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Political Speech in the Workplace (And What – If Anything – To Do About It)

Written By Justin T. Hill (jthill@wardandsmith.com) **and Grant B. Osborne** (gbo@wardandsmith.com)

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Politics could hardly be more conspicuous these days. A monumental presidential election looms on the horizon, and it seems that everyone has an opinion.

Many who do have jobs and bring those opinions into the workplace. That's fine as long as those with opinions either keep them to themselves or are willing and able to share them, if they must, without distracting or upsetting others. Diplomacy and tact, however, are not exactly surging in popularity in the public square. Employers must therefore consider what they can do to prevent their workplaces from becoming embroiled in controversial debate, which can disrupt productivity, undermine morale, and lead to wasteful and expensive conflict. But what can employers lawfully and prudently do?

The answer depends on what kind of employer we're talking about.

The Distinction between Public and Private Employment

The answer hinges, first, on whether an employer is "public" – meaning associated with government – or "private." This distinction matters enormously because those in the first category are subjected to limitations imposed by the United States Constitution, whereas those in the second are not.

Many people believe that the U.S. Constitution – specifically the First Amendment – ensures their right to engage in "free speech" in all circumstances. But that's not true. In North Carolina (and presumably everywhere else in the U.S.), for example, no one has the right to defame another person with impunity. Or – according to the old saw at least – scream "Fire!" in a crowded theater when there obviously is no fire and thus cause a stampede that injures others. And the First Amendment doesn't prohibit a *non-governmental* employer from limiting speech of any kind. It provides in relevant part only that "**Congress** shall make no law … abridging the freedom of speech", and therefore limits only what *government* – whether federal or state – may do. (Courts decided long ago that the First Amendment applies to the states, too.) It has nothing to do

with purely private conduct. Speech, in other words, is protected only from *governmental* intrusion.

So what is a "public employer"? Generally speaking, it is a federal or state or state-related governmental agency, such as any branch or office of federal, state, county, or municipal government, and includes state-funded colleges and universities. All other employers are considered "private employers."

Legal Limits on Free Speech

A. Public Employment

Public employers must take caution before restricting speech. Employees of such employers are not deprived of their First Amendment rights by virtue of their status as government employees. The speech of a public employee, if his or her employer wants to prohibit or limit it, must be examined with regard to content, form, and the context in which made. No clear test does or could precisely describe the kind of speech that a public employer may subject to "prior restraint" or punish after it has been made, but – again generally speaking – the question will be whether an employee whose speech is in question wishes to speak – or spoke – in the capacity of a *citizen* regarding a matter of *public concern* or, rather, for some other reason, such as only to advance a *personal interest*. When speaking only as a citizen regarding a matter of public concern, the employee's speech is likely to be protected, whereas speaking only to promote one's personal interests probably won't be.

Even when speaking regarding public concerns, there are limits – in the context of governmental employment – on what employees may say. Courts evaluate speech on public concerns in the context of governmental employment by balancing the interests of the employee in speaking freely against the employer's interest in restricting free speech. A public employer that wants to restrict it had, therefore, better have a compelling reason to do so.

B. Private Employment

Private employers, in contrast, if they wish and believe it prudent to do so, are generally free in North Carolina to limit the speech of their employees within the workplace (and, for that matter, elsewhere, as imperious as that would be). They may establish rules prohibiting speech without fear of *constitutional* restrictions because such restrictions don’t apply to private entities unless some kind of "state action" is involved. Private employers' freedom to control what their employees say, however, is subject to a considerable *statutory* limitation. But more about that in a few.

Blurring the Lines

Private employers are not as likely to confront limits on their right to restrict speech as are public employers, but even private employers can encounter them if they are deemed "state actors" or engage in "state action." Four tests have been developed and used by courts to determine whether conduct by a private employer amounts to "state action" and therefore subjects the private employer to constitutional limitations: they are (1) the public-function test; (2) the nexus test; (3) the symbiotic-relationship test; and (4) the joint-action test. In a nutshell:

1. The public-function test ascertains whether a private employer acted in a way traditionally and exclusively reserved to the state, such as by holding elections or performing typically municipal functions;

2. The nexus test considers whether the state ordered or influenced a decision to such an extent that the action of a private party amounts to that of the state, such as when state law facilitates a private party's abuse of a citizens' rights;
3. The symbiotic-relationship test determines whether the state is so intertwined with a private party that the private party's actions should be deemed those of the state, such as when a restaurant leases and uses a state-owned building and the state finances the upkeep of the space; and
4. The joint-action test evaluates whether a private party willfully participated in joint action with state agents to such an extent that the distinct actions of the private and state actors should be deemed to be the actions of both.

If any of these tests apply, then private employers will be subject to the same constitutional restrictions as public employers. Private employers should therefore ensure that they know when their actions may implicate those of the "state."

Private Employers and the NLRA

Regardless of whether "state action" is involved, almost all private employers are subject to the "National Labor Relations Act" of 1935. That Act, in part, protects the right of employees to "engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection", and to join together to try to improve their wages and working conditions (*regardless* of whether a labor union is involved). Protection of that right applies to work-related discussions, whether oral or written, such as but not limited to those that may occur in internet-based social media. Even private employers should, therefore, avoid policies and practices that *could be construed* as limiting employees' rights to engage in such speech. Alleged violation of that right can result in an "unfair labor practice" charge before the National Labor Relations Board, which has the right to – and often does – enforce the Act in the context of private employment.

What IS an Employer to do?

A. Public Employment

Public employers must be willing to distinguish an employee's speech as a citizen on a matter of public concern from speech undertaken for some other reason and must have the wisdom to know the difference. Speech made by an employee on behalf of the employer can lawfully be limited because even a public employer has the right to restrict and frame its own message. Employees' comments about political campaigns and elections can easily be construed as speech regarding a matter of public concern, but public employers may, carefully and judiciously, require employees to refrain from conduct – even verbal conduct – that is so likely to inflame co-workers that productivity and morale may be jeopardized. The trick, of course, will be how to do so without inviting a legal challenge. Consulting informed legal counsel would be the place to start.

B. Private Employment

Private employers in North Carolina (but for the noted NLRA exception that applies to about every private employer) enjoy wide latitude as to how they may lawfully restrict employee-speech. But that's only where the analysis begins. The critical question turns not on what private employers may do but rather on what they should. If they want to impose restrictions on what their employees say in the workplace about delicate subjects – and what could be more delicate these days for many people than their political views and

allegiances – then they should lay those restrictions out in a well-crafted written personnel policy (perhaps written by someone who does that for a living). The policy should express, as plainly as possible, the purpose of the restrictions, the kinds of speech and behavior that are and are not out of bounds, and the results that may follow violation of the policy. No one wants to feel "censored," but most employees, if informed of a clear policy and persuaded as to why the policy is needed to preserve harmony in the workplace, will be happy to go along.

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