EXECUTIVE SERIES:
LABOR & EMPLOYMENT

HANDLING CONTROVERSIAL SPEECH IN THE WORKPLACE



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AGENDA

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01	What counts as speech
02	Federal protections
03	State protections
04	Off-duty speech
05	Best practices

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WHAT IS SPEECH?

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Statements	• Verbal or written
Digital content	• Posts, images and videos
Clothing	• Messages worn at work
Demonstrations	• Informal protests

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AUDIENCE SURVEY

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Which factor should an employer NOT consider before disciplining an employee's speech?

A	Business disruption	**B**	Ideological disagreement
C	Performance history	**D**	It depends
E	None of the above		

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KEY CONSIDERATIONS

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Content	Context	Jurisdiction
• What was said? • Does it relate to a protected characteristic?	• Business disruption • Written policy violations	• Where and when • On or off duty • In person or online

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STATUTORY FRAMEWORK

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First Amendment	National Labor Relations Act ("NLRA")	Federal Anti-Discrimination Statutes	State laws
• Public-sector employees only	• Private employers • Union and non-union workplaces	• Public and private employers	• Vary by jurisdiction

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FIRST AMENDMENT PROTECTIONS

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FIRST AMENDMENT

"Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble …"

Important for **public** employers

Private employers are not limited by First Amendment

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FIRST AMENDMENT PROTECTIONS

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Public Concern

- Does the speech address a matter of public concern?
- Controversy alone does not decide this question

Balancing Test

- Employee speech interests

vs.

- Employer interest in efficient operations

Pickering v. Board of Education, 391 U.S. 563 (1968); *Rankin v. McPherson*, 483 U.S. 378 (1987).

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FIRST AMENDMENT PROTECTIONS

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When Does First Amendment Apply?

Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968)

An employee must show the speech (1) involves "matters of public concern," and (2) that his free speech interests outweigh the employer's interest in efficient operations.

Rankin v McPherson, 483 U.S. 378, 387 (1987)

"The arguably "inappropriate or controversial" character of a statement is irrelevant to the question whether it deals with a matter of public concern."

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FIRST AMENDMENT PROTECTIONS

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Controversial speech can be protected

- **Instagram post related to death of Charlie Kirk** - *McVeigh v. Kelly*, 830 F. Supp. 3d 1198 (N.D. Fla. 2026)
- "**Black Lives Matter" masks** - *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 513 F. Supp. 3d 593, 612 (W.D. Pa. 2021), *aff'd,* 39 F.4th 95 (3d Cir. 2022)

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FIRST AMENDMENT CASE STUDIES

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Controversial Training

- Employees self-sensored during mandatory DEI training
- Chilling effect can create standing
- Implications beyond public sector

Henderson v. Springfield R-12 Sch. Dist., 163 F.4th 478 (8th Cir. 2025)

Controversial Comments

- Professor disciplined for off-campus comments favoring the Alt-Right
- University argued comments led to campus disruption
- Employee's speech rights outweighed university's interests

Jorjani v. New Jersey Inst. Of Tech., 15 F.4th 135 (3d Cir. 2025)

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NLRA PROTECTIONS

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Scope

- Concerted activity for mutual aid or protection
- Prohibits employers from retaliating or interfering with Section 7 rights

NLRA §§ 7 and 8(a)(1)

Case Study

- Employee terminated after raising COVID-19 safety concerns during work meeting
- Court upheld protection for concerted activity
- Formal organizing was not required

Miller Plastic Products v. NLRB, 141 F.4th 492 (3d Cir. 2025)

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AUDIENCE SURVEY

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“F* Trump” button**

“Blue Lives Matter” shirt

The messages create tension at work

Can an employer prevent an employee from wearing either item?

Yes / No

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FEDERAL ANTI-DISCRIMINATION PROTECTIONS

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Speech linked to protected characteristics may be protected

- Title VII of the Civil Rights Act (“Title VII”)
- Americans with Disabilities Act (“ADA“)
- Age Discrimination in Employment Act (“ADEA”)
- Genetic Information Nondiscrimination Act (“GINA”)

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FEDERAL ANTI-DISCRIMINATION PROTECTIONS

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Courts are not personnel boards

- Deference to business judgment bolstered by employer's consistent enforcement.
- **Case Study** – dismissing Title VII race discrimination and retaliation claims where content-neutral dress code policy prohibiting Black and non-Black employees from wearing Black Lives Matter masks provided a lawful, non-race-based reason to restrict controversial apparel.

Frith v. Whole Foods Mkt., Inc., 38 F.4th 263 (1st Cir. 2022)

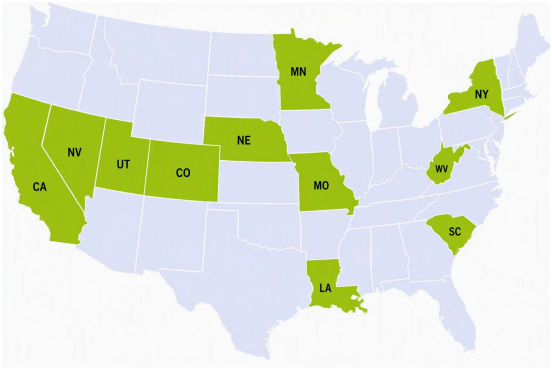
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STATE LAW PROTECTIONS

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11 **States expressly prohibit discrimination or retaliation based on an employee's political activities, expression and/or election-related speech***



- California
- Colorado
- Louisiana
- Minnesota
- Missouri
- Nebraska
- Nevada
- New York
- South Carolina
- Utah
- West Virginia

**excluding voting rights law*

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STATE LAW PROTECTIONS

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	California	Minnesota	Nevada
Relevant Statute	Cal. Lab. Code §§ 1101-1102	Minn. Stat. § 211B.07	Nev. Stat. § 613.040
Prohibited conduct	Bars any employer rule, regulation, or policy: "(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."	An individual or association must not engage in economic reprisals or threaten loss of employment or physical coercion against an individual or association because of that individual's or association's political contributions or political activity	"It shall be unlawful for any person, firm or corporation doing business or employing labor in the State of Nevada to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office in this state."
Remedy	Civil and criminal	Criminal	Civil

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STATE LAW PROTECTIONS – CONNECTICUT OUTLIER

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Connecticut:

First Amendment rights extended to private employees

- Activity must not "substantially or materially interfere" with job performance or working relationships
- Actual workplace disruption must support the decision
- **Case Study**: Employee terminated after posting Facebook meme mocking public figures made valid free speech claim

C.G.S.A. § 31-51q; *Mumma v. Pathway Vet Alliance*, 648 F. Supp. 3d 373 (D. Conn. 2023).

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AUDIENCE SURVEY

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How many states expressly prohibit discrimination based on off-duty political activity/speech?

A	None	**B**	Fewer than five
C	More than five	**D**	It depends

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OFF-DUTY POLITICAL SPEECH

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#1 New York

- Lawful political activity outside work
- Off employer premises
- Without employer equipment

#2 Utah

- Lawful expression outside work
- Related to religious, political or personal convictions
- Exception for essential business interests

N.Y. Labor Law § 201-d; Utah Code § 34A-5-112.

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OFF-DUTY LAWFUL CONDUCT

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General protections for lawful off-duty conduct (may be broadly defined to include political activity)

Excludes state laws on lawful products or consumables

- California
- Colorado
- North Dakota

Cal. Lab. Code § 96(k). Colo. Rev. Stat. § 24-34-402.5. N.D.C.C. § 14-02.4-03.

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EMPLOYER LIABILITY FOR OFF-DUTY SPEECH

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General Rule

- Employers generally are not liable for employees' off-duty speech or conduct

Exception

- Liability can arise where outside conduct impacts workplace
- Can contribute to a hostile work environment
- Consider social media

Example from EEOC Guidance:
If an Arab American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a hostile work environment based on national origin.

See 2024 EEOC Enforcement Guidance on Harassment in the Workplace.(rescinded)

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EMPLOYER LIABILITY FOR OFF-DUTY SPEECH

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Social media posts can affect the workplace

- Coworker's Instagram page reached 100+ employees
- Posts referenced the workplace and female coworkers
- Court reversed summary judgment on hostile work environment claim
- Ninth Circuit: "social media posts are permanently and infinitely viewable," so such a page does not "occur" in only a discrete location

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

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EMPLOYER LIABILITY FOR OFF-DUTY SPEECH

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Management knowledge can establish notice

- Private Facebook group included 10,000+ current and former employees
- Management aware of sexually suggestive/sexist posts
- EEOC found Title VII liability

***Elenor S.*, EEOC DOC 2019005538, 2020 WL 8018600 (Dec. 30, 2020).**

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BEST PRACTICES AND RECOMMENDATIONS

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Discipline conduct NOT content

- Neutral written policies
- Consistent enforcement
- Regular workplace training
- Review of local laws

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