

Five Issues for Employers to Consider as Political and Social Activism Surges in the Workplace

Insights for Employers Alert | 6 min read

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Six months into a global pandemic, employers across the United States continue to deal with a series of new economic realities. More employees are working from home, with companies continuing to reevaluate their business needs in compliance with local health guidelines. Most employers will readily agree that the pandemic has forced them to find new way to keep the lights on and employees paid.

One phenomenon employers are now dealing with is a surge of political and social activism in the workplace. Individuals across the country are voicing opinions in what can only be described as a highly polarized political environment. Many of these opinions reflect passionate views held by employees concerning race relations, racial disparities, and the proper way forward in creating a better work environment and, in general, a better society. Employees are expressing these viewpoints both on social media and in the workplace, and it is unreasonable to expect these conversations will not happen during working hours.

So, how should employers continue to balance business operations with the reality of political and social speech in the workplace? Here, we discuss the constitutional rights afforded to public employees, and, to the extent they exist, rights for employees of private employers. We also highlight Illinois-specific laws employers must be mindful of when addressing certain workplace policies and the regulation of speech.

There is little doubt that the pandemic has shifted the way companies operate. Even before the pandemic, many were changing to digital and remote platforms. Some companies moved away from the traditional office environment and toward a work from home arrangement. Those efforts are only accelerating. Other companies simply delayed the return of their workforce until business improves or further health guidance is available. A common question raised is does the analysis regarding workplace speech change depending on whether the employee is remote or on site. The answer to this question depends on several considerations.

1. Free Speech and Section 7

One of the most basic freedoms afforded to public employees is the right to free speech, guaranteed by the First Amendment, when speaking as citizens and not in the performance of their duties. In addition, Section 7 of the National Labor Relations Act allows employees to discuss social and political issues, to the extent they might be related to or concern terms and conditions of employment. Aside from the federal protections afforded to public employees, states such as Illinois guarantee the right to privacy while not engaged in work-related activities. But none of these rights are absolute.

Most private employees have no duty to accommodate political speech in the workplace that does not concern terms or conditions of employment under federal law. For example, Illinois' Privacy in the Workplace Act makes it clear that private employers are free to enforce uniform workplace policies that regulate speech. In California, Labor Code § 1101 does not prevent a private employer from enforcing uniform policies that curtail speech in the workplace. In New York, the right to free speech is not available in a private workplace. These policies typically apply to company-owned social media platforms, electronic devices, and emails. Private employers must be aware these laws do not allow for the regulation of personal speech that is not connected to work-related functions. This means private employers cannot regulate or control personal phones, texts, or social media accounts, but it does not mean an employer must allow for the access of personal social media sites and email on company property during work hours.

2. Whether to Implement a Speech-Related Policy

Some employers question whether they should post a uniform policy concerning speech in the workplace. To be clear, there is no blanket answer that applies to every employer. Each employer must decide on a case-by-case basis what works best for its workforce and the company's operations. Employers should first evaluate whether the company maintains a policy that reserves the right to deal with disruptions in operations. Most employers likely do not, but that does not mean a private employer cannot react to a disruption in the workplace. Employers may always take consistent and reasonable steps to maintain discipline.

If the company does maintain a policy, a determination should be made regarding whether it is sufficient to deal with disruptions arising as a result of current political and social issues. Having a policy that is consistently enforced will protect an employer when dealing with issues brought on by political speech. Notably, such policies can be problematic if not worded appropriately. For example, such a policy might be too vague and ultimately construed as interfering with rights under Section 7 of the National Labor Relations Act. Additionally, inconsistent enforcement could invite issues under Title VII of the Civil Rights Act of 1964.

3. Litigation Over Black Lives Matter Apparel

In evaluating the practical effects of these policy considerations, employers need look no further than the current litigation before the U.S. District Court for the District of Massachusetts on whether Whole Foods selectively applied its dress code barring slogans and messages to Black Lives Matter apparel in violation of anti-discrimination laws. Whole Foods denies the allegations and has vowed to defend its policies, which may result in prolonged litigation and a trial. While Whole Foods may possess the resources to defend its policy, other employers may not be able to afford the costs associated with a prolonged litigation. Considering the possible financial costs, it is best to consult an experienced employment attorney in order to understand whether the policy is sound and tailored to achieve the desired result.

4. Designing a Speech-Related Policy

When deciding to implement a speech-related policy, employers must anticipate that the policy will be implicated in a variety of situations. Consider the following hypothetical: an IT specialist comes into the workplace and decides to promote a political agenda with postings in his cubicle. The posting may be a simple bumper sticker, but it also may cover most available space in his cubicle. Now, imagine that the political expression angers or inflames other employees who do not share the political perspective of the IT worker. If there is an issue, the private employer has the right to address it. With public employers, the analysis is more complicated, and, assuming the employee is speaking as a public citizen, the question next turns on the balance between the employee's First Amendment right and public employer's right to act as an employer and promote efficiency in the office.

In another instance, while promoting his political views—popular or unpopular—through his own social media site, an employee identifies his employer, or the identity of his employer is obvious on the site. Associational issues are problematic for many employers. While the employee is free to promote his own political ideas on his own time, the employer has every right to regulate the employee's speech and demand that any reference to the company be removed. To be clear, employers should not be monitoring employee private social media spaces. However, to the extent that information becomes readily known to the employer—or places the employer in a compromised position or false light—the employer has the right to counsel the employee and demand that the reference to the employer on the social media site be removed.

In determining what policy works best for your company, always be mindful of balancing the rights of your workforce with the actual or perceived rights of your employees. Many employees in the private sector mistakenly believe they have First Amendment rights that allow them to post or voice whatever they want in the workplace. Such misperceptions, if not addressed in an appropriate way, can create their own set of problems.

5. Other Considerations

Public and private employers should also keep the following considerations in mind. First, does your company maintain a non-solicitation agreement that prohibits political speech in the workplace? Further, do your

workplace policies have the practical effect of treating one race or group of employees differently from others? Finally, if dealing with an organized workforce, does a collective bargaining agreement impact the analysis and limit employer options? These are risky times for employers, especially when political speech is regulated in the workplace.

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