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Free Speech in the Workplace

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Introduction

01

Workplace Speech in Recent Press

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The image is a composite of three separate content snippets. The central, largest image shows a person's hands using a smartphone on a wooden desk, with a white keyboard and a laptop in the background. To the left, a smaller image shows a Microsoft employee standing outside a modern building. To the right, a video thumbnail shows a person playing a guitar on a stage. The entire composite is framed by a blue border.

Legal Framework

02

Workplace Speech and Anti-Bias Protections

- The applicable legal framework for workplace speech and anti-bias protections depends on:
 1. The type of employee
 2. The jurisdiction
- These frameworks are important for lawyers to understand and think about in their jobs
 - All lawyers need to be mindful of potential bias issues in their workplaces
 - Law firm attorneys may litigate or advise on cases raising these matters
 - In-house lawyers may need to guide internal clients through these issues

Public Employees

- The First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' based on protected speech.
 - Courts apply the framework from *Pickering v. Board of Education*, 391 U.S. 563 (1968), to analyze First Amendment retaliation claims brought by public sector employees.
 - In evaluating the First Amendment rights of a public employee, the threshold inquiry is whether the statements at issue substantially address a matter of **public concern**.

Government Contractors

- **Government contractors are generally treated like public employees for First Amendment claims.**
 - No “difference of constitutional magnitude exists” between contractors of the government and government employees. *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 713 (1996).
 - First Amendment retaliation claims generally follow *Pickering* balancing framework.
 - Employer defense: A plaintiff cannot establish unconstitutional retaliation “if the same decision would have been reached” absent the protected conduct, even if “protected conduct played a part, substantial or otherwise,” in motivating the government’s action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977).

Private Employees

- The First Amendment's free speech clause does not apply to actions by private employers.
 - Under the state action doctrine, a private entity becomes a state actor subject to First Amendment constraints only when it exercises a function "traditionally exclusively reserved to the State." General business operations and personnel decisions alone do not qualify.
 - Private employers are instead bound by **key federal and state anti-discrimination and anti-retaliation laws** aimed at addressing bias against private employees based on protected characteristics or activities.

Title VII of the Civils Rights Act of 1964

- Title VII is the key anti-discrimination federal law for private employers.
- Protects employees from discrimination based on the following protected characteristics: race, color, religion, sex, or national origin.
- Also prohibits ***retaliation*** against an employee for participating in protected activities under Title VII: complaining about discrimination, filing a charge of discrimination, or assisting in an investigation of discrimination.

Key Anti-Bias Federal Laws

Other Anti-Discrimination Laws

- Age Discrimination in Employment Act
- Americans With Disabilities Act
- Section 1981 of the Civil Rights Act of 1866
- Equal Pay Act

National Labor Relations Act (NLRA)

- Section 7 protects employees' rights "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."
- Concerted activities include communicating about working conditions and pay.
- Section 8 prohibits employers and unions from engaging in certain "unfair labor practice[s]," including restricting the exercise of Section 7 rights.

42 U.S.C. § 1983

- Employees can bring a claim against a ***public employer*** for violation of employee's Free Speech rights under the First Amendment.
- Section 1983 generally does not apply to private actors because it requires an individual to act "under color of state law."
- A private party can be treated as a state actor if their actions are intertwined with the government in specific ways.

Key Anti-Bias California Laws

Fair Employment and Housing Act

- Rough equivalent of Title VII.
- Prohibits discrimination based on broader group of protected characteristics: race, color, religion, sex/gender, gender identity, gender expression, sexual orientation, marital status, medical condition, military or veteran status, national origin, ancestry, disability, genetic information, request for family care leave, request for medical leave, request for pregnancy leave, age.
- Similarly prohibits retaliation based on protected conduct, including complaining of discrimination.

Key Anti-Bias California Laws

Labor Code § 1101 and 1102: Political Activity by Employees

- Prohibits private employers from:
 - (a) Forbidding or preventing employees from **engaging or participating in politics** (including running for office).
 - (b) Controlling or directing, or tending to control or **direct the political activities or affiliations** of employees.
- Cannot coerce or influence employees to adopt or follow any particular political belief or activity.

Key Anti-Bias California Laws

Labor Code § 96(k), 98.6: Off-Duty Conduct

- Allows Labor Commissioner to pursue claims if an employee was demoted, suspended, or terminated based on their **lawful conduct during nonworking hours** away from the workplace.
- Generally protects “moonlighting,” personal social media activity, and personal speech / association.
- Section 98.6 allows a civil penalty of up to \$10,000 per employee for each violation.

Labor Code § 1137: Worker Freedom from Employer Intimidation Act

- Enacted in response to “**captive audience meetings**,” during which employers share their opinions on political or religious matters unrelated to the employees’ job duties.
- Broadly prohibits employers from subjecting employees to adverse action where the employee declines to attend a meeting where the employer communicates their opinion about religious or political matters.
- Note: The Eastern District of California enjoined enforcement of the law in Sept. 2025; appeal pending.

Key Anti-Bias California Laws

Enforcement Mechanisms

- **Private action authorized by statute:** FEHA, Sections 1101 and 1102
- **Wrongful Termination in Violation of Public Policy Claim:** Common law claim, must be based on an enumerated public policy (i.e., statute)
- **Labor Commissioner Enforcement:** Sections 96(k), 98.6

Key Anti-Bias California Laws

Civil Code § 47(c): Statutory Common Interest Privilege

- An employer is privileged in pursuing its own economic interests and that of its employees to ascertain whether an employee has breached his responsibilities of employment and if so, to communicate, in good faith, that fact to others within its employ.
- Not well-defined, but determined to apply to statements by management and coworkers to other coworkers explaining why an employer disciplined an employee.
- ***Elimination of Bias:*** Avoid creating any potential perception of “hatred or ill will” towards the employee.

Key Anti-Bias California Laws

Civil Code § 47(c): Statutory Common Interest Privilege

Framework: A publication or broadcast is privileged if made in a communication, without malice, to a person interested therein by one who:

1. is also interested, or
2. stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or
3. is requested by the person interested to give the information.

Elimination of Bias: Malice focuses on the employer's state of mind, not his or her conduct.

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Recent Case Studies

**Workplace Speech/Bias Litigation in the
Federal Courts**

03

Case Study #1: *McKagan v. Las Virgenes Unified School District, No. 2:25-cv- 11580 (C.D. Cal.)*

- After Charlie Kirk's shooting, a teacher posted a message on her personal Facebook account while off-duty and off-campus, using her personal phone. The School District placed her on administrative leave.
- She sued the school district and its officials, alleging, among other claims, violation of her First Amendment rights, defamation, political activity retaliation under Cal. Labor Code § 1102, and unlawful retaliation under Cal. Labor Code §1102.5.
- The case is currently in the pleadings stage.

Case Study #2: *Gaw v. Surgical Care Affiliates, LLC, No. 3:25-cv- 01556 (S.D. Cal.)*

- Nurse brought a water bottle to work with a sticker that read “Israel is committing genocide in Gaza.” She alleged her supervisors admonished her, and she was terminated less than two weeks later.
- She sued for retaliation under Cal. Labor Code §§ 1101, 1102, and 98.6, discrimination under Cal. Gov. Code § 12940(a), harassment under Cal. Gov. Code § 12940(j)(1), and wrongful termination in violation of public policy.
- The parties settled all claims on November 3, 2025, with no ruling on the merits.

Case Study #3: *Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County, 39 F.4th 95 (3d Cir. 2022)*

- In July 2020, the Port Authority implemented a policy that prohibited masks with political or social-protest messages and disciplined employees for violating the policy. The Port Authority revised its policy in September 2020, allowing only a narrow range of approved masks to be worn.
- The union sued the Port Authority, alleging a violation of its members' First Amendment rights.
- District court granted a preliminary injunction. Third Circuit affirmed.

Best Practices for Eliminating Speech- Related Bias

04

Evaluating Controversial Expression by Employees

- 1. Determine what law applies**
- 2. Evaluate if the posts or activities are protected by applicable law**
- 3. Evaluate if the posts or activities express purely political or religious beliefs**
- 4. Evaluate if the posts or activities violate company policy**
- 5. Evaluate if the posts or activities are made on behalf of the company**
- 6. Evaluate the impact on the company's reputation, employees, and customers**
- 7. Be consistent in enforcement**

Best Practices for Lawyers

- **These laws and frameworks apply to legal professionals too!**
- **Approach speech-related issues carefully, even within a corporate or law firm environment**

Q&A

05

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