

NEWS & INSIGHTS

“Everybody Talks” - Understanding free speech rights in the workplace

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NOVEMBER 4, 2025



The First Amendment of the U.S. Constitution is the bedrock of the country’s free speech rights, but that freedom is often fundamentally misunderstood – especially in the workplace. As more people engage in political rhetoric both in person and online, employers frequently face difficult questions: Which types of speech are protected by the First Amendment? Can the company implement and enforce policies that prohibit certain kinds of speech? Can employees be fired for such speech? The answer to these questions lies in the age-old, favorite lawyer response, “It depends.”

“Hey baby what you gotta say, all you’re giving me is fiction”

While the First Amendment guarantees all Americans the right to free speech, courts across the nation have consistently held that this right has limits, particularly in the workplace. When faced with discipline for certain speech-related conduct, many employees are quick to waive the “free speech” flag, contending their employer’s actions violate their rights, but because the First Amendment only prohibits *governmental* interference of free speech rights, the amendment’s protections do not extend beyond the public employment sector of government jobs.

Even in the public sector, the burden falls on the employee to prove their free speech is protected, and a court’s analysis is going to be case and fact specific. In 2020, the Pennsylvania Supreme Court utilized the balancing test in ruling the Pennsylvania Department of Transportation could [fire an employee for an offensive social media post](#) complaining about school bus drivers because her social media statements were contrary to the department’s mission of providing safe roadways and could result in a loss of public trust.

Private employers have more leeway to discipline and even terminate employees for engaging in speech the company may disagree with, subject to certain pockets of protection at the state level. States such as South Carolina, California, Colorado, Connecticut, and New York all have laws that in one way or another and under certain circumstances, protect employee speech or political opinions.

However, the protections provided under state law are not absolute and may be subject to varying interpretations by the courts. South Carolina’s statute, which protects employees from termination “[because of political opinions or the exercise of political rights and privileges](#)” has been interpreted by South Carolina courts as extending only to matters directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political campaign contributions, and the right to vote. Many other state statutes that protect off-duty speech also contain exceptions for conduct that an employer believes is disruptive to its business or reputation, which can justify lawful terminations for public speech, including social media posts.

“Never thought I’d live to see the day (ooh-ah) when everybody’s words got in the way, Oh!”

An uncertain and ever-evolving political climate has more employees speaking out in a myriad of ways – social media posts, participation in demonstrations, and even initiation of or participation in politically charged conversations in the workplace. That makes setting clear expectations for employee behavior critical.

Understand state and local law restrictions: Be familiar with state and local laws that may provide your workforce with certain free speech protections. Some of these laws specifically prohibit employers from terminating employment for speech-related conduct, and others may only allow for separation under certain circumstances.

Develop a clear policy: A consistent theme throughout your handbook and policies should be respect and civility towards other coworkers in all interactions, including conversations that involve political topics. Clearly denote in all policies that bullying, harassing, and discriminatory conduct are not tolerated in the workplace, in both spoken and written communications.

Implement the policy consistently and document your enforcement: One of the fastest ways to find yourself on the wrong end of legal action is to haphazardly enforce company policy. Ensure enforcement is consistent, addressing all forms of improper speech and documenting improper behavior. Steer clear of any impulse to focus on the opinion expressed by the employee (or the underlying ideology of the speech) and focus instead on the behavior that violated policy (e.g., threats of violence, intimidation, etc.).

Train your managers: Managers should know and understand all policies regarding speech in the workplace and be trained on how to intervene neutrally to prevent (or deescalate) any inappropriate conversations or comments that run afoul of speech and behavioral expectations.

Consult with legal counsel: The law in this area can be murky. Because these issues often require a case-by-case analysis of all relevant facts and circumstances, always consult experienced legal counsel before disciplining or terminating an employee for speech-related conduct.

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