EMPLOYEE ACTIVISM AND WORKPLACE POLITICAL SPEECH

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OVERVIEW









- Rules for public versus private employers
- Laws and regulations implicated by workplace speech
- "Callout culture" vs. lawful off-duty conduct
- Best practices: to restrict or not restrict?

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BOULETTE GOLDEN & MARIN L.L.P.

What is "speech"?

- Spoken words
- Written words
- Gestures
- Displays: images, pins, bumper stickers, flags, hats, t-shirts. . .
- Social media conduct (individual posts, replies to posts, clicking "like" on Facebook)
- Lawsuits?
  - Associated press conferences/media coverage
  - Example: April 23, 2020 Smithfield employee lawsuit protesting COVID-19 safety measures (*Rural Community Workers Alliance and Jane Doe v. Smithfield Foods, Inc. and Smithfield Fresh Meats Corp.*; in the United States District Court for the Western District of Missouri, CA No. 5:20-cv-06063)

The Laws – Public v. Private

- Federal and State constitutions provide for the right to "free speech"
- AKA "what about my First Amendment rights?!"
  - Public employers may not unduly restrict an employee's right to expression
  - Not all speech is protected
  - While public employer cannot regulate protected speech, is permissible to regulate communication method
  - If claiming retaliation, employee must prove his/her interest in speaking openly on a matter of public concern outweighs the government's interest in having an efficient workplace
  - Complex area, will focus on private employer dynamic today

The Laws

- Anti-discrimination laws, for example:
  - Title VII/Texas Commission on Human Rights Act/local ordinances
    - Religious discrimination/accommodation
    - Evidence of discriminatory intent
    - Harassment prevention obligations
  - Americans with Disabilities Act
  - Age Discrimination in Employment Act

The Laws

- Federal and state whistleblower laws may also be implicated by employee speech or conduct, depending on the topic.
- Potential claim asserting that discharge based on certain employee conduct or speech violates "public policy."

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