"But the First Amendment Will Save Me": Key Communication Laws and Policies That Your Engineering Students Get Wrong

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Abstract

This paper describes a technical writing course in Mississippi State University's core engineering curriculum that exposes students to nine key communication regulations that greatly impact workplace communication today. The employment-at-will doctrine, Equal Employment Opportunity Commission, Fair Chance Act, salary-history-ban movement, Fair Credit Reporting Act, First Amendment, National Labor Relations Board, Whistleblower Protection Act, and No FEAR Act are relevant, evolving, and oftentimes controversial laws or regulatory agencies that can shift course dramatically with changing political administrations. Engineering educators should encourage learner-centered student engagement with these topics by framing the lesson(s) in terms of how these topics relate to finding and maintaining employment.

Keywords

Workplace-communication laws, employment, regulatory agencies

Introduction

The ethical considerations related to written and spoken communication, and the legal ramifications of how employers and employees communicate, are important topics for students in all majors to understand. Yet too many disciplines dismiss communication ethics and communications law as pertaining only to communication, liberal-arts, or business majors.[1,2] Science, technology, engineering, and mathematics (STEM) students may receive helpful guidance on crafting a cover letter and résumé or successfully navigating an interview, but who helps them understand—when they put their signatures on their offer letters—what communication rights they take with them into their prospective workplaces or leave at the door?

This paper summarizes nine notable regulations and regulatory agencies related to workplace communication that engineering students should be aware of before they enter the workplace but often have never heard of, based on the author's five years of experience teaching technical writing to junior and senior engineering students in the Mississippi State University James Worth Bagley College of Engineering. Anecdotal evidence from this course suggests that many engineering students have practically no exposure to these topics before entering the course—often within one to two semesters of graduation—and lack understanding of how these regulations affect them.

It should be noted that by no means are the definitions and suggested class exercises herein exhaustive or legally comprehensive, and the intention is rather to introduce these concepts to students so they may take the initiative to learn more outside of the lesson's scope. Neither educators nor students should ever consider workplace communications law static.

Especially in the fast-paced, ever-changing communicative landscape that today's Generation Z students inhabit, the main objective is not to teach students what these laws entail at this snapshot in time—although that familiarity is helpful—but to make students realize these laws exist at all and, therefore, shape their futures.

Finding Employment

Teaching students about technical communication in the workplace assumes that those students will eventually enter the workplace, which—despite the unfilled STEM jobs languishing in the U.S.[3]—is never guaranteed. The job-search process is a perfect opportunity to introduce students to legal concepts and agencies that govern how employers communicate with prospective employees, including the employment-at-will doctrine, Equal Employment Opportunity Commission, Fair Chance Act, salary-history-ban movement, and Fair Credit Reporting Act.

Employment-at-Will Doctrine and the Equal Employment Opportunity Commission (EEOC)

Every state except Montana[4] presumes that employment is "at will," generally meaning that employees can be terminated by their employers at any time and for any reason, except for illegal reasons (e.g., discrimination against members of federally protected classes). The at-will doctrine likewise gives employees the right to leave their employers at any time and for any reason, and debate exists about whether at-will doctrine favors the employer or the employee.[5]

Exceptions to the at-will employment doctrine include three major categories dependent on each state—public policy, implied contract, and implied covenant of good faith and fair dealing[6]:

a) *Public policy* – All except eight states have laws preventing employers from terminating an employee for reasons such as refusing to engage in or alerting authorities to violations of federal or state law or exercising rights provided under federal or state law.
b) *Implied contract* – Thirty-seven states also have laws against terminating an employee with a promise or guarantee of employment for a set period.
c) *Implied covenant of good faith and fair dealing* – Eleven states have laws supporting the good faith and fair dealing exception to at-will employment. In those states, this law prohibits employers from terminating employees without just cause.

The EEOC enforces workplace reporting guidelines and federal laws that prohibit workplace discrimination due to race, color, religion, national origin, sex, pregnancy- or childbirth-related conditions, age (for those 40 years old or older), disability status, or genetic predisposition.[7] Students are often surprised to learn that employers should refrain from asking interview questions related to the federally protected classes, such as whether an applicant is married or has children, what year he or she graduated from high school, and what extracurricular organizations he or she participated in, as these questions frequently relate to federally protected classes.

The abundant anecdotes that students volunteer related to illegal questions they have encountered while interviewing for internship or co-op opportunities help students collectively grasp that they must recognize illegal workplace communication when—rather than if—they experience it firsthand, as well as avoid asking these types of questions when they themselves become the interviewers. (Yale University's Office of Career Strategy is one of many helpful resources about

navigating illegal interview questions.[8]) Figure 1 provides an in-class discussion-based activity that helps reinforce these concepts.

Class Activity: "May I Fire an Ostrich Farmer?"

Students devise lists of reasons a person may be terminated—which often run the gamut from the extremely plausible to the wildly imaginative—and volunteer their reasons to their classmates, who must apply at-will doctrine and its exceptions to issue a ruling in each case. This activity's name arose when a student asked the class whether he could legally terminate an employee based solely on the fact that the employee wanted to start an ostrich sanctuary and the employer had a personal aversion to ostriches. Students must carefully consider if the termination may be related to an individual's inclusion in a federally protected class. For example, a company's policy that it will fire any employee who wears blue eye shadow to work may adversely impact female employees, while federal law protects an employee from being discriminated against in the workplace due to gender.

Fig. 1. Employment-at-will and EEOC in-class discussion activity

Fair Chance Act and Salary-History-Ban Movement

When starting the job-search process, college students are often enthused to learn about the 2019 Fair Chance to Compete for Jobs Act and salary-history-ban movements. Illegal activities such as incurring speeding tickets and driving under the influence may be unearthed in a background check during the job hunt.[9] The Fair Chance Act is pending federal legislation rooted in the "ban-the-box" movement, a growing campaign to eliminate questions about a federal job candidate's arrest or criminal record on an employment application. If implemented, the Fair Chance Act makes it illegal for a federal agency or contractor to consider an applicant's criminal background during initial screening.[10]

Several states and municipalities have also adopted laws that prohibit employers from requesting salary histories of prospective employees and from penalizing those who refuse to disclose their previous salaries.[11] The rationale is that one's past salary should not play a role in determining future salary, nor should salary histories be used (albeit perhaps illegally under the EEOC) to justify pay differences among employees with comparable job responsibilities. Figure 2 provides a simple salary-based class exercise.

Class Activity 2: Know Your Worth

While some students may receive advice not to broach the topics of salaries and benefits during an initial interview, they may not realize that they should come to the interview prepared to have these discussions. In this activity, students write the key skills and abilities they believe that employers in their target job-search area seek, as well as what they consider to be a reasonable salary for a market. Then they visit https://www.bls.gov/ooh/ *and select the A-Z index feature to search for careers alphabetically and to view the "Summary," "How to Become One," "Pay," "Job Outlook," "Similar Occupations," and "State & Area Data" fields. Alternatively, they may* visit https://www.onetonline.org/ *and type their profession or key words directly into the search box, paying special attention to "Wage & Employment Trends" and "Job Openings on the Web." They then discuss their search results.*

Fig. 2. Identifying a target salary in-class exercise

Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) of 1970 ensures that job applicants have the right to know about and challenge information uncovered by the employer during an applicant's background check, which often includes a candidate's criminal record, credit history, and—increasingly—social media presence.[12] The FCRA also tasks employers with performing due diligence to ensure that information uncovered about a candidate (e.g., social media accounts) in fact relates to that exact applicant and not, for example, to another person with a similar name.[13]

When students learn of the FCRA's existence, two questions unfailingly arise: Has any student in the class NOT "Googled" him or herself lately (or ever)? When (not if) a potential employer inputs a student's name in a search engine and searches for him or her on social media, what will the employer find? An alarming number of students report not having done these steps in several years, and sometimes never. Figure 3 is an enlightening exercise about social-media footprints.

Class Activity 3: The Downside of Social Media

The two aforementioned questions often result in vigorous class discussions in which students Google themselves and (optionally) share the results, then explore and offer personal-branding tips, with the latter discussion usually leaving students to consider why they should be careful about what they post on social media and how they may use social media for positive personal branding.

Fig. 3. Social-media-based personal branding in-class discussion activity

Maintaining Employment

Once students successfully navigate the job search, they should also understand that their behavior can sabotage their long-term success at their new jobs. A particularly memorable way to enforce this point with college students is via social media.

Employers want and expect their employees to have social media skills, as companies can leverage their employees' social-media savvy to expand companies' online footprints.[14] According to the Society for Human Resource Management (SHRM), "Today, Millennials account for 36 percent of the U.S. workforce, according to the Bureau of Labor Statistics, and they will account for 75 percent of the global workforce by 2025. Given that this group of employees has grown up actively communicating via myriad social media sites and devices, the use of social media is a workplace trend with staying power for the foreseeable future."[15] This statement likely is even more apt to today's Generation Z. However, students may assume that what they post in their own time is none of their employers' business or that they cannot be fired merely for posting something their employers do not like. Some believe that if their social media posts are legal, then their employers cannot take disciplinary measures.

On the contrary, not only does the at-will doctrine apply in most states, usually with no good-faith exception, but savvy employers have social-media policies in their employee handbooks. SHRM recommends that employers[16]

> [s]tate that employees can be held accountable for content they post on the Internet—whether in the office, at home or on their own time—particularly if something they post or share violates other company

policies [e.g., posting during company time, posting without receiving the appropriate approvals, and acting as a poor brand ambassador].

Students should understand, however, that employers cannot create a blanket policy that prohibits employees from discussing workplace conditions on social media, which may violate the First Amendment and National Labor Relations Act (NLRA). Additionally, the revelation of unlawful or illegal activities may be covered by the Whistleblower Protection or No FEAR Acts.

The First Amendment and National Labor Relations Board (NLRB)

The First Amendment and NLRA (enforced by the NLRB) permit employees to engage in protected concerted activity, such as discussing workplace-related issues and petitioning for improved workplace conditions, whether or not the employees are members of an organized union.[17] Certain groups—e.g., agricultural workers, home-based care providers (such as nannies), supervisors or managers, and public-sector personnel—are excepted from NLRB jurisdiction.[17]

The five-member NLRB governing board is appointed by the U.S. President and approved by the Senate. It currently has 26 regional offices that hear and publish details of cases involving allegations of employers violating employees' rights to engage in protected concerted activity.[18] The NLRB periodically compiles and publishes its rulings in cases specifically pertaining to disciplinary actions taken by employers based on employees' social-media activity.[19] Figure 4 demonstrates how students may role play these cases in class.

Class Activity 4: Nobody Expects the National Labor Relations Board!
This activity is named after the famous Monty Python skit "Nobody Expects the Spanish Inquisition!" In this activity, students act out a real case heard by the National Labor Relations Board, which publishes actual complaints filed against employers by employees who believe they have been wrongfully terminated under the provisions of protected concerted activity.[19] *Working as partners or small groups, students review a case and then act it out for the class audience, and then the audience members vote on whether they believe the termination was legal or illegal. The actors then reveal the NLRB's or judge's final decision in each case and the rationale for the legal judgment. Appendix A provides a sample case.*

Fig. 4. Social-media-fueled NLRB role-playing activity

The Whistleblower Protection and No FEAR Acts

The Whistleblower Protection Act of 1989 protects public-sector employees who seek to expose illegal activities or wrongdoing within their agencies.[20] Covered federal employees have the First Amendment right to take their allegations directly to the press, with notable exceptions[21], including those employees who handle confidential information or work in intelligence agencies, such as the FBI, CIA, and NSA, which are exempted from the Act and whose employees may file complaints only through four congressionally-approved channels. The Notification of Federal Employee Antidiscrimination and Retaliation (No FEAR) Act of 2002 prohibits federal agencies from illegally discriminating or retaliating against employees, including those who should be shielded under EEOC or whistleblower protection guidelines, and requires agencies to report alleged violations to the public.[22]

Intelligence and military personnel who share confidential information related to whistleblowing allegations outside of the approved channels may be charged under the Espionage Act of 1917, which criminalizes actions that benefit enemies of the U.S. or impede U.S. military operations.[23] High-profile individuals (sometimes called "leakers") who have been charged under the Espionage Act include Edward Snowden, Chelsea Manning, and Reality Winner.

Students may have no understanding of the laws governing whistleblowing or "leaking," nor of the ethical or legal implications behind these terms or what distinguishes these terms. Students may be unfamiliar with the term "whistleblowing" itself, as in the case of the author's student who mistakenly thought that the media used the term "whistleblower" in reference to a whistleblower complaint filed against the Trump administration in 2019 as a code name for a specific individual, similarly to how the whistleblower in the Watergate scandal was nicknamed "Deep Throat." Educators must not assume students understand whistleblowing or its consequences. Figure 5 is a simple in-class research activity related to whistleblowing and its ramifications.

Class Activity 5: Whistle While You Work

The Washington Post*'s succinct video "Leaking vs Whistleblowing"*[24] *offers a detailed, clear explanation of the First Amendment protections for whistleblowing. (The video may raise questions among students about media bias in its focus on the Trump administration, and it is noteworthy that the Obama administration was intolerant of "leakers," including Snowden and Manning.) In this activity, students break into teams to research and report back about the Snowden, Manning, and Winner cases, including their ages at the time each allegation was first made public, their ages today, what each allegation entailed, the charges filed against them, and the ramifications of those charges, sometimes including lengthy prison sentences.*

Fig. 5. Whistleblowing research activity

Conclusion

Regarding the class activities described herein to reinforce students' introductory exposure to communications law, educators may find value in surveying students at the beginning and end of the course to gauge understanding and retention of the material. In the author's technical writing course, students' grasp of communication law is not an evaluated course outcome, but rather these activities are designed to situate students' understanding of best practices regarding professional writing and speaking in a larger societal context. The author's course evaluations show generally positive reception, with selected responses including that "the conversation about careers was a great use of time in class," "1st class where lectures were interesting and useful in the real world," and "[the class] definitely helped me learn about [the] professional world."

Ultimately, engineering educators should expose their students not only to the technical and technological know-how their professions require, but also to the social framework that informs communication in the workplace. This understanding—and the separate but also crucial conversations about the communication ethics behind effective interpersonal communication—have perhaps never been more relevant than today, when U.S. students are leaving what may feel like academic safe havens and entering a highly politicized and polarized society, which seems increasingly reflected in the modern workplace.

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Appendix A: Sample NLRB Case: The Waiters – Student Actors: Douglas, James, & John
(This case is closely adapted from the NLRB's 2011 case "Employees' Facebook Postings About Tax Withholding Practices Were Protected Concerted Activity"[19])

Douglas and James are waiters at a sports-themed restaurant. Their employee handbook has a policy that they will not engage in "inappropriate discussions" via the Internet or blogging. One day, both Douglas and James learn that, due to their employer's odd tax withholding practices (or lack thereof), they each now owe the IRS a large amount of taxes. They request to speak to the restaurant's business manager, John, who tells them they will talk about the issue during the next staff meeting. Other employees start to complain about their taxes. That night, a former coworker of Douglas and James who recently quit her job posts on Facebook that she also owes a considerable amount of taxes. On Facebook, the former employee calls John a profane term and says he is incompetent at tax paperwork. Douglas posts a reply agreeing with the characterization of John, and James "likes" both of their comments on Facebook.

The next day, John fires Douglas and James for being disloyal to the company and violating the handbook policy about inappropriate discussions. He also says Douglas and James, along with the former employee who originally called John a profanity on Facebook, will be hearing from the corporate legal team about their "disparaging remarks."

***Student Actors:** Bring this scenario to life, let the audience vote about whether this termination decision was lawful, and then explain the NLRB's actual ruling to the class.*

***NLRB Board Ruling**[19]: The terminations were ruled unlawful because the employees' behavior qualified as protected concerted activity protected by the First Amendment and NLRA; in this case, the employees were found to be exercising their federally protected right to engage in "criticism of the Employer's labor policies, treatment of employees, and terms and conditions of employment" and expressing their opinions of John rather than making false or malicious statements. A more comprehensive explanation of the NRLB's decision in this case is available in the NLRB's 2011 social-media-based report by its general counsel.*[19]