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Employee expression in the workplace

By Grant P. Alexander and Melissa K. Bell

With the recent protests and social unrest relating to the killings of George Floyd and others, and the 2020 presidential election around the corner, California employers should take this opportunity to revisit their policies and guidelines relating to employees' rights of speech and expression in the workplace and on social media (including remote workplaces). While there are state and federal constitutional free speech protections from government intrusion that do not apply to private employees, there are a number of other state and federal laws that do provide protections for certain categories of speech and expression. When addressing complaints or issues arising out of speech or expression, employers should consider what policies they have (or should have) addressing such speech or expression, and what approach they might take in responding to workplace complaints or scenarios involving potential political speech or expression.

Speech in the Workplace

People are often mistaken about what rights they have to expression and speech in the workplace. The United States and California Constitutions provide protections relating to an individual citizen's freedom of speech, among others. However, the protections afforded by the federal and state constitutions are protections from government limitations or incursions on those rights — not the incursions or limitations imposed by a non-governmental employer who is a private actor. Notwithstanding the distinction, employees do have some protected rights of association and expression that employers should be aware of.

Political Activity

Section 1101 of the California Labor Code prohibits employers from either preventing employees from engaging in "political activity" or otherwise controlling or directing employees' political activities or affiliations. Political activity has been interpreted to include running for office, support for a candidate or cause, and action to promote support for a candidate or cause. Political activity is therefore not necessarily limited to partisan activity, and could include, for example, employee expression related to racial and social justice movements. Therefore, employers should be mindful not to prevent employees from or directing employees' support of certain candidates, ballot measures, or other political activity.

That being said, 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. In circumstances where companies prohibit the placement of posters, pictures or banners on interior walls to maintain certain aesthetic appearances, such a policy may not violate an employee's right to engage in political activity or political affiliation, if the policy's purpose is to maintain a professional working environment free of any wall décor, which would also include sports posters, personal art and the like. Likewise, a company policy that requires employees to maintain professional tone, decorum and demeanor in common areas may not be considered to infringe upon an employee's rights to debate each other or engage in a political or social protest in a common area, if the policy is intended to prevent employees and clients' work from being disturbed during business hours. Each case must be evaluated to determine whether a policy could potentially run afoul of the Labor Code as it relates to political activity and/or political affiliation.

Wages, Working Conditions and Whistleblowing

Employee speech related to wages and working conditions is also protected under the federal National Labor Relations Act and, in the case of wages, also the California Equal Pay Act. Sections 7 and 8 of the NLRA provide employees with the right to self-organize, bargain collectively, and to engage in other concerted activities. Therefore, employee discussions about wages, working conditions, unionizing, or other collective bargaining activity are all protected speech that should not be discouraged by any company policies. Employers should be mindful of drafting policies regarding employee speech in the workplace and on social media so as not to run afoul of the NLRA.

Similarly, employee speech in the form of reporting company activity that is illegal, or that the employee reasonably believes to be illegal is generally protected under whistleblower provisions in various State and federal laws. Under the California Labor Code, an employee has a right to disclose information that the employee "has reasonable cause to believe ... discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation" to a government or law enforcement agency, or other employees with authority over the employee or authority to investigate the

report. This whistleblower statute protects employees who report harassment or discrimination to supervisors or other employees with authority to investigate the report against retaliation for making such reports.

Other Forms of Protected Expression

California's recently enacted Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act expanded the definition of race to include "traits historically associated with race, including, but not limited, hair texture and protective hairstyles" for purposes of prohibiting discrimination based on race. The CROWN Act specifically protects employees' right to wear "protective hairstyles" including "braids, locks, and twists."

Additionally, California law prohibits employment discrimination based on sexual orientation, gender identity, gender expression, or against an individual who is transitioning, has transitioned, or is perceived to be transitioning. With the recent U.S. Supreme Court decision in *Bostock v. Clayton County, Georgia*, 2020 DJDAR 5681, federal law also includes protections for gay and transgender employees.

Social Media Policies

A growing area of expression, and concern, for employers is social media. Employers are increasingly interested in determining what, if any, limitations they can place on an employee's use of social media. The answer is: It depends. During work hours and in the workplace, employers may restrict access to and use of social media on company hardware and by employees while "on the clock" if such restrictions are for apolitical reasons such as to increase productivity and to reduce data and security breaches. On the other hand, once "off the clock" and outside of the workplace, employers are much more limited in restricting employees' social media activity and cannot generally regulate or discipline employees' lawful, off-duty social media activity. This comes into play especially when employees engage in political or other similar activity or expression on social media.

However, the rule on social media is not absolute. In certain circumstances, employers can regulate employees' off-duty social media activity when that activity includes instances of employees publicizing trade secrets, confidential information, and certain disparaging statements. Employers can also potentially take action when an employee's conduct on social media violates company policies relating to conduct and behavior in the workplace.

The political and social climate of the last few years, coupled with the significant expansion of social media and access to that media in the workplace, has created a challenging minefield for companies who seek to foster employee participation and to strengthen morale, while trying to maintain a workplace respectful of all views and free of discrimination, harassment, and bullying. With the increasingly charged environment in response to the recent social and political climate, as well as the effects of the COVID-19 pandemic, companies should be wary of policies, practices or actions which could potentially infringe on employee rights of expression, political affiliation, and/or political activity. Companies should review current policies on expression in the workplace, as well as access to and use of social media, to determine whether those policies should be updated or modified. Before taking action, employers should consider contacting employment counsel to determine what steps to take as workplaces begin to reopen. ■

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