



## Ep. 11: Political and Controversial Activity in the Workplace

October 16, 2020

*Election season is in full swing and the climate is certainly charged. In this episode we'll discuss employees' political and controversial speech, implications on employment, and what employers can do to discourage or discipline employees engaging in distracting and controversial activity inside and outside of the workplace.*

**Rasch Brown:**

Hi, I'm **Rasch Brown**, Member in McGlinchey's New Orleans office. Today I'm joined by my fellow Labor and Employment colleagues here in New Orleans, **Mag Bickford**, **Camille Bryant**, and **Kathy Conklin**. Camille, a question I'd like to throw to you to get us started is something we as employment lawyers may take for granted. What is free speech in the workplace? And is it different between a private employer and a public employer?

**Camille Bryant:**

That's actually a great question. And there is a distinction between free speech between government employees and private employees. Most individuals acknowledged that the First Amendment guarantees citizens the protection of free speech from government intrusion. However, employees working in the private sector often don't understand that that constitutional First Amendment right to free speech applies only to government employees, and not to employees working for private businesses. Although employees don't have a constitutional right to free speech at work, employers still need to be aware of federal and state laws that do protect workers' rights in certain situations. And Mag is actually going to go into that a little bit deeper with respect to certain laws that apply under the National Labor Relations Act. But also under other various federal laws, employees may have the right to complain about harassment or discrimination and other issues. Employees, however, don't have the freedom or the right to express racist, sexist, or other discriminatory comments when those comments would violate federal laws or company policy for that matter. So state laws may also enhance workers' rights and is also something that employers need to be cognizant of. For example, in some states, specifically California, employees cannot be discriminated against based upon their political affiliation or their political activity. So to really

understand what law is going to apply to what state, an employer really is going to need to do a deep dive into the law applicable to where they're conducting business.

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- Rasch Brown:** Thanks Camille. Mag, Camille touched on a specific state statute in California. Are there other statutes around the country directly implicating free speech protections?
- Mag Bickford:** Yes, almost all the states have regulations with regard to protections for voting and political activity. They range, though, in the protections that they give. And there are certain ones that have specific protections with regard to speech. For example, Louisiana has some provisions and it mandates that we may not intimidate individuals with respect to their political party affiliations. So that seems to touch on the concept of speech. And what's interesting about Louisiana is they have a statute that says that employees' political contributions cannot affect their compensation or employment. And certainly that would be a form of speech. But more importantly, employers with more than 20 employees also may not prevent employees from engaging and participating in politics, including becoming a candidate, controlling or directing employees' political activities or affiliations, or threatening to discharge them if they support or participate in certain political organizations and activities. Other states that have similar types of statutes that need to be paid much attention include New York, Connecticut, Illinois, Utah, California we've already discussed, and an interesting one actually is a local ordinance in Madison, Wisconsin. So in all those other states, they're saying that people who engage in protected free speech, including political speech have some sort of protections in the workplace. Then last but not least, we can't forget about the NLRB. So Camille mentioned that earlier – under the National Labor Relations Act, it says that employers have to allow their employees, whether they be in a unionized setting or a non-unionized setting, to engage in protected concerted activity. That activity certainly could have shades of politics in it, but typically the courts and the NLRB have limited that to the terms and conditions of employment. So I don't think it's a bright line test under the NLRB, whether or not political activity or speech is protected, but certainly an analysis needs to be done under that statute to determine if it could be applicable.
- Rasch Brown:** Yeah, Mag, I think a lot of employers forget that section seven of the National Labor Relations Act applies to all employers, or most employers, not just those who have unions involved. Kathy, I want to ask you, most of our clients' employees are on social media these days. They're on Twitter, they're on Facebook, whichever platform it may be. Can you as an employer take action against an employee for something they do on social media?
- Kathy Conklin:** Absolutely. The mere fact that a comment has been made on social media, whether it is a private page or a public posting, does not protect an employee. Clearly, if the speech is

outlawed by an employer's policies and it doesn't violate any of the laws that we've been discussing, the fact that a post is on social media is absolutely fair game for termination. There are some restrictions, most states, including Louisiana have a law that prohibits employers from demanding access. So you can't ask for a password and get into social media that way. But if your employee posts an offensive post, and it's shared with another employee who then shares it with the employer, that particular post could be grounds for employment action. There's also a federal law, a federal communications protection act that basically says the employer cannot hack into your website to find out what you've been posting. But the mere fact that it's on social media is no protection whatsoever.

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**Rasch Brown:** Well, and so, to piggyback on that, what about the situation where a post is made about an employee? We had the example in New York City of Amy Cooper, whose name got blasted across the country after reporting a birdwatcher in Central Park. Camille, what can we do about those types of situations?

**Camille Bryant:** Well, in most states, an employer can't fire an employee simply because they don't like or disapprove of an employee's off duty activities. If they do, then the employer could potentially be in danger of a wrongful termination lawsuit. However, there are some instances of off-duty misconduct that can do significant damage to an organization's reputation and their ability to operate effectively. So in those cases where the behavior directly relates to the employee's ability to do their job, the organization may in fact be permitted to terminate or discipline the employee in those instances. An Off Duty Conduct Policy can help clarify what outside work behavior can get employees in trouble. And with the increased use of social media and technology, a robust Off-Duty Conduct Policy is more important now than it has ever been before.

**Rasch Brown:** That's a very good point, Camille. And Kathy, I just want to come back to you now, because I want to bring in specific potentially controversial speech here. Let's say we have footage of an employee at a MAGA Make America Great Again rally, or a Black Lives Matter protest, and it shows up on the news. And it's clearly your employee's face engaging in some sort of activity that's not necessarily political, but could be seen as controversial. What can an employer do in that instance again?

**Kathy Conklin:** Again we have to get into the fine hairs of what these various laws protect. I think we're going to look at what is the difference between controversial speech and political speech. I think many of the states with these statutes that protect political speech, they're merely stating that you can put a sign for a particular political candidate. Who you are voting for is protected. But stepping beyond that and engaging in what is more colloquially seen as "controversial speech," you can be terminated for that. If you have an employer, for instance, in sales, that really just wants to have his salesforce

perceived as completely neutral on all controversial matters, participation publicly in any sort of rally along those lines could be legal grounds for termination.

**Rasch Brown:** So we know political donations are a matter of public record. Mag, what if an employee's political support runs counter to a candidate that your organization has already supported. Any recourse there?

**Mag Bickford:** In Louisiana, certainly there is a specific law that says an employer can't treat you differently because of your political contributions. As I mentioned earlier, most of the states have some form or fashion of protections for political activities or voting, but you don't see a lot of specificities with regard to the donation aspect. So I think it's going to have to be a state by state analysis of that particular statute to see what the ramifications are going to be. I think another interesting topic that goes hand in hand with this is the concept of PACs (political action committees). I'm aware of a company that had its own PAC and required its employees to donate to that PAC, which of course was controversial. Some states, for example, West Virginia specifically precludes that kind of activity. So in that scenario, you've got to look at the state laws too. But I also think you need to look at the bigger picture, which is, how are your employees going to feel about that?

**Rasch Brown:** Right, you don't want to really hurt your culture that you've worked really hard to create. Kathy, Mag touched on this earlier, but what if an employee decides to run for office?

**Kathy Conklin:** Last I checked, there were about 17 states that specifically provided that an employee could not be terminated for running for public office. However, I think employers also have to be mindful of the time that these employees are taking. If they're not performing their jobs because they're campaigning during work hours, that could be grounds for termination. But the mere fact that somebody is running for office is not necessarily a grounds for termination.

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**Rasch Brown:** Thanks, Kathy. Mag, what should employers do publicly when they do terminate an employee or discipline an employee because of a controversial activity?

**Mag Bickford:** That's an interesting question too, because many years ago, when an employee was terminated for controversial activity, it stayed within the employment arena. It may have been the topic of conversation with employees, but it didn't go to the general news. Now that's a different scenario. What we see happening is the news media of course, loves to tie in to controversial terminations, and social media provides a platform for the input and discussion for basically anyone who wants to comment upon

it. And it's been a real problem for many of our clients in this particular set of circumstances.

So I want to back up a second. Let's talk about before the termination occurs, right? So before someone is terminated for engaging in controversial behavior -- and that's different from political behavior in most circumstances -- then the employer needs to do their homework. They need to investigate what happened. They need to talk to witnesses. They need to see exactly what was said, who it was said to, what the impact was. They should also look at how other people were treated. What are the comparators to the situation? What was the intent of the person making the statement, and how will the discipline affect people within the workplace? And then they need to contemplate, how will the discipline be perceived outside of the workplace? So once all of that is contemplated, the decision has been made. Either before the decision has been implemented or shortly thereafter, in a controversial situation, it makes a lot of sense to bring in a PR company or someone who is trained in sending the message out to the public, so that that sort of behavior doesn't generate a lot of activity and criticism in social media, and in just any media whatsoever. So a lot of times what we do in that scenario is the law firm will actually go ahead and retain the PR company or whatever company you're using to help with the communications, because then the communications regarding that termination can be structured in a way that attorney client privilege applies to both the employer clients, as well as those third party consultants.

And that way you can have a discussion, a meaningful discussion, which is probably going to be the most effective, without having to disclose those details. So these are all things you want to think about. It's really a problem. I will tell you, the other part of the problem is when you terminate someone for controversial activity and that breeds discontent in the workplace. So you also need to be thinking about, how are you going to handle that internally as well?

**Rasch Brown:**

Again, maintaining that culture of your workplace is just so important. This has certainly been a great discussion today on these timely topics. I want to thank all my panelists and also thank all of you for listening in today.

*Thanks for tuning into this episode of "More with McGlinchey." If you have a question or would like to propose a topic, we'd love to hear from you at [podcast@mcglinchey.com](mailto:podcast@mcglinchey.com). For additional resources on this topic, please visit [mcglinchey.com](http://mcglinchey.com). On behalf of the law firm that brings you more, we hope you'll join us next time.*



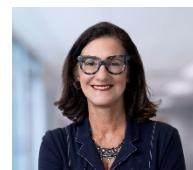
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