

Politics, Protests, and Posts: What Employers Can (and Can't) Do About Employee Speech in a Polarized Climate

A Practical Guidance® Article by Michael R. Marra, Joshua D. Nadreau,
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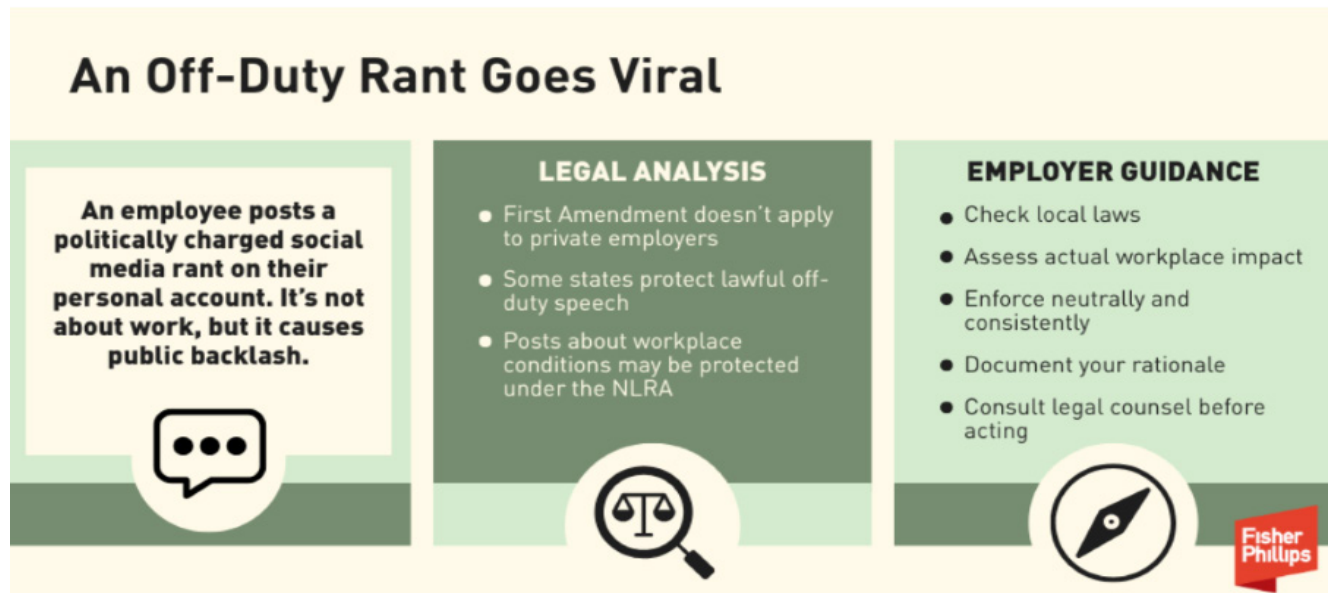
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As political tensions surge and employee expression spills into every corner of the modern workplace, employers are finding themselves caught in the crossfire. From off-hours protests to heated workplace debates and viral social media posts, the question for us isn't just whether speech is free – but whether it's job-protected. With laws, rights, and risks swirling around every conversation, T-shirt, post, and "like," it's time for a clear-eyed guide. Here's what your business needs to know about navigating employee speech in various scenarios, both on and off the clock.

Scenario 1: An Off-Duty Rant Goes Viral



An employee posts a politically charged rant on their personal social media account over the weekend. It's not about work, but it causes public backlash.

Legal Analysis:

Private-sector employers are not bound by the First Amendment's free speech protections, which only restrict government action. That said, employers may not be able to discipline off-duty speech with total impunity. Several states – including California, New York, and Colorado – have statutes protecting employees from retaliation for lawful off-duty conduct, and Minnesota, Connecticut, Louisiana, South Carolina, and Wyoming are among the states that specifically protect off-duty political activity. These laws may prevent employers from firing or disciplining employees for expressing their personal views unless those views have a clear, material impact on the business.

Even without a directed state law at issue, the federal National Labor Relations Act (NLRA) could also provide your employees with protection. If the social media post relates, even indirectly, to the employee's terms and conditions of employment, it may qualify as protected "concerted activity." This is especially true if the post touches on workplace issues shared by coworkers (e.g., wages, scheduling, discrimination). [The NLRB under recent interpretations has cast a wide net over what counts as protected speech](#), and this protection applies to non-union workplaces as well.


Employer Guidance:

- **Check local laws first.** Understand whether your state limits employer action on off-duty political or personal speech. These laws may surprise you, as some prevent employers from terminating the employment of someone who posts even clearly offensive posts unless you can show the communication caused direct business harm.
- **Evaluate the workplace impact.** Determine whether the post caused operational disruption, reputational damage, or significant internal strife. Absent that, discipline may not be legally or strategically justifiable.
- **Enforce policies neutrally.** Whether the post supports or opposes a cause, the focus should be on the impact, not the ideology. Selective enforcement invites discrimination claims.
- **Document the decision-making.** If you discipline, ensure documentation ties the action to the legitimate workplace impact you considered. Avoid using inflammatory or subjective language.
- **Consult legal counsel.** These decisions often exist in legal gray areas and public scrutiny can escalate quickly. Getting a second opinion can help de-risk the response.

Scenario 2: Political Debate at the Water Cooler


Political Debate at the Water Cooler

Two employees get into a heated political argument in the breakroom. Coworkers complain it's creating a hostile environment.




LEGAL ANALYSIS


- Some political conversations may be protected under the NLRA
- Employers can regulate disruptive or harassing behavior
- The line between protected activity and misconduct can be thin



EMPLOYER GUIDANCE

- Establish clear, respectful communication policies
- Train managers to de-escalate neutrally
- Focus on behavior, not viewpoints
- Apply rules consistently





Two employees get into a heated political argument in the breakroom. Other workers complain that it's creating a hostile or toxic environment.

Legal Analysis:

Political debates in the workplace are becoming more common – and more combustible. While the NLRA protects employees who engage in conversations about workplace conditions (regardless of whether the employees are members of a labor union), the law does not give employees free rein to disrupt the workplace. Employers may lawfully restrict political speech that creates a toxic atmosphere, distracts from productivity, or can be appropriately characterized into harassment or bullying.

That said, you must tread carefully. If employees are discussing matters that relate to shared working conditions, such as diversity policies, unionization, or workplace safety, their speech may be protected. Discipline in that context could trigger an unfair labor practice charge. The challenge is distinguishing between disruptive or discriminatory conduct (which may be regulated) and protected activity (which may not). If the discussions relate to other protected activity (complaining about discrimination or harassment), then fair employment laws might be triggered.

Employer Guidance:

- **Set clear boundaries in your code of conduct.** Your policies should emphasize respect and civility in all workplace interactions, including political conversations. Make it clear that hostile or demeaning speech won't be tolerated, regardless of the topic.
- **Train managers to intervene early and neutrally.** You should teach supervisors to spot the line between a healthy discussion and a volatile one. They should not express political views themselves or allow situations to escalate.
- **Focus on conduct, not content.** If you take action, make sure it's about the *behavior* – disruption, intimidation, name-calling – not the *opinion* expressed.
- **Be consistent.** If you address one type of political conflict but ignore another, you create risk of a discrimination or retaliation claim.

Scenario 3: Workers Plan a Walkout



Employees organize a walkout in support of a political movement – similar to the Day Without Immigrants or recent global protest days.

Legal Analysis:

The legality of employee walkouts hinges on the purpose behind the protest. If the protest is purely political and unrelated to workplace issues, such as a walkout opposing foreign policy or supporting a national election candidate, it likely falls outside the protection of the NLRA. In those cases, employers may treat the absence as unexcused and impose discipline under normal attendance policies.

However, if the walkout is tied to workplace issues or advocacy for better working conditions, it could be protected “concerted activity.” For example, employees walking out to protest workplace discrimination or to express solidarity with a national labor strike may fall under NLRA protection, even if your organization is not unionized. The NLRB under the Biden administration showed a growing willingness to connect national issues to local employment conditions, particularly under a broad reading of employee rights. We do not expect

this trend to continue under the Trump Board once it regains a quorum.


Employer Guidance:

- **Determine the purpose of the protest.** Ask whether this is political advocacy or workplace-related activism. If there’s a link to workplace terms, protection may apply.
- **Avoid snap discipline.** Even if a walkout seems unprotected, consult counsel before issuing discipline. An inaccurate legal assumption can backfire.
- **Reinforce your attendance and conduct policies.** Make sure employees understand how protest-related absences will be treated in advance. Apply policies consistently.
- **Prepare a contingency plan.** If you anticipate workplace disruptions, line up backup coverage, communicate clearly, and debrief afterward to reset expectations.

Scenario 4: Dress Code Disputes


Dress Code Disputes

An employee wears a shirt with a political slogan, and another wears a BLM pin, despite a no-message dress code.




LEGAL ANALYSIS


- Neutral dress codes can be enforced, but only if consistent
- NLRA protects messages tied to labor issues or workplace policy
- Selective enforcement = legal risk



EMPLOYER GUIDANCE

- Reassess policy for clarity and fairness
- Apply it to all messages equally
- Call counsel if labor-related speech is involved
- Communicate the rationale to employees





An employee wears a shirt with a political slogan, and another wears a Black Lives Matter lapel pin. Your dress code prohibits all messaging.

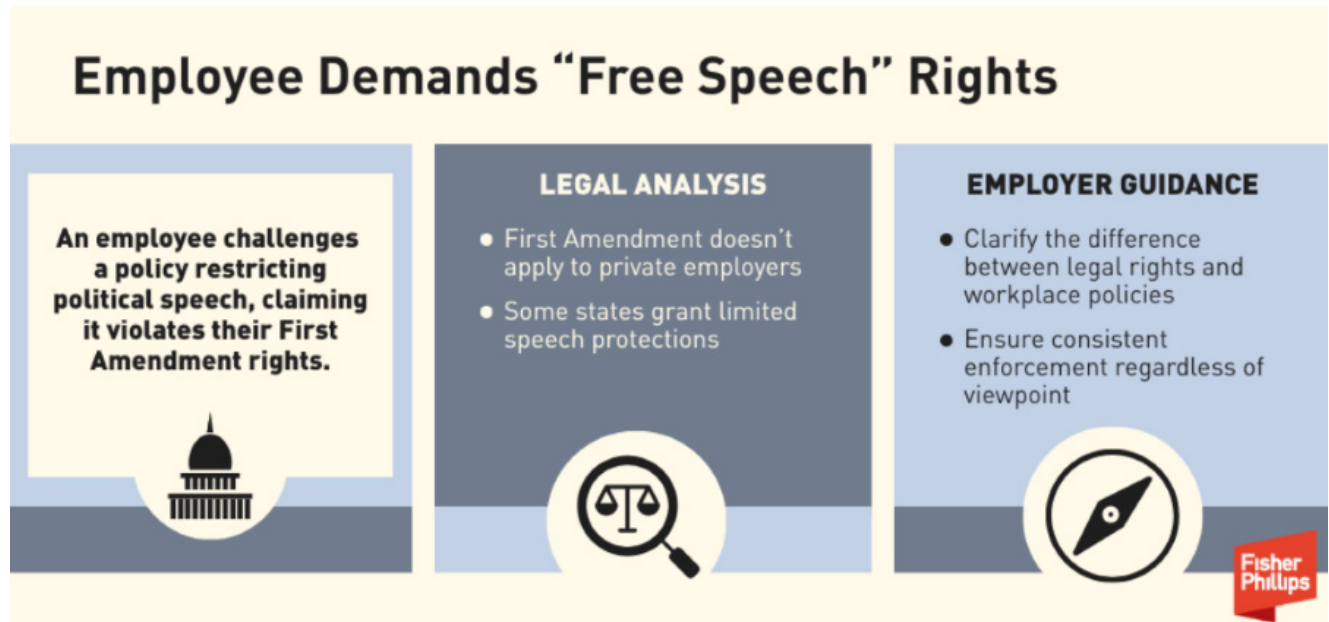
Additionally, uneven enforcement of dress codes – allowing purportedly patriotic or humorous slogans but prohibiting political or social messages – can expose employers to legal risk. If messaging restrictions disproportionately impact one group of employees or one viewpoint, a discrimination claim could follow.

Employer Guidance:

- **Reassess your policy.** If your dress code prohibits all messaging, make sure it's uniformly enforced and tied to a legitimate reason, such as safety, customer expectations, or professionalism.

- **Apply it evenly.** You can't allow some messages and ban others based on subjective content. If you prohibit "BLM" attire, you should also prohibit "Back the Blue" messaging, for example.
- **Avoid knee-jerk enforcement.** If the messaging relates to labor rights or workplace activism, call your FP lawyer before issuing discipline or sending someone home.
- **Communicate the rationale.** When enforcing the policy, explain the focus is on maintaining a distraction-free, respectful environment – not silencing ideas.

Scenario 5: Employee Demands “Free Speech” Rights



An employee challenges a policy restricting political speech, claiming it violates their First Amendment rights.

Legal Analysis:

One of the most common misunderstandings among employees is believing the First Amendment protects their speech at work. While that may apply in public-sector employment, it has no direct application in the private sector. However, some states provide narrow protections for off-duty political activity, especially when the speech has no connection to the workplace or employer.

Still, the law does not give employees carte blanche to say whatever they want in the workplace or on platforms where their employer may be impacted. You retain the right to impose reasonable restrictions on workplace speech to preserve productivity, safety, and a respectful environment. It's a balancing act between creating space for diverse perspectives and maintaining order.

Employer Guidance:

- **Educate employees.** Consider issuing FAQs or training to clarify that the First Amendment doesn't apply to private workplaces, and explain how your policies balance expression with workplace cohesion.
- **Enforce policies neutrally.** Don't suppress one viewpoint more harshly than another. Fair and even application is your best legal defense.
- **Refine your messaging.** When enforcing restrictions, emphasize business impact, not ideology. Reiterate that all employees must follow the same rules regardless of beliefs.
- **Respect protected off-duty conduct.** If your employee's speech occurred off-hours and in a jurisdiction with political activity protections, proceed with caution. Seek counsel before taking action.

Scenario 6: A Manager Makes Political Statements to Staff

A Manager Makes Political Statements to Staff

A supervisor frequently shares political opinions in meetings. Employees feel uncomfortable or pressured.



LEGAL ANALYSIS

- Manager speech may feel coercive or biased
- Risks include harassment, retaliation, or discrimination claims
- Higher standard applies to people in authority



EMPLOYER GUIDANCE

- Train leaders to stay politically neutral
- Create safe reporting channels
- Investigate concerns quickly
- Set the tone through leadership behavior





A supervisor frequently shares their personal political views in team meetings. Some employees feel pressured or uncomfortable.

Legal Analysis:

When a manager shares political views with those who report to them, legal risks multiply significantly. Even if the statements aren't explicitly coercive, the power dynamic can create the perception of pressure – especially if employment decisions follow. Employees may feel silenced or retaliated against for not agreeing with their manager's views.

From a legal perspective, such speech could open the door to claims of discrimination, retaliation, or hostile work environment, especially if the political commentary touches on race, religion, gender identity, or national origin. Managers are held to a higher standard because their words are presumed to carry the weight of the company.

Employer Guidance:

- **Train your leadership team.** Make it clear that managers should avoid discussing personal politics with subordinates and must never appear to favor or disfavor anyone based on political alignment.
- **Create reporting channels.** Ensure employees can safely raise concerns about inappropriate speech by supervisors without fear of retaliation.
- **Respond swiftly.** If a complaint arises, investigate promptly and document the findings. Corrective coaching is often sufficient, but more serious consequences may be needed in egregious cases.

- **Model the right tone.** Culture starts at the top. Your leadership team sets the example for respectful, inclusive communication across the company.

What Employers Should Do Now

The legal landscape surrounding employee speech is more complex than ever. While you have significant discretion to shape workplace norms, that discretion is bounded by state laws, federal protections, and public expectations. A one-size-fits-all approach won't cut it.

Here's what your business can do now to stay out of the crossfire:

- ✓ **Audit your policies** on political expression, conduct, social media, and dress code. Make sure they're clear, enforceable, and compliant.
- ✓ **Train managers** to handle political tensions respectfully and neutrally – and avoid injecting their own views into the workplace.
- ✓ **Monitor enforcement for bias.** Whether it's discipline, messaging, or investigations, make sure all actions are consistent across the board.
- ✓ **Prepare for protest-related absences.** Have a contingency plan for potential walkouts or disruptions linked to national events.

- ✔ **Get legal support early.** When in doubt, loop in your FP counsel, especially in high-visibility or legally gray situations.

Conclusion

Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information on the issues discussed in this insight. If you have questions about these issues, please contact your Fisher Phillips attorney, the authors of this Insight, or [any member of our Labor Relations Group](#). Also make sure to visit our [New Administration Resource Center for Employers](#) to review all our thought leadership and practical resources.

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Law360 News

- [Politics In The Workplace: What Employers Need To Know](#)

Related Content

Practice Notes

- [Hatch Act and Prohibitions on Employment Discrimination Based on Political Affiliation](#)

Templates

- [Political and Protest Activity Policy](#)

Michael R. Marra, Co-Regional Managing Partner, Fisher & Phillips LLP

Michael Marra is co-managing partner of the New York office. He excels at understanding business needs, developing effective strategies and solutions, and working closely on communication strategies. Michael represents some of the world's best known luxury brands, social media companies and law firms, and has significant experience with businesses leading the fields of advertising and technology.

Michael is a trusted advisor to private equity firms in their acquisition, integration and divestiture of businesses. Together with Steve Mitchell (Managing Partner, Columbia, SC office) Michael leads the firm's practice in support of corporate M&A transactions and integration, deploying the firm's enormous practical expertise and M&A experience to provide value-added guidance throughout the deal process.

He works on a broad range of matters, with unique experience counseling clients through complicated and high stakes employee relations matters. Additionally, he has resolved hundreds of adversarial proceedings through employer verdicts and negotiated resolutions, including discrimination claims, worker classification determinations, and trade secret and non-compete disputes.

Prior to helping to open the NYC office, Michael served for nearly a decade as Associate GC with The Interpublic Group in New York, where he worked closely with Interpublic's corporate team, Board of Directors and member companies on the full array of employment matters and initiatives. Michael has also practiced at renowned firms including Jones Day, Proskauer and Cooley.

Michael earned a J.D. from New York University School of Law and a B.A. from University of Iowa, where he was elected Phi Beta Kappa as a junior. He was commissioned as an officer in the United States Army through Iowa's ROTC program.

Joshua D. Nadreau, Regional Managing Partner and Vice Chair, Labor Relations Group, Fisher & Phillips LLP

Joshua Nadreau is the Regional Managing Partner of the firm's Boston office, partner in the Portland, ME office, and Vice Chair of the Labor Relations Group.

Working with clients in New England and throughout the country, Josh routinely advises and represents clients in collective bargaining, arbitration proceedings, and before state and federal administrative agencies. His litigation practice focuses on class and collective wage and hour litigation. Josh also advises clients on compliance with state and federal leave laws, restrictive covenants, and matters concerning allegations of employment discrimination.

Labor: Negotiation and Arbitration

In connection with his Labor practice, Josh has represented clients in both the public and private sector at the bargaining table during collective bargaining negotiations with unionized employees. Josh has also tried numerous labor arbitration hearings concerning employee discipline and discharge, contractual interpretation, and denial of tenure.

Josh has significant experience in representing both union and non-union clients in proceedings dealing with labor protections tied to Federal Transit Administration funding under Section 13(c) of the Urban Mass Transportation Act.

Josh also represents his clients in labor litigation matters in state and federal courts, including matters involving the breach of the duty of fair representation, injunctions, and proceedings to vacate arbitration awards.

A large part of his Labor practice is advising clients on the day to day decisions (and potential consequences) of operating in a unionized environment.

Employment Litigation: Complex Wage & Hour Litigation

In addition to his labor practice, Josh regularly advises and represents clients in class and collective wage and hour litigation under the Fair Labor Standards Act and the Massachusetts Wage Act. These cases typically involve allegations of impermissible rounding of time clock punches, off-the-clock work, misclassification, and meal/rest breaks.

Josh also handles wage and hour audits on behalf of large and small clients before the Massachusetts Attorney General's office and the Department of Labor.

Representative Clients

Josh enjoys representing clients of all sizes, from Fortune 500 corporations to locally owned car dealerships and other businesses. His industry experience includes hospitality, manufacturing, health care, higher education, and retail organizations.

In his spare time he is a certified high school football and basketball official and proud father of Watson the Beagle

Monica Snyder Perl, Partner, Fisher & Phillips LLP

Monica Snyder Perl, a partner in the Boston and New York office of Fisher Phillips, represents management on a variety of employment matters in state and federal court and before administrative agencies. Monica has defended employers against discrimination, sexual harassment and wrongful termination suits under both federal and state laws, including claims brought under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Massachusetts Chapter 151B. Monica also assists employers in their liability prevention efforts by conducting employee training, preparing handbooks and implementing policies, as well as conducting pay equity audits.

Monica regularly speaks on workplace issues such as sexual harassment and Performance Improvement Plans (PIPs). She is also an active member of Fisher Phillips' Pay Equity Practice Group, where she analyzes compensation issues related to gender, race, and other protected categories.

While in law school, Monica served as a judicial intern for the Honorable Patti B. Saris of the United States District Court for the District of Massachusetts and was a Note Editor of the Journal of Science and Technology Law.

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