

# “Let’s Give Them Something to Talk About”: Employee Speech During and After COVID-19

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*Presented by:*



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# OVERVIEW

- Employee speech and conduct in and out of the workplace is an increasingly hot topic, particularly due to our current epidemiological and political climate
- Advances in technology enable employers to know more about their applicants and employees
- Changes in workplace dynamics and technology are blurring the line between on and off duty
- Employers face unique challenges balancing First Amendment concerns and consequences for inappropriate employee conduct

# EMPLOYEE SPEECH IN THE HEADLINES – CURRENT EVENTS

- Nurse fired after publicly raising concerns to media outlets about lack of masks and other personal protective equipment at hospital he worked at
- Detroit nurse fired for posting a 7-second video on her Facebook page showing the precautions the hospital was taking to treat COVID-19 patients and voicing concerns to management regarding staffing ratios and poor conditions at the hospital
- New Jersey nurse fired after returning to work with her own N95 mask and a pair of gloves when hospital would not provide her with personal protective equipment



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## EMPLOYEE SPEECH IN THE HEADLINES – CURRENT EVENTS

- Police officer terminated within hours of posting a comment on Facebook stating it was “unfortunate” that more black people did not die of COVID-19
- Local brewery fired its head brewer after learning about the brewmaster’s inflammatory Instagram post advocating violence against the police
- South Florida prosecutor now unemployed after posting “Act civilized and maybe things will change. I’ve never seen such animals except at the zoo” in reference to the protests that began shortly after George Floyd’s death
- Owner of a popular Old Town Scottsdale bar facing harsh criticism for a post on her personal Facebook page referring to Black protestors as “thieves, violent criminals, and low-class a\*\*holes”
- Shelby Township, Michigan Police Chief placed on leave of absence pending investigation into inflammatory internet posts attributed to him, which called for “body bags” for “vicious sub-humans” involved in recent demonstrations over the death of George Floyd



# AGENDA

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- Employee Rights and Protections
- Applicable Legal Issues and Standards
- Social Media Issues
- Examples of Polarizing Speech in and out of the Workplace
- Employer Responses and Best Practices



# EMPLOYEE RIGHTS AND PROTECTIONS

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- General Rules and Laws Protecting Employees
- Employee Speech in and out of the Workplace
- Implications of Employee Social Media Activity

# GENERAL RULES FOR EMPLOYEE SPEECH

- For an at-will employee, an employer may impose discipline for any off-duty speech or conduct it deems inappropriate as long as the activity is not protected
- Employees may have more protection if they are subject to a collective bargaining agreement or an employment contract with a just-cause provision
- Public employees have First Amendment rights



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# LEGAL PROTECTIONS FOR EMPLOYEE SPEECH

- Constitutional (federal or state) protection applies to public employees only
- Collective Bargaining Agreements and Employment Contracts
- State statutes that protect specific employee off duty speech
- National Labor Relations Act (NLRA) claims (or MERC claims)
- Retaliation and Whistleblower claims
- Federal and State EEO laws
- State statutory or common law privacy rights

# PUBLIC EMPLOYEES

- Any termination of public employees must be carefully considered in light of their First Amendment rights
- Presumption that an employee's private life is outside of the employer's control
- However, discipline or termination for off duty conduct can be appropriate where there is a nexus between the off duty conduct and employer's legitimate business interests
  - Protection generally limited to speech that is on matters of "public concern." Speech regarding the COVID-19 pandemic and the Black Lives Matter movement could fall under this category



# COLLECTIVE BARGAINING AGREEMENTS AND EMPLOYMENT CONTRACTS

- CBAs and contracts may protect employees from discipline for off duty conduct. The typical language prohibits termination unless “just cause” exists.
  - “Just cause” requires a nexus between off-duty conduct and the workplace
  - Arbitrators will generally sustain discharge grievances for off-duty conduct except under three circumstances where supported by evidence:
    - 1)The off-duty behavior harms the company’s reputation, business, or product
    - 2)The off-duty conduct renders the employee unable to perform his duties or appear at work, in which case discharge would be based on inefficiency or excessive absenteeism
    - 3)The off-duty conduct leads to refusal, reluctance, or inability of other employees to work with the individual



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# HARM TO THE COMPANY'S REPUTATION

- Where an employer claims that the off-duty conduct caused harm to the employer's business, this typically refers to an actual business loss or damage to the employer's reputation
- Arbitrators have also made the following considerations
  - **Adverse publicity**
    - *Baker Hughes*, 128 Lab. Arb. (BNA) 37 (2010) (denying grievance, arbitrator noted that employee's blog had reached 10,000 views and that the blog harmed his supervisor's reputation and disrupted the harmony in the plant)
    - *Handy v. Harman Refining Division*, 106 Lab Arb. (BNA) 1049 (1996) (Newspaper article that does not even mention the company's name militated against a finding that the off duty conduct hurt the company's reputation)

# EEO LAWS AND PROTECTED CHARACTERISTICS

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- EEO Laws
  - Title VII – protects race, color, religion, sex or national origin
  - Michigan Elliot Larsen Civil Rights Act – protects race, color, religion, sex, age, national origin, height, weight, and marital status
  - Americans with Disabilities Act
  - Michigan Persons with Disabilities Civil Rights Act
  - Age Discrimination in Employment Act



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# RETALIATION AND WHISTLEBLOWER LAWS

- Numerous Michigan and federal laws provide protection to employees who oppose or report illegal activity
- Employees who engage in protected activities under laws in the following subject areas are protected from retaliation:
  - Discrimination, harassment, failure to accommodate
  - Wage and hour
  - Occupational safety and health
  - Workers' compensation
  - FMLA leave
- Michigan also has a general whistleblower protection statute, the Whistleblowers' Protection Act (WPA) that prohibits retaliation against employees who report or are about to report a suspected violation of law to a public body



# STATE STATUTES PROTECTING OFF DUTY CONDUCT

- Michigan does not have a specific state law that protects employee off-duty activities and behavior
- However, some states, like California, Colorado, New York, Nevada and North Dakota, have laws which protect the legal off-duty conduct of employees
  - Employers in those states may be prevented from disciplining or terminating an employee for off-duty conduct that was legal, even if the message of the conduct was adverse to the values of the employer



# NATIONAL LABOR RELATIONS ACT

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- Section 7: “Employees shall have the right . . . To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”
- Section 8(a)(1): “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of this Act”

# EMPLOYEE SPEECH IN AND OUT OF THE WORKPLACE: DOES THE CONSTITUTION PROTECT AN EMPLOYEE'S RIGHT TO DISCUSS POLARIZING TOPICS IN THE WORKPLACE?

## ▪ IT DEPENDS

- Public employees have a right to free speech, including free political speech, in the workplace
- Private employers may prohibit political speech, discussions, and conduct *at the workplace*
- Private employers may *generally* refuse to hire, adjust pay/benefits, and discharge “at-will” employees because of their political views or other potentially polarizing viewpoints
- Speech surrounding COVID-19 may be considered political speech, depending on the nature, focus, and topic of the speech

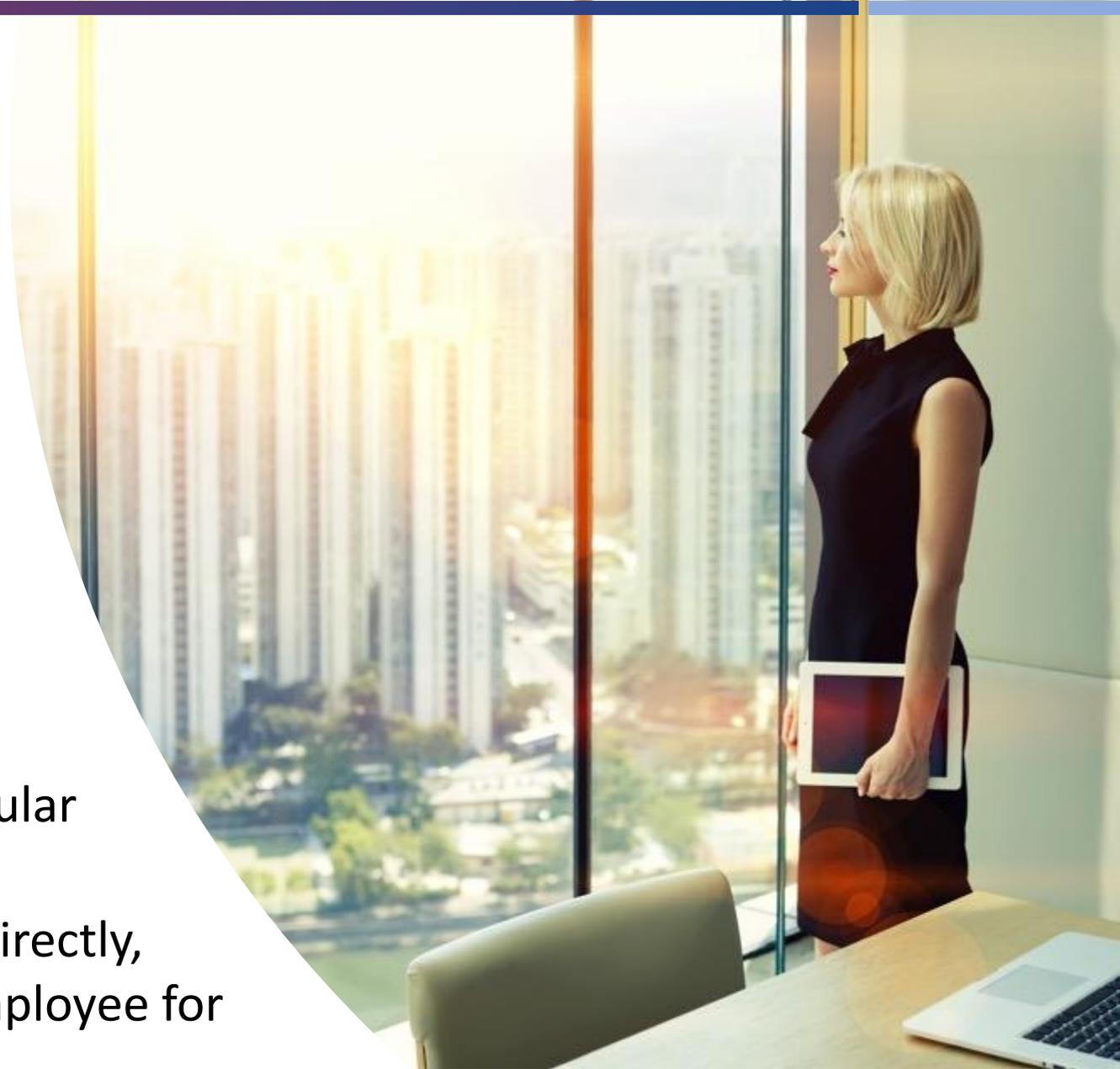


# EXCEPTIONS TO EMPLOYER'S FREE DISCRETION TO LEGALLY LIMIT POLARIZING SPEECH IN THE WORKPLACE

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## 1. State Laws

- Under Michigan law:
    - It is a misdemeanor criminal offense, either directly or indirectly, to give, lend, or promise valuable consideration to any person to award them for voting a particular way or refraining from voting
    - Employers may not, either directly or indirectly, discharge or threaten to discharge an employee for the purpose of influencing their vote
- MCL § 168.931



# EXCEPTIONS TO EMPLOYER'S FREE DISCRETION TO LEGALLY LIMIT POLARIZING SPEECH IN THE WORKPLACE

## 2. Section 7 of the NLRA

- “Employees shall have the right . . . To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”
  - Non-supervisory employees have a right to discuss wages, hours and other terms and conditions of employment (“concerted activity”)
  - Protections extend to workplace conversations as well as those outside the workplace and outside working hours
  - Union and non-union employees



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# EXCEPTIONS TO EMPLOYER'S FREE DISCRETION TO LEGALLY LIMIT POLARIZING SPEECH IN THE WORKPLACE

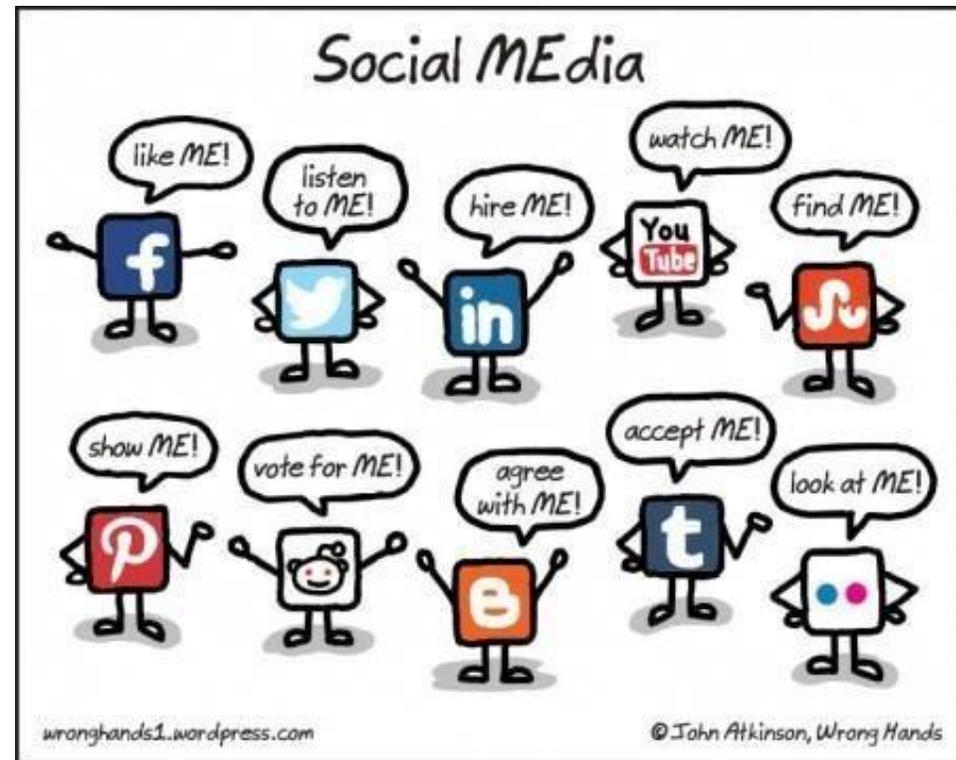
## 2. Section 7 of the NLRA

- NLRB has broadly interpreted Section 7 to prohibit employers from banning all political communications and activities in the workplace
- NLRB has struck down “bad behavior” policies, *i.e.* policies requiring respectful communication, prohibiting workplace gossip, profanity, offensive comments, and displaying or wearing racially insensitive slogans or depictions
- 2015 GC Memo
- New political landscape today (Former guidance withdrawn on Dec 1, 2017)
  - New Guidance on Handbook Rules issued in June 2018





# SOCIAL MEDIA



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# SOCIAL MEDIA IN THE WORKPLACE

- **Reasons to allow:**

- Effective business tool
- Marketing
- Employee recruitment
- Reach out to masses
- Greater interactivity between customers and businesses
- Professional networking
- Product/service feedback
- Community outreach



# SOCIAL MEDIA IN THE WORKPLACE

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- **Reasons to prohibit:**
  - Diverts employees' attention away from work priorities
  - Hurts productivity
  - Can lead to security incidents
  - Can lead to unproductive discussions or physical or mental abuse
  - Creation of an unharmonious workplace
  - Encourages the spread of rumors or misinformation

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# SOCIAL MEDIA IN THE WORKPLACE

- Why develop a social media policy?
  - Protect trade secrets
  - Prevent employees from tarnishing an employer's brand or reputation with clients or customers
  - Prevent unlawful harassment between co-workers
- The NLRB has long held that Employers usually may not discipline employees for engaging in certain collective or concerted activity, including comments regarding terms and conditions of employment, unless the employee's behavior is so outrageous that it loses the protection of the Act



Our benefit package is we don't block Facebook.

## SOCIAL MEDIA IN THE WORKPLACE

- Section 7 does not protect all employee speech, and a well-crafted social media policy **can still prohibit:**
  - Unprotected speech that may damage an employer as long as it does not relate to an employee's terms and conditions of employment
  - Accessing social media use during working hours
  - Identifying as being employed by a specific Company
  - Disclosure of confidential information or trade secrets
  - Harassment or discrimination



# EXAMPLES OF POLARIZING SPEECH IN AND OUT OF THE WORKPLACE

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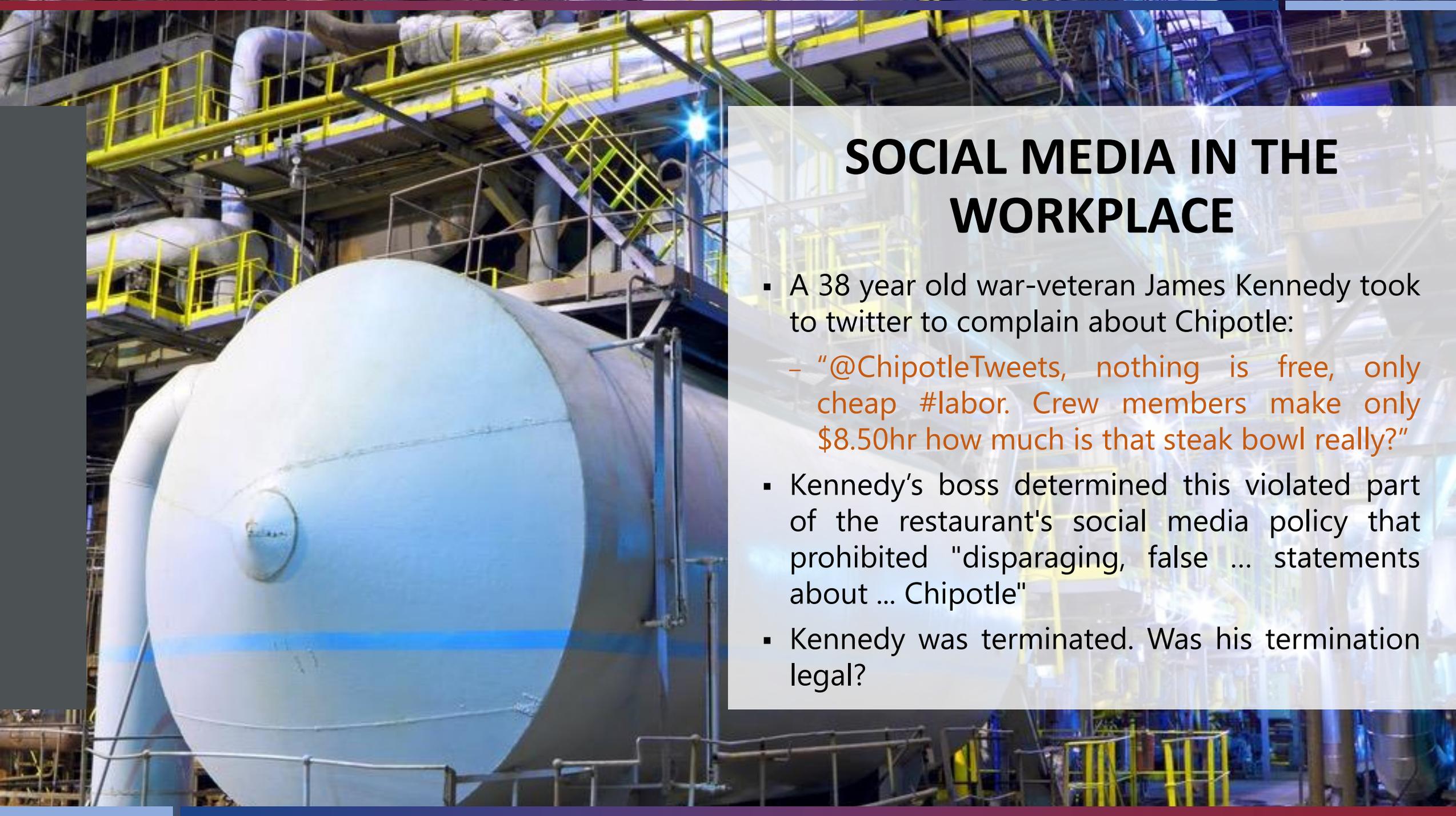
- Headlines and Lawsuits
- Potential Speech in light of COVID-19 and Black Lives Matter Movement

# SOCIAL MEDIA IN THE WORKPLACE

- In Alabama, a police officer was terminated after speaking at a League of the South rally. Portions of his speech were posted for the public's view on YouTube and his involvement with the League of the South was covered in local articles.
- League of the South is a White-Nationalist and White-Supremacist organization that advocates for a second Southern secession



- The police officer sued the City alleging his termination violated his constitutional rights
- The Court upheld the termination, finding that the interest in speaking out was outweighed by the police force's interests in maintaining order, loyalty, morale, and harmony within the police force and throughout the community.



# SOCIAL MEDIA IN THE WORKPLACE

- A 38 year old war-veteran James Kennedy took to twitter to complain about Chipotle:
  - “@ChipotleTweets, nothing is free, only cheap #labor. Crew members make only \$8.50hr how much is that steak bowl really?”
- Kennedy’s boss determined this violated part of the restaurant's social media policy that prohibited "disparaging, false ... statements about ... Chipotle"
- Kennedy was terminated. Was his termination legal?

# SOCIAL MEDIA IN THE WORKPLACE

- In August 2017, a **Google Engineer** was fired for publishing a **controversial memo** where he claimed women are **underrepresented in technology because of psychological and biological differences, not sexism**. NLRB dismissed his claim. He and another former engineer are now suing the company for discrimination against white men and conservatives.
- The NLRB, in a memo regarding the claim, found that statements regarding immutable traits linked to sex were discriminatory and constituted sexual harassment. It concluded: “Thus, while much of the Charging Party’s memorandum was likely protected, the statements regarding biological differences between the sexes were so harmful, discriminatory, and disruptive as to be unprotected.”
- Similar result would likely occur if engineer published a controversial memo regarding a different trait protected by federal law.



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# SOCIAL MEDIA IN THE WORKPLACE

- A white employee posted the following on her personal Facebook page:
  - “All lives matter. Period. I will not be preached to. I never said Black lives dont [sic] matter. I believe Black lives matter is stoking the fire of racial tension and hate by exploiting deaths and encouraging division. Period. Look again at my words and do not put words in my mouth.”
- The employee complained to management that coworkers were creating a hostile work environment by calling her racist in response to the post.
- In February, the court dismissed her racial discrimination claims. The Judge emphasized that calling someone “racist” is not racial on its face, and is not related to race.
- What if the employer had taken action against the employee based on her speech?



# POTENTIAL EMPLOYEE SPEECH DURING AND AFTER COVID-19

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- "I don't want to wear a face mask."
- "I'm afraid to return to work as I believe I might catch the virus."
- "I don't feel comfortable reporting to my job downtown in light of protest activity."
- "My employer is not implementing proper sanitation and cleaning procedures as we return to work."
- "I'd rather just stay home and continue to telework. Why is my boss being so unreasonable?"
- "My employer is not handling the pandemic well. I think they are violating state orders regarding returning to work."

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# PUTTING IT ALL TOGETHER: EMPLOYER BEST PRACTICES AND TAKEAWAYS

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- Addressing polarizing speech and creating a cohesive workforce
- Politics in the workplace
- Social media
- Employer responsibility

# ADDRESSING RETURN TO WORK CONCERNS

- Have open and honest conversations with employees
  - Is the reason the employee is afraid to return to work legally qualifying for leave? (e.g. FFCRA, ADA, etc.)
  - Does the employee have documentation supporting their fear?
- Provide clear and continuous updates to employees regarding employer's approach to COVID-19 and steps taken to ensure employee safety as employees begin to return to the workplace
  - Notify employees of sanitation policies, cleaning schedules, and whether you will provide masks, cleaning wipes, etc.
  - Inform employees of expectations: will employees be offered flexible scheduling or does a return to work indicate a full-time return to the office? Will employees be allowed to leave early in the event the downtown area becomes unsafe or curfews are implemented?
  - Addressing these common concerns at the forefront will calm employee nerves and likely hinder controversial speech or the spread of misinformation



# ADDRESSING TELEWORK CONCERNS

Many employees have become accustomed to working from home and may voice their displeasure if they are asked to return to the office environment

- **Make a decision:** Do you want to implement new telework policies to allow employees to work from home full-time or part-time? Or do you want to go back to old policies requiring in-person attendance?
  - Either approach is acceptable, as long as the policy is **implemented consistently** for all covered employees
- **Inform employees of your decision**
  - If returning to former policy, notify employees and reinforce job requirements
  - If implementing new policy, engage in careful drafting and send policy to all covered employees
- Providing clear, up-front communication about your company's telework policy will limit the spread of misinformation and harmful discourse



# CREATING A COHESIVE WORKFORCE

Despite addressing employee concerns and providing consistent updates on workplace policies, employees may still engage in difficult and potentially harmful discourse in and out of the workplace

How can an employer combat these challenges?

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- Recognize diversity
  - Encourage the respect and consideration of various viewpoints
- Consider adjusting expectations
  - While you may have frowned upon working from home prior to COVID-19, perhaps consider allowing remote work on a part-time basis to retrain and attract talented employees
- Coach management to remain neutral during polarizing conversations
  - Employees may feel the need to vent to supervisors regarding the current state of our country and world. Consider allowing employees to voice their concerns, but encourage supervisors to maintain neutrality while reminding employees the value and importance of their role



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# CREATING A COHESIVE WORKFORCE

Despite addressing employee concerns and providing consistent updates on workplace policies, employees may still engage in difficult and potentially harmful discourse in and out of the workplace

How can an employer combat these challenges?

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- Anticipate emotional responses
  - Train supervisors to approach difficult discussions with empathy and understanding as these discussions will no doubt occur in light of COVID-19, protests regarding racial inequality, and the upcoming presidential election
- Consider and Value Personal Opinions
  - Encourage management to seek out the opinions of its employees
    - This can be done by asking employees to complete office-wide surveys and encouraging open dialogue between employees and management. Employees are much less likely to engage in harmful discourse if they believe their opinions have been heard and considered.



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# SOCIAL MEDIA: EMPLOYER BEST PRACTICES

*Also consider reviewing/drafting social media policies as employees return to work:*

- Address employee conduct both at work and at home with regard to harassment, discrimination, code of conduct, confidentiality, non-disparagement and technology use
- Prevent social media use at work unless it is part of an employee's assigned duties
- Preserve confidentiality and privacy by crafting carefully written policies that specifically delineates which posts are prohibited. Internal company matters should never be posted online or discussed online, regardless of whether the employer is indicated.
- Review and rethink existing policies and prohibitions to ensure that they properly take account of Section 7 concerns.
- **\*\*Make clear that the policy is not intended to prohibit protected speech or interfere with employee rights recognized under the NLRA\*\***



# SOCIAL MEDIA: EMPLOYER BEST PRACTICES

- Other steps an employer should take:
  - Provide examples in employee handbooks that explicitly describe which communications are allowed and not allowed
    - *i.e.* You may indicate in your handbook that communications that would put other employees at risk or create safety concerns are not allowed
  - Respond to workplace complaints made on social media
    - *Debord v. Mercy Health Systems of Kansas, Inc.* (10<sup>th</sup> Cir. 2013) – employee complained on Facebook that her supervisor “needs to keep his creepy hands to himself . . . Just all around d-bag”
    - Preserve evidence – screen shots (do not preserve metadata), draft and implement litigation hold letters



# EMPLOYER RESPONSIBILITY FOR EMPLOYEE OFF DUTY CONDUCT – HOW ELSE CAN AN EMPLOYER PROTECT ITSELF?

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- Have clear policies and procedures which:
  - Maintain employer discretion to discipline for any unprotected conduct
  - Instruct employees not to mention their employer on social media or wear clothing with a company logo during off-duty activities in public
  - Reserve the right to intervene if an employee's private activity could tarnish the image of the company or hurt your business position in the community
  - Carve out exceptions for Section 7 conduct
  - Prohibit, under any circumstance, the disclosure of confidential information or trade secrets



## WRAP-UP QUIZ:

### “I DON’T WANT TO WEAR A FACEMASK!”

- An employee returns to work at an accounting firm. Management has informed all employees they must wear a face mask when leaving their individual workspace to go to the bathroom/go to the printer/get coffee/etc. in accordance with state and CDC guidelines.
- The displeased employee posts on his Twitter account, “I don’t want to wear a mask! This is Bu\*\*\*\*it!”
- Can you terminate the employee?
- Yes, if the employee is at-will
  - However, consider the effect the termination may have on employee morale and the company’s reputation
  - Also consider whether the speech involves protected concerted activity
  - Maintain consistency in implementing policies and consequences

# FINAL TAKEAWAYS

- Consider both federal and state laws when determining consequences for employee speech
  - The speech may be protected!
- Carefully analyze the effect of an employee's speech on your business reputation
  - Before terminating an employee, consider whether there are tangible ways to measure the perceived harm?
- Review employee handbooks and ensure compliance with the NLRA
- Review CDC Recommendations in light of COVID-19
  - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- Encourage Open, but Respectful, Dialogue and Recognize Growth



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To help provide perspective and education on COVID-19, Clark Hill attorneys have produced several pieces of thought leadership to assist clients and colleagues through this difficult and rapidly-changing time.

Please visit [www.clarkhill.com/pages/covid-19](http://www.clarkhill.com/pages/covid-19) for access a wide range of resources related to coronavirus.

# THANK YOU!



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## Legal Disclaimer

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