

You Said *What??*

Understanding The Differences
Between Protected Speech
And Prohibited Speech

Scope

- Rules
 - With some excluded topics
- Process
 - Customizable workflow
- Examples
 - Comparing lawful and unlawful policies

Rules

What's In

- Rules that are frequently encountered
- Real-life applications
 - Common
 - Confusing
 - Consequential

What's Out

- Rules that are less frequently encountered
 - Federal Privacy Act restrictions
 - Freedom of Information Act requirements
 - Criminal claims and defenses
 - Family and Educational Rights and Privacy Act (FERPA)
 - Many others

Principles of Analysis

Permitted

Prohibited

Required

Context-
dependent

Permitted—Required

- **First and Fourteenth Amendments and public employees**

"When a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she **spoke as a citizen on a matter of public concern....**"

- **Section 7 rights**

“concerted activities for the purpose of collective bargaining or other **mutual aid or protection**”

Permitted—Required (cont'd)

- **Compensation-related speech**

“An employer shall not... require nondisclosure by an employee of his or her wages as a condition of employment....”

- **Whistleblowing**

“An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because... the employee, or a person acting on behalf of an employee, in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official....”

Prohibited—Required

- Minnesota government data: nonpublic, private, confidential, protected nonpublic
 - Liability for failure to adopt “appropriate safeguards” to protect nonpublic data
- Harassment, protected class
 - (1) submission is made a term or condition of employment, or
 - (2) used as a factor in decisions, or
 - (3) the conduct or communication has the purpose or effect of substantially interfering with an individual's employment

Prohibited—Required (cont'd)

- Harassment, protected class (continued)

“Sexual orientation’ means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, **or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.**”

Prohibited—Required (cont'd)

- HIPAA
 - “Individually identifiable health information”
- A.D.A.
 - If medical examination allowed:
 - “information ... [must be] collected and maintained on separate forms and in separate medical files and ... treated as a confidential medical record, except...”

Prohibited—Required (cont'd)

- Confidentiality in investigations and settlements
 - N.L.R.B.
 - Chilling effect on exercising Section 7 rights
 - Not *entirely* absolute—see next slide
 - E.E.O.C.
 - Chilling effect on public policy of allowing the filing of administrative charge
 - Retaliatory
 - “protect the confidentiality of harassment complaints to the extent possible”
 - S.E.C.

Permitted—Context-dependent

- **N.L.R.B.:**

“The rule in this case violates Section 8(a)(1) because it does not take into account the Employer's burden to show in each particular situation that the Employer has a business justification for confidentiality that outweighs employees' Section 7 rights. The Employer may not avoid this burden by asserting its need to protect the integrity of every investigation, but rather must establish this need **in the context of a particular investigation that presents specific facts giving rise to a legitimate and substantial business justification for interference with the employees' Section 7 right.**”

Permitted—Context-dependent (cont'd)

- Some health-related information
 - Some A.D.A. medical examination data
 - “except that ... supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations....”
 - Some otherwise private HIPAA-protected health information
 - Employment records
 - Within limited scope of management activity
 - Some otherwise protected Minnesota health records
 - Authorized releases

Permitted—Context-dependent (cont'd)

- Some investigation-related information
 - Title IX
 - Instances of overriding student request for confidentiality should be limited and information should be **shared only with individuals who are responsible for handling school's response**
 - State mandatory reporting can generally be followed **without disclosing information to school personnel who are not responsible for handling school's response**
 - Even if student does not request confidentiality, school should only disclose information regarding alleged incidents of sexual violence **to individuals who are responsible for handling school's response**

Permitted—Context-dependent (cont'd)

- Title VII
 - Limited disclosure
 - Informing Complainant that action in process or complete
 - Requesting Complainant to renotify if recurrence
 - Limits on disclosure
 - Retaliation
 - Defamation
 - Privacy intrusion
 - “protect the confidentiality of harassment complaints to the extent possible”

Prohibited—Context-dependent

- May be prohibited by employer rules, e.g., bullying
- May be prohibited by civil law, e.g., defamation

Prohibited—Context-dependent (cont'd)

- Harassment, not protected class (“bullying”)
 - "Abusive conduct" means conduct, including acts or omissions, that a reasonable person would find hostile, based on the severity, nature, and frequency of the conduct. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, or epithets; verbal or physical conduct of a threatening, intimidating, or humiliating nature; the sabotage or undermining of an employee's work performance; or attempts to exploit an employee's known psychological or physical vulnerability. A single act is not abusive conduct unless the act is severe and egregious.
 - "Abusive work environment" means an environment in which an employer or employee acts with malice to subject an employee to abusive conduct so severe that it causes tangible harm to the employee.

(Minnesota S.F. 1932 (March 23, 2015))

Prohibited—Context-dependent (cont'd)

- Some concerted activity
 - Generally not protected by Section 7, if
 - Breach of confidentiality unrelated to terms and conditions of employment
 - Malicious falsehood
- Defamation
 - "(a) a false and defamatory statement about the plaintiff, (b) in an unprivileged publication to a third party (c) that harmed the complainant's reputation in the community."
 - Section 7 might still protect

Prohibited—Context-dependent (cont'd)

- Commercial disparagement and deceptive trade practices
 - False or misleading statement tending to disparage employer's products or services, and resulting in provable damages

Process

Workflow Example

- Does the conduct violate a standard?
 - Notice; Consistency; etc.
- Is the standard compliant?
- Is the content protected?

Separating Standards and Conduct

- Standard compliant; conduct protected
- Standard compliant; conduct not protected
- Standard noncompliant; conduct protected
- Standard noncompliant; conduct not protected

Examples

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- "Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."

- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."

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- “Do not make ‘[s]tatements that damage the company or the company's reputation or that disrupt or damage the company's business relationships.’”

- "Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."

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- “Do not make ‘insulting, embarrassing, hurtful or abusive comments about other company employees online,’ and ‘avoid the use of offensive, derogatory, or prejudicial comments.’”

- “Any logos or graphics worn by employees ‘must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.’”

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- “[I]t is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation during employees' working time. "Working time" is the time an employee is engaged, or should be engaged, in performing his/her work tasks for [Company]. These guidelines also apply to solicitation and/or distribution by electronic means.”

- “[I]t is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation and distribution of literature during employees' working time. "Working Time" is the time an employee is engaged or should be engaged in performing his/her work tasks for [Company]. These guidelines also apply to solicitation by electronic means. Solicitation or distribution of any kind by non-employees on Company premises is prohibited at all times. Nothing in this section prohibits employees from discussing terms and conditions of employment.”

Q & A

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