

Allen Matkins

Employee Expression in the Workplace

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Public v. Private Employers

Public Employers

- Federal, state, county, city and other government entities and agencies are covered by federal and state constitutions.
- Quasi government entities (entities which receive federal, state, county or city funding) may also be included
- Employees of these government entities enjoy protections of the federal and state constitutions.

Private Employers

- All other privately owned and publicly traded entities.
- Employees of these entities and organizations are not covered by federal and state constitutions as their employers are private actors.
- Protected speech in the workplace depends on a variety of factors.

Why is this a concern in today's workplace?

- In July 2020, several current/former Whole Foods employees filed a lawsuit and a complaint with the National Labor Relations Board against Whole Foods alleging that they were disciplined and fired for wearing Black Lives Matter face masks.
- Whole Foods has a policy that prohibits employees from wearing apparel with visible slogans, messages, or advertising that aren't company related.
- The employees allege that Whole Foods did not previously enforce this dress code policy for other causes, including sport teams names and logos, political messages, and support for LGBTQ issues.



SO, DO WHOLE FOODS
EMPLOYEES HAVE A RIGHT TO
FREE SPEECH OR EXPRESSION IN
THE WORKPLACE?

- Employees do not have an unfettered right to free speech in the workplace.
- The First Amendment (under the U.S. and California Constitutions) ensures that citizens' rights to speech, among others, shall not be encroached upon by state action.
- Private employers are not state actors and, as such, may curb employee speech and expression, with certain limitations.

Can a company restrict all employee speech and expression?

- No. While employees do not generally have a right to free speech in the workplace, there are certain limitations at the federal and state level, which prohibit employer action in certain circumstances.



What federal laws protect employee expression?

- Section 7 of the National Labor Relations Act
 - Section 7 guarantees employees “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.”
 - Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.
 - What type of speech and conduct does Section 7 of the NLRA cover?

NLRA, Section 7 Protects:

- Employee discussion about **wages**;
- Employee discussion about **working conditions**;
- Employee discussion about **unionization or other collective bargaining activity**.

NLRA, Section 8 Protects:

- Any adverse employment action based upon engaging in protected speech. This includes demotion, termination, failure to promote, or other actions that adversely affect employment.
- What is the point of this law?
 - It allows employees to speak freely, without fear of adverse employment action, about their working conditions.

What makes someone a whistleblower under federal law?

- A whistleblower is a person who learns of unethical or even illegal activity within their company or organization, and reports or refuses to participate in it.
- Any retaliatory conduct for engaging in whistleblower activity is actionable (demotion, harassment, termination, etc.)
- Penalties can include reinstatement, back wages, attorneys' fees, and penalties.

What other federal laws protect speech/expression?

Federal Whistleblower Laws

Affordable Care Act

Asbestos Hazard Emergency Response Act (AHERA)

Clean Air Act (CAA)

Comprehensive Environmental Response,
Compensation and Liability Act (CERCLA)

Consumer Financial Protection Act of 2010 (CFPA)

Consumer Product Safety Improvement Act (CPSIA)

Energy Reorganization Act (ERA)

FDA Food Safety Modernization Act (FSMA), Section
402

Federal Railroad Safety Act (FRSA)

Federal Water Pollution Control Act (FWPCA)

International Safe Container Act (ISCA)

Moving Ahead for Progress in the 21st Century Act (MAP-21)

National Transit Systems Security Act (NTSSA)

Occupational Safety and Health Act (OSH Act), Section 11(c)

Pipeline Safety Improvement Act (PSIA)

Safe Drinking Water Act (SDWA)

Sarbanes-Oxley Act (SOX)

Seaman's Protection Act (SPA)

Solid Waste Disposal Act (SWDA)

Surface Transportation Assistance Act (STAA)

Toxic Substances Control Act (TSCA)

Wendell H. Ford Aviation Investment and Reform Act for the
21st Century (AIR21)

What expression is protected under California law?

Political Activity

- Employers cannot hinder employees from engaging in “political activity” or running for public office (California Labor Code section 1101)
- What is political activity?
 - “the term ‘political activity’ connotes the espousal of a candidate or cause, and some degree of action to promote the acceptance thereof by other persons.”
 - Interpreted to include running for office and action to promote support for a candidate or cause.
 - Causes are not necessarily partisan (*i.e.*, racial and social justice movements)

What expression is protected under California law?

Political Activity (continued)

- However, company policies that are enacted for “wholly apolitical reasons” that, when enforced, infringe upon an employee’s freedom of expression, are not violations of Section 1101.
- Potential “wholly apolitical reasons” may include:
 - Employee productivity
 - Maintaining a professional working environment (e.g., free from any wall décor)
 - Maintaining consistent uniforms among employees

What expression is protected under California law?

Political Activity (continued)

- Labor Code section 1102 states:
 - "[n]o employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."
 - However, note that the Fair Employment and Housing Act ("FEHA") does not specifically reference political affiliation or political activity as a protected category for purposes of harassment or discrimination.

What expression is protected under California law?

Fair Employment and Housing Act (FEHA)

- Reporting harassment to management;
- Engaging the employer in the interactive process for a reasonable accommodation;
- Acting as a whistleblower on improper conduct in the workplace.

California Equal Pay Act

- Discussion of wages in the workplace.

What expression is protected under California law?

Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act

- Expanded definition of race to include “traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.”
- “‘Protective Hairstyles’ includes, but is not limited to, such hairstyles as braids, locks, and twists.”

What gender and sexual orientation expression is protected under California and/or federal law?

California Law (FEHA)

- Prohibits employment discrimination based on:
 - Sexual orientation
 - Gender identity
 - Gender expression
 - An individual who is transitioning, has transitioned, or is perceived to be transitioning

Federal Law (Title VII)

- Includes protections for gay and transgender employees.
(See *Bostock v. Clayton County, Georgia* (June 15, 2020) 140 S.Ct. 1731.)

How do you navigate the landscape?

Treat each situation as it presents itself.

- Who made the statement(s) being considered?
- What was the substance of the statement?
- Does the statement relate to one of the protected categories of speech in the workplace?
- To whom was the statement made?



Work with Human Resources and counsel to determine whether action can/should be taken.

Social media in the workplace

- If employees have limited rights to expression and speech in the workplace, how does the use of social media come into play both inside and outside of the workplace?



Social media use by employees depends on the location and the substance of the expression

In the Workplace

- Employers can control the access and manner in which social media is used.
- Social media policies regularly restrict the use of social media during work hours on work computers.
- Policies also extend to use of social media on handheld devices, but if those devices are owned by the employee, blocking social media sites can be difficult

Outside the Workplace

- Employers have far less influence in restricting social media use.

Social media in the workplace

- A 2017 survey showed that 54% of businesses do not allow employees to visit social networking sites for any reason while at work. (Only 10% allow for unlimited personal use)
- The study revealed that 70% of people who use the internet at work engaged in “WILB” or workplace internet leisure browsing.
- Those who engage in WILB are 9% more productive than those who don’t.



Social media in the workplace

- In the workplace, the employer can restrict access to and use of social media on work hardware.
- Companies can and do restrict online access to social media sites using software to prohibit company computers from accessing sites.
- Companies can also use social media policies to restrict the use of social media unless postings (on company Twitter/Facebook) accounts are reviewed and pre-approved by PR, Media, HR and Legal groups.

Social media in the workplace

- If employees in California have some limited rights to expression, how can employers institute social media policies that curb some of the processes to express those views?
- Employers can restrict the platforms used for social media because the restriction on use of social media at work is for a uniform, apolitical purpose such as **productivity**.



Social media outside the workplace

- An employer's ability to control employee social media outside the workplace is significantly curbed by Labor Code section 96(k).
- Under this section, the Labor Commissioner is empowered to pursue claims for loss of wages for employees who are terminated, demoted or suspended for "lawful conduct occurring during nonworking hours away from the employer's premises."
- What does this section mean?

Social Media outside the workplace

- Labor Code section 96(k) means that, generally, so long as employees are engaging in otherwise lawful conduct outside the workplace, an employer cannot restrict that conduct.
- Exceptions do exist:
 - If the employer has reason to believe that the person's activities have a direct impact on the company's reputation or financial well-being, employers can take action for legitimate business reasons.
 - If employee conduct outside the workplace otherwise violates company policies, the company can take corrective action. (E.g., Facebook posts).

Employee Expression in the workplace roundup

- In California, employees do not have an unfettered right to speech and expression. However, exceptions exist and we should be mindful of them.
- Those rights to expression and speech carry over into corporate social media policies, and companies should review all policies to ensure that those policies are up to date with California and federal law.

Examples of Free Speech Issues in the Workplace?

- Juli Briskman worked for a government contractor in Virginia.
- In 2017, while riding her bicycle, President Trump's motorcade passed by her and she used an inappropriate hand gesture as he drove by. A photographer captured the incident.
- Briskman reported what she did to her employer, as she had received phone calls from press outlets and wanted to give the company a heads up of what might happen. She was terminated for violating the company's social media policy.

Examples of Free Speech in the Workplace?

- Briskman sued, claiming she had a First Amendment right to free speech, and that her termination was wrongful.
- The Company argued that there is no free speech protection in Virginia's labor laws.
- What happened? The parties settled out of court and Briskman ran for and won a seat on the county board of supervisors.
- What would have happened if she were in California?

Examples of Free Speech in the Workplace?

- James Damore was a software engineer at Google who prepared and submitted an internal memorandum stating, among other things, that biological differences between men and women “may explain why we don’t see equal representation of women in tech and leadership.”
- Damore was separated from his position with Google. He then sued, alleging, among others, that Google singled out “conservatives” and punished political and social viewpoints that it did not agree with. Damore then “agreed” to arbitration of his claims.
- Is Damore’s memo protected “political speech”?

Summing Up

- The current political and social landscape leaves a lot of questions and potential potholes. In the midst of a presidential election, and with workplaces potentially re-opening soon, there may be increased dialogue in the workplace about politics, governmental responses to COVID-19, the politicization of issues around COVID-19, social justice movements, and the like, as people have largely been at home, and have had more limited interactions with co-workers.
- As we move forward, when you are approached with an issue regarding speech or activity in the workplace, carefully evaluate what happened, where it happened, what company policies in place might address the activity, and how the activity was addressed before.
- Human Resources personnel should consult with counsel on these issues.

Parting Thoughts

- What do your company's policies say about expression the workplace?
- What do your company's policies say about social media and use in and out of the workplace?
- Does your company have a policy regarding external presentations made by employees?
- Does your company have a policy about banners, posters, art or the posting of other materials on office or cubicle walls?
- Does your company have a policy about slogans, insignia, or messaging visible on employees (shirts, masks, tattoos, hats/caps, etc.)?

QUESTIONS?

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