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ACLU OF RI POSITION: OPPOSE

TESTIMONY ON 23-H 5516,
RELATING TO LABOR RELATIONS ACT
March 1, 2023

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 and statutory coverage of all employees raise independent free speech concerns of their own by failing to fully recognize the concomitant constitutional free speech rights that private *employers* in the workplace retain against government interference. It will also unintentionally create conflict for employers trying to navigate important anti-discrimination laws.

The bill, which is based on a Connecticut statute, has two distinct provisions. The first is a broad guarantee to private employees of free speech and other constitutional "rights guaranteed by the first amendment" as long as the exercise of those rights "does not substantially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer." While broad speech protection is appropriate in the government setting where employers are constitutionally obligated to respect the First Amendment rights of their employees, its wholesale transfer to the private sector is problematic and would sometimes put private employers – and other employees – in very difficult positions.

Regarding the first section of the bill, 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

[1] These concerns are not hypothetical. The Connecticut law has generated a cottage industry of litigation. In a case decided just two months ago, 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).

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.

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. Further, by statutorily suppressing the employer's own First Amendment rights from government interference, the bill raises potentially significant constitutional challenges.

The second provision, a so-called "captive audience" ban, 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. We understand that the particular context in which this problem has arisen is an important one, and one that deserves attention. Specifically, 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. A legislative attempt to address that problem might very well be appropriate in light of the important statutory rights that employees have to organize and join unions. Similarly, an employer's harangues on religious matters at mandatory meetings likely conflicts with anti-discrimination laws and could, in our view, be legitimately restricted by legislation. But this bill casts a much wider net on what employers can tell their employees and therefore, like the first provision, raises significant First Amendment concerns in terms of an employer's own free speech rights. It is worth noting that this provision of the Connecticut law is currently the subject of a court challenge.[2] We would respectfully suggest it makes sense for this committee to await the outcome of that litigation before moving forward with this effort.

In sum, the ACLU is extremely mindful, and supportive in principle, of the idea of granting private employees free speech rights in the workplace. However, we also believe a more careful balance needs to be struck before legislation can be enacted without impinging on the constitutional rights that private employers and other employees also have to be free from governmental action that suppresses their own rights in the workplace.

Thank you for your time and attention to our views.

[2] Chamber of Commerce of the United States of America v. Bartolomeo, C.A. No. 3:22-cv-1373 (D.Conn.) (filed 11/1/22).