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LEGAL ADVISORY

To: Paul Gothold, Ed.D, County Superintendent of Schools

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From: San Diego County Office of Education Legal Services Department

Subject: **Free Speech Rights of Public Employees**

Free Speech Overview

As a general proposition, courts have long held that school district employees do no forfeit their First Amendment free speech rights because they work for a public agency.

The First Amendment largely protects an individual's right to free speech. As a public employee however, an individual does not have an absolute right to free speech, and an employer may limit speech to the extent required to protect the agency's interest. To address a First Amendment issue, it must first be analyzed whether the employee spoke on a matter of public or private concern.[1] If the matter spoken on involves an issue of public concern, there is First Amendment protection. Next, a determination of whether the employee spoke as that of a private citizen or as a public employee must be made.[2] If an employee spoke as a private citizen, there is First Amendment protection.

However, this right is not without limitations. The law simultaneously recognizes that employers may have a legitimate interest in limiting an employee's free speech, but only to the extent that there is a need to protect their interest as an employer, and the speech is not otherwise protected. Even if the employee spoke on a matter of public concern and as a private citizen, the court will also weigh the employee's First Amendment right to free speech against the agency's interest in promoting efficiency and integrity.[3] **Thus, public employees, including teachers, retain First Amendment rights to free speech even while employed by a government agency (school district), but these rights are balanced against the interest of the public employer.**

Free Speech Analysis

Public Concern

[1] *Connick v. Myers*, 461 U.S. 138, 146-147 (1983)
[2] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)
[3] *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)

The first issue that must be decided is whether the speech is of public concern. This involves a multi-part analysis of the following:

Speech Content

Speech that involves a matter of public concern is generally protected free speech. Courts have held that speech that involves or reasonable relates to "any matter of political, social, or other concern to the community" is a matter of public concern.[4] Speech that does not involve a public concern is not protected by the First Amendment.[5]

Form and Context of Speech

Although the content of the speech is the primary consideration, the form and context of the speech are also relevant in determining whether the speech is protected. The content of the communication must be of broad societal concern.[6] The determining factor is whether the public or community is likely to be interested in the expression, or whether it is essentially a private/personal grievance or whether the speaker is motivated by his or her own personal interests, or by a broader public purpose which is protected.[7] Where the speaker utilizes a broader platform to reach a wide audience (i.e., social media), courts are also more likely to find that the speech touches on a matter of public concern.

As an example, Facebook specifically as a forum for speech is relevant when determining whether the matter is one of public concern. Not all Facebook pages are public and therefore not all are intended to reach a broad audience. In situations such as this, the more an employee directs their speech at the public rather than a smaller, private audience, the more the First Amendment will be implicated.[8]

Private Citizen or Employee

If the speech touches on a matter of public concern, the next step is to determine whether the employee was speaking as a **private citizen or as an employee**. For the speech to be protected, an employee must show that the speech was made as a private citizen and not as an employee.[9] The Supreme Court emphasized the First Amendment's protection for speech made by private citizens, holding "that 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."[10] Job descriptions are not dispositive to

[4] *Demers v. Austin*, (9th Cir. 2014) 746 F.3d 402, 415.
[5] *Eng. v. Cooley*, (9th Cir.) 552 F.3d 1062, 1070 (2009)
[6] *Roe v. City & County of San Francisco* (9th Cir. 1997) 109 F.3d 578, 585
[7] See *Desrochers v. City of San Bernardino*, (9th Cir. 2009) 572 F.3d 703, 715.
[8] *Sabatini* at 1085.
[9] *Garcetti* at 420.
[10] *Id.*

demonstrate the speech was conducted as a part of the employee's official duties.[11] Moreover, statements or speech uttered pursuant to an employee's official job or duties are not afforded constitutional protection.[12] Conversely, if the speech is the subject of legitimate news interest, the courts have held it is protected by the First Amendment.[13]

Balancing Test

Where an employee's First Amendment rights conflict with the employer's interest in maintaining an orderly work environment, courts have consistently held that the free speech rights of the employee may be appropriately limited.

If an employee's speech touches on a matter of public concern and is made in the employee's capacity as a private citizen and not pursuant to his or her official duties, it is protected free speech. However, it still may be limited in certain instances. The final step is to apply a **balancing test** between the employee's statement and the public employer's interests in an efficient workplace. This test, also known as the *Pickering/Connick* test, requires the employer to establish that their interest in promoting the efficiency of the public services it performs. The balancing test asks, "whether the [district] had an adequate justification for treating the employee differently from any other member of the general public."[14] The district must show that its legitimate administrative interests outweigh the speaker's First Amendment rights.[15] Further, a government agency's justification must be " far stronger than mere speculation" to regulate what government employees speak or write on their own time on topics unrelated to their employment.[16] Generally, private posts on blogs or social media about matters of public concern are protected. [17]

For example, the right to wear clothing or articles like buttons and t-shirts is protected under the First Amendment right to free expression. An analysis of whether an agency may prohibit this activity turns on whether the act is a political controversy the agency may appropriately disassociate themselves from, or a matter of broad societal (public) concern in an employee's capacity as a private citizen which is appropriately protected. Accordingly, the employer would need to show strong justification for limiting the teacher's speech or expression on the matter under the balancing test.

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[11] *Id.*
[12] *Id.*
[13] *Lane v. Franks*, 573 U.S. 228 (2014)
[14] *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071.
[15] *Id*. at 1071.
[16] *Roe*, supra, 543 U.S. at 80.
[17] Fegan Friedman and Fulfrost, LLP,J. Salt, Esq.

Free Expression

Rules or regulations regarding clothing or appearance may implicate a liberty interest and accordingly, are governed by the First Amendment. As stated above, teachers or other educational agency employees retain their right to express themselves via clothing or other items worn on the body. Nonetheless, California law gives the governing board of a local agency the ability to establish rules on employees engaging in political activities during work hours.[18]

Prohibited Political Expression and Activity

California Education Code § 7055, along with opinions on the matter from the attorney general, expressly concludes that educational agencies may prohibit employees from wearing political buttons or other articles of clothing during classroom periods or instructional settings due in part because of the power or influence teachers have over their students.[19] The San Diego County Office of Education's own policy on this issue, titled "Political Activities of Employees," states that employees shall not "wear buttons or articles of clothing that express political opinions on ballot measures or candidates during instructional time."[20] It is foreseeable that many districts have the same or similar policies which were at some point, templates generated by the Association of California School Administrators. Likewise, Education Code § 7054 prohibits the use of district "funds, services, supplies, or equipment" for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district."

Political Statements or Controversy's Generally

The law is clear in giving educational agencies the ability to prohibit teachers from wearing clothing or buttons concerning political candidates or ballot measures while in the classroom or on instructional time. This discretion however is not as clear when the clothing or button concerns statements that may have a political undertone or otherwise are controversial. As a result, the balancing test in *Pickering* should be used, weighing the employees First Amendment right against the agency's interest in maintaining a harmonious and efficient educational environment.[21]

Moreover, an analysis of whether an employee may wear a "Black Lives Matter" t-shirt while teaching in the classroom requires a determination of whether "Black Lives Matter" is a political statement or controversy the educational agency may have the power to disassociate themselves from by prohibiting their employees from engaging the advocacy while in the classroom.[22]

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[18] Cal. Ed. Code § 7055
[19] 77 Cal. Op. Atty. Gen. 56 (1994)
[20] SDCOE Board Policy No. 4022: Political Activities of Employees
[21] *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)
[22] *Cal. Teachers Ass'n v. Governing Board*., 45 Cal. App. 4th 1383, 1388 (1996).

Black Lives Matter as a Political Controversy or Public Concern?

Due to the recent nature of the Black Lives Matter (BLM) movement as a whole, little case law addresses this issue in particular. Rather, many cases concerning speech on matters of general political controversy including war, military intervention abroad, and abortion have been upheld in favor of the districts, not the employees.[23] In these cases, courts found little difficulty in concluding the school's interest in preserving a harmonious atmosphere in the classroom and among teachers outweighed the employees' right to advocate for these cause from the classroom.[24] The educational environment in particular was found to be intimate and deferential to any particular political point of view.[25] Accordingly, a district may make a reasonable decision to disassociate themselves from any political advocacy by prohibiting teachers from participating in their classrooms during instruction.[26]

In the present case, any facts supporting contention or turmoil in the educational environment as a result of the Black Lives Matter t-shirt should be documented to support a finding that any speech or advocacy by teachers concerning BLM should be prohibited. As time progresses on this issue however, it is likely that courts of binding precedent will analyze this issue and hold in favor of the employee, particularly if it is viewed as a matter of broad social concern and is not affiliated with any particular political party.

For example, this issue of whether federal employees wearing or displaying materials relating to BlackLives Matters was political, or protected free speech was recently analyzed by the U.S. Office of Special Counsel .[27] The Special Counsel, which investigates Hatch Act violations, opined that the Act allows employees to engage in BLM-related activities while on duty or in the workplace.[28] Acknowledging that BLM terminology is issue-based, not a campaign slogan and concerns racial issues. Therefore, using BLM terminology, without more, is not political activity. … [A]nd employees are not prohibited from wearing or displaying BLMGN paraphernalia in the workplace." There is no specific alignment with a single political party. Conversely, articles of clothing, buttons, or slogans specific to one political party may be more readily limited.

Despite the fact that California teachers and educational employees are not subject to the Hatch Act, this opinion may serve to be instructive to state and federal courts when determining whether BLM is a political statement that government agencies may appropriately limit its employees freedom of expression or speech, or a matter of broad social concern which is afforded greater protection.

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[23] *Hennessey v. City of Melrose*, 194 F.3d 237, 246 (1st. Cir. 1999); *Calef v. Budden*, 361 F. Supp. 2d 493, 501 (2005).
[24] *Id.*
[25] *Id.*
[26] *Cal. Teachers Ass'n* at 1387.;
[27]Office of Special Counsel: Rules Black Lives Matter is not a political activity", Nolan D. Mccaskill, Politico.com, 07/16/2020, https://www.politico.com/news/2020/07/16/trump-special-counsel-black-lives-matter-366177.
[28] The Hatch Act prohibits federal employees from participating in partisan political activities.

Educational Equity Instruction

The First Amendment considerations and the ability of a school district to limit political activity and regulate some forms of speech and expression, do not concern the continuing ability of schools to teach about issues of educational and social justice. Teachers are free to discuss matters of public concern, such as Black Lives Matter, so long as they do not take a political position or espouse political versus factual beliefs. It is important to note that the politicization of an issue does make the issue a political matter versus one of broad public concern.

Conclusion

The First Amendment is fiercely protected in our legal system and a right individuals do not lose once a public employee. Despite this, employers may have justification to limit speech if disruptive to the function of the agency, or if it would cause public distrust. Determining whether the speech may be appropriately curtailed is fact intensive and should involve careful consideration of the principles mentioned above.

Moreover, analysis concerning the issue of Black Lives Matter should include a determination of whether it is a political statement or a broad public concern, which may be protected.

The issue of employee free speech rights is complicated and highly nuanced. It requires a balancing of interests on a case-by-case basis based upon the facts of each situation.

District's should have clearly defined board policies that address the issue of free speech within the district.

If you have any questions or need additional information, please email Trinity Daniel at trinity.daniel@sdcoe.net.