

**Fahey Schultz  
Burzych Rhodes**

EXPERT COUNSEL  REAL SOLUTIONS

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# You Said What? – Navigating Employee Speech Rights

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ATTORNEYS HELEN “LIZZIE” MILLS & CHAD KARSTEN

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# Disclaimer

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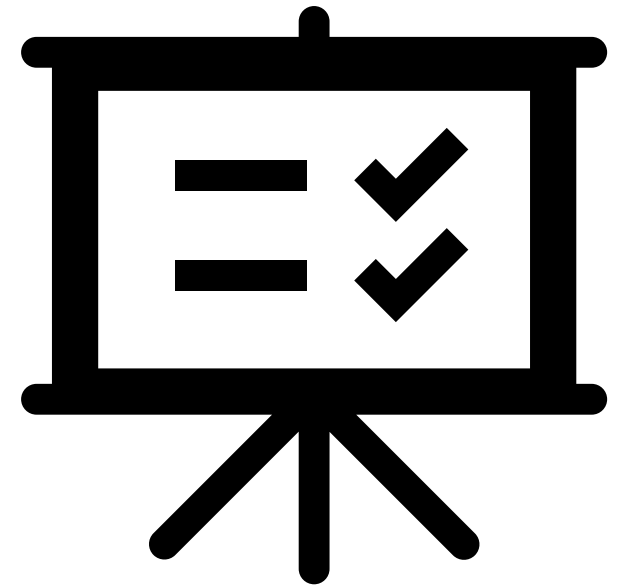
- This presentation, and the materials associated with it, are general information and not intended as legal advice.
- Employee speech issues are very fact-specific!
- Please contact your township attorney if you need assistance related to a specific legal issue.

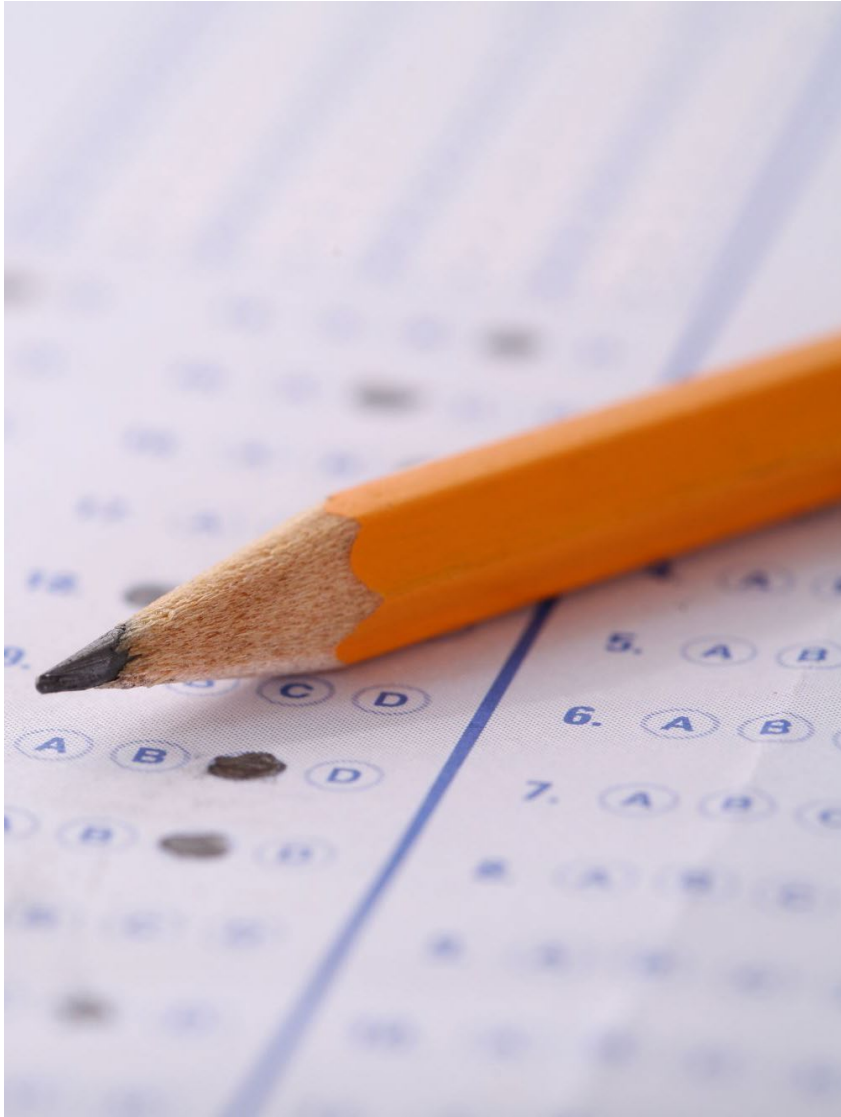


# Goals

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- ✓ Leave the presentation with a basic understanding of public employee speech rights and the ability to identify thorny free speech issues.
- ✓ Learn strategies to avoid costly and high-profile mistakes.
- ✓ Answer Questions





# POP QUIZ!

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## TRUE OR FALSE:

Township employees have unfettered free speech rights because they are Americans.

**FALSE!**



# Overview of Employee Speech Rights

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HOWEVER, speech  
rights are more limited



# The Test

Public employers may NOT discipline for speech if:

- The topic is a matter of public concern;
- The employee is speaking as a private citizen; AND
- Employee's right to free speech outweighs the township's interest in efficient operation.



## Matter of Public Concern

- Employee speech more likely to be protected when:
  - Discussing “newsworthy” topics
  - Political, social, or community concerns
  - Public interest, not private
- Public employees have unique and valuable perspectives on public concerns





# Public Concern or Private Griping?

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- Assistant Prosecutor transferred to new department, unhappily
- Distributes questionnaires to coworkers, asking if they agree with employer transfer policy, and trust supervisors
- County fires her
- Are those topics a matter of public concern?



## Speaking as a Private Citizen

- Free speech rights don't apply to speech in official capacity
- Ask yourself, "was employee speaking in furtherance of the job or as part of official duties?"





# Says Who?

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- Police officer and firearm aficionado advocated for higher-powered firearms in patrol cars
- City Council members opposed the plan
- Officer criticized Council online and in news interviews
- Subsequently terminated
- Speaking as employee or private citizen?





# Balance of Interests

- Weighing employee interest in free speech vs. public employer interest in efficient and effective operation
  - Courts give high weight to speech rights (*especially* political speech)
  - Township must show disruption to operations (more than bruised egos)
- Examples:
  - Public outcry (but generally insufficient on its own)
  - Harm to working relationships
  - Disruption to employee supervision
  - Damage to public trust



# Putting It All Together ... An Example

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- Teacher wrote letter to the editor in local paper that was critical of School Board and Superintendent
- Letter addressed how the Board handled a proposal to raise money for the school
- Fired for conduct “detrimental to the efficient operation and administration” of the school
- The test
  - Matter of public concern?
  - Spoken as private citizen?
  - Balance of interests





# Labor Law and Free Speech

- Michigan Public Employment Relations Act (“PERA”)
- Shields employees’ “protected concerted activity,” even if not in a union
- Related to the terms & conditions of employment
- Protects right to be critical of employer (within reason)



# Protected Concerted Activity

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- Employee posts on social media
- Calls for limit on how many children someone can have
- “Just go to your nearest big box store and start picking them off.”
- Coworker comments about likely discipline for the posting employee
- Social media policy prohibits harassment, discrimination, threats on social media
- Employee terminated
- Protected Concerted Activity?

# Speech Restrictions for Unionized Employees

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Unionized employees typically have “just cause” standard for discipline

If speech is off-duty, need a “nexus” to job





# Social Media

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- Can have social media policies
- Same First Amendment & labor law rules apply
- Can't prohibit personal use of social media
- Can't prohibit all criticism of township
- Can't prohibit posting personal political beliefs
- Can prohibit discriminatory and harassing posts
- Can prohibit and/or limit social media while on duty



# Avoiding Employee Speech Missteps

Avoid

Avoid heat-of-the-moment decisions. Please, stay objective even when you're seeing red.

Consider

Consider the legal test for employee speech.

Determine

Determine the impact (if any) to operations.

Consult

Consult township labor and employment counsel!





# Questions

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Helen “Lizzie” Mills

Chad Karsten

Fahey Schultz Burzych Rhodes PLC  
4151 Okemos Rd, Okemos, MI 48864

Tel: 517-381-0100

[hmills@fsbriaw.com](mailto:hmills@fsbriaw.com)

[ckarsten@fsbriaw.com](mailto:ckarsten@fsbriaw.com)

[www.fsbriaw.com](http://www.fsbriaw.com)

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