

L&E Live

# Red! Blue! Purple!

## Navigating Political Speech at Work

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# What is “Political Speech” in Employment?

- Political activism with a nexus to an employer’s business and workplace.
  - Social media
  - Debates at work
  - Protests, rallies, and campaigns
- *“Everything is related to everything else.”* - Justice Scalia

# Why Do Employers Regulate Political Speech?

- Reputation/brand
- Disruption to workplace/productivity and morale
- Anti-discrimination and anti-harassment
- Non-disclosure agreements
- Pay-to-play regulations
  - State regulations – None in Colorado
  - Federal regulations – SEC, MSRB, FINRA, and CFTC



# Public vs. Private Employment

- **Government employers** may be subject to the **First Amendment** and, therefore, may be required to consider constitutional rights when making employment decisions.
- **Private employers** are not directly bound by the First Amendment.
  - Presumption of at-will employment.
  - Concerns about free speech rights **arise by statutes protecting certain speech.**

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# Issues To Consider When Regulating Political Speech

# Title VII of the Civil Rights Act of 1964

## Intersection Between Social and Cultural Movements

- “Me too”
- Confederate flags
- Sexual orientation and transgender status

## The risks:

- Harassment:
  - Some political speech may also be based on a protected characteristic.
  - Implement **reasonable preventative** and **corrective measures** to avoid liability.
- Discrimination and Retaliation
  - Employees participating in social movements at work may claim **discrimination** and **retaliation**.

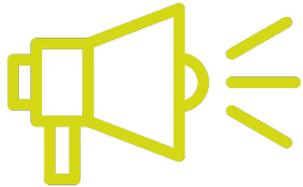
# Title VII of the Civil Rights Act of 1964

- *Frith v. Whole Foods Market, Inc.*, 1:20-cv-11358 (D. Mass.).
  - Claim the company discriminated against employees who wore Black Lives Matter face masks at work.
  - Company bans any “visible slogans, messages, logos or advertising.”
  - Plaintiffs claim selective enforcement of dress code.

# National Labor Relations Act

- Section 7 of the NLRA provides employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”
  - Applies to both union and non-union employees.
- Does the political speech relate to working conditions?

# National Labor Relations Act



Solicitation of  
employees for union or  
other organizing  
activities



Buttons and insignia



Distribution of  
Literature

# National Labor Relations Act

- “Day Without Immigrants” – NLRB found it fell within the scope of Section 7
- Demands for increased wages – Fight for \$15
- OUR Walmart – Walkouts were unlawful intermittent strikes
- NLRB orders Google to allow more employee free speech

# Colorado Lawful Off-Duty Activity Law (C.R.S. § 24-34-402.5)

- Unlawful for employer to terminate the employment because of employee's lawful activity off the premises during nonworking hours, *unless*:
  - Relates to a bona fide occupational requirement or is reasonably and rationally related to employment activities; or
  - Necessary to avoid a conflict of interest or the appearance of a conflict of interest.

# Colorado Lawful Off-Duty Activity Law (C.R.S. § 24-34-402.5)

- *Oransky v. Martin Marietta Materials, Inc.*, 400 F. Supp. 3d 1142 (2019).
  - Sales manager led raucous protest against client of employer.
  - Law enforcement need not cite or prosecute employee for off-duty activity to be “unlawful”
  - Employer’s restrictions on employee’s off-duty activities were reasonably and rationally related to duties of sales manager.

# Colorado Political Participation Statute (C.R.S. § 8-2-108)

- Unlawful for employer to adopt or enforce a rule forbidding or preventing employees from engaging or participating in politics or from becoming a candidate for public office.

# 42 U.S.C. § 1985(3)

- Passed in 1871 to protect African-Americans and their supporters from the KKK.
- Prohibits a conspiracy to deprive an individual or class of persons of the equal protection of the laws or of equal privileges and immunities under those laws.

# 42 U.S.C. § 1985(3)

- There is a circuit split, unresolved in the Tenth Circuit, about whether “class of persons” includes members of political parties.
  - *Keating v. Carey*, 706 F.2d 377 (2d Cir. 1983): in 1871, it was clear that the law was intended to protect Republicans because the KKK intended to ensure the election of Democrats.
  - *Farber v. City of Paterson*, 440 F.3d 131 (3d Cir. 2006): support of a particular politician is too subjective and indeterminate to obtain protection under §1985(3); the statute attacks “invidious” hatred of racism and is not concerned with political affiliation.
  - *Dodge v. Evergreen School District No. 114*, Case No. 3:20-cv-05224-RBL (W.D. Wash. July 30, 2020): “MAGA” supporters are not a protected class. Additionally, plaintiff was not a Republican, and his support of a particular political candidate is not protected.

# Government Employment: The *Pickering/Connick* Test

Two prongs:

- Did the employee **speak** on a **matter of public concern**?
- **Balancing** the employee's right to **free speech** against the employer's interest in an **efficient, disruption-free workplace**.

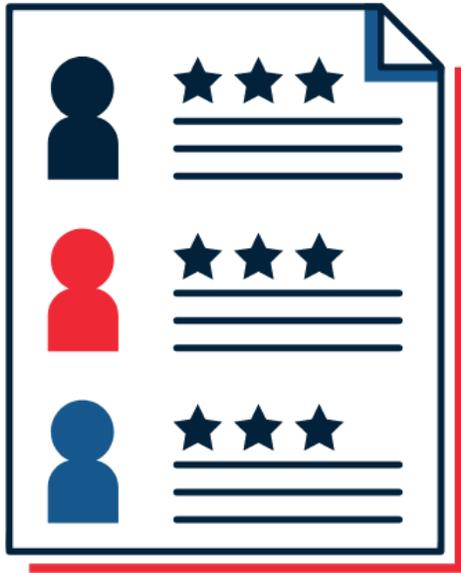
Limitations on First Amendment protections:

- **Private activities** as a **citizen** are protected, while speech **in the course of employment** is not.
- Political appointees with **policy-making** responsibilities are not protected, while **career employees** are.

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# Closing Thoughts

# The Election is Near (33 Days)!



- Voting in Colorado (C.R.S. § 1-7-102)
- If an employee does not have three or more hours between the opening and closing of polls when not required to work, then the employee must be provided up to two hours of *paid* voting leave.
  - Request to vote must be made prior to the day of the election.
  - Employer may specify the hours during which the employee may be absent, but the hours must be at the beginning or end of the work shift, if requested.

# Key Takeaways

- ✓ Adopt a reasonable non-solicitation policy and apply it consistently.
- ✓ Assess the impact on your business or entity.
- ✓ Be prepared to address situations you did not anticipate.
- ✓ Is the political speech protected by the First Amendment or by statute?
- ✓ If you have questions or a difficult situation, seek legal counsel.

# Questions?

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