

When Employees Go Viral: Employee Speech Within and Outside the Workplace

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- Goals – issue spotting & avoiding, addressing and mitigating risks
- Questions for *you* (some have clearer answers than others)
 - Do all employees have a constitutional right to free speech at work?
 - Can employees be fired only for legitimate business reasons or for cause?
 - Can a company fire a senior executive for attending an abortion rally, doing drugs on the weekend or cheating on a spouse even though the executive consistently performs well at work?



- Many of these issues have surfaced recently in the news:
 - “Google Memo”
 - CBS in-house legal executive fired
 - Trump vs. NFL players



- General Principles
 - First Amendment
 - Employment at will; limited by:
 - » Employment agreements
 - > Term, severance, cause definitions
 - » Collective bargaining agreements
 - > Term, severance, cause definitions
 - > Union-relation issues add some complexity
 - » Protected classes and protected activities (see next slides)

- Federal Laws
 - Title VII
 - » Race, ethnicity, sex, religion, etc. protected but NOT political affiliation
 - » Still, it's important to consider the connection between a protected class and political affiliation (e.g., employee attending an immigration rally)
 - National Labor Relations Act (NLRA)
 - » Protects unionized AND non-unionized employees (but not supervisors)
 - » “Concerted activities for mutual aid and protection”
 - > Employee speech for or on behalf of employees, relating to terms and conditions of employment = protected speech under the NLRA
 - > Gray line between political speech and NLRA-protected speech
 - > Limits on protected speech (violence, using company resources for non-NLRA-protected speech & purely political speech)
 - > Mixed communications (protected & unprotected speech) considered protected speech under the NLRA

- California Laws
 - Off-duty conduct law
 - » CA Labor Code §96(k): assignment of claims to Labor Commissioner for loss of wages from demotion, suspension or discharge for *lawful conduct* during non-working hours away from employer premises
 - » CA Labor Code §98.6: prohibits discrimination against applicants and employees because they exercised a right protected by 98(k).
 - > EXCEPTION: “signed contract” protecting employer against conduct that’s in “direct conflict” with employer’s “essential enterprise-related business”
 - > Gray areas

- California Laws, cont'd
 - California Labor Code §232: Cannot prohibit employees from (1) discussing or disclosing wages, or refusing to agree not to do so or (2) disclosing working conditions (or require them to sign an agreement restricting working condition discussions)
 - California Labor Code §1101: Prohibits employers from making, adopting or enforcing any rule, regulation or policy (1) forbidding or preventing employees' engagement or participation in politics or candidacy for political office or (2) controlling or directing, or tending to control or direct, employees' political activities or affiliations
 - California Labor Code §1102: Prohibits coercion/intimidation through threat of discharge because of political activity
 - California Constitution- Article I, Section 1 (privacy)
 - California Fair Employment and Housing Act (FEHA)
 - » Adds protected classes (but not political affiliation)



- Legal Changes and the Internet
 - Growth of Internet as a medium of employee communication
 - Facebook “likes”
 - Social media policies

- Culture
 - Legal *and* cultural considerations – employee morale
 - Diverse viewpoints heard but within reasonable limits
 - » Extreme diversity efforts (Google Memo)
 - » Extreme speech and rise of the right (Charlottesville)
 - Role of management

- Policies, Procedures and Practices
 - Clear, carefully-drafted policies and a code of conduct
 - » Respect, dignity
 - » Complaint procedure/reporting structure
 - » Rules regarding purely political, non-NLRA protected speech during working hours and on employer premises
 - » Prohibit activities that cause significant work disruptions, negatively affect business operations, result in violence and/or unlawful behavior
 - » Consider: NLRA, Title VII, off-duty conduct laws and other relevant California laws, and privacy protections



- Policies, Procedures and Practices
 - Limits on use of an employer's electronic systems, technology and other property
 - Equitable enforcement of policies and practices
 - Training management to diffuse employee disputes and controversies



- Policies, Procedures and Practices
 - When disaster strikes- best practices (“IRCA”)
 - » Investigate
 - > Investigate the facts immediately
 - > Preserve confidentiality to the extent possible
 - » Review
 - > Review relevant employees’ employment agreements and/or collective bargaining agreements (if applicable)
 - > Review relevant policies (e.g., handbook and code of conduct) and procedures
 - » Consider
 - > Legal risks, cultural/employee morale concerns and branding/reputational issues
 - » Act
 - > Act swiftly
 - Revisit and revise

Questions?

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