



Employee Activism and Its Impact as Laws and Politics Rapidly Evolve

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Today's Agenda

- What is “Employee Activism,” and how did we get here?
- Exploring employer responses to “Employee Activism”
- Old and new risks implicated by “Employee Activism”
- Strategic considerations for responding to risks and finding your way through these at-times turbulent seas
- Questions welcome AT ANY TIME

Your Standard Lawyerly Disclaimer

- Little about “Employee Activism” is hard and fast — not like other types of labor and employment law compliance areas
- Rapidly evolving concept in a rapidly evolving world in the midst of a political sea change
 - And this time, the vote maybe (?) seems a little more clear
- Today’s presentation is not meant to be a “do this, don’t do that” discussion
 - “Think about this, think about that”
 - Understand where your organization fits on a spectrum and where it maybe should go (or not go)

What is Employee Activism?

- No uniform definition across industries
 - For today, we will consider the definition to be employees engaged in coordinated action to address a societal problem connected to the company they work for
 - Realize the one uncoordinated individual can also create risks
- Similarly, no standard response for how to address employee activism
- More often than not, employee activism involves some sort of **concerted effort** to influence specific societal events or company policies
 - Can take many forms, including public protests, social media campaigns, information exchanged between employees, etc.
- Ultimately employee activism is focused on one goal: “CHANGE”

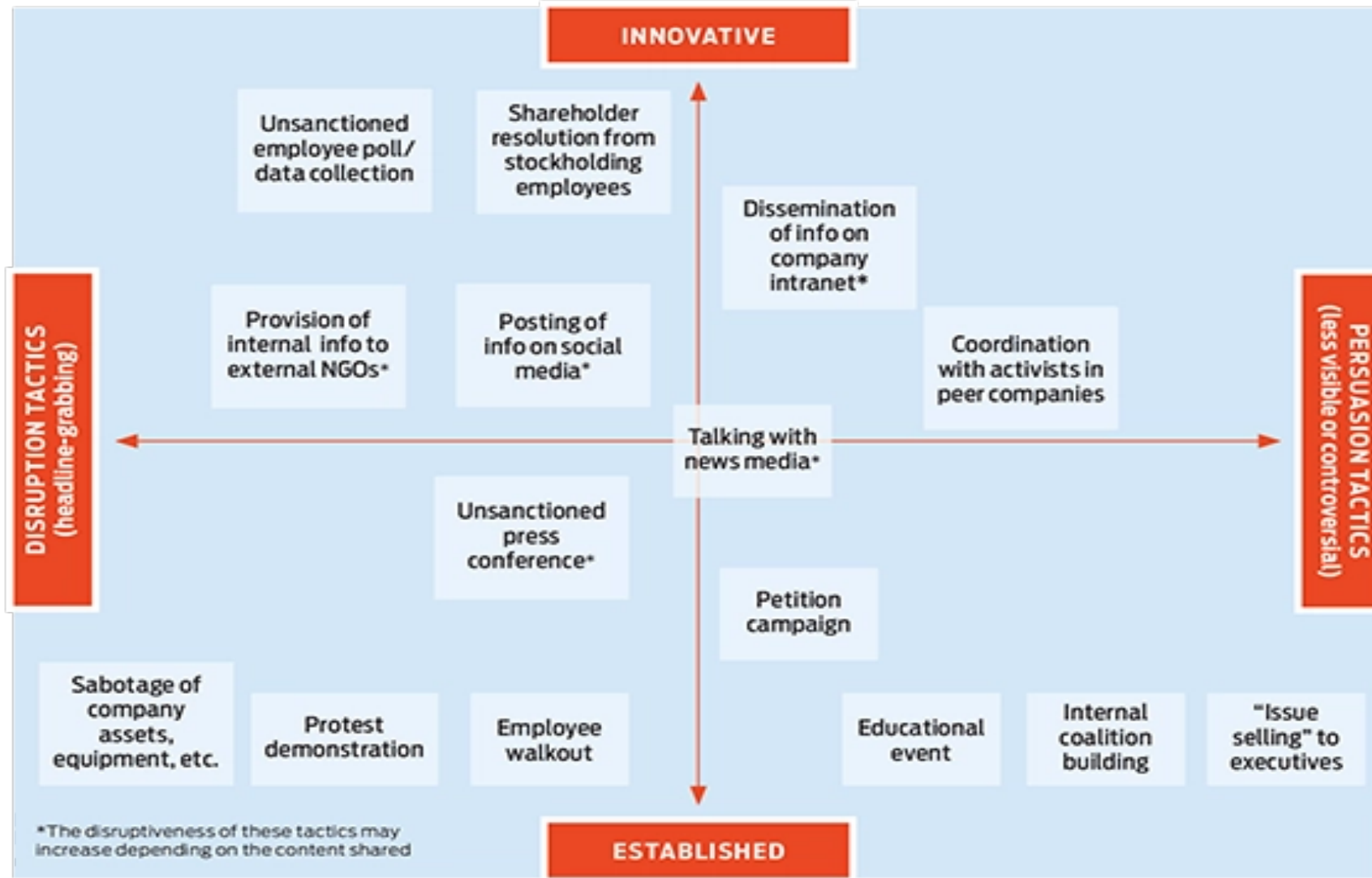
What is Employee Activism? (cont.)

- Do not need studies (thought they do exist) to convince most of you that employee activism exploded right around the onset of the COVID-19 pandemic, though its origins can trace back at least to the 1970s
 - The “Me Too” movement was also a significant evolutionary moment
- Activism can be entirely within an organization, or employees may work with third-party organizations whose sole mission is to support certain societal causes
- Employee activism is typically considered distinct from what unions would typically advocate for, namely terms and conditions of employment
 - But it does not mean that unions will not get involved

What is Employee Activism? (cont.)

Employee Activist Tactics

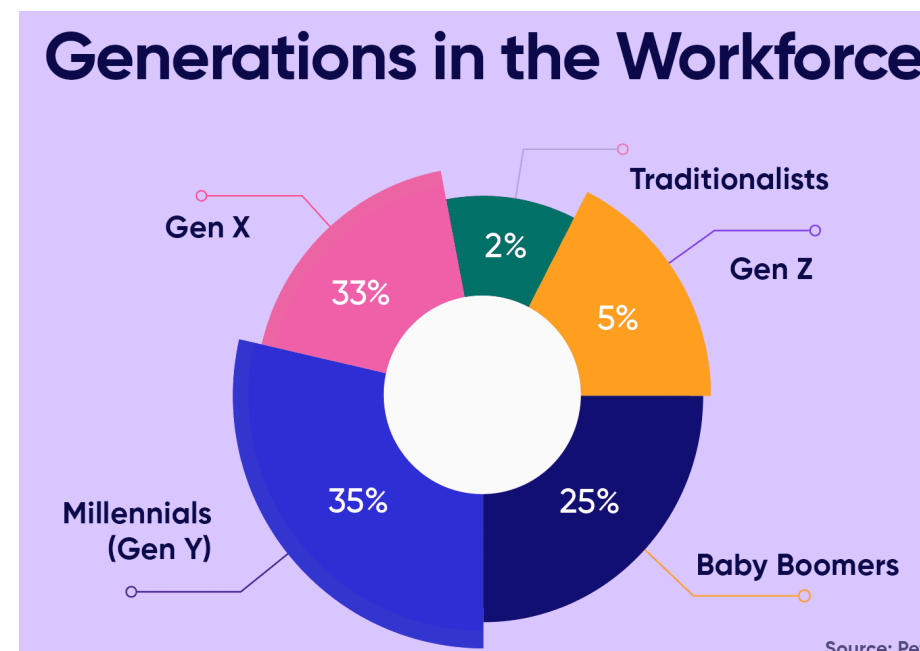
Employees use a range of tactics to gain attention and influence decision makers in their organizations.



Source: Stanford Social Innovation Review, *Business Disruption From the Inside Out*, Forrest Briscoe & Abhinav Gupta, Winter 2021.

Generational Factors Contributing to Employee Activism

- Traditionalists/The Silent Generation (Born 1928–1945)
 - Dependable, loyal, straightforward
- Baby Boomers (Born 1946–1964)
 - Resistant to change, workaholic, team-oriented
- Gen X (Born 1965–1980)
 - Flexible, independent, skeptical
- Millennials (Born 1981–1996)
 - Competitive, achievement-oriented, open-minded
- Gen Z (Born 1997–2012)
 - Progressive, advocate for change, highest rates of mental illness



Trends Leading to Increased Employee Activism

- Rising Workforce Expectations
 - Relate to generational differences, latest generations place a greater importance on finding meaning and purpose in their work
- Empowerment as a Management Principle
 - Increasingly taught concept that empowering employees leads to better results
- Urgent Societal Challenges
 - Social justice, climate change, international conflicts, etc.
- New Technologies
 - Easier than it has ever been for people to collaborate and disseminate messages, especially with social media

Source: Stanford Social Innovation Review, *Business Disruption From the Inside Out*, Forrest Briscoe & Abhinav Gupta, Winter 2021.

How Employees Get Active Depend on Who You Are and Who They Are

- Nature of how work is performed impacts what employees do
 - Think about whether your operations are primarily manual labor- or manufacturing-based versus computer- and service-based
 - But even manufacturing companies have customer service and sales work
- The demographics of your workforce impact how employees are active
 - Degree of education, degree of skill developed, geography, time in the workforce, other generational factors as mentioned all impact employee behavior
- Don't make the mistake that you have less employee activism simply because you don't employ many Gen Z, college-educated individuals

Pressure on Organizations To Take a Position on Current Events

- [Less than half of U.S. adults](#) (38%) believe businesses should take a public stance on current events.
- BUT Generation Z & cancel culture
 - In a [2022 survey](#), 28% of Gen Z consumers stated they had already attempted to cancel a brand for its marketing campaign or advertising.
- Examples:
 - McDonald's facing a boycott regarding its alleged support of Israel in the Gaza war; McDonald's reported that its global sales declined for the first time since 2020
 - In April 2023, Bud Light faced a boycott after partnering with a transgender influencer. The boycott is reported to have cost Anheuser-Busch InBev (AB InBev), Bud Light's parent company, more than \$1 billion in revenue.

Pressure on Organizations To Take a Position on Current Events (cont.)

- If you believe the news reporting, current political climate largely affected by response to war in Gaza and Biden Administration response
 - Significant groups of younger, “progressive” voters stayed home in key states
 - How will those same voters react to the business climate with this new Administration?
- How does “DEI” play into all this at a social and political level, particularly in light of the recent Executive Orders?
 - What are legislatures and the administration going to do?
 - What are companies going to do?

Recent Developments from the New Administration that May Give Rise to Activism

- On his first days in office, President Trump issued dozens of Executive Orders
- DEI and DEIA
 - Ending Illegal Discrimination and Restoring Merit-Based Opportunity: Eliminates DEI programs in the federal government, prevents federal contractors and subcontractors from considering race, color, sex, sexual orientation, religion etc. in their offices.
 - Initial Rescissions of Harmful Executive Orders and Actions: Rescinds numerous Biden era Executive Orders, states that laws and practices should only refer to sex assigned at birth, rather than gender
 - There are still state and federal laws prohibiting discrimination
 - *Bostock v. Clayton County* still prevents discrimination based on sexual orientation and gender identity.

Recent Developments from the New Administration that May Give Rise to Activism (cont.)

- Immigration
 - Protecting the American People Against Invasion: revocation of multiple executive orders issued by the Biden Administration, which were aimed at initiating immigration reform
 - Directs the Attorney General, in coordination with the Secretaries of State and Homeland Security, to prioritize the prosecution of criminal offenses related to illegal immigration
 - Securing Our Borders: directs the Secretaries of Defense and Homeland Security to prioritize the construction of physical barriers and the deployment of personnel at the southern border.

Recent Developments from the New Administration that May Give Rise to Activism (cont.)

- Immigration (cont.)
 - Protecting the Meaning and Value of American Citizenship: ends birthright citizenship, a right guaranteed by the 14th Amendment, for individuals:
 - (1) born to mothers who were in the U.S. illegally during their birth and whose fathers were not U.S. citizens or lawful permanent residents during their birth; or
 - (2) whose mother's presence during their birth was lawful, but temporary, and whose fathers were not U.S. citizens or lawful permanent residents at the time of their birth.
 - Also plans for ICE to increase scrutiny of employers' compliance with Form I-9, Employment Eligibility Verification by initiating a higher number of I-9 inspections

Common Mistakes Responding to Employee Activism

- One researcher, Morgan Reitz at the Hult Ashridge Education Program, categorized common response mistakes as follows:
 - Denying there is a problem
 - Believing the organization can remain entirely apolitical
 - Rushing to make quick fixes
- Ultimately the biggest challenge may be choosing which battles to fight

Types of Leadership Responses

- **Nonexistent (“Activism? What activism?”)**: Leaders are oblivious to activist voices or so distanced that they are unaware of these voices and thus do nothing.
- **Suppression (“Expel it before it spreads”)**: Leaders attempt to quash voices either through directives that certain subjects are not up for discussion or by making it clear (explicitly or implicitly) that, if employees speak up, they will face negative consequences.
- **Facadism (“Let’s just say the right thing”)**: Leaders respond with positive words but take no meaningful action, either because they never really intend to do anything or because they become distracted by the next hot topic.

Types of Leadership Responses (cont.)

- **Defensive engagement (“Do what the lawyers say we have to”):** Leaders agree to engage on an issue but only up to the point of legal requirement — they do the minimum.
- **Dialogic engagement (“Let’s sit down, listen, and learn”):** Leaders understand that they don’t know enough about certain issues, are curious to learn more, and take steps to share decision-making — marking a critical shift in the power dynamic.
- **Stimulating activism (“Let’s be the activist!”):** Leaders identify themselves and their organization as activists. They publicly stand for a particular cause, and they recruit, reward, and retain employee activists.

Source: Harvard Business Review, *A Leader’s Guide to Navigating Employee Activism*, Megan Reitz and John Higgins, February 2024.

Employee Activism Response Suggestions

- Whether the organization decides to enact “change” or not, simply making employees feel that they are heard can go a long way
 - Can be accomplished a number of ways, either through conversations with supervisors, larger town halls, or general messaging that the organization understands there are certain ongoing issues and positions
- Human Resources can play an important role in relaying employees’ concerns to company management

Employee Activism Response Suggestions (cont.)

- Consider adopting an employee activism policy that describes how the organization will generally approach activism
 - Should contain language that gives permission or prohibits speaking publicly against the interests of the employer
 - Should make clear that the policy is not intended to infringe on any protected rights under such statutes as the NLRA
- Consistency in responses is key to prevent any potential discrimination claims

Some of the Many Risk Areas

- Assessing organizational identity and assessing potential changes
- Technological tools
- Social media and employee communication channels
- Workplace relationships across diverse* working groups and diverse locations
- More obvious and less obvious labor relations considerations
- Leadership development and succession planning

Organizational Identity and Change

- Any significant potential organizational cultural shift is itself a risk area
- Exploring your organizational identity?
 - Surveillance?
 - Protected activity/retaliation?
 - Notice of legal obligations?
- Making changes to identity?
 - Talent and leadership exodus?
 - Employee misunderstanding/resistance?

Technological Tools

- The rise of Slack-like tools
 - Significant business advantages, but also a legal landmine field
 - What notice problems does they present for employers?
 - And then what surveillance issues might that open up (think AI)?
 - What document retention issues do they create?
 - What level of professionalism expectations does it change?
- The more communication becomes easy and multi-faceted, the more communication can increase as a source of risk

Employee Social Media Surveillance

- Have a clear and **consistently enforced** policy
 - Inconsistent enforcement as evidence for some discrimination claims
- Beware of NLRB policy on non-disparagement and protected concerted activity, **even if you are a non-union employer.**
- Common law defenses: Reasonable Expectation of Privacy
- Federal Law: Electronic Communications Privacy Act, Stored Communications Act (SCA): Prohibits the interception, disclosure, or use of electronic communications of another. Exceptions:
 - Consent – employee voluntarily shares
 - Public Posts – Instagram, Facebook, X Blogs

Ideological conflicts in the Workplace: Disagreement vs. Discrimination

- Few states have political beliefs as a protected class in employment. BUT ideological conflicts can lead to discrimination claims on other protected categories in all states.
- Examples:
 - 2024 Election Issues:
 - Border enforcement: National Origin Discrimination
 - Police Brutality: Race Discrimination
 - LGBTQ+ rights: Sexual Orientation and Gender Identity Discrimination
 - Israel/Palestine:
 - Religious Discrimination
 - Vaccine Mandates:
 - Religious & Disability Discrimination
 - OSHA concerns

Labor Relations: A New Era?

- “Employee Activism” is classic “concerted activity” — so... is it protected?
 - And, even if it’s not necessarily protected for now, will it be?
 - State law is growing consideration as well (think “captive audience” bans and pay transparency laws, for example)
- Many classic National Labor Relations Act/National Labor Relations Board considerations but in new frontiers where we might not have immediately thought about labor relations implications
 - Slack is a perfect example
 - But think about productivity tools in Zoom/Teams, etc.

More Issues to Consider with a Unionized Workforce

- Avoiding pitfalls in employee relations against the backdrop of the unionization trend (and where it might turn):
 - Recent changes at the NLRB
 - NLRA: Unionization in atypical industries
 - NLRA liability in non-unionized workplaces
 - Union avoidance tactics vs. unfair labor practices
 - Public relations considerations
 - Generational differences: Gen Z priorities in the workplace

What About Leadership Development?

- More and more, promoting people because they are good at the job they are doing is a misguided strategy
 - People skills, thoughtfulness, and the ability to see something larger than “my operation” become critical
 - As an organization, are you prepared to invest in that (do you even have the resources to invest in that)?
- How do you think about that at senior succession planning levels versus leadership development levels?

Are You Confounded Yet????

- It's ok — we are too!
 - But our job is to help **you** problem solve and manage risk — so, we have to embrace these problems
 - **And so do you**
- One-size-fits-all advice is bad advice, even if it's the proverbial “right” advice
 - Trying to look at yourself in a “we have to do it better” is the “right” thinking but a misguided application of it that good thinking

So, What Are “Good” Employers Doing?

- Step one — there’s no such thing as a “good” employer...
 - Just like we are as humans, as organizations we are all on our own journeys with constant forks in the road
- Decide what level of organizational response is most appropriate based on the realities you can and cannot control
 - Being a “head in the sand” employer is not necessarily the wrong anchor, if that is your present and future reality
 - Acknowledge that these are not the kinds of decisions that drop to the bottom line in any measurable fashion (so, being a thought-leader and change-agent can be a very hard sell)

So, What Are “Good” Employers Doing?

- Step two — take an honest account of where you are at, where you want to go, and whether you can get there
 - Step 2.5 — accept that there is no perfect risk management solution
- Rightly or wrongly, “good” employers are:
 - Making an honest self-assessment of what they want to do *and can do* in the face of things they (largely) do not control
 - Where they are currently at against those goalposts
 - Making a plan for how they will pursue change and marshalling the resources to make it while planning for the risks they can see but cannot perfectly eliminate

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