

Influencers at Work: Novel Issues in Employee Speech

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This year, employees across industries stoked controversy with their out-of-work activities. On Wall Street, junior bankers posed for a fashion photoshoot that showcased their significant spending habits – a shoot which many of their employers did not authorize. In law, multiple law firm influencers posted a steady stream of “day in the life” videos, often including shots of their workstations, office hallways, and cafeterias. Such activities have raised important questions concerning the permissible bounds of employee speech while on and off the clock. In light of the rapidly growing number of individuals who leverage their employment to gain social media fame, employers should refamiliarize themselves with the tools they can lawfully use to address employee speech that negatively affects their businesses. This article examines several recent New York court decisions addressing claims against employers who take adverse actions due to their employees’ speech activities, analyzes current statutory protections for employee speech, and provides practical guidance for employers.

As a starting point, New York courts often apply two legal frameworks when evaluating employee speech: New York Labor Law § 201-d and § 7 of the National Labor Relations Act.

NYLL § 201-d

New York Labor Law § 201-d provides a limited level of protection for employee off-the-clock speech. Specifically, the statute prohibits employers from discriminating against employees based on certain defined “recreational activities” outside work hours, off employer premises, and without use of employer equipment. The term “recreational activities” often shapes judicial analyses of the statute, which the legislation defines as “any lawful, leisure-time activity, for which the employee receives no compensation and which [people generally engage in] for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.” Section 201-d(3)(a) creates an important exemption for any recreational activity that “creates a material conflict of interest related to the employer’s trade secrets,

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proprietary information or other proprietary or business interest.” Therefore, if a court considers an activity as recreational, it may not limit employer adverse actions resulting from the activity if the employer reasonably concludes that the activity poses a material conflict with the employer’s business interests.

The definition of recreational activity often becomes the focus of § 201-d lawsuits. Employees, claiming their outside activities constituted recreational activities, have attempted to assert § 201-d protections following terminations of employment. Courts, however, have interpreted “recreational activities” narrowly. See, e.g., *McCavit v. Swiss Reinsurance America Co.*, 237 F3d 166 (2d Cir. 2001) (dating is not a “recreational activity”).

Recent cases, however, have signaled a potential shift in how courts view off duty conduct. As new technologies, including social media posts, present novel issues as to what constitutes a recreational activity, courts have shown increased receptivity to analyzing the other subsections of the statute. Rather than focus on whether activities are “recreational” or not, some courts have instead centered their analysis on whether an activity impacts the employer’s reputation, and, therefore, excludes the activity from coverage by the statute under the “conflict-of-interest” exception.

For example, in *Evseroff v. Scripps Media, Inc.*, 2026 N.Y. Misc. LEXIS 123 (Sup. Ct. N.Y. Cty., Jan. 6, 2026), the court evaluated whether a Facebook post marred an employer’s reputation. In that case, an employee shared a Facebook post featuring the World Trade Center with the phrase “Never Forget” juxtaposed with an image of Representative Ilhan Omar stating “I am the Proof – You Have Forgotten.” The employee invoked § 201-d as protecting the post. The court rejected the invocation of § 201-d on summary judgment. In a shift from prior cases, the court held that even if the social media post was a recreational activity, the post created a “material conflict of interest” with the “defendant’s business interest.” The court explained that the post “invite[d] a public backlash” against the employer. Thus, the material conflict exception to § 201-d applied, because the employee’s activity placed the employer’s reputation and standing in a negative light.

Similarly, in *Neel v. N.Y. Univ.*, 2026 N.Y. Misc. LEXIS 1253 (Sup. Ct. N.Y. Cty., Feb. 26, 2026) New York University removed a doctor from his leadership positions due to posts regarding the Israel-Hamas war. The doctor filed suit, arguing that these removals were unlawful. The court granted the University’s motion to dismiss the doctor’s § 201-d claim. The court distinguished between recreational and content-based termination activities. The court noted that even assuming that blogging was a recreational activity, the University did not terminate the professor “for the activity of blogging, but for the content of the blog post.” The doctor’s termination therefore remained permissible.

Lessons Learned

Evseroff and *Neel* are instructive to employers facing questions concerning off-the-clock employee speech that negatively impacts the employer’s business. For employers facing claims relating to employee speech, these cases suggest that courts will scrutinize

whether an employer based an adverse action on the activity of posting or the content of posts. Nevertheless, employers taking adverse action due to such speech should consider contemporaneously documenting the nature of the offending content. In addition, attorneys handling employee speech cases should consider developing evidence of the harm that the employee's activity causes to the employer's reputation, standing, or relationships in the relevant community or business environment.

NLRA § 7

By contrast to § 201-d, which focuses on employee off-the-clock conduct, NLRA § 7 protects employee rights both on-the-clock and off-the-clock. Section 7 establishes that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act provides that employers cannot "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Section 7 applies to both unionized and non-unionized employees. For the past three years, the NLRB has interpreted § 7 under the framework set forth in *Stericycle, Inc.*, 372 NLRB No. 113 (2023). There, the Board held that in setting forth a § 7 claim, the NLRB General Counsel must demonstrate that the challenged rule had a reasonable tendency to chill employee speech. If the General Counsel succeeds in this showing, then the NLRB will presume that the conduct violates § 7. The NLRB then offers the employer the opportunity to rebut the presumption of unlawfulness by demonstrating that the rule advances a legitimate and substantial business interest that the employer cannot achieve with a more narrowly tailored policy.

Presidential administrations often shape the NLRB's approach to § 7 cases. In the first Trump term, the NLRB evaluated § 7 cases under the standard set forth in *The Boeing Company*, 365 NLRB No. 154 (2017). That standard evaluated potential limits to employee speech under a framework which balanced "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirement(s)." Employers may wish to reacquaint themselves with arguments in cases brought under the prior standard, as the current NLRB has already signaled a willingness to overturn certain Biden-era policies. *See, e.g.*, 91 FR 9707, 9708 (publishing a rule rescinding and replacing a prior rule regarding the standard for determining joint employer status under the NLRA). For now, however, recent case law still instructs employers as to the current limits on employee speech.

Espinal v. MPI Mgt. LLC, 231 A.D.3d 618 (1st Dep't 2024) demonstrates how New York courts currently evaluate § 7 claims. In that case, a construction worker alleged that a management company failed to properly protect windows from asbestos debris. The construction worker then warned supervisors about unsafe asbestos abatement at the work site. The court held that the NLRA did not protect the employee's warning about unsafe asbestos abatement. The court reasoned that the complaint did not allege that the employee engaged in concerted activity within the meaning of § 7. Plaintiff did not allege that he discussed the asbestos containment hazard with other workers, and thus Plaintiff's speech was not for the purpose of mutual aid or protection.

Lessons Learned

The *Espinal* case provides valuable lessons for employers facing claims concerning policies in the workplace. In evaluating the risk posed by a § 7 claim, employers should consider the extent to which an employee shared safety concerns with other employees.

Preventing Future Litigation

Taken together, New York Labor Law § 201-d and NLRA § 7 provide meaningful protection to employees that may complicate employer attempts to set guidelines on employee speech. Still, employers possess several tools to help mitigate their litigation risk while also maintaining appropriate guardrails on employee speech.

First, to prevent litigation stemming from on-the-clock policies, employers may wish to craft guidelines that address when employees may and may not leverage the employer's brand in personal social media, photoshoots, interviews, or other public content.

Second, employers also may wish to issue guidelines advising employees that the firm's communications or human resources departments would be available to consult with employees engaging in media appearances or sponsored partnerships and to provide guidance on avoiding harm to the employer's business interests.

Third, employers may wish to include social media policies in employee handbooks. Such policies could, for example, remind employees that employee posts on social media may reflect upon the employer, even if the employee is posting off-the-clock. That said, such policies should clarify that they are not meant to limit or interfere with any of the employees' rights, and specifically state that the policy does not interfere with the employees' ability to exercise § 7 rights. Indeed, employers may wish to revise policies governing workplace speech, such as impermissible hate speech, to explicitly state that nothing in the policy limits, or should be construed to limit, an employee's § 7 rights.

Finally, in providing guidance on employee speech, employers may wish to consider any relevant public relations concerns. While certain employer actions may be lawful, employers may wish to also evaluate the potential impact of certain actions from a public relations standpoint.

Conclusion

For off-the-clock conduct, New York Labor Law § 201-d provides meaningful but limited protection for off-duty employee activities. In particular, courts distinguish protected activities from unprotected content-based posts that harm the employer's business interests. Employers wishing to navigate employee speech issues may wish to document the effects of an employee's actions on the employer's business interests as a method to buttress the employers' potential defenses to § 201-d claims. Indeed, the statute's material conflict exception gives employers broad authority to regulate employee expression affecting business reputation and relationships.

For on-the-clock conduct, NLRA § 7 protects concerted activity for mutual aid or protection but not individual expression or personal brand-building. Current cases will be evaluated under the *Stericycle* framework.

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