Frontline Reports From Healthcare Employees On COVID-19 Challenges May Constitute Protected Activity

Insights
5.14.20

Social and traditional media has been buzzing with reports that healthcare providers – from nurses to physicians – are being discharged because they have publicly shared negative frontline experiences treating COVID-19 patients. After her sixth consecutive shift, one nurse spoke to the media about the inadequacy of the personal protective equipment (PPE) her employer issued her. An employed physician's off-the-clock Facebook post blasting her employer's unsafe working environment went viral. Both were purportedly discharged as a result of their speech.

Whether these reports are #fakenews, we do not know. But, one thing is true -- employees who discuss the terms and conditions of their workplace may very well be protected under either the First Amendment of the United States Constitution or the National Labor Relations Act (NLRA). What does this mean for your healthcare organization?

"Hey, It's A Free Country!"
Everyone is familiar with the First Amendment, but many incorrectly believe that it applies to the everyday private workplace. To be sure, the First Amendment's free speech protections are not triggered unless the *government* attempts to interfere with the right to speech. As a result, the First Amendment only affords employees with employment-related free speech rights where they work for a public employer.

For an employee's speech to be protected in the employment context, it must involve a matter of "public concern," and the employee's interest in commenting on it must outweigh the employer's interest in promoting efficiency in the workplace. To determine whether the speech addresses a matter of public concern, you need to analyze the content, form, and context of the statement. Courts have regularly held that, in order to be afforded First Amendment protection, employees must be speaking as a citizen (i.e., on their own time), rather than as an employee. Thus, when an employee speaks in an employment capacity, the speech typically falls outside the protection of the First Amendment.

The employee's interest in communicating a matter of public concern must then be balanced against the employer's desire to have a working environment free of unnecessary disruption. The more important the employee's interest, the more disruption the employer would have to demonstrate. Even though First Amendment rights are integral to our democracy, courts have held that employers have significant latitude when making decisions that relate to efficiency.

What about the nurse and physician at the top of this article? Since both spoke out on their own time, and on a matter of public concern – the quality of care in the midst of a pandemic that is overwhelming countless hospitals – their speech is likely protected. Unless, of course, their employers can demonstrate that the speech was unnecessarily disruptive, which may be a difficult showing given the current state of affairs. If the employers cannot make that showing, then terminating those employees as a result of their speech could result in significant liability under 42 U.S.C. §1983.

"I'll Say What I Want!"

What about employees working for private employers? They have protections, too – just not via the First Amendment. Typically, employees who appeal to the media or members of the public (e.g., Facebook posts) concerning their wages, hours, or the terms and conditions of employment are engaged in protected activity under the NLRA, regardless if they are members of a union. If employers make adverse employment decisions based on that protected activity, the employee (or a union representative, if the company is unionized) can file an unfair labor practice charge against them.

Although this is not a one-size-fits-all legal issue, and each case requires an individual analysis), if employees publicly voice concerns about the challenges faced when treating COVID-19 patients – such as being instructed to reuse certain PPE and unsafe working conditions – they are likely engaged in protected activity. Thus, their conduct would be protected under the NLRA, so long as their statements do not purport to speak on behalf of the employer or make maliciously false statements about the employer.

Think Before You Speak (About Termination)

The impact of COVID-19 has been felt across all industries, but, at least arguably, no industry has felt it as acutely as healthcare. As the number of confirmed cases continues to increase, so do tensions. And, understandably so. Healthcare employers should be mindful, however, that employees' public discussions about the challenges they are experiencing could be protected under the First Amendment or NLRA. Not to mention, even when employees have no First Amendment or NLRA rights, they may nevertheless be protected as whistleblowers or relators, or under another federal law (e.g., Title VII of the Civil Rights Act of 1964).

These protections do not mean employers should do nothing in the face of such conduct. Instead, you should consider communicating with your employees concerning operations and efforts to keep them safe during the ongoing national crisis. You should also consider implementing a strategy in place to respond to media inquiries or stories that may circulate on social media. At a minimum, you should exercise caution when making adverse employment decisions that are the direct result of an employee's speech, and make sure to get in touch with your legal counsel.

For more information, contact the author.

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