an Oregon law, ORS 659A.033. These accommodations include:

- Allowing vacation or other leave to engage in religious observance or practice, including holy days; and
- Allowing the employee to wear religious clothing.

An "undue hardship," for purposes of these two accommodations only, occurs if the accommodation "requires significant difficulty or expense." ORS 659A.033(4). The factors used to determine whether this standard is met under Oregon law are stated in ORS 659A.033(4)(a) (f):

> "(a) The nature and the cost of the accommodation needed.
>
> "(b) The overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility caused by the accommodation.
>
> "(c) The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of persons employed by the employer and the number, type and location of the employer's facilities.
>
> "(d) The type of business operations conducted by the employer, including the composition, structure and functions of the workforce of the employer and the geographic separateness and administrative or fiscal relationship of the facility or facilities of the employer.
>
> "(e) The safety and health requirements in a facility, including requirements for the safety of other employees and any other person whose safety may be adversely impacted by the requested accommodation.
>
> "(f) [And for public education entities] [t]he degree to which an accommodation may constrain the obligation of a school district, education service district or public charter school to maintain a religiously neutral work environment."

Oregon law does not specifically address other accommodations.

APPENDIX A: Religious accommodations checklist

DUE PROCESS

All employers should keep basic due process in mind when making employment decisions during a crisis. It is easy to make a snap judgment and skip a step that ensures the process is fair to employees. The appearance or fact of unfairness can be damaging, whether or not the process is required by law.

In many instances, public employers have constitutional due-process obligations. Constitutional due process includes giving notice to the employee and providing a meaningful opportunity to respond. Whether due process meets constitutional standards can be a difficult question and highly context-specific—some employees may have greater rights than others. Although the same requirements might not be legally required for private employers, private employers that do not afford some meaningful opportunity for an employee to be heard before a final employment decision is made can look arbitrary or unfair, which is not in and of itself illegal in most instances, but can certainly affect a determination whether a decision was made for an illegal reason.

SPECIAL CONSIDERATIONS FOR PUBLIC EMPLOYERS

In addition to the rights described above, public employees have additional rights to express themselves in ways that private employees do not. Thus, public employers have more legal risk and more issues to consider when addressing employee expressive conduct.

Free exercise

Some employees (including private-employer employees) claim that an employer is violating the employee's "Free Exercise" rights when the employer creates or enforces a rule that infringes on a religious practice. It is rare that this occurs, because neutral rules of general applicability do not create a federal Free Exercise claim. To respond to a Free Exercise claim, an employer should (1) ensure that it isn't discriminating and offer antidiscrimination processes for the employee to make a complaint and (2) ensure that it has considered reasonable-accommodation obligations, like those outlined above, and empathetically explain that the employer is not burdening the employee from actually exercising the employee's religious belief or practice.

Free speech

The First Amendment protects public employees' freedom to speak on some topics in the workplace. The Supreme Court has crafted a framework to draw the line between protected speech and unprotected speech by public employees. In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (and other cases), the Supreme Court determined that a public employee's speech is protected when speaking in his or her capacity as a private citizen on a matter of public concern—but not when the employee's speech derives from his or her official duties. 547 U.S. at 417-18. Oregon and Washington courts apply this framework to public-employee speech in internal office settings and in external public statements.

APPENDIX B: Public-employee speech checklist

Oregon—political campaign speech in the public workplace

The Oregon Secretary of State publication *Restrictions on Campaigning by Public Employees*, linked below, addresses personal expression by public employees in relation to politics and political campaigns. This comes up a lot in campaign season. This document explains:

- Campaign signs and materials are generally allowed in workspaces or on cars, so long as they are posted on personal time and not in violation of an employer policy. If the employer has policies relating to posting political or campaign materials, employees should be reminded. Think about how these policies will apply to people working from home.
- Similarly, political buttons and clothing are generally allowed unless it violates an employer policy. Employees who frequently face the public (receptionists, etc.) are restricted, while others are not, so long as not disruptive.
- Distributing political material to others in the workplace is generally prohibited.
- Verbally promoting or opposing political opinions during work hours and while on the job is prohibited.

- Political speeches or presentations are also prohibited during work hours. Public employees who make such speeches on their personal time should also announce that they are acting in their capacity as a private citizen.
- Additional information can be found on the Oregon Secretary of State's website: https://sos.oregon.gov/elections/Documents/restrictions.pdf.

KNOW WHEN TO CALL FOR ASSISTANCE

Remember, employee expression issues don't have to be a do-it-yourself project—Miller Nash's Employment Law and Labor Relations team is here to support you.

KEY TAKEAWAYS

1. Proactively eliminate harassment and discrimination.
2. Be creative in making religious accommodations, and show your work when you can't.
3. Design clear policies and procedures and implement them consistently, so employees understand your expectations.
4. All employers should pay attention to basic fairness in their response processes, and public employers should be mindful of constitutional due-process requirements.
5. Understand the framework for responding to employee free-speech issues.

RELIGIOUS ACCOMMODATIONS CHECKLIST

Appendix A

- ☐ Include religion and accommodations requests in employment policies.
- ☐ Listen for conflicts between work and religious obligations.
    - There are no magic words—an employee may explain a conflict or request an accommodation in a multitude of ways.
    - Don't assume—ask questions to gather information, such as the time, day of the week or date, and what the employee believes would be an appropriate accommodation.
- ☐ Evaluate whether the religious belief is "bona fide."
    - This should be a limited inquiry; do not deny a request on the basis that the belief is not "bona fide" without advice of counsel.
- ☐ Consult EEOC and state resources in specific situations:

  Religious garb and grooming. Exceptions to the company's dress and grooming code for a religious practice, e.g., Pentecostal Christian woman who does not wear pants or short skirts; a Muslim woman who wears a religious headscarf (hijab); or a Jewish man who wears a skullcap (yarmulke). In general, the EEOC does not consider conflict between an employee's religious garb or grooming and a company's "image" sufficient to pose an undue hardship. Relying on customers' preferences could be considered relying on customers' religious bias.

  Schedule conflicts. If an employee's religious practice conflicts with a work obligation, consider shift swaps, substitutes, or transfers.
- ☐ Ask whether the accommodation causes an undue hardship under federal law.

  Remember that public employees are entitled to additional protections.
- ☐ For purposes of Title VII, an undue hardship can be anything that causes the employer more than a *de minimis* cost. Factors to consider include:
    - Type of workplace. Would the accommodation cause the employer to violate seniority systems or a collective bargaining agreement?
    - Nature of duties. Would the accommodation cause a safety issue?
    - Identifiable cost in relation to size and operating costs.
    - Number that will "in fact" need accommodation.
- ☐ Ask whether the particular accommodation causes an undue hardship under Oregon law. Consult specific Oregon standards regarding leave and clothing.
- ☐ Document your decision.
    - Use religious-accommodation language.
    - For denials. Explain that the request is not reasonable and would cause an undue hardship, and give the reasons why.

PUBLIC-EMPLOYEE SPEECH CHECKLIST

Appendix B

- ☐ Is the speech is in the course of the employee's job?
  - For example, speech during classroom instruction, school events, and parent-teacher conferences would all be examples of speech that a school district can regulate.
  - The more easily the speech can be characterized as being directed by or on behalf of the public employer itself, the more likely it is subject to regulation.
  - For instance, a coach's conversation with a parent after practice is less likely to be speech within the scope of employment than an administrator sending a formal communication on school letterhead to all parents.
- ☐ Is it nonwork-related speech on a matter of public concern?
  - Employees have more latitude to discuss matters of public concern on their personal time, even if the speech could impact the employer.
    - Political measures and candidacies, climate change, and Black Lives Matter may all be matters of public concern.
    - There are rare circumstances when disruption from the speech is so significant that it may be addressed by a public employer. For example, hateful speech by a manager that is arguably political that becomes widely known could theoretically create a hostile work environment for the manager's employees.
- ☐ Is it speech on a matter of *private* concern?
  - This type of speech is generally not protected.
  - For example, an individual making complaints about his/her/their own employment is typically not protected under the First Amendment.
  - This speech may, however, be protected under employment laws.