Employers Can Discipline Employees' Private Speech…Sometimes

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Despite periodic rumors to the contrary, employers are typically not interested in policing their employees' off-duty-conduct or in becoming their employees' thought-patrol. However, there are occasions in which an employee's ostensibly "personal" off-duty statements can force an employer's hand. When that happens, both employees and employers are often confused about the line between unpleasant statements about which they can do nothing and those that can lead to discipline or termination.

Part of the confusion stems from the fact that in California, employers are bound by both generally-applicable federal law, such as the National Labor Relations Act (NLRA), as well as specific state law. Generally speaking, the NLRA protects both unionized and non-unionized employees who complain or share information about their working conditions. Under most circumstances, an employer may not do anything to curtail or penalize that type of expression.

California law actually expands on the federal protections with a set of very specific laws that restrict an employer's ability to discover or to penalize or curtail employee speech:

- Labor Code Section 980 states that employers cannot, under most circumstances, request or require an employee to disclose their social media activities or passwords or to access their social media accounts in the employer's viewing presence.
- Labor Code Section 232 states that employers cannot prohibit employees from discussing their wages.
- Labor Code Section 232.5 states that employers cannot prohibit employees from discussing their working conditions.
- Labor Code Section 1101 states that employers cannot prevent employees from engaging in political activities of their choice.
- Labor Code Section 96(k) states, most comprehensively, that employers cannot refuse to hire or discipline an employee for engaging in lawful off-duty conduct away from the employer's premises.

The obvious question, then, is can an employer ever curtail or penalize employees' private speech? The answer is, yes, an employer can. Under very limited and very specific circumstances. One obvious way in which personal posting to social media can lead to employee discipline is if it takes place during work hours. Employees who are on-the-clock can be prevented from engaging in any personal non-work-related activities and social media posting can certainly fall into that general category.

Another obvious way in which an employee can get in trouble for personal postings even on private time is if, contrary to the general protections of Labor Code Section 96(k), the postings are not lawful. Unlawful postings can be anything from defamation of co-workers or clients to threats of violence to unauthorized disclosure of the employer's or its clients' confidential information or trade secrets. The fact that such conduct took place off-duty will not insulate an employee against its essential unlawfulness. Similarly, employees' use of social media to engage in unlawful gambling, sex trafficking or drug sales is equally fair game for discipline and termination.

Notably, employees are often surprised when they get disciplined or even terminated for lawful but unprotected speech. Examples of such social media posts would be private rants that are racist, sexist or otherwise bigoted about other employees. Such speech is almost always in violation of the employer's harassment prevention policies, whether uttered in the workplace or not.

It is less clear, however, whether an employer can discipline an employee for such hateful speech if it is not directed toward a co-worker or anyone specific. It is probably lawful, and conduct that is lawful and off-duty is technically protected by Labor Code Section 96(k), as hateful as it is. Responding to conduct that is not clearly unlawful falls into the dangerous gray area that leads to litigation. Proceed with caution and always involve legal counsel.

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