

Political Speech and Social Media in the Workplace

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What is Political Speech?

- Discussing government affairs, candidates for public office, and advocacy
 - It can range from mundane issues like amendments to building and safety codes to more polarized topics like abortion, immigration, gun control, etc.
- While the First Amendment provides citizens with protections against the government from infringing on most speech, there are also protections that apply to employees who engage in political activity
- However, not all speech or political activity is protected
 - Incitement of lawlessness or violence
 - Defamation

Today's Political Landscape is Becoming Increasingly Polarized and Even Violent

- Political parties have steadily become more polarized over decades, and the issues as well as sometimes incendiary language used by candidates are far more charged in the past several years.
- With the November 2026 mid-term elections quickly approaching, the political environment can seem like a powder keg, especially where, leading up to the 2024 election, there were multiple violent incidents targeting multiple political candidates.

Political Speech Often Occurs Online

- Many Americans engage in political speech online.
- Many Americans believe that social media is an important tool to reach political goals.

Employees and Employers Alike Have a Variety of Concerns About Political Speech in or Impacting the Workplace, Including:

- Potential breakdown in workplace relationships, which may lead to a decline in morale, performance or other workplace issues.
- Arguments or even violence due to differences of opinion, particularly over hot-button issues.
- Adverse employment actions, including termination, over political differences or for statements that may run afoul of labor and employment laws.
- Accusations that an employee was improperly pressured to vote in a way that aligned with an employer or supervisor's views.
- Lawsuits arising from political statements that might be inappropriate in the workplace.



Federal Legal Framework Protecting Political Speech

Key Regulations & Case Law

Overview of Key Statutes

There are few restrictions on private employers regulating employees' political speech in the workplace at the federal level as the First Amendment applies to government actors, not private actors.

However, political speech may be protected by the National Labor Relations Act (NLRA) to the extent that employees are engaged in concerted activity connected to the workplace.

There are certain limits on employees' political speech and, under Title VII or similar state laws, employers have a duty to stop speech that is discriminatory, harassing, retaliatory, or may otherwise violate the law.

The NLRA

Section 7 of the NLRA 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," as well as the right "to refrain from any or all such activities."

Section 8(a)(1) of the NLRA 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.

NLRB's Position

The National Labor Relations Board (NLRB) has concluded certain employee activities on social media are protected:

...federal law gives you the right to join together with coworkers to improve your lives at work - including joining together in cyberspace, such as on Facebook....

Using social media can be a form of protected concerted activity. **You have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media.** But just individually griping about some aspect of work is not "concerted activity": what you say must have some relation to group action, or seek to initiate, induce, or prepare for group action, or bring a group complaint to the attention of management. **Such activity is not protected if you say things about your employer that are egregiously offensive or knowingly and deliberately false, or if you publicly disparage your employer's products or services without relating your complaints to any labor controversy."**

Federal Protections Applied

- For example, an employee's posting of an email to co-workers that urges voting for a candidate who promises to raise the minimum wage and criticizes their employer's low wages is likely protected activity under the NLRA.

Caution:

Not All Types of Speech Are Protected

- Offensive, knowingly false, or disparaging statements may serve as a basis for defamation or business interference claims by employers or other employees.
- Although statements made in litigation related to an employment dispute are protected by litigation privilege, that privilege generally does not extend to extrajudicial statements that do not promote the goals of the litigation. See *Rothman v. Jackson*, 49 Cal.App.4th 1134, 1149 (1996) (“we hold that the litigation privilege should not be extended to ‘litigating in the press.’”).



State & D.C. Legal Framework Protecting Political Speech

Key Regulations & Case Law

California's Protections

- Labor Code § 1101 prohibits employers from preventing employees from participating in politics, including becoming candidates for office, or seeking to control or direct the political activities or affiliations of employees.
- Labor Code § 1102 prohibits employers from coercing or influencing employees, by threatening loss of employment, or preventing them from following or refraining from adopting or following political actions or activities.
- Labor Code § 1137 prohibits employers from requiring that employees attend meetings where the employer gives its opinions on religious or political matters, or penalizing employees for not attending.
- Employers should post the California Voting Rights poster in every break room and be aware that employees have the right to take time off to vote. See California Elections Code section 14001.

Connecticut Protections

- Section 31-51q of the Connecticut General Statutes prohibits an employer from subjecting or threatening to subject employees to discipline or discharge because they exercise rights guaranteed by the First Amendment of the U.S. Constitution or by Sections 3, 4, or 14 of the first article of the Connecticut Constitution, provided such activity does not substantially or materially interfere with their bona fide job performance or their working relationship with the employer.
- This does not apply to managerial and supervisory employees.

Illinois Protections

- Under §820 ILCS 40/9, employers cannot keep a record of an “employee’s associations, political activities, publications, communications, or nonemployment activities unless either:
 - The employee submits that information in writing
 - The employee gives their explicit, written consent when the employer keeps or gathers that information.”

Missouri Protections

- Missouri Revised Statute § 130.028 prohibits employers from discharging an employee based on his political beliefs or making contributions to a candidate a condition of employment.
- Under Missouri Revised Statute § 115.637, an employer may not “prevent an employee from engaging in political activities”, including accepting candidacy for nomination to, election to, or the holding of, political office, holding a position as a member of a political committee, soliciting or receiving funds for a political purpose, acting as chairman or participating in a political convention, among other things.
- Under Missouri Revised Statute § 67.145 a “political subdivision of the state” may not “prohibit any first responder from engaging in any political activity while off duty and not in uniform, being a candidate for elected or appointed public office, or holding such office unless such political activity or candidacy is otherwise prohibited by state or federal law.”

New York Protections

- Under New York Labor Law § 201-d(2)(a), employers are prohibited from discriminating against employees based on their legal “political activities” during nonwork hours, off employer premises, and without the use of an employer’s equipment or other property.
- “Political activities” means (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fundraising activities for the benefit of a candidate, political party or political advocacy group.
- *Espinoza v. CGJC Holdings LLC*, No. 23cv9133 (DLC), 2024 WL 3520662 (S.D.N.Y. Jul. 23, 2024) “recreational activity” vs. “political activity”

Texas Protections

- TX ELECTION § 276.001: makes it a felony to retaliate, through physical harm or threat or by threatening the voter with a loss or reduction of wages or loss of another employment benefit, against a voter for their vote or refusing to reveal how they voted
- TX ELECTION § 276.004: makes it a misdemeanor for an employer to refuse an employee time to vote on election day or penalizing them for voting
- TX ELECTION § 161.007: makes it a misdemeanor for employers to refuse to permit an employee to be absent from work to attend a precinct convention or serve as a political delegate, and cannot retaliate against employees who participate.

Washington, D.C. Protections

- The D.C. Human Rights Act prohibits employers from discriminating based on “political affiliation.” However, they may take action that is (1) justified by a business necessity and (2) not intended to be unlawful. D.C. Code Ann. § 2-1402.11; D.C. Code Ann. § 2-1401.03.
- Employers may not discriminate based on an employee's membership in a political party with unlawful goals, unless required by law.
- Employers may not require an employee to provide support for political parties or candidates or to contribute to fund-raising campaigns.



Limits and Duties Concerning Problematic “Political” Speech

Key Regulations & Case Law

Title VII of the Civil Rights Act of 1964

- Protects employees from discrimination based on
 - race,
 - color,
 - religion,
 - sex (including pregnancy, childbirth, related conditions, sexual orientation, and gender identity), and
 - national origin.
- Also protects employees from harassment or retaliation for complaints about discrimination.

Alabama Protections

- Alabama is vastly different from the states previously covered, in that there are no statutes directly protecting nonwork activities.
- While Alabama may not have specific applicable provisions to political speech/activities, federal statutes still provide protections to employees.
 - But, Title VII's protections do not protect all political views/commentary.
 - *Kiel v. Sheriff Anthony Lowery*, No. 1:24-CV-314-TFM, 2026 WL 1552253 (S.D. Ala. June 2, 2026).

California's Fair Employment and Housing Act of 1959

- Protects employees from discrimination, harassment, or retaliation at work based on protected characteristics, including:
 - race, color,
 - religion, creed,
 - national origin, ancestry,
 - physical disability, mental disability,
 - reproductive health decision-making,
 - medical condition,
 - genetic information,
 - marital status,
 - sex, gender,
 - gender identity, gender expression, sexual orientation,
 - age,
 - veteran or military status

Many Other State & Federal Laws Provide Additional Protections to Employees

- By way of example and not limitation:
 - The California CROWN Act prohibits race-based discrimination over hairstyles such as braids, locs, twists, or bantu knots.
 - FEHA was amended to provide certain protections to victims of domestic violence, sexual assault, stalking, crimes or threats of crimes that cause physical or mental injuries, and family members of those who are deceased as a result of a crime.
- Whenever faced with problematic statements, whether couched in political terms or not, employers should enforce preexisting policies against harassment, discrimination, and retaliation in the workplace whenever speech, political or otherwise, may also violate Title VII, FEHA, or other laws, and consult with experienced labor and employment attorneys.

Where “Political” Speech Violates Title VII, FEHA, and Other Laws, Employers Must Address It, and May Need to Discipline or Terminate Employees

- Employers have a duty to prevent discrimination, harassment, or retaliation in the workplace.
- Certain statements by politicians, political parties, or other groups, if repeated in the workplace, could lead to employment claims such as discrimination or harassment, or adverse employment actions for offending employees. For example:
 - referring to a woman as a “bimbo” or other degrading term could lead to sex discrimination claims,
 - discussing sexual acts or encouraging assault, which should not be dismissed as “locker room talk” at work, may lead to sexual harassment and discrimination claims,
 - calling Mexican immigrants “rapists” or stating that Haitian immigrants “eat pets,” may lead to race, ethnicity, national origin, or ancestry discrimination claims
 - referring to Black Lives Matter activists as “thugs” may lead to race discrimination claims, or
 - calling members of the LGBTQ+ community “groomers” could lead to discrimination claims based on sexual orientation, gender expression, or gender identity, as well as defamation claims.

Although Social Media Activity Occurs Outside of the Workplace, Employers Should Be Prepared to Address It When It Affects the Workplace

- Employers can be held liable for Title VII hostile work environment claims based on content that is posted on an employee's personal social media account when that off-duty conduct impacts the workplace.

Title VII, FEHA, and Similar Restrictions Do Not Violate the First Amendment

- While some employers or employees might contend that the application of Title VII, FEHA, or other laws to their “political” speech violates the First Amendment, courts have found that laws restricting discriminatory speech do not violate the First Amendment.
- This is because, among other things, such speech amounts to discriminatory conduct, the regulation of discriminatory speech is a time, place, and manner restriction, the law is narrowly drawn and serves a compelling government interest, and other workers would be a captive audience while in the workplace and be harmed by the discriminatory speech.
 - See *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1246 (10th Cir. 1999) (overruled on other grounds), citing *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla.1991); see also, *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 980 P.2d 846 (1999) (injunction issued against manager for FEHA violations for use of racial epithets was not a prohibited prior restraint on speech).



What *Not* To Do With Social Media

Regulations & Key Case Law

California Protections

- Labor Code §980 prohibits employers from asking for employees' or applicants' personal login credentials to social media or other online accounts, asking employees to access their social media in the employer's presence (known as "shoulder-surfing"), requiring that employees divulge their personal social media, or retaliating against employees or applicants who refuse to disclose their social media.
- However, employers are permitted to ask employees to divulge their social media if it is believed to be relevant to an investigation of allegations of employee misconduct or violation of laws or regulations, and that social media is *only* used for the investigation or related proceedings.

Illinois Protections and Social Media

- Under Illinois' Right to Privacy in the Workplace Act, employees and potential employees are protected from sharing their passwords or information associated with personal online accounts. See 820 ILCS 55/10.
- Employers cannot request, require, or coerce any employee or prospective employee to share usernames or passwords, nor can they discharge, discipline, or retaliate against an employee for refusing to give an employer access to that personal online accounts.

New York's Protections and Social Media

- New York Labor Law § 201-i prohibits employers from requesting access to employees' exclusively "personal accounts."
- A "personal account" is an account or profile where a user can share, create, and view content, including uploading and downloading media that is used by an employee or an applicant solely for personal purposes.

Employers Must Be Careful Viewing Employee Social Media Accounts

- Viewing social media accounts may reveal information about an employee or applicant's protected class(es). Misuse of this information could lead to claims of discrimination.
 - Unless relevant to an investigation, it is best for employers to exercise caution or avoid reviewing employee or applicant social media to prevent claims of bias.
- Employers should be mindful that the social media accounts they view or that are brought to their attention may not be entirely authentic, generated by AI or, in extreme cases, may include revenge porn, real or fabricated.
 - When this occurs, employers should work with their counsel to take precautions to limit the impact on the workplace, including by blocking offending websites, meeting with the affected employee, providing employee assistance materials, and, if appropriate, take steps to ensure employee safety, such as through procedures outlined in the employer's Workplace Violence Prevention Plan.

Implications of Artificial Intelligence in Employment Cases

- Prior to the advent of AI, scam social media accounts were already a problem, although they were more commonly used to obtain money under false pretenses and/or hack other users.
- Now, the implications are more wide-spread and may extend into the workplace.
- Attorneys should be careful to confirm that the social media profiles they may use are authentic, through regular discovery methods, such as depositions or requests for admissions related to the authenticity of the document.
- Employers should also be cautious if they come across damaging social media content about an employee or applicant, and consider whether it appears reliable, the motivations behind sharing damaging content, etc.



Litigation Considerations

For Employers and Employees

Timely Legal Advice Is Key: Employers Should Consult with Counsel

- When crafting social media policies, including hiring policies, to ensure they do not restrict protected activity and are narrowly tailored. See *Stericycle, Inc. & Teamsters Loc. 628*, 372 NLRB No. 113 (Aug. 2, 2023).
- Before seeking access to employee social media or other online accounts, and only do so when needed for investigation of alleged employee misconduct or violations of laws or regulations. See Labor Code § 980.
- Before taking any potentially adverse action against employees regarding their social media activity.
- When employee social media posts may indicate a potential claim.

Employee Protections Are Not Limitless

- Employees' posts about employment disputes on social media, if false, defamatory, or containing trade secrets or other improper material, may not be protected.
 - **Case example:** Plaintiff ex-employee with hundreds of thousands of followers repeatedly posted false, inflammatory statements about defendant ex-employer to her social media accounts, doxed another employee, and encouraged her followers to harass her targets, resulting in numerous threatening calls and messages from third parties and the ex-employer's social media being flooded with negative comments repeating false, inflammatory statements by ex-employee.
 - Doxed employee could seek a restraining order against ex-employee.
 - Defendant ex-employer and doxed employee could sue ex-employee for defamation and interference with business relationships, among other claims.
 - Defendant ex-employer could seek a Workplace Violence Restraining Order.
- While employees may have the right to organize through social media, their communications with one another may be discoverable in a lawsuit, regardless of whether the post is public or the communications are through direct messages to one another.

Your Turn:

- Employee A: “I think your fake eyelashes are messing up what you’re reading.”
- Employee B: “Well, you have a bleach blonde bad built butch body”

Is there an issue here?



Ethical Considerations for Attorneys and In-House Counsel in Employment Cases

Focus on what is publicly available or subject to regular discovery
procedures

Ethical Considerations

- While social media activity is generally discoverable through regular discovery procedures, attorneys should approach obtaining social media materials outside such procedures with caution and seek only publicly available information.
- Model Rules of Professional Conduct (“MRPC”):
 - Rule 4.1 prohibits misleading communications to third parties.
 - Rule 4.2 prohibits unauthorized communication with represented parties.

Ethical Considerations Continued

- Attorneys should **not** instruct clients to delete social media posts as this may be spoliation, subject to monetary and/or terminating sanctions, and professional discipline.
 - MRPC 3.4 prohibits a lawyer from obstructing access to evidence, altering, destroying, or concealing evidence.
- Attorneys **can** advise clients to adjust settings to “private” rather than “public,” and, in appropriate circumstances, such as receiving harassing or threatening messages, to “block” other users, including opposing parties, provided that such action does not destroy potentially relevant material.
 - However, that social media activity may be discoverable regardless of privacy settings.

Questions?

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