

PUBLICATION

Employee Rights and Free Speech: Does the NFL's National Anthem Policy Violate the First Amendment?

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On May 23, 2018, the National Football League (NFL) implemented a policy that requires all players and team personnel who are present on the sideline for the national anthem to "stand and show respect for the flag." The new policy is in response to players kneeling during the pre-game playing of the anthem to protest police brutality against minorities. Aside from the propriety of the NFL's policy, which has been the subject of heated debate, the prominence of instances of police brutality in the news has led many to ask whether the players have a free speech right to protest on what amounts to a political issue of great national importance.

The answer to that question is found in the First Amendment itself, which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . ." The phrase "Congress shall make no law" is a far cry from "the NFL shall implement no policy," and it is this key phrase that dictates that the First Amendment applies to public employers but not private ones like the NFL. Indeed, this principle was succinctly explained by former Supreme Court Justice Oliver Wendell Holmes Jr. when he wrote that "[an employee] may have a constitutional right to talk politics, but he has no constitutional right to be [employed]." So while there is a healthy debate surrounding whether the NFL's national anthem policy represents sound business judgment, there is no question that it does not violate the First Amendment.

Private employers should keep in mind, however, that the ability to restrict speech is not unlimited. Employers should, for example, be mindful of applicable state laws, such as the Connecticut statute providing liability for "[a]ny employer who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution" Similarly, certain federal and state laws protect whistleblowers, and terminating an employee because he or she makes a protected complaint or report under one of these laws would constitute retaliation. Another important example is the National Labor Relations Act, which precludes employers from retaliating against employees who engage in protected, concerted activity, such as workers attempting to unionize their workforce.

So what is the key takeaway for employers? The First Amendment does not apply to private employers, but that does not mean that they are free to restrict speech in any manner they see fit. There are a host of federal and state laws that operate to protect employee speech under certain circumstances. If you are considering implementing a policy or otherwise taking action that restricts employee speech, you should contact the Baker Donelson attorney with whom you regularly work before proceeding.