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EXPERT COUNSEL



REAL SOLUTIONS

You Said What? – Navigating Employee Speech Rights

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Disclaimer

- 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

- 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!

☐ 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 Gripping?

- 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?





Workplace strife or public scandal?

- Fire Marshal for FDNY
- Deadly fire on movie set, Specht pins it on production crew
- Supervisors pressure him to alter findings
- Specht refuses, emails colleagues, threatens to sue City
- Goes to news media about supervisor's demands
- Reduced role, denied overtime, retires
- 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?”

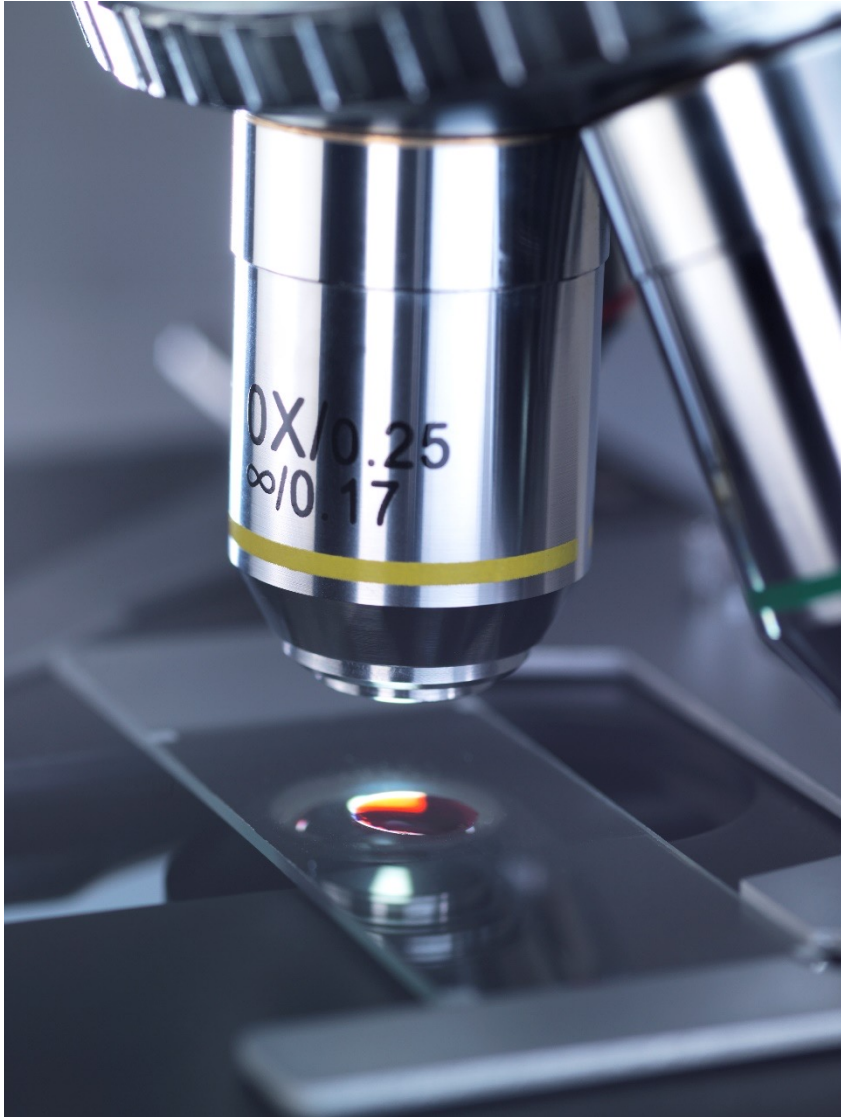




Says Who?

- 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?





Private Opinion or Official Duty?

- Forensic scientist, analyzes blood samples for alcohol
- Frequently testifies in court for work
- Believes defendants should be given access to more testing data, supervisors disagree
- Began testifying his opinion that more data should be provided, offering to provide it
- Suspended
- Private citizen or public employee?



- 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



- 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



Putting It All Together ... An Example



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



- 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?



Mutual Aid or Personal Gain?

- Employee works for Detroit Water & Sewage as “senior assistant mechanical engineer.”
- Employment transferred to Great Lakes Water Authority as “special projects technician.”
- Engineers are “just cause” employees, technicians are “at-will.”
- Repeatedly complained about his classification to upper management.
- Repeatedly complained about supervisors’ incompetency to upper management.
- Supervisors get sick of complaints. Employee is laid off.
- Protected Concerted Activity?

Speech Restrictions for Unionized Employees

Unionized employees typically have “just cause” standard for discipline

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



Off-Duty Speech

- More likely to be matter of public concern and spoken as private citizen
- Needs a “nexus” to the job
- Things to look for in a “nexus”
 - Relation to job duties
 - Damage to supervisory relationships
 - Bringing employer into disrepute
 - Creation of unsafe conditions for employees or public
 - Severity of misconduct



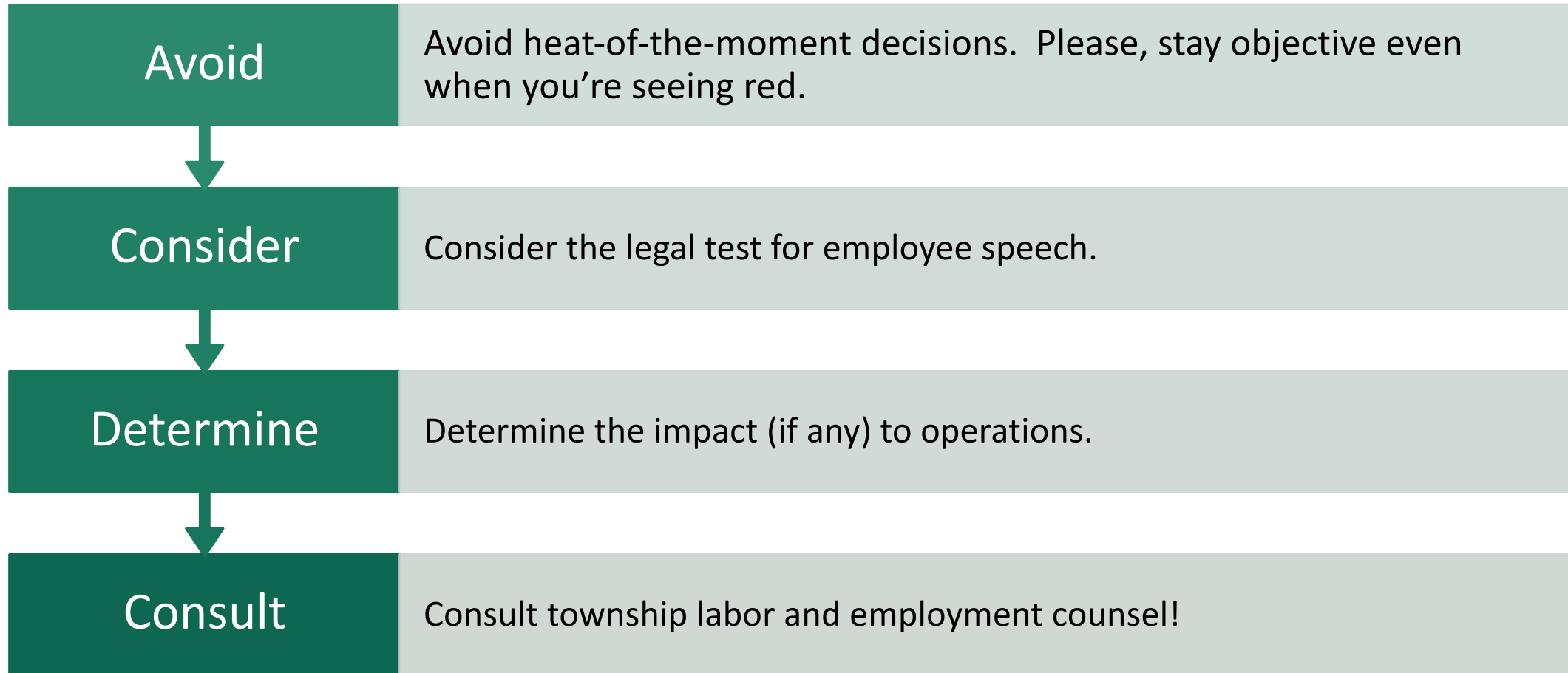


Social Media

- 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





Questions

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