Free Speech and Corporate Policy

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In my previous article on personal expression and corporate policy, I mentioned that free-speech arguments sometimes enter the discussion of whether or organizations can or should attempt to limit employee self expression in public.

I am specifically referring to written materials prepared outside working hours and posted without the use of corporate resources on publicly accessible sites such as a personal Web page, a blog, a social networking site (e.g. MySpace <http://www.myspace.com> or FaceBook <http://www.facebook.com>) or, for that matter, on the cork bulletin board at the local supermarket.

In the United States, an employer attempting to enforce a policy forbidding employees from identifying themselves as such in public commentary without explicit permission and prior approval of the content of their postings may encounter resistance based on a misunderstanding of law. "But you have no right to limit my speech," says the outraged employee. "You are violating my rights under the Constitution of the United States!"

Well, not usually.

The angry employee is muddily thinking of the First Amendment of the U.S. Constitution, which reads in part, "Congress shall make no law … abridging the freedom of speech, or of the press. . . ."

After calming the employee down to prevent possible violence, explain quietly that the First Amendment refers to government action, not to private contracts. An employment contract can and in your case, presumably does, limit public speech when the employee identifies herself as an employee. Other forms of limitation of speech under contract can apply even for non-employees; for example, one could insert nondisclosure clauses into a contract for consulting.

In the 1980s and early 1990s, before the World Wide Web became such a normal part of our lives, I was the Wizop of the NCSA (National Computer Security Association) Security Forum on CompuServe, which at that time was an important value-added network with thousands of moderated discussion groups. I promulgated policies that enforced professionalism and forbade profanity, libel, demeaning comments about individuals or groups and general incivility in our discussions. We had a dozen sysops who monitored each of the 20 sections of the Forum and who would remove offensive messages at once. They would write to the correspondent and explain the rules (often by rewriting the offensive message without the offensive language or style), warning that repeat offenses would result in exclusion from the Forum.

Occasionally, we’d get a furious message protesting that it was illegal for us to restrict speech because of the First Amendment. At that point, I would trot out a macro to generate a response something like this: "Perhaps you misunderstand the application of the First Amendment. The CompuServe Security Forum is not a government agency: we are a privately-owned discussion
group running on a privately-owned network. If we establish rules forbidding the use of the letter 'e’ in any message on the Forum, we may not get much traffic but we will not be violating any laws. Comply with our rules of conduct or leave.”

Even government agencies have the right to control public speech by their employees; an example is the Uniform Code of Military Justice which applies to members of the Armed Forces of the United States. Article 88 (Contempt Toward Officials) states that “Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.” <http://tinyurl.com/33nm7u>

On the other hand, I don't think your corporate counsel will be very keen on attempts to limit your employees’ personal activities and speech outside working hours if they don't identify themselves by their position in your organization. For example, telling an employee to remove a political bumper sticker from his private automobile – one that has no visible link to your organization – goes beyond the reasonable limitations of a speech policy. However, I am not a lawyer and this is not legal advice. For legal advice, consult an attorney with experience in this aspect of employment law.

In my next column, I have some advice to pass on to young people about public self-expression on the World Wide Web.

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