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MEMORANDUM

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First Amendment Speech Rights of Government Employees

First Amendment free speech protections for an employee depend primarily on whether the employee works in the public or private sector. The First Amendment, for example, provides free speech protections for those who work in the public sector. "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[1] Governmental "[r]estrictions on speech based on its content are presumptively invalid and subject to strict scrutiny."[2] As briefly explained in this legal memorandum, "the right of free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right."[3]

First Amendment free speech rights, moreover, provide critical protections for public sector employees who discuss matters of public concern. "Protection of the public interest in having debate on matters of public importance is at the heart of the First Amendment."[4] "[P]ublic sector employees play a crucial role in this debate 'on subject matter related to their employment . . . because those employees gain knowledge of matters of public concern through their employment.'"[5] Accordingly, "government employees do not forfeit their constitutional rights at work . . . ."[6] "[T]he rights of public employees to speak as private citizens," however, "must be balanced against the interest of the government in ensuring its efficient operation."[7]

Also, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[8] "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[9]

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[1] *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).
[2] *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) (citations omitted) (internal quotation marks omitted).
[3] *Thomson v. Belton*, No. ELH-18-3116, 2018 U.S. Dist. LEXIS 199831, at *35 (D. Md. Nov. 26, 2018) (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000)).
[4] *Id.* at *36 (quoting *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998)) (internal quotation marks omitted).
[5] *Id.* at *37 (quoting *Lane v. Franks*, 573 U.S. 228, 240 (2014)).
[6] *Bland v. Roberts*, 730 F.3d 368, 373 (4th Cir. 2013).
[7] *Id.*
[8] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
[9] *Id.* at 421-22.

Speech Pursuant to Official Duties

Government employees (those employed by federal, state, or local government) accept some restrictions on their freedom of speech by virtue of their agreement to work for a government entity, given that they "occupy trusted positions in society."[10] A government employer maintains the right to restrict an employee's speech when the speech is "pursuant to his duties."[11] When pursuant to his (or her) duties, the Supreme Court of the United States has said that "the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech."[12]

Such speech may include statements or written documents that are "commissioned or created" by the employer or "that owe its existence to a public employee's professional responsibilities . . . ."[13] Though "employees retain the prospect of constitutional protection for their contributions to the civic discourse,"[14] government employers are given "sufficient discretion to manage their operations."[15]

Speaking as a Citizen on a Matter of Public Concern

In contrast to government speech pursuant to one's official duties, "when an employee speaks as a citizen addressing a matter of public concern . . . the First Amendment may be implicated and courts should proceed to a second step."[16] Here, "courts should attempt to engage in a delicate balancing of the competing interests surrounding the speech and its consequences."[17] "[C]ourts at this second step have sometimes considered whether an employee's speech interests are outweighed by the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[18] "Generally, speech 'involves a matter of public concern when it involves an issue of social, political, or other interest to a community.'"[19] Moreover, "[w]hether the speech relates to a matter of public concern turns on 'the content, form, and context of a given statement, as revealed by the whole record.'"[20]

In *Grutzmacher v. Howard County*, for example, the Fourth Circuit held that crude Facebook comments about gun control as well as the First Amendment implications of a public employer's social media policies both addressed matters of public concern.[21] *Thomson v. Belton*

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[10] *Id.* at 419.
[11] *Id.* at 420-22.
[12] *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022) (citing *Garcetti*, 547 U.S. at 421).
[13] *Garcetti*, 547 U.S. at 421-22.
[14] *Id.* at 422.
[15] *Id.*
[16] *Kennedy*, 142 S. Ct. at 2423 (internal citation omitted) (internal quotations omitted).
[17] *Id.* (internal citation omitted) (internal quotations marks omitted).
[18] *Id.* (internal citation omitted) (internal quotations marks omitted); *see Garcetti*, 547 U.S. at 419 (noting that if "employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively").
[19] *Thomson*, 2018 U.S. Dist. LEXIS 199831 at *42 (quoting *Liverman v. City of Petersburg*, 844 F.3d 400, 409 (4th Cir. 2016)) (internal quotation marks omitted).
[20] *Id.* (quoting *Connick*, 461 U.S. at 147-48).
[21] *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 343-44 (4th Cir. 2017).

similarly held that a government employee's Facebook post commenting on a Democratic candidate's decision to exclude a journalist from serving on an election debate panel was also a matter of public concern, and that her speech was as a citizen, not pursuant to official duties.[22]

In support of its holding, the *Thomson* court reasoned: "[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office . . . . [T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[23] The *Thomson* court further explained:

> Similar to writing a letter to a local newspaper, publicly posting on social media suggests an intent to communicate to the public or to advance a political or social point of view beyond the employment context. . . .
>
> It is also clear that Thomson was speaking as a citizen and not pursuant to her official duties, as a Facebook post was not ordinarily within the scope of her duties. Although Thomson managed social media for NRP at that time, this fact does not place all social media—no matter how unrelated to NRP—within the scope of her duties. While she was at home before work hours, Thomson used a personal electronic device to comment on the Facebook post of another, on a topic unrelated to her NRP responsibilities.[24]

On the other hand, "when speech involves 'matters only of personal interest,' it is not protected, 'in the absence of unusual circumstances.'"[25] Notably, "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[26] Personal grievances and employment condition complaints "do not constitute speech about matters of public concern."[27] Moreover, "matters of internal policy, including mere allegations of favoritism, employment rumors, and other complaints of interpersonal discord" are also not matters of public concern.[28]

Finally, the employee's interest in speaking about a matter of public concern must be balanced against the employer's interest "in promoting the efficiency of the public services it performs through its employees."[29] This analysis is framed in terms of whether the employer's interest gives "adequate justification for" the restriction of the employee's speech, conditioned on the fact that "the restrictions [the government employer] imposes must be directed at speech that has some potential to affect the entity's operations."[30] A government entity, for example, has an interest in regulating its employees' speech given the need for "official communications" to

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[22] *Thomson*, 2018 U.S. Dist. LEXIS 199831 at *56-58.
[23] *Id.* at *56-57 (citations omitted) (internal quotation marks omitted).
[24] *Id.* at *57-58 (citations omitted) (internal quotation marks omitted).
[25] *Id.* at *43 (quoting *Grutzmacher*, 851 F.3d at 343).
[26] *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).
[27] *Grutzmacher*, 851 F.3d at 343 (quoting *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007)).
[28] *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (4th Cir. 2000).
[29] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).
[30] *Garcetti*, 547 U.S. at 418.

demonstrate accuracy, "substantive consistency[,] and clarity."[31] In balancing these interests, factors may include whether a public employee's speech

> (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.[32]

Of note, the Fourth Circuit has stated that "a public employee who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee."[33] This position "tends to merge with the established jurisprudence governing the discharge of public employees because of their political beliefs and affiliation."[34] In this regard, the Fourth Circuit has adopted "a two-part test for conducting this analysis."[35] First, the court considers "whether 'the [plaintiff's] position involve[s] government decisionmaking on issues where there is room for political disagreement on goals or their implementation.'"[36] "If it does, [the court] then 'examine[s] the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation [or political allegiance] is an equally appropriate requirement.'"[37]

Political Discrimination of Government Employees

The First Amendment provides public sector employees protection against retaliation for the exercise of constitutional rights, including the free expression of political views and beliefs.[38] Government "action designed to retaliate against and chill political expression strikes at the heart of the First Amendment."[39] In *Heffernan v. City of Paterson*, for example, the Supreme Court of the United States stated that, "[w]hen an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action . . . ."[40]

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[31] *Id.* at 422-23 (holding that "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity").
[32] *Grutzmacher*, 851 F.3d at 345 (quoting *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 317 (4th Cir. 2006)).
[33] *Bland*, 730 F.3d at 374 (quoting *McVey*, 157 F.3d at 278).
[34] *Id*. (quoting *McVey*, 157 F.3d at 278).
[35] *Id*. at 375 (citing *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990)).
[36] *Id*. (quoting *Stott*, 916 F.2d at 141).
[37] *Id*. (quoting *Stott*, 916 F.2d at 142).
[38] *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 686 (1996) (also recognizing "the right of independent government contractors not to be terminated for exercising their First Amendment rights").
[39] *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986).
[40] *Heffernan v. City of Paterson*, 578 U.S. 266, 273 (2016).

"To prevail on such a claim, a plaintiff must establish a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'"[41] In this context, the Supreme Court explained that,

> It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.[42]

The Supreme Court cited to the *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* case to further explain that, regardless of the government entities' motives, the "First Amendment 'principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [protected speech].'"[43]

Despite these potential hurdles, if a public sector employer demotes a public sector employee because of the employee's political activity that the First Amendment protects, the employee is entitled to challenge that demotion on constitutional grounds.

Speech Rights of Private Sector Employees

Though this memo focuses primarily on First Amendment speech rights of government employees, this section briefly addresses the speech rights of private employees (from a cursory perspective). In general, First Amendment free speech protections do not apply to private sector employees. Some states, however, provide speech protection to private sector employees in other ways.

Connecticut, for example, offers broad statutory protection for private sector employees' speech.[44] Conn. Gen. Stat. § 31-51q(b) reads in part:

> any employer, including the state and any instrumentality or political subdivision thereof, who subjects or threatens to subject any employee to discipline or discharge on account of (1) the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge . . . .[45]

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[41] *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 259 (2006)).
[42] *Id*. (quoting *Hartman*, 547 U.S. at 260).
[43] *Id*. (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-286 (1977)).
[44] Conn. Gen. Stat. § 31-51q(b). In *Trusz v. UBS Realty Inv'rs, LLC*, 319 Conn. 175, 179 (2015), the Supreme Court of Connecticut explained that, "under [Connecticut's] state constitution, employee speech pursuant to official job duties on certain matters of significant public interest is protected from employer discipline in a public workplace, and § 31-51q extends the same protection to employee speech pursuant to official job duties in the private workplace."
[45] Conn. Gen. Stat. § 31-51q(b). Conn. Const. art. I, § 3 (protecting the freedom to worship); § 4 (protecting the right to "freely speak, write and publish . . . sentiments on all subjects"); § 14 (protecting the right "to assemble").

In North Dakota, it is discriminatory for an employer to take adverse action against a private sector employee because of "participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer."[46] New Mexico offers statutory protection for private sector employees as well (in the voting context). In New Mexico, it is a felony for an employer to discharge or threaten to discharge an employee "because of the employee's political opinions or belief or because of such employee's intention to vote or refrain from voting for any candidate, party, proposition, question or constitutional amendment."[47]

With respect to the speech rights of private sector employees, the critical point is that it is a state specific issue. Some states, like Connecticut, North Dakota, and New Mexico (and likely others), provide varying levels of speech protections. Other states likely offer minimal (if any) speech protections in the private sector context. Consulting with an attorney that specializes in this area of law may be the best option if ever faced with such an issue.

Conclusion

In sum, while case law may vary on the issue depending upon the federal circuit in which the government employee is located, generally, a government employer may only restrict its employee's speech where the speech is made pursuant to the employee's official job duties or where the speech regards a matter of public concern and the right to speak is outweighed by the government employer's interest in providing a public service. In contrast, speech rights of private sector employees depend on the extent (if any) to which a particular state provides for such protections.

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[46] N.D. Cent. Code § 14-02.4-03.
[47] N.M. Stat. Ann. § 1-20-13.