



Workplace Political Expression

Best Practices for Balancing
Employee Rights and Employer
Responsibilities

June 13, 2024

Seyfarth Shaw LLP

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Speakers



Marjorie Culver
Partner
New York



Dawn Solowey
Partner
Boston

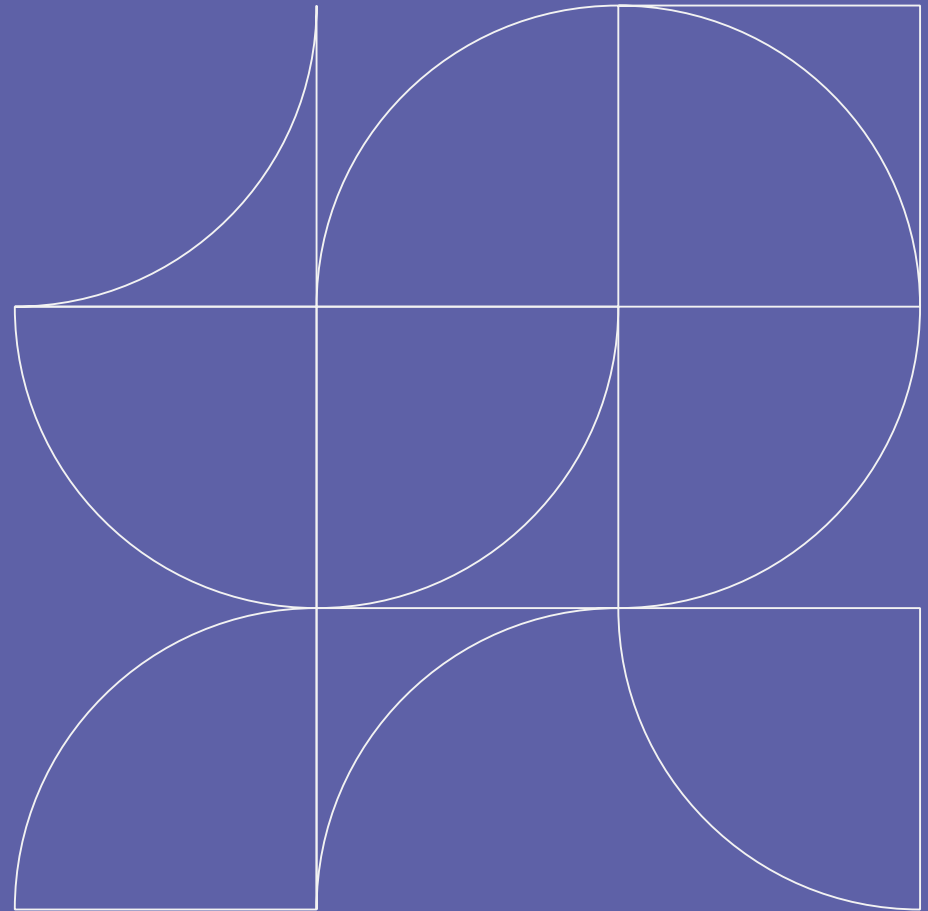


Sam Schwartz-Fenwick
Partner
Chicago

Agenda

- 01** State Law Considerations
- 02** The NLRB's Approach to Political Expression
- 03** Title VII Considerations
- 04** Beyond the United States

State Law Considerations



Interfering With or Restricting Speech or Conduct in the Workplace Regarding Electoral Activities

- Over 40 states have laws to this effect.
- Generally, prevent employers from coercing or attempting to coerce employee's voting activity / political activity.
- Types of activities that may be covered:
 - influencing or seeking to influence:
 - joining a particular party.
 - voting for a particular candidate or on a particular issue.
 - requiring political contributions to particular party or candidate.
 - including political mottos or similar messages on pay envelopes.
- Specifics vary state by state.

Captive Audience Laws

- Increasing number of states passing “Captive Audience Laws.”
- Generally, these laws bar employers from requiring employees to attend company meetings (or receive or listen to company messages) that express the employer’s opinions on “political matters” or “religious matters.”
- May also bar employers from disciplining, terminating, or taking other adverse actions against employees who refuse to participate in such actions (such as refusing to attend a company meeting).
- Seven states have such laws in effect (CT, ME, MN, NJ, NY, OR, and WA) and two more have passed them but not yet in effect (WI and VT).

Some Jurisdictions Go Even Further

- California

- Broad Ranging Protections for political activity and lawful off-duty conduct.
- “Political Activity” defined very broadly.
 - Courts have found political activity to include:
 - advocating for gay rights,
 - publicly criticizing a public official,
 - wearing symbolic arm bands, and
 - associating with others for the advancement of beliefs to be political activity.
- “Lawful off-duty conduct” also broad (and vague).
 - Activity that is already an existing right under the state and federal constitutions, such as activity protected by privacy or free speech rights.

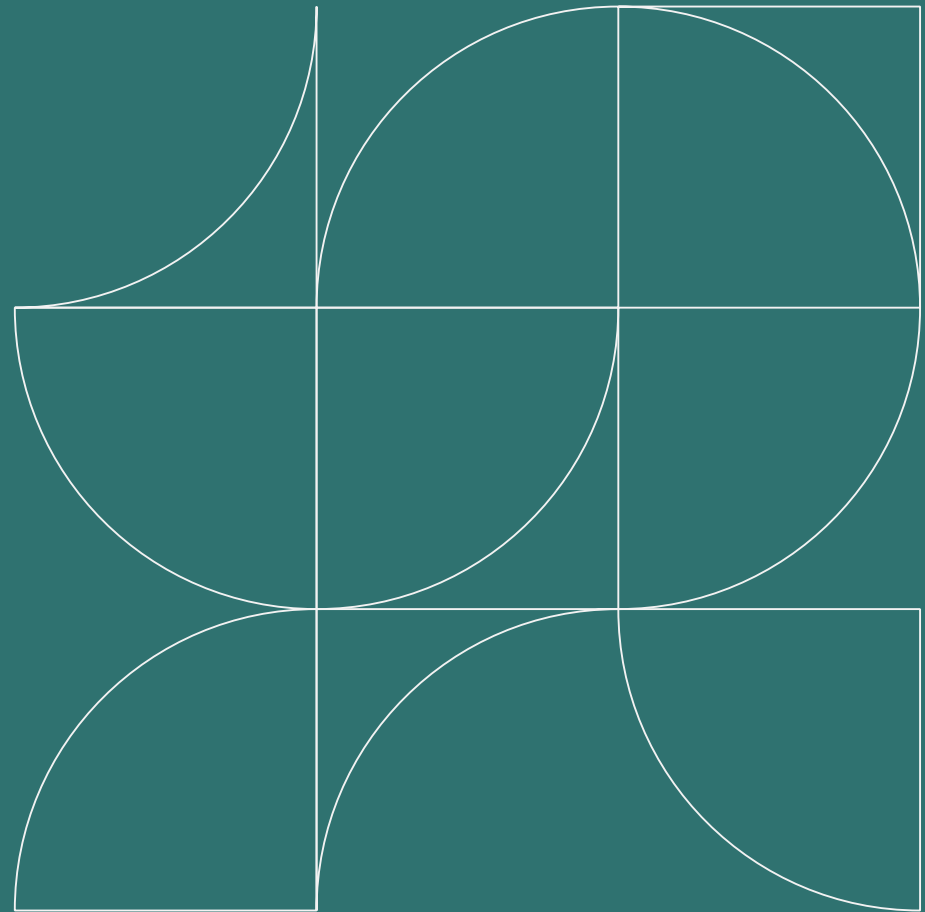
- Connecticut

- Extends First Amendment protections to speech by employees of private companies.
- Bars most private employers from disciplining or terminating an employee for engaging in the type of political speech protected by the Connecticut or U.S. constitution.
- Important Carve Out – law does not protect activities that “substantially or materially interfere with the employee’s bona fide job performance or the working relationship between the employee and the employer.”

Know Thy States' Laws

- Despite some general overlap, state laws vary as to scope of protections afforded workers and particular requirements.
- Moving Target -- New laws are being passed; legal challenges to new and existing laws.
- New laws can coincide with broader national trends/developments (such as NLRB rulings/guidance).

NLRB Approach to Political Expression



National Labor Relations Act

What is Protected Concerted Activity?

- Section 7 of the National Labor Relations Act (“NLRA”) protected certain “concerted activities” of employees for purposes of “mutual aid or protection
- “Protected” means:
 - Employees acting together for collective bargaining **or** mutual aid or protection (*e.g.*, working conditions, compensation, hours, and other terms and conditions of employment)
 - Peaceful and lawful activity in support of NLRA rights (no takeover, sabotage, etc.)
- “Concerted” means:
 - Activity by two or more employees **or** with the object of initiating or inducing group action
 - Can be *individual action* with this express or implied purpose
- Ex: Facebook post: “I’m refusing to come to work until this safety concern is addressed. Who’s with me?”
- Does not include individual gripes that do not express group concerns

Political Speech/Conduct



Political Speech/Conduct May Qualify as “Concerted Protected Activity” Under the NLRA

- Cannot retaliate against employees who participate in **outside** political activities that relate to **labor** or **working** conditions.
 - Contacting legislators, testifying before agencies, or joining protests and demonstrations.
- Protections for political speech/conduct at work
 - 1 Discussions re: minimum wage or working conditions.
 - 2 NLRB says a rule broadly prohibiting discussion of topics that may be considered “objectionable or inflammatory” is unlawful.
 - 3 NLRB says a rule stating “don’t pick fights” on the internet is unlawful; could be construed to restrict protected discussions.

Political Speech/Conduct



How do you draw the lines?

- Advocating for a political candidate
- Advocating for a political party or movement (e.g. MAGA)
- Advocating for an idea strongly aligned with a political party or candidate
- Challenging business deals made by your employer

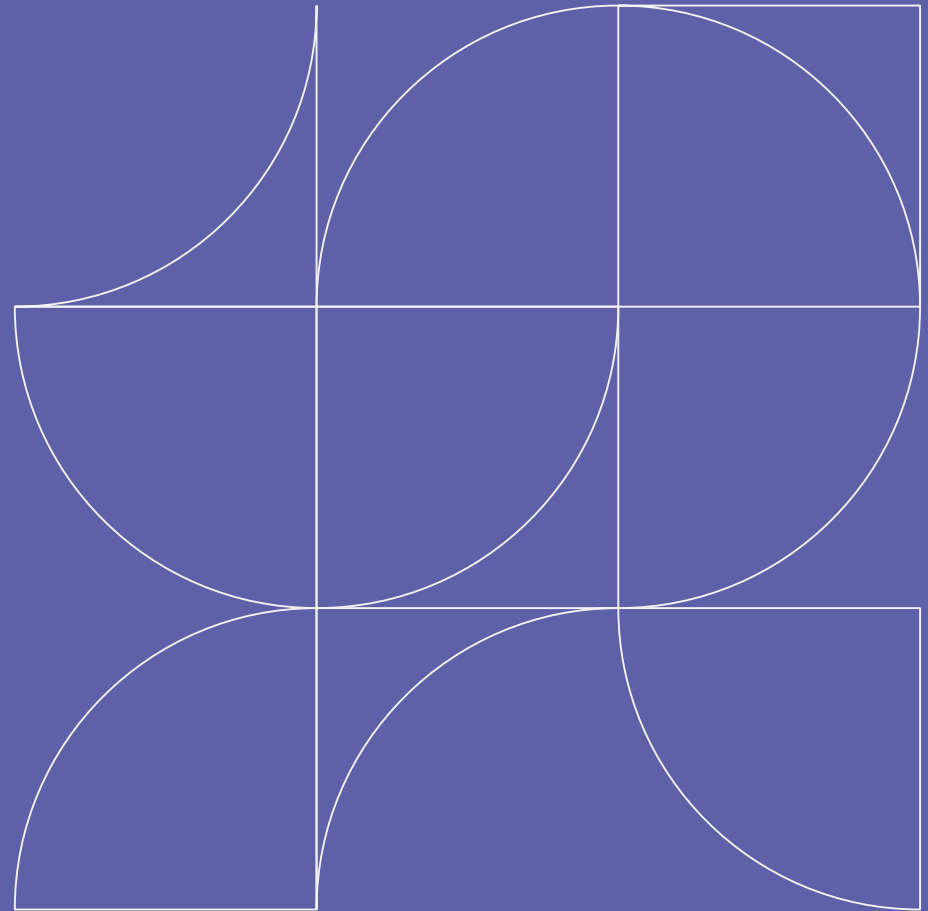
***Home Depot, 18–
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(2/21/24)***

- Dress code and apron policy prohibited displaying causes or political messages unrelated to workplace matters.”
- GC alleged employer discharged employee who wore BLM on apron, engaged in conversations with co-workers and management about ongoing discrimination and harassment.
- The majority said mask was "logically related to employees' prior protected concerted activities opposing racism in the workplace”
- Board did not reach argument of the GC protests of racial discrimination are inherently concerted, regardless of whether workers are acting together.

***Social media posts
& Do we need a
policy?***

- EEOC guidance
- Position of the NLRB
- Pros and cons of putting in place a social media, respectful workplace and/or political expression policy.

Title VII Considerations



Does the Political Expression Impact the Workplace?

**Effect on
Coworkers**

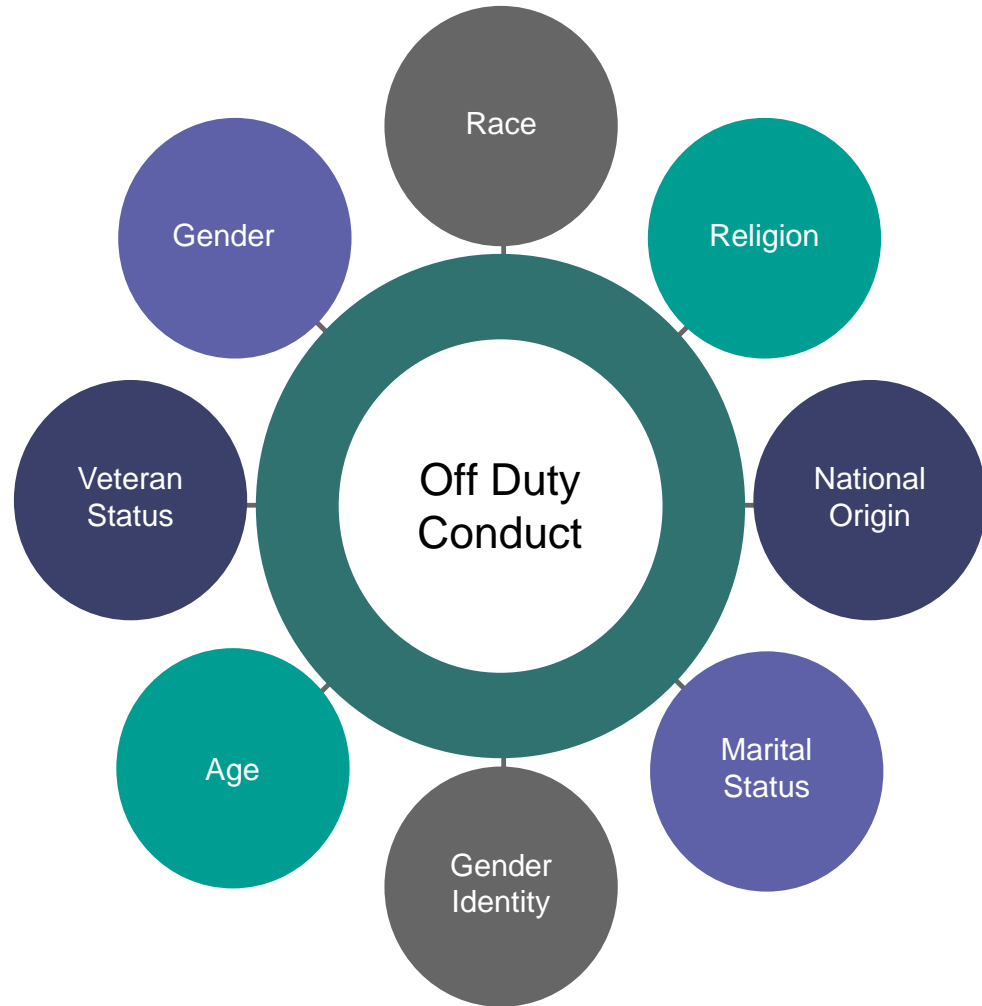
**Give Rise
to
Complaints**

**Effect on
Job Duties**

**Damage
Company
Reputation**

**Effect on
customers,
investors,
applicants**

Does the Political Expression Implicate a Protected Classification?



Does The Political Expression Violate a Company Policy?



- Anti-discrimination policy
- Anti-harassment policy
- Respect for others policy
- Diversity & inclusion policy

Duty to Investigate



- If Company is on notice of potential report of discrimination, harassment or retaliation, it may have a duty to investigate and take prompt corrective action
- Gather relevant facts
- Don't make assumptions
- Get complainant's account
- Due process for accused
- Reasonably thorough
- Zero tolerance for retaliation

Practical Considerations

- What is our company culture?
- How much political expression can, or do we want to, police?
- How do we stay reasonably consistent?
- What boundaries can we enforce?



SCAN ME

CLE: NEW PROCESS

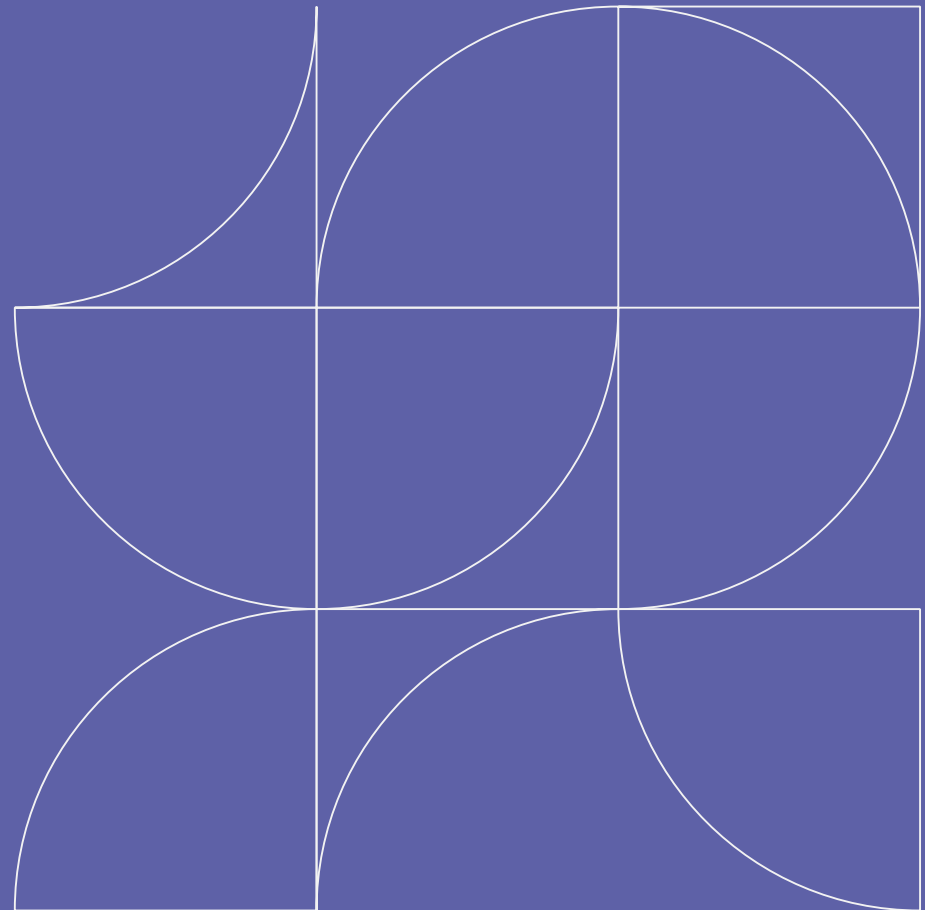
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Beyond the United States: International Approaches



Constitutional Protections

Constitutional Protections More Broadly Applied

- Can apply in the workplace
- Often include freedom of expression, freedom of association, right to organize
- Balance against workplace rights – to be free from discrimination and harassment
- Balance against company business interests
- Additional sources of protection - EU Human Rights Charter
 - Specifically includes right to private life

Discrimination Protections

Scope can be broad

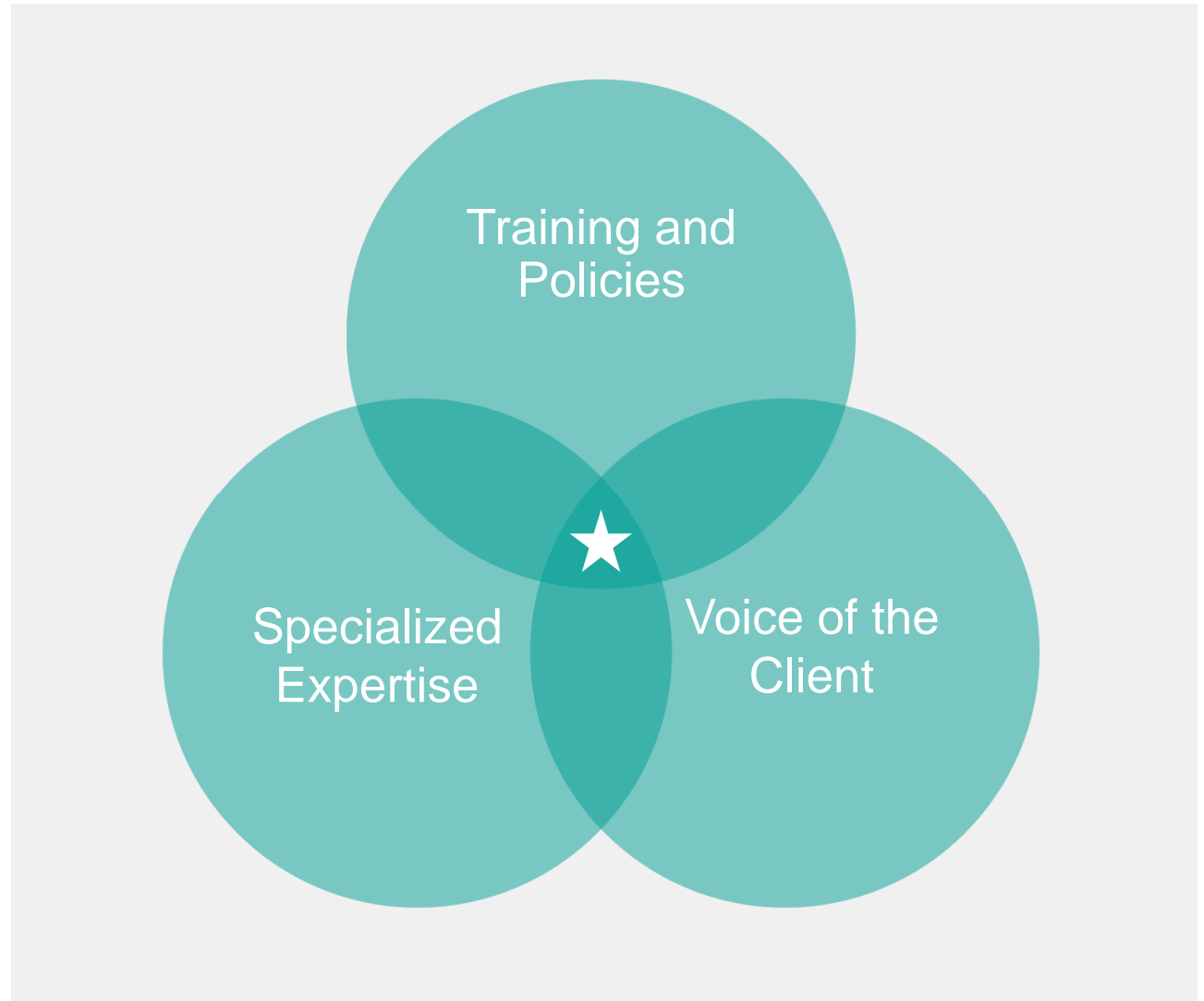
- Inclusive of beliefs and affiliations
- Protections against bullying – not linked to discrimination
- Discrimination protections overlap
 - Union affiliation and political association
 - Religion and party
- Cultural considerations

“Private” vs “Work” Spheres

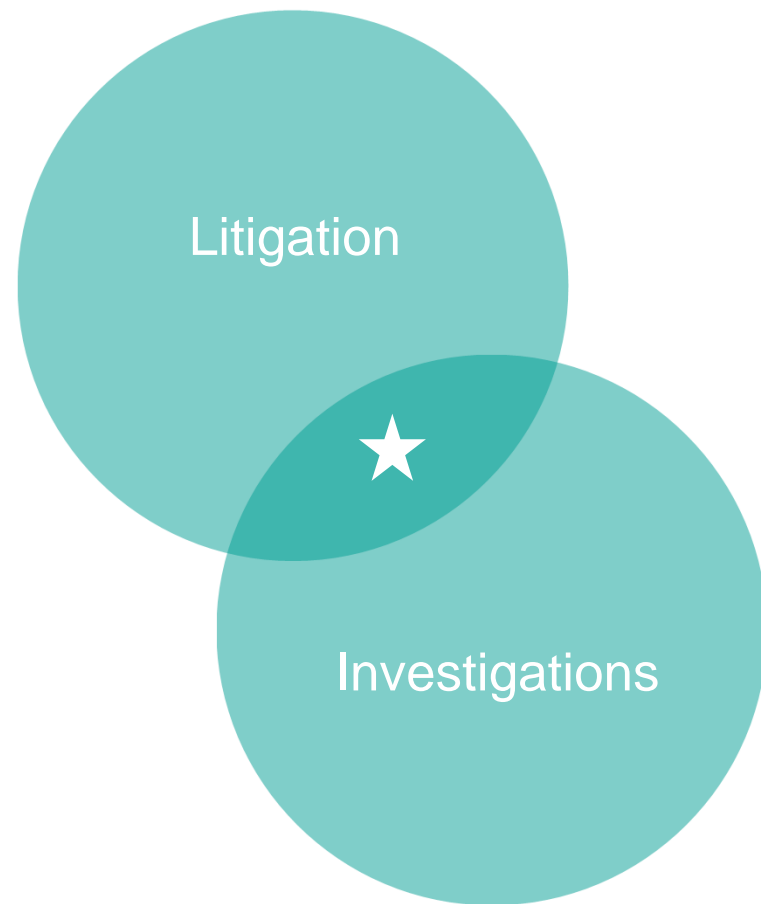
Privacy Protections

- Recognition of right to privacy
 - Impact on monitoring
- Recognition of right to private life – limitations on regulating off duty conduct
- Threshold of showing impact to business is higher

**Reach out if you
need help --
Counseling**



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need help**



**thank
you**

contact information

For more information, please contact

Marjorie Culver

email: mculver@seyfarth.com

Dawn Solowey

email: dsolowey@seyfarth.com

Sam Schwartz-Fenwick

email: sschwartz-fenwick@seyfarth.com