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ACLU OF RI POSITION: AMEND

TESTIMONY ON 24-H 7106,
RELATING TO LABOR RELATIONS ACT
February 1, 2024

As an organization that deeply values freedom of speech, the ACLU of Rhode Island is very sympathetic to the goals of this bill, which would create a broad statutory right to free speech and the free exercise of religion for employees in the private sector. However, its breadth raises independent First Amendment concerns of its own by failing to fully recognize the concomitant constitutional free speech rights that private *employers* in the workplace retain against government interference. Just as importantly, it would unintentionally create conflict for both employers and employees trying to navigate important anti-discrimination laws. We instead urge adoption of a Sub A version of this bill, which is attached to our testimony and which seeks to promote the goal of the bill while also respecting the competing rights of employers and employees.

To give a few examples of how the breadth of the first section of the bill as introduced could raise troubling scenarios for both employees and employers:

- Consider an employee who espouses discriminatory views about LGBTQ individuals either inside or outside of the workplace. It might not interfere at all with the employee's job performance or the relationship between that employee and their employer. But it could very well impact the work performance of other employees. In some instances, an employer who did not take adequate steps to disassociate from such views could find themselves facing a "hostile work environment" lawsuit from the affected employees for tolerating the expression of that viewpoint. But taking action against the offending employee could have the employer run afoul of this bill, placing them between the figurative rock and a hard place.[1] Similarly, an employer would likely be barred from restricting an employee from extensive proselytizing in the workplace in the absence of evidence of "substantial interference" with the employee's job performance, no matter how uncomfortable it might make other employees.

[1] These concerns are not hypothetical. The Connecticut law has generated a cottage industry of litigation. In a case decided last year, for example, a federal court denied an employer's motion to dismiss an action brought by a conservative Christian woman who was terminated after she posted a controversial meme on her personal Facebook page which other employees had objected to on the grounds that it was offensive to transgender individuals, Native Americans, and others. *Mumma v. Pathway Vet All., LLC*, 2023 WL 34666 (D. Conn. Jan. 4, 2023).

- To give another example, consider the employer of a three-person business who is a recent victim of gun violence and who faces a lawsuit for terminating a strident gun rights advocate who regularly posts about this viewpoint. The employer could be forced to spend time, money and energy to prove in court that this speech activity "substantially interfered" with their relationship with the employee. While government employers must tolerate a certain level of tension and discord in respecting the free speech rights of its employees, it becomes much more problematic when imposed on employers in the private sector.

We consider the second part of the bill, a so-called "captive audience" ban that would generally bar employers from disciplining employees for refusing to attend an employer-sponsored meeting or to listen or view an employer's communications with opinions on religious or political matters, much more appropriate. We are aware of the heavy-handed tactics some employers use to dissuade employees from joining a union, including forcing them to listen to lengthy and multiple anti-union screeds. We believe a legislative attempt to address that problem is appropriate in light of the important statutory rights that employees have to organize and join unions. Similarly, protecting an employer's harangues on religious matters at mandatory meetings likely conflicts with anti-discrimination laws and can be legitimately restricted by legislation.

Our proposed Sub A language attempts to address the more constitutionally problematic aspects of the bill by narrowing its focus to "captive audience" situations on political and religious topics that employers simply should not have the power to coerce their employees to listen to. We believe the Sub A strikes a balance that protects the free speech rights of both employers and employees.

Thank you for your time and attention to our views.

2024 -- H 7106
PROPOSED SUB A

AN ACT
RELATING TO LABOR AND LABOR RELATIONS -- EMPLOYEE FREE SPEECH

It is enacted by the General Assembly as follows:

SECTION 1. Title 28 of the General Laws entitled “Labor and Labor Relations” is hereby amended by adding thereto the following chapter:

CHAPTER 6.15

Employee Free Speech in the Workplace

28-6.15-1. Employee rights of free speech in the workplace.

(a) As used in this section:

(1) "Political matters" means matters relating to elections for political office, political parties, proposals to change legislation or regulations unrelated to the employer’s business or business activities, and a decision whether to join or support any political party or political, civic, community, fraternal or labor organization; and

(2) "Religious matters" means matters relating to religious affiliation and practice and the decision whether to join or support any religious organization or association.

(b) Except as provided in subsections (c) and (d) of this section, an employer or the employer's agent, representative or designee may not discharge, discipline or otherwise penalize or threaten to discharge, discipline or otherwise penalize or take any adverse employment action against an employee because of the employee's refusal to:

(1) Attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters; or

(2) Listen to speech or view communications, including electronic communications, from the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters

(c) Nothing in this section shall prohibit:

(1) An employer or its agent, representative or designee from communicating to its employees any information that the employer is required by law to communicate, but only to the extent of such legal requirement;

(2) An employer or its agent, representative or designee from communicating to its employees any information that is necessary for such employees to perform their job duties;

(3) An institution of higher education, or any agent, representative or designee of such institution, from meeting with or participating in any communications with its employees that are part of coursework, any symposia or an academic program at such institution;

(4) Casual conversations between employees or between an employee and an agent, representative or designee of an employer, provided participation in such conversations is not required; or

(5) A requirement limited to the employer's managerial and supervisory employees.

(d) The provisions of this section shall not apply to a religious corporation, entity, association, educational institution or society that is exempt from the requirements of Title VII of the Civil Rights Act of 1964 pursuant to 42 USC 2000e-1(a) with respect to speech on religious matters to employees who perform work connected with the activities undertaken by such religious corporation, entity, association, educational institution or society.

(e) In a civil action to enforce this section, the court may award a prevailing employee all appropriate relief, including injunctive relief, reinstatement to the employee's former position or an equivalent position, back pay and reestablishment of any employee benefits, including seniority, to which the employee would otherwise have been eligible if the violation had not occurred, and damages. The court shall also award a prevailing employee reasonable attorney's fees and costs.

SECTION 2. This act shall take effect upon passage.