

JacksonLewis

Race, Politics, and Religion in the Workplace

Hot Topics as Employees Return to Work

Katessa M. Charles, Esq. and Michael D. Thomas, Esq.

Jackson Lewis P.C. | Los Angeles

April 20, 2021



AGENDA

- Responding to Political and Social Events
- First Amendment Protected Speech
- Responding to Social Media
- Responding to Off Duty Conduct

Intertwining Social Activism with the Workplace



Your Corporate Statement

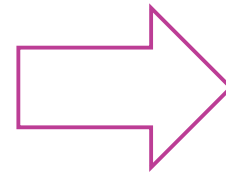
How To Minimize Exposure/Public Criticism

- Should be from CEO.
- Identify primary audience (e.g., employees, customers) and focus on them
- Be precise about what the company condemns and what it supports
- Recognize potential adverse impact on the group at issue, while acknowledging impact on other people of color or minority groups - and keep all employees or consumers in mind
- State support for employees and specify the available resources (e.g., Employee Assistance Program, paid leave)
- Promise at least some action. Statements without action are generating criticism.

Footer in sentence case

Responding to Public Allegations of Racism/Sexism

What should I do when the firm receives emails and/or Facebook postings where **former** employees call out the company for a lack of diversity and/or for alleged racist comments by current employees?



Responding to Public Allegations of Racism/Sexism

- Be aware of multiple audiences (e.g., the employee, all employees, clients, Social Media, judge/jury).
- Keep responses High Road.
- Thank former employee for speaking up; acknowledge it may have been difficult.
- Remind former employee of company's diversity and inclusion policies and actions, as well as anti-discrimination policies.
- Provide “sketch” of additional actions to which the company commits.
- Possibly, invite input from this former and other employees.
- Consider an audit of the claim.

Responding to Allegations of Racism/Sexism - Current Employees

How do I address old complaints that **current** employees are bringing back up, or bringing up for the first time, feeling emboldened by recent events?



- Thank employee for speaking up; acknowledge it may have been difficult to re-assert a prior complaint.
- Be mindful of retaliation (real or perceived)
- Do not automatically dismiss an untimely complaint
 - Involve a current policy
 - Involve a current supervisor
- Critically review the initial complaint and the response, then determine if a new investigation needs to happen.
- If necessary, investigate new complaint.
 - Interview complainant, witnesses
 - Require specificity
 - Take appropriate action
- Consider a third party investigator.

Watercooler vs. First Amendment

Am I required to allow my employees to express their political or social justice beliefs in the workplace or can I restrict such speech?



Do private-sector employees have free speech rights to make anti-Semitic, racist, or other inflammatory statements

- Unless you are a government employer, your employees generally do NOT have a First Amendment right to say whatever they want in the workplace.
- The First Amendment right to free speech is particular to government actors, not private employers.
- An employer may enforce its anti-harassment, non-discrimination, and social media policies and practices



- Consider tensions between business interests and expressions
- Consider other risks
 - National Labor Relations Act
 - California Whistleblower Statutes
 - Public policy i.e. Discrimination Claims

Protected Concerted Activity

- **What is Protected?**
 - Section 7 of the National Labor Relations Act provides: “Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to ***engage in other concerted activities*** for the purpose of collective bargaining or other mutual aid or protection.”
 - Essentially, the law protects employees who work together to try to improve their pay and other working conditions.
 - Speech protected by public policy and whistle blower laws
- **What is Not Protected?**
 - Reckless or malicious behavior, such as sabotaging equipment, spreading lies about a product, or revealing trade secrets.
 - Harassing, hate speech, and threats of violence.
 - Personal gripes.

Does California law allow employers to fire or retaliate against employees for political activity?

- But two sections of the California Labor Code (sections 1101 and 1102) specify that private employers may not do any of the following:
 - Make, adopt or enforce any rule or policy forbidding or preventing employees from engaging or participating in politics or running for public office;
 - Make, adopt or enforce any rule or policy that tends to control or direct the political activities or affiliations of employees; or
 - Use the threat of job loss to coerce, influence or attempt to coerce or influence employees to take or refrain from taking any particular course of political activity.
- It follows from these laws against employer political suppression or coercion that employers may not fire or retaliate against employees for their political activity or beliefs.

SB 238-Diversity of Thought Act

- Senate Bill 238 – Diversity of Thought Act - Introduced by California Senator Melissa Melendez
- Attempts to make political affiliation a protected trait under the FEHA;
- Prohibits discrimination in employment, housing and other areas based on political affiliation and opinion;
- On April 6, the Senate amended bill to expand political affiliation protection to the Unruh Civil Rights Act and Section 1102 of the Labor Code.
- Well intentioned but a headache for employers.

Social Justice Speech: T-Shirts, Masks, and Buttons

- Employers can enforce dress code or uniform policies.
- Employer can enforce anti-harassment, non-discrimination, and social media policies and practices.
- “Customer-focused” branding v. consistency with social justice messaging
- NLRA Considerations



Managing Off Duty Conduct

- What if I learn my employee engaged in actions that I did not like or agree with while off the clock. Can I take actions based on employee off duty conduct?



Footer in sentence case



Jackson Lewis P.C.

Can employers discharge employees who participate in protests?

- **It Depends:**
- **What is Protected?**
 - Engaging in peaceful, lawful political protest.
- **What is Not Protected?**
 - Illegal conduct i.e. illegally storming the Capital.
 - *Leah Snyder v. Alight Solutions LLC, 3:20-cv-04439 (Central District- California).*
 - Protests or behavior during a protest that involves threats and expressions of racist violence or harassment are not political speech.

Legal Constraints on Employee Discipline: Privacy

- California employers must be aware of state privacy laws that protect workers when they engage in certain lawful off-duty activities.
- The California Constitution identifies certain inalienable rights for citizens, including “pursuing and obtaining safety, happiness and privacy.” Additionally, employees in the state are covered by various statutes that protect their privacy.
 - Employee activism and social engagement may take the form of protests, rallies, demonstrations or social media.
 - The California Labor Code includes a number of protections for workers. For instance, **Section 96(k)** protects workers who have faced adverse employment actions for engaging in lawful activities during nonworking hours.
 - An employer could arguably violate these laws by terminating an employee after discovering from social media that, for example, the employee was at a lawful protest the night before.

Disciplinary Action & Social Media

- **Can Employers Base Disciplinary Action or Termination Decisions on a social media?**
 - Typically, yes, if it does not violate discrimination or other employment laws, **BUT**, employers should do so cautiously.
 - Article 1, Section 1 of the California Constitution (privacy) and Labor Code Section 980 (social media protections) provide employees some privacy protections.
 - Some questions to ask, for example:
 - How was the information obtained (public v. private post)?
 - Was the social media search performed consistently?
 - Is the source reputable?
 - Are there NLRA issues?
 - During or outside of working hours?
 - How is the workplace impacted?



Examples of Social Media Discussions

- **Protected:**

- A group of employees who sets up their own web page to complain about:
 - Company actions
 - Supervisor's attitude or performance
 - Shared concerns about terms and conditions of employment
- Employees participating in email discussions are also protected so long as the discussions relate to employment.

- **Not Protected:**

- Employee derogatory comments about protected groups;
- Employees may not harass other employees through, emails, skype or platforms for video or chat communication.
- Employee posts considered a threat of violence.
- An employee's own individual gripe.

What Can Employers Do to Limit Employees' Comments about the Company

- Employees do not have an unfettered right to publish or say anything.
- Remarks that are violent, libelous or just plain false are not protected whether they are about the company or its managers.
- Employers may still discipline or discharge employees who do such things regardless of the forum for the comments.
 - Expressions of individual gripes
 - An employee acting **solely** on his/her behalf or posting comments on an individual Facebook page
 - Comments sent to non-employees

Poll Everywhere: Text ACC420 to 22333.



Text voting



Can you terminate this employee?

- You are a private sector employer.
- You've just learned an employee posted an offensive message on their personal social media account regarding Black Lives Matter. An outraged public quickly learns where the employee works. Internal and external stakeholders (i.e. employees and customers) demand the employee's dismissal.
- Your CEO (if not the offending party) issues a statement calling the comments "incompatible with the values of the organization." You conclude the only way to prevent further reputational and business damage is to fire the employee.
- Can you fire this employee?

Can you lawfully fire the employee?

No, he is expressing a political opinion and his speech is protected by the First Amendment.

Yes, his speech could be considered a form of harassment based on race.

Maybe, it depends if someone was offended.

None of the above

Can you terminate this employee?

- Current employee David Johnson took to Facebook to complain about his employer “International Happy Pancakes.” He wrote “@HappyPancakes, nothing is free, only cheap #labor. Crew members make only \$9.50hr how much are pancakes really?”
- Can you terminate this employee?

Can you terminate this employee?

No, he is complaining about wages, hours and conditions of employment which is protected by the NLRA.

Yes, he is making a disparaging comment that could impact the employer's business.

It depends whether his statement is true or not

None of the above

Can you terminate this employee?

A group of employees in California come to work wearing apparel in support of BLM. Your company has a policy prohibiting political apparel but has previously permitted apparel supporting sports teams and LGBTQ issues.

- **Poll: Can you require these employees to remove their BLM apparel and discipline them if they refuse to do so?**



Can you require these employees remove their BLM apparel and discipline them if they decline?



Yes, BLM is not a form of political speech
and is not protected.

No, BLM apparel is a form of complaining of
racial discrimination which is protected.

It depends on whether BLM implicates some
form of public policy and whether the dress
code is neutral and consistently enforced.

None of the above

Can you discipline this employee?

Your employee Joe isn't hesitant to express his opinion that immigrants from Latin America shouldn't be allowed to enter the United States or "take American jobs." At times, he uses offensive terms for immigrants when discussing his views. He has posted those views on social media and has also directed comments towards Latino co-workers.

Poll: Can you take action against Joe for his comments on social media and at work?

Can you discipline this employee?

No, his speech is a protected political opinion.

Yes, his speech violates anti-harassment policies and respect in the workplace policies.

It depends whether Joe is Latin American or not.

None of the above

Can you stop this behavior?

Employee Jaclyn brought a large stack of gun rights advocacy flyers to the office. She has handed them out to co-workers and posted one on the break room bulletin board.

Poll: Can you prohibit Jaclyn from distributing or posting the flyers?

Can you prohibit Jaclyn from distributing or posting the flyers?

No, nobody has complained and she is expressing a protected interpretation of the constitution.

Yes, her opinion likely offends some employees and her speech is not protected.

It depends whether the employer has an anti-solicitation policy and has applied it consistently regardless of content.

None of the above

Can the employer promote a legislation or candidate?

Your company is advocating for a particular ballot initiative to pass. In the weeks leading up to the election, you post “Vote Yes for Prop 22” posters on company letterhead throughout the workplace. Managers are required to train employees on the benefits of Prop 22, urging them to vote for it to ensure that the company remains in business.

Poll: Is it okay for the company to promote its interest in the passage of Prop 22 among its employees?

Can an employer promote legislation or candidate?

No, the employer cannot use money from customers to fund a law or candidate.

A

Yes, employees are free to choose how to vote.

B

Yes, but the employer should be mindful that California prohibits retaliation based on political opinion.

C

None of the above

D

JacksonLewis

Thank **you.**