

Pushing Politics, Religion, and Charity at Work¹

Employment Roundtable

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I. INTRODUCTION

Anyone who works has likely heard “water cooler” talk that runs the gamut from current events, to plans for the weekend, to last’s night’s HBO special. Most people know (or should know) by now that sex is not an appropriate topic at work. However, when it comes to politics and religion, the line is not nearly as clear.

Workplace discussions about political, religious, and volunteer activities are often well-intended. People are bound to discuss current events, which implicate one or more of these subjects every day. Politics, religion, and volunteering are common subjects in relation to workplace requests in support of a worthy cause, community involvement, and or participation in the political process. These issues may also surface in discussions about problem-solving and self-improvement. While discussions and activities of this nature are often well intended, they can easily be perceived otherwise.

Every company is comprised of individuals who arrive at work with their own diverse political, religious, and social concerns and biases. Notwithstanding such differences, most employees want to feel that they are valued and respected members of the company. Consequently, even the most praiseworthy attempts to allow or promote political, religious, and community involvement should be examined for unintended consequences to employee morale and legal exposure.

Politics and religion are hot-button issues that have the potential to become volatile and erupt into conduct that is (or is perceived as) discriminatory based on religion or national origin. Discrimination and harassment based on religion and national origin not only are prohibited under federal and state laws, but employers have an affirmative obligation to reasonably accommodate religious beliefs. In addition, employers are prohibited from engaging in conduct designed to influence employee political activity. It is, therefore, important to understand and establish appropriate limits on workplace conduct that implicates these subjects.

¹ This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

II. THE PROBLEM WITH POLITICS

A. Political Participation and Donations

The Federal Election Campaign Act of 1971 (FECA)² prohibits certain individuals and groups from making contributions to or expenditures on candidates for federal office. Corporations and labor unions may not directly contribute or use corporate or labor organization resources or facilities to engage in fundraising activities in connection with any federal election.³ However, they are permitted to establish a "separate segregated fund" (also known as political action committees or PACs), for which they may solicit and collect voluntary personal donations for a federal political campaign or party. PACs must register with the Federal Election Commission and file periodic financial reports.⁴

FECA prohibits employers from requiring employees to contribute to a federal political campaign.⁵ Nevertheless, it still happens. For example, in a recent write-in question and answer article in CNNMoney.com, one person reported:

My company was recently acquired, and the culture is changing drastically. One aspect of the new regime, as openly expressed by the company president, is that we are all expected to donate money to a political action committee. I have heard that failure to join the PAC means your name ends up on a list and you get fewer opportunities for promotions, plum assignments, etc.

² 2 USC § 431, *et seq.*

³ 29 CFR § 114.2(b)(1) and (2)(f). Prohibited activities include:

- Directing staff (who are not acting as volunteers) to plan, organize or carry out the fundraising project as a part of their work responsibilities using corporate or labor organization resources, unless the corporation or labor organization receives advance payment for the fair market value of such services;
- Soliciting contributions earmarked for a candidate that are to be collected and forwarded by the corporation's or labor organization's PAC, except to the extent such contributions also are treated as contributions to and by the PAC;
- Using coercion, such as the threat of a detrimental job action, the threat of any other financial reprisal, or the threat of force, to urge any individual to make a contribution or engage in fundraising activities on behalf of a candidate or political committee.

In addition, the employees' use of corporate facilities and working time for volunteer political activities is limited under 29 CFR 114. *See also*, Jan Witold Baran, *Political Contributions and Expenditures by Corporations*, 1508 *PLI/Corp* 51 (Sept. 2005).

⁴ 29 CFR 114.2(f).

⁵ *See The Federal Election Campaign Act of 1971*, 2 USC §§ 441 to 455. Under 2 USC § 441b(b)(3), it is unlawful for any corporation or labor organization to "make a contribution or expenditure to any federal campaign by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment."

When the PAC representatives first held an after-hours meeting to tell us about it, my boss said attendance was “mandatory.” Since this PAC is in support of candidates I would not otherwise support or vote for, I really feel compromised by having to join. The company recommends that everyone donate 1% of gross salary.⁶

Assuming the foregoing employee’s perception is accurate, imposing a mandatory contribution would clearly violate federal election campaign laws.

Political solicitations of employees are also limited.⁷ Solicitations may occur only twice annually and must not be made at work (they must be sent to the employee’s residence). In addition, the employees solicited must be informed of both the political nature of the fund and the right to refuse to contribute without risk of reprisal.⁸

Some states have similar laws restricting political activities by employers in connection with state elections. For example, Oregon law⁹ prohibits employers from using “undue influence” to:

- Induce a person to vote or refrain from voting or registering to vote
- Register to vote or vote in a particular manner
- Be or refrain from or cease to be a candidate
- Challenge or refrain from challenging a person offering to vote
- Apply or refrain from applying for an absentee ballot
- Contribute or refrain from contributing to any candidate, political party or political committee
- Render services or from rendering services to candidates, political parties or political committees¹⁰

⁶ Anne Fisher, *Help! My boss insists I donate to a cause I disagree with*, <http://money.cnn.com/2006/07/05/news/economy/annie0705.fortune/index.htm> (CNNMoney.com July 5, 2006). Enron is another example of a company that sought to direct employees’ political contributions. Kenneth Lay reportedly sent top executives a memo asking them to contribute \$1000 each to the Bush campaign. Enron and its employees contributed more than \$615,000 to the Bush campaign in 2000. Linda Ligos, *Politics Can Be a Taboo Subject in Many Work Settings* (The New York Times, Sept. 15, 2000), reprinted at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/09/15/BU69921.DTL> (noting that there are limits, even at companies like Enron. Steven Kean, an Enron executive vice president at the time was quoted as stating, “We might tell employees to go out and vote, but nobody tells them who to vote for or passes out brochures.”).

⁷ 2 USC § 441b(3)(A) and (4)(B); 11 CFR 114.6.

⁸ 11 CFR 114.5.

⁹ A packet on Oregon election law is available through the Oregon Secretary of State at http://www.sos.state.or.us/elections/Publications/elec_law_summary.pdf.

Violations may result in civil or criminal penalties.¹¹ Similarly, Washington's Fair Campaign Practices Act¹² prohibits employers from:

- Increasing the salary or providing an emolument to an employee with the intent that any part of the increase or emolument be contributed or spent to support or oppose a candidate, state official against whom recall charges have been filed, political party, or political committee;
- Discriminating against an employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.
- Withholding or diverting a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee made on a form prescribed by the commission informing the employee of the prohibition against employer and labor organization discrimination. This section applies to any person responsible for the disbursement of funds in payment of wages or salaries.

B. Political Opinions

While many people tend to avoid inherently controversial topics like politics at work, some feel they have a right to voice their opinion about them.¹³ Few employers impose an outright ban on political discussion at work, possibly because of the difficulty enforcing it. However, many computer policies restrict email distribution of political content which, when distributed indiscriminately, can create resentment or an atmosphere of intolerance for opposing views.

Even employers who have no wish to formally curtail political speech at work may at least want to caution employees to be sensitive that not all employees share the same political views or respond favorably to political humor. Dr. P.M. Forni, director of the Civility Initiative at John Hopkins University, offers some tips for acceptable political speech at work:

¹⁰ ORS 260.665 ("undue influence" means "force, violence, restraint or the threat of it, inflicting injury, damage, harm, loss of employment or other loss or the threat of it, or giving or promising to give money, employment or other thing of value"); *see also* 260.422 (person may not accept employment with the understanding that part of the compensation received will be contributed for political purposes).

¹¹ ORS 260.993, 260.995.

¹² RCW 42.17.680; *see also* WAC 390-17-100 (includes Political Contribution Withholding Authorization form) and WAC 390-17-110.

¹³ Many employees are under the mistaken impression that their right to free speech applies in private employment. However, only public employees enjoy this freedom and even their right to free speech can be limited at work. *See, e.g., United States v. Nat'l Treasury Employees Union*, 513 US 454, 465 (1995) (government may impose restraints on First Amendment activities of employees that are job-related even when such constraints would be unconstitutional if applied to non-employee public); *Pickering v. Board of Education*, 391 US 563, 568 (1968) (state's interests in restricting speech of its employees differ significantly from interests in restricting speech of public at large).

1. **Decide whether you want to get involved.** Is this the time and place to engage in a discussion that may become heated? Consider the consequences your argument may have. Is it worth your while to engage in it? Is someone baiting you? Do you have trouble remaining calm and collected in this kind of situation? You can always change the subject, excuse yourself, or even state that you just prefer not to talk politics right now.
2. **Be fair and respectful.** If you do choose to discuss politics, give others the opportunity and the time to state their opinions. Do not interrupt and do not ignore. Do listen to what the other person has to say. Allow the possibility that there may be something good in his or her ideas. Acknowledge the points on which you agree. Do not use demeaning or abusive language.
3. **Be thoughtful.** Taking for granted that the political preferences of your coworkers and acquaintances will coincide with yours is not a good idea. Even friends whose steady voting record you know may on occasion vote for the “other guy.” Do not say to your boss: “So, sir, how are we going to make sure that X is not re-elected?” Maybe your boss wants X re-elected. You have the right to express your opinion, but presuming to know the minds of others is rarely endearing.
4. **Be discreet.** You may be perceived as being too bluntly inquisitive or outright intrusive if you say, out of the blue: “So, for whom are you voting, Joan?” Avoid exposing someone’s political affiliation. In mixed company do not say: “So, Jim, I bet you will vote Democrat once again, you old liberal dog you.”¹⁴

Private employers, while free to restrict political and other types of speech at work, wisely tend to avoid it. The same tends to be true for off-duty political speech:

[T]here seems to be a robust social norm against disciplining workers based on their ideology. Refusing to hire Republicans, Democrats, pro-life voters, or pro-choice voters is generally seen as intolerant, and it can lead to public criticism that translates into embarrassment and lost business. This isn’t true for employees whose jobs involve expressing the employees’ views or trading on the employees’ good-will: Opinion magazines aren’t condemned for preferring columnists whose views the editors endorse, and advertisers are rarely condemned for avoiding spokespeople whose politics have caused controversy. But when other kinds of employees are fired because they have the wrong off-the-job views on gay rights, environmentalism, or various other issues, the public is more likely to disapprove. This helps explain why there have been few firings of ordinary workers for off-the-job speech criticizing the war, or faulting President Bush or Senator Kerry.¹⁵

¹⁴ P.M. Forni, *The Etiquette of Political Conversation*, <http://web.jhu.edu/civility/Tipspolit.pdf>.

¹⁵ Eugene Volokh, *Deterring Speech: When Is It 'McCarthyism'? When Is It Proper?* (*Deterring Speech*), 93 Cal L Rev 1413, 1430-1431 (October 2005). The author notes that exceptions to this general rule often occur when the expressed views implicate racism, sex or other discrimination, advocacy of

Yet, political opinions sometimes do get people fired. For example, a software contractor for the CIA recently alleged she was fired for postings she made to a classified online journal maintained by the government. In one of her postings, she was critical of the U.S. government's treatment of prisoners and use of torture as an interrogation technique.¹⁶ In another case, an employer fired an employee for refusing to remove a Kerry-Edwards bumper sticker that was on the car she drove to work.¹⁷ More recently, Deborah Frisch, a former University of Oregon professor and a liberal blogger, lost her job at the University of Arizona after engaging in "a nasty back-and-forth with right-wing blogger Jeff Goldstein of ProteinWisdom.com."¹⁸ The University's handbook included a statement that employees have "an obligation to respect the dignity of others, to acknowledge their right to express differing opinions, and to foster and defend intellectual honesty, freedom of inquiry and instruction, and free expression on and off the campus."¹⁹

Some states, such as California²⁰ and Washington,²¹ explicitly prohibit employers from firing employees for political activities or affiliations. In those states, "[i]f you blog about membership in the Libertarian Party and your boss fires you for it, you might very well have a case against

violence, or other "evil" speech, noting that "[t]he social norm appears to be broad tolerance for mainstream speech, but not for speech that's seen as evil enough to cast serious doubt on the employee's fundamental decency." *Id.* at 1431.

¹⁶ Dana Priest, *Top-Secret World Loses Blogger: CIA Contractor Is Fired When Internal Post Crosses the Line*, (Washington Post, July 21, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/07/20/AR2006072001816_pf.html.

¹⁷ Timothy Noah, *Bumper Sticker Insubordination*, <http://www.slate.com/id/2106714>.

¹⁸ Frisch, who admittedly crossed the line, wrote:

You live in Colorado, I see. Hope no one Jon-Benets your baby If some nutcase kidnapped your child tomorrow and did to her what was done to your fellow Coloradan [*sic*], Jon-Benet Ramsey, I wouldn't give a damn If I woke up tomorrow and learned that someone else had shot you and your tyke, it wouldn't slow me down one iota. You aren't human to me.

BlueOregon, *Blog insult costs former UO professor her job*,

http://www.blueoregon.com/2006/07/blog_insult_cos.html.

¹⁹ *Id.*

²⁰ Cal. Labor Code §§ 1101-1102:

1101. No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.

1102. No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

²¹ RCW 42.17.680. *See also* Seattle, Washington Municipal Code §§ 14.04.030-14.04.040 (prohibits discrimination based on "political ideology"), <http://clerk.ci.seattle.wa.us/~public/toc/14-04.htm>.

him or her.”²² However, in many states where private employers are not regulated in this area, discrimination based upon political ideology is not unlawful, but may still be unwise.

On the other hand, too much tolerance for political views can also lead to negative consequences. Some types of political or pseudo-political expressions -- for example, those advocating hate, violence, sexism, or racism -- may give rise to discrimination or harassment claims. In addition, tolerance of employees’ expressions of advocacy for things like violence or racism may be used to support in a negligent hiring or negligent retention claim.²³ Such considerations may understandably “lead employers to fire people who praise or defend illegal, harmful behavior.”²⁴

*Melzer v. Board of Education*²⁵ is one such case. Melzer, in some ways an exemplary high school science teacher, was editor of a newsletter for the North American Man/Boy Love Association (NAMBLA). When his association with NAMBLA was disclosed in a local television news report, parents and students complained. Parents also threatened to withdraw their children from the school and engage in a sit down strike. There was fear that Melzer, a self-described pedophile who admitted to being attracted to young boys, might practice what he preached, although there was no evidence he had acted out any of the conduct advocated in the newsletter. The court upheld the Board’s decision to terminate his employment, finding it was not directly based on Melzer’s speech or associations, but on the substantial disruption threatened by the community if he was returned to the classroom.²⁶

One tool employers can use to address the legal ramifications of political talk in the workplace is a well-crafted, anti-harassment policy. Also helpful is a policy or value statement that the organization has a professional work environment where respect for individual feelings and convictions of others is required. Diversity awareness, interpersonal communications, and other similar programs may be effective ways to reinforce this policy.²⁷

A well-communicated, “open door” policy and/or complaint procedure may encourage employees to address concerns about offensive political speech before employees come to blows over it. The policies may prove particularly useful in election years as hot-button issues are replayed in the media, increasing the likelihood that water cooler talk will involve divisive topics. Abortion, war, immigration, and gay marriage are all examples of current issues that

²² *How to Blog Safely (About Work or Anything Else)*, <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php> (Updated May 31, 2005). See also generally, Eugene Volokh, *State Laws Potentially Protecting Employee Blogging*, <http://www.law.ucla.edu/volokh/empspeechstatutes.pdf>.

²³ See n. 16, *supra*, *Deterring Speech*, 93 Cal L Rev at 1434-1439.

²⁴ *Id.* at 1435. The author points to a complaint filed in which the plaintiff, who was harassed and assaulted by co-workers, alleged the employer was negligent because it knowingly “hired and retained certain employees who had certain connections with or were sympathetic to the beliefs of the Ku Klux Klan.” *Id.* at fn. 80.

²⁵ 336 F3d 185 (2d Cir 2003).

²⁶ *Id.* at 194.

²⁷ See Rebecca R. Hastings, SPHR, *Sex, Religion and Politics: Practical Tips for Handling Workplace Discussion About the “Forbidden Three,”* http://www.shrm.org/hrresources/whitepapers_published/CMS_000393.asp (SHRM White Paper 2001).

could degenerate into conflicts in which employees feel harassed or discriminated against based on religion, national origin, race, sex, or sexual orientation.

C. Illustrative Cases

➤ *Nelson v. McClatchy Newspapers, Inc.*²⁸

Nelson worked for a Washington newspaper as a reporter. The newspaper adopted a code of ethics that prohibited conflicts of interest, which were defined to include situations in which readers may be led to believe that the news reporting is biased. Participation in high profile political activity was one example of a conflict of interest. A self-professed lesbian, Nelson spent much of her off-duty time serving as a political activist in support of gay and lesbian rights, feminist issues, and abortion rights. The newspaper told Nelson that her activities compromised the paper's appearance of objectivity, but she said she intended to continue her public political activity anyway. When she gained media attention because of her work on an anti-discrimination ballot initiative, she was transferred to a copy editor position because of the paper's concerns about the appearance of objectivity. The new position required the same general qualifications as a reporter and Nelson maintained her salary, benefits, and seniority, but had to work nights and no longer investigated and wrote stories. She sued.

The court held that RCW 42.17.680(2)(c), which prohibits Washington employers from discriminating against an employee for "in any way supporting or opposing a candidate, ballot proposition, political party, or political committee," precludes employers from demanding "political abstinence."²⁹ The law "means that employers may not disproportionately influence politics by forcing their employees to support their position or by attempting to force political abstinence on politically active employees. The law is designed to restrict organizations from wielding political influence by manipulating the political influence of their employees through employment decisions."³⁰ Nevertheless, in this case, the application of the law infringed on the newspaper's federal and state constitutional rights to freedom of the press, for which credibility is an integral component. The court, therefore, affirmed dismissal of Nelson's statutory claim.³¹

➤ *Smedley v. Capps, Staples, Ward, Hastings and Dodson*³²

Smedley worked as an associate attorney at a law firm in California. Upon seeing a picture of Smedley's same-sex "companion," Ward, the partner responsible for supervising associates, "expressed the strongest opinions about employees bringing political and controversial issues into the office." He told her he "did not think sexual preference was [] the kind of discussion that should be initiated by members of the firm at the firm's social events." He then wrote a note stating that his remark meant that "given our clientele it would not be appropriate to discuss lesbian rights, groups, activities, etc." As a result of these remarks, she curtailed her activities with the Bay Area Lesbian Feminist Bar Association, of which she was co-chair. Smedley was

²⁸ 131 Wash.2d 523, 936 P.2d 1123 (1997).

²⁹ 936 P.2d at 1127-1128.

³⁰ *Id.* at 1128.

³¹ *Id.* at 1133.

³² 820 F Supp 1227 (ND Cal 1993).

fired shortly after an article was published identifying her as a lesbian and quoting her as stating that “being out” at work would help other lesbian attorneys brave the threat of discrimination. She sued alleging a violation of California Labor Code §1101, which forbids employers from preventing employees from engaging or participating in political activity. The court held that Smedley was entitled to a jury trial.

D. NLRA Rights and Issues

Political issues are often union issues, and vice versa. Both union and non-union employees have rights under the National Labor Relations Act (NLRA),³³ which guarantees employees the right to unionize and engage in concerted activity.³⁴

1. Concerted Activity and Protected Communications

Employers are prohibited from interfering with, restraining, or coercing employees in the exercise of rights guaranteed under the NLRA.³⁵ These include the right to engage in “concerted activities” for the purpose of organizing or to provide “other mutual aid and protection.”³⁶ Policies restricting communication, such as confidentiality, non-fraternization, and no-gossip policies often inadvertently implicate these statutes.³⁷

When political speech bears some relationship to the workplace, restrictions on such speech may conflict with employees’ rights under the NLRA. For example, discussion of the recently-proposed federal minimum wage bill that would force states to allow employers to count employees’ tips toward the minimum wage could be considered concerted activity among employees who receive tips.³⁸ As a result, employers who wish limit political discussion at work must consider whether the communication is protected activity.

³³ 29 USC § 151, *et seq.*

³⁴ 29 USC § 157.

³⁵ 29 USC § 158(a)(1).

³⁶ 29 USC § 157. Protected concerted activity may include employee conduct that appears to have little or nothing to do with unions directly, as when employees act together to complain about their work places or salaries. Other examples of concerted activities include strikes, honoring picket lines, group complaints, and filing or processing grievances.

³⁷ *See, e.g., Double Eagle Hotel & Casino v. NLRB*, 414 F3d 1249 (10th Cir 2005) (confidentiality policy that restricted employees’ right to discuss wages and other terms of employment, such as discipline, performance evaluations, and termination data was unlawful); *Cintas Corp. v. Union of Needletrades, Industrial and Textile Employees*, AFL-CIO, 344 NLRB No. 118 (June 30, 2005) (holding broad confidentiality provision violated §8(a)(1)).

³⁸ Dennis Camire, *Minimum-wage bill could lower pay for Oregon tip earners*, (Statesman Journal, August 3, 2006), <http://159.54.226.83/apps/pbcs.dll/article?AID=/20060803/STATE/608030345/1042>.

2. Solicitation and Distribution Rules

Solicitation means canvassing of employees for a non-employment related purpose. Distribution is the handing out of similar written materials on the employer's property. Blanket prohibitions against all solicitation and distribution on the employer's property are not permitted.³⁹

Non-solicitation policies are presumptively invalid because they restrain employees from solicitation during the employee's own time, including rest and meal breaks.⁴⁰ However, an employer may ordinarily limit employees from soliciting during working time.⁴¹

A prohibition on oral solicitation at company premises during non-working time is likely, although not presumptively invalid. Such a ban is generally held to be invalid because oral solicitation is dependent upon having the time and space in which to conduct a discussion and hold the employee's attention. The free time of employees on company premises is a "uniquely appropriate" time for employees to conduct oral solicitation.⁴² However, under certain circumstances, employers may limit oral solicitation in public working areas, such as on the selling floor of a department store, or at a restaurant where customers are likely to be present.⁴³

In contrast, a prohibition on *distribution* in working areas is facially valid.⁴⁴ For example, a non-solicitation policy that "prohibited employees from soliciting or distributing literature during working time and in working areas" was found presumptively valid.⁴⁵ Conversely, a distribution ban on literature in non-working areas is presumptively invalid in the absence of special circumstances requiring the rule for safety, production or discipline.⁴⁶

In the light of statutory protections afforded solicitation and distribution by employees, prohibitions on *political* solicitations and distribution at work may run afoul of employees' rights under the NLRA. The lawfulness of the restriction would depend on the subject matter of the particular solicitation or distribution.

3. Badges, Buttons, and the Like

Employers often impose a dress code that prohibits the display on clothing (in the form of insignia, buttons, badges, etc.) of any writing, advertisement or group affiliation. An employer may establish a neutral policy that prohibits employees from wearing certain items of clothing

³⁹ *NLRB v. Walton Mfg. Co.*, 289 F2d 177 (5th Cir 1961).

⁴⁰ *See Our Way, Inc.*, 268 NLRB 394, 394 (1983).

⁴¹ *See Peyton Packing Co.*, 49 NLRB 828 (1943) (stating long-accepted maxim, "working time is for work"); *NLRB v. Clinton Electronics Corp.*, 284 F3d 731, 739 (7th Cir 2002) (noting that employer has "legitimate interest in maintaining discipline and production. *** [I]t may, in fact, limit solicitation generally during work time").

⁴² *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 1962 NLRB LEXIS 217 * 12-13, 15 (1962).

⁴³ *See Montgomery Ward & Co.*, 145 NLRB 846 (1964) (department store); *Marriott Corp.* (Children's Inn), 223 NLRB 978 (1976) (restaurant).

⁴⁴ *Our Way, Inc.* 268 NLRB at 411 (citing *La Marche Manufacturing Company*, 248 NLRB 1470 (1978)).

⁴⁵ *Webco Industries, Inc. v. NLRB*, 217 F3d 1306 (10th Cir 2000).

⁴⁶ *NCR Corp.*, 1993 NLRB LEXIS 911 * 12 (1993) (citing *NLRB v. Magnavox Co. of Tenn.*, 415 US 322, 324 (1974)).

that have insignias on them (such as T-shirts with logos). To the extent such a policy prohibits T-shirts with union insignia, it is permissible so long as it is uniformly enforced.⁴⁷

In contrast, employees generally have the right to wear union buttons and pins to work, unless the wearing of these items creates a safety hazard or, in the case of workers with public contact, the employees consistently are required to wear uniforms without buttons and pins.⁴⁸ In other words, a prohibition against employees wearing union insignia must be justified on the basis of a safety, production, or other legitimate business purpose.⁴⁹ To the extent employees wish to wear political buttons and pins that contain a union insignia or other union-related message, these should be permitted, also.

4. Email

Employers may lawfully limit employees' use email for personal use, and may specifically preclude dissemination of political speech at work, including via email. However, many employee discussions about the terms and conditions of employment are protected by the NLRA. The National Labor Relations Board (NLRB) has taken the position that employee email systems used regularly by employees to communicate are extensions of the workplace, where employees are entitled to communicate about unions and the terms and conditions of their employment.⁵⁰ Therefore, email communications containing political speech that may qualify as concerted activity are protected by the NLRA.

⁴⁷ See *Ideal Macaroni Co.*, 301 NLRB 507 (1991), *enforcement denied on other grounds*, 989 F2d 880 (6th Cir 1993) (employer violated NLRA by strictly enforcing a dress code requiring employees to cover union T-shirts during a union campaign when it had not enforced the dress code prior to the campaign).

⁴⁸ See, e.g., *Burger King Corp. v. NLRB*, 725 F2d 1053 (6th Cir 1984) (employer did not violate the Act where it consistently enforced its policy); *NLRB v. St. Francis Healthcare Center*, 212 F3d 945 (6th Cir 2000) (employer cannot ban union pins and buttons when it regularly tolerated nonunion pins and buttons on employee uniforms that violated the employer's policy).

⁴⁹ *Association Hospital del Maestro v. NLRB*, 842 F2d 575 (1st Cir 1988) (employer's prohibition against wearing insignia held unlawful); *Meijer, Inc.*, 318 NLRB 50 (1995), *enforced*, 130 F3d 1209 (6th Cir 1997) (Employer can restrict employees from wearing union insignia during working time only if it demonstrates "special circumstances" justifying the prohibition); *Pay'n Save Corp. v. NLRB*, 641 F2d 697 (9th Cir 1981) (employer's ban on wearing union buttons interfered with the exercise of a protected right in violation of Section 8(a)(1) of the Act unless there were special considerations justifying the ban).

⁵⁰ See NLRB Advice Memorandum dated February 23, 1998, *Pratt & Whitney*, Cases 12-CA-18446, 12-CA-18722, 12-CA-18745, 12-CA-18863, concluding that in environment in which email represented 70% of worker communications, email was a form of solicitation that could not be banned entirely:

[I]t has been widely recognized that at least some E-mail messages are not merely analogues of printed written messages; rather, they have been characterized as "a substitute for telephonic and printed communications, as well as a substitute for direct oral communications." There has even been Congressional recognition that email "is interactive in nature and can involve virtually instantaneous 'conversations' more like a telephone call than mail."

III. RELIGION

Employers have a responsibility to ensure that employees are not discriminated against or harassed based on their religious beliefs or practices.⁵¹ In addition, both federal and state laws require reasonable accommodation of an employee's religious observance or practices.⁵²

The threshold for qualifying as a religious belief is very low. A belief or set of beliefs constitute a "religion" under Title VII if they "occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified."⁵³ Such a belief system "need not have a concept of a God, supreme being, or afterlife *** or derive from any outside source. Purely 'moral and ethical beliefs' can be religious 'so long as they are held with the strength of religious convictions.'"⁵⁴

To be entitled to religious accommodation, the employee's belief must be "sincerely held."⁵⁵ An employee who sincerely believes that his or her religion prohibits certain conduct has a sincerely

⁵¹ 42 USC § 2000-e2; ORS 659A.030(1)(a) and (b).

⁵² 42 USC § 2000e(j); OAR 839-005-0010(6)(a). See BOLI FAQ at http://www.boli.state.or.us/BOLI/TA/T_FAQ_Religious.shtml ("Courts generally have not required employers to go as far in accommodating religious requests as they must when accommodating disabled employees under the ADA. Still, you should evaluate an employee's religious restrictions seriously and make a good faith effort to accommodate. If you decide to deny a requested accommodation, you should be prepared to show with documentation why it would have been an undue hardship for your company.").

⁵³ *Peterson v. Wilmur Communication, Inc.*, 2002 WL 1270590 (ED Wis 2002) (holding that "Creativity," a white supremacist belief system, constituted a "religion" under Title VII); see also *Van Koten v. Family Health Management*, 955 F Supp 898, 902 (ND Ill 1997) (Wicca aka "The Craft" may be considered a religion under Title VII).

⁵⁴ *Id.* at *4. The EEOC has adopted an extremely broad view of what constitutes a religion under Title VII as stated in 29 CFR § 1605.1:

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).

⁵⁵ The "sincerely held" standard stems from the conscientious objector test formulated in *United States v. Seeger*, 380 US 163 (1965). See EEOC Decision No. 76-104, 1976 WL 5041. While "the element of sincerity is fundamental," its resolution ultimately depends upon the fact finder's assessment of the employee's credibility. *EEOC v. Union Independiente De La Autoridad de Acueductos Y Alcantarillados De Puerto Rico*, 279 F3d 49, 55-56 (1st Cir 2002) (emphasizing that "[r]eligious beliefs protected by Title VII need not be 'acceptable, logical, consistent, or comprehensible to others ****'. The statute thus leaves little room for a party to challenge the religious nature of an employee's professed beliefs").

held belief even if that belief is not explicitly based upon the organized, formal, uniform, or recognized teachings of his or her professed (or any specified or particular) religion or sect.⁵⁶

Employers must be careful not to rely upon their own personal beliefs or knowledge as to what constitutes a religion or a “bona fide” religious practice under a particular religion. Nor should they rely exclusively upon the opinion of a church or other religious organization as to its required or forbidden practices in deciding whether or not to grant a religious accommodation.⁵⁷ Ultimately, the test both the EEOC and the courts apply stems from the sincerity of the employee’s beliefs, not the official or recognized beliefs of third-party organizations. While the sincerity of an employee’s belief may be disproved by directly contradictory behavior (*e.g.*, requesting Saturdays off for religious observance and then working at a second job), the fact that the belief is not generally accepted by others, even those holding to the same faith, is not determinative.⁵⁸

Employees of diverse religious backgrounds and beliefs may request accommodation to observe holy days or practices relating to prayer, appearance, food, or other ritual. Such accommodations may conflict with the employers’ need to ensure that work actually gets done, and that *all* employees’ rights are respected. This can prove extremely challenging.

For example, in *Peterson v. Hewlett-Packard Co.*,⁵⁹ the employer conducted a workplace diversity campaign in which it displayed posters depicting gay employees. Peterson was a self-described “devout Christian” who believed he had a duty to “expose evil when confronted with sin.” Consistent with this belief, he began to post Biblical scriptures in his work cubicle condemning gay practices. Peterson’s supervisor removed the postings because he believed they violated Hewlett-Packard’s harassment policy. In meetings with management to determine whether Hewlett-Packard could accommodate Peterson’s religious beliefs, Peterson confirmed that he intended the passages to be hurtful and he hoped that his gay and lesbian co-workers would read them, repent, and be saved. He claimed that Hewlett-Packard’s diversity campaign targeted heterosexual and fundamentalist Christian employees in general and him in particular. Although Hewlett-Packard presented Peterson with several options, Peterson said he would stop

⁵⁶ *Lambert v. Condor Mfg., Inc.*, 768 F Supp 600 (ED Mich 1991); *Edwards v. School Bd. of City of Norton*, 483 F Supp 620, 625 (WD Va 1980) (emphasizing the inherent problems of a court determining the tenets of a particular religion).

⁵⁷ For example, in EEOC Decision No. 76-104, 1976 WL 5041, a Christian employee was convinced, for one reason or another, that Saturday should be observed as a day of rest. The employer failed to accommodate his request for Saturdays off, even though it acknowledged that the day off would have been allowed if the employee was either a Seventh Day Adventist or Jewish. In finding the employee entitled to Title VII protection, the EEOC emphasized that the employee did not have to be a member of a recognized or particular faith for the accommodation requirement to apply. *See also, Jackson v. Mann*, 196 F3d 316 (2nd Cir 1999) (black prisoner whose sincerity was demonstrated by past affirmations he was Jewish and history of strictly refusing to eat non-Kosher food could sincerely hold to Jewish faith and be entitled to accommodation of religious practices despite rabbi’s conclusion that prisoner was not Jewish, having not been not born Jewish or formally converted).

⁵⁸ *Union Independiente*, 279 F3d at 56-57 (noting that evidence of conduct inconsistent with professed religious belief or practice is relevant, although not necessarily conclusive, in assessing sincerity).

⁵⁹ 358 F3d 599 (9th Cir 2004).

posting the passages only if Hewlett-Packard removed the posters. Hewlett-Packard allowed Peterson time off to reconsider his position. When he returned to work, he again posted the Biblical passages. When Hewlett-Packard terminated Peterson for insubordination, he sued for religious discrimination under Title VII.

Hewlett-Packard had an obligation to engage in good faith efforts to reasonably accommodate Peterson's religious belief.⁶⁰ However, Peterson made it clear that he would accept only two alternatives: either allow him to continue to post the anti-gay messages or remove the posters depicting gay employees. The question for the court was whether Peterson's proposed alternatives would have imposed an undue hardship on the company. The court concluded that both of the proposed accommodations "would have created undue hardship for Hewlett-Packard because it would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success."⁶¹ With respect to the first proposed accommodation, the court held that although an employer must tolerate some degree of employee discomfort in the process of accommodating another employee's religious beliefs, "it need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce."⁶² With respect to the second proposal, the court noted that today's increasingly global marketplace demands skills developed only through exposure to diversity and requiring Hewlett-Packard to exclude homosexuals from its workplace diversity program would create undue hardship for the company.⁶³

In *Wilson v. US West Communications*,⁶⁴ a Roman Catholic employee insisted on wearing a badge with a two inch color photo of an aborted fetus and the words "Stop Abortion" on it, having made a vow to God to wear it until the abolition of abortion. Several employees complained, and two filed grievances about the button. US West gave Wilson several options, which included covering the badge while at work. Wilson was fired after he refused to accept any of the options presented. The court held that the employer's options reasonably accommodated the employee's religious beliefs, and that to allow her to do more would place an undue hardship on the employer by creating a hostile environment for co-workers.⁶⁵

Employers can also run into trouble when they allow management's religious beliefs to affect how the company treats employees. For example, in *Nielson v. Agrinorthwest*,⁶⁶ a long-term employee and a vice president of a farming operation was excommunicated from the Mormon church for adultery after having an affair with his secretary. Following the excommunication, the CEO of the company held a meeting for directors and officers to discuss Neilson's affair. His former brother-in-law, a unit manager for the employer and a stake member in the Mormon church, attended the meeting, although Neilson was not invited and no one discussed the meeting

⁶⁰ *Id.* at 606. The court assumed, without deciding, that plaintiff could establish a *prima facie* case of religious discrimination on the basis of a failure to accommodate theory.

⁶¹ *Id.* at 606-607.

⁶² *Id.*

⁶³ *Id.* at 608.

⁶⁴ 58 F3d 1337 (8th Cir 1995).

⁶⁵ *Id.* at 1342.

⁶⁶ 95 Wash App 571, 977 P2d 613 (1999).

with him. Several years later, Neilson began dating a Seventh Day Adventist who was not permitted to attend the company picnic because she and Neilson were not married. A couple of months later, Neilson received his first official reprimand for unacceptable performance. Two years later, the employer ceased to provide health insurance to Neilson's wife because they were living apart. Later that year, Neilson divorced. The same month he announced his engagement, he was demoted. Around the same time, the employer demoted another employee who had been excommunicated from the Mormon Church for adultery. Neilson received a second written warning for poor performance shortly after marrying his girlfriend. Seeing the writing on the wall, he quit. The Court of Appeals found this evidence sufficient to show that the employer's motive for taking action against Neilson was discriminatory.

In *Meltebeke v. Bureau of Labor and Industries*,⁶⁷ an evangelical Christian owner of a small painting company invited his employee to church multiple times, tried to call the employee at home to encourage him to go to church, told him he had to be a good Christian to be a good painter, and told him that he wanted to work with a Christian so he would not have to worry about theft. The employee, who was 22 years old and learning disabled, never complained to anyone about these comments. The court held that the employer established an affirmative defense based on the rights of conscience and religious practices under Article I, sections 2 and 3 of the Oregon Constitution. The court reasoned that the employer had no knowledge that his religious practice created an intimidating, hostile, or offensive working environment.

There are a number of affirmative steps an employer can take to minimize religious conflicts at work:

- Establish a policy for religious accommodation.
- Set guidelines for acceptable workspace decor.
- Establish boundaries for employees by indicating which tools are for business use only. For example, employers can restrict the use of bulletin boards and email systems to business use⁶⁸ and limit activities that improperly use company equipment, interfere with the company's ability to do business, are excessive, or create a likelihood of offending others.
- Make it a core value that all employees treat one another with dignity and respect. You can tell employees that while the company respects and will attempt to accommodate their religious beliefs, everyone's beliefs must be respected.

IV. CHARITABLE ACTIVITIES

A. Let's All Volunteer!

Employers may be eager for their employees to volunteer with charitable and/or non-profit organizations in their community by serving on boards, donating time to a fundraising campaign,

⁶⁷ 322 Or. 132, 903 P.2d 351 (1995).

⁶⁸ Prohibiting any personal use of email is not permissible in all circumstances. See Part II(4), *supra*.

or providing services. Such activities are typically perceived as positive and may enhance the company's image in the community. Encouraging employees to volunteer may also boost employee morale and loyalty. However, employers must be careful that their encouragement does not lead to compulsion, which poses legal risks under federal and state laws.

B. Legal Issues Arising Out of Volunteerism

The primary source of legal difficulty associated with work-initiated volunteerism is wage and hour laws, although election law or religious discrimination may also be implicated. In general, the concept of "employment" does not include services that individuals provide to religious, charitable, educational, or other similar organizations without the expectation of compensation.⁶⁹ Volunteers ordinarily work part time and do not displace paid workers or perform work that would otherwise be done by employees.⁷⁰

As the word "volunteer" implies, volunteerism must be voluntary, not mandatory. An activity undertaken at the direction or forceful suggestion of an employer may not be deemed voluntary. When that is the case, the employer must pay the employees for the time spent in the "volunteer" activities.⁷¹ In addition to liability for wages, the failure to adequately distinguish between work and volunteer time may result in liability for any injuries that occur while volunteering.⁷²

Under both Oregon and federal law, the key factors in considering whether an employee is engaged in working time are:

- (1) whether the employer has requested the work;
- (2) whether the employer is directing/controlling the work;
- (3) whether the volunteer activities occur during the employee's normal working hours; and

⁶⁹ ORS 653.010(3). There is no express exception under the FLSA for volunteers working for private nonprofit, charitable, or religious organizations, but the Department of Labor has recognized one. *See* WH Opinion Letter, 1996 WL 1005197 (April 12, 1996); WH Opinion Letter 2006-4. For-profit employers cannot have unpaid volunteers perform services for their own organization.

⁷⁰ WH Opinion Letter 2006-4, citing Field Operations Handbook § 10b03(c); WH Opinion Letter 2002-9.

⁷¹ "Time spent in work for public or charitable purposes at the employer's request, or under its direction or control, or while the employee is required to be on the premises, is working time. Time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked." OAR 839-020-0046(3); 29 CFR § 785.44. Any insinuation that volunteerism will even tangentially impact performance reviews (*e.g.*, telling an employee that volunteering is a good way to show that he or she is a team player) would increase the risk that an employee's participation in the employer's volunteer program is compensable.

⁷² Non-profits are generally shielded from liability by the Volunteer Liability Protection Act, Public Law 105-19. Therefore, employees may have no one but the employer to turn to if the volunteer opportunity was work-related.

- (4) whether the volunteer activity is of the same type that the employee generally undertakes for the employer.⁷³

“Paid employees may not volunteer to perform the same type of services for their employer that they are normally employed to perform.”⁷⁴ For example, the employees of a moving company who volunteer as a group to help move a homeless shelter are probably acting as employees, while in the same situation the employees of coffee shop would not be employees.

Employers should not rely on employee perceptions in considering whether a program qualifies as volunteerism as opposed to compensable time. An employee who volunteers in a borderline situation but later becomes disgruntled may assert a wage claim even though at the time of the volunteer activity the employee clearly had no expectation of compensation. It should also be noted that an employee who genuinely expects no payment and genuinely seeks to volunteer cannot waive his or her right to compensation under the FLSA.⁷⁵

C. Developing a Volunteering Program for Your Organization

In developing a program for civic involvement, consider what purpose of the volunteer activity serves for your organization. Are you trying to generate goodwill in the community or are you trying to use the volunteer activity as an opportunity to publicize your competency at performing a central function of your business? To avoid wage and hour obligations, the focus of the volunteer program should be on the former.

The further removed the volunteer activity is from your company’s daily operations, the easier it is to avoid an argument that the time is compensable. For example, an advertising agency can publicize to its employees an opportunity to volunteer as a group to staff the cashiers at a rummage sale raising money for a school district. However, if a retail store tells its salespeople about the same opportunity, it is more likely that its employee could later claim the time spent “volunteering” should be paid. Likewise, if the ad agency asked employees if they wanted to volunteer off-duty time to help a charity draft an advertisement, this would be more likely to be seen as an extension of the workday, and something for which the employees should be paid.

Any publication of volunteer opportunities through company channels should emphasize the voluntary nature of the activity. Compare the following:

Employer will sponsor a team of volunteers at the homeless shelter next Thursday evening. Please contact human resources for more information if you are interested.

* * *

⁷³ See fn. 50, *supra*.

⁷⁴ WH Opinion Letter 2006-18.

⁷⁵ WH Opinion Letter 2002-09, citing *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 US 290, 299, 302 (1984); *Brooklyn Savings Bank v. O'Neil*, 324 US 697 (1945).

Employees are encouraged to show their community spirit and civic-mindedness by participating in next Thursday's company volunteer event at the homeless shelter. Sign up today with human resources.

While the latter version is probably more effective, it may be characterized as more coercive. One way to avoid such tacit pressure is to allow volunteer organizations to recruit at your company, rather than having your managers recruit for the activity.⁷⁶

Whenever possible, employees who perform volunteer services at an event should have their activities directed by the charitable organization. Avoid having your volunteers work in a way that mimics how your management structure functions on a day-to-day basis. Management should not go to the volunteer site and train employees when they arrive.

V. CONCLUSION

It is human nature for people to want to share their opinions and experiences. For many people, work is a natural place to do that. When sensitive or controversial subjects like politics and religion are discussed at work, some employers want to limit communications while others want to offer their own views. In either case, it is important to not go too far in promoting religious or political views or restricting communications or observances related to those subjects. Finding the appropriate balance can be extremely complicated. When in doubt, employers should seek legal counsel.

⁷⁶ 29 CFR § 553.01.