

Social Media, Free Speech, and the Workplace: Navigating the Modern Legal Landscape

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The intersection of protected speech and employment law continues to challenge employers striving to maintain productive, inclusive workplaces. In the social media era, conversations that once stayed in the break room can rapidly reach vast audiences, creating legal and practical complications. When an employee's online activity disrupts workplace harmony, employers must tread carefully; missteps can be costly.

As the First Circuit recently observed, “once speech is posted on the internet, the speaker has virtually no control over its distribution.” *Hussey v. City of Cambridge*, No. 24-1279, at *27 (1st Cir. Aug. 15, 2025). Even deleted or “private” posts may already have been shared or captured by screenshots. Both employees and employers should therefore pause before acting—employees before posting, and employers before disciplining—because content and context matter.

Legal Considerations

Free Speech Protections

Federal Law

Employees often invoke the First Amendment in defense of online speech. However, the First Amendment primarily restricts governmental—not private—action. Even public employers' authority is limited: they cannot punish protected speech unless it disrupts workplace efficiency or crosses into unprotected categories, such as incitement. The *Pickering* balancing test governs these disputes, weighing the employee's speech rights against the employer's operational interests.¹

In *Hussey*, a police officer's controversial comments about a George Floyd reform bill were found to be protected expression, yet the court dismissed his retaliation claim because the employer's response stemmed from concerns about workplace impact, not disagreement with his viewpoint.² Offensive or unpopular speech may still enjoy constitutional protection, but the First Amendment is not an unfettered right. As one court stated, “[i]t is notoriously difficult to determine when speech descends from political speech—even impassioned speech—to incitement” of violence – the latter of which is not protected under the First Amendment.³

State Law

Private-sector employees generally lack First Amendment protections against termination for speech. However, one state does extend limited statutory safeguards. Connecticut's §31-51q, prohibits employers from disciplining workers for exercising constitutional free-speech rights so long as the activity does not “substantially or materially interfere” with job performance or

¹ *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563 (1968).

² *Hussey v. City of Cambridge*, 720 F. Supp. 3d 41, 56 (D. Mass. 2024).

³ *Wells v. Rice*, 692 F. Supp. 3d 735, 742 (E.D. Ky. 2023).

workplace relationships. Violations can expose employers to damages, punitive awards, and attorneys' fees. Florida does not have a similar law protecting private-sector employees.

Protected Concerted Activity

Under the National Labor Relations Act (NLRA), employees—unionized or not—have the right to engage in “concerted activity” for mutual workplace benefit, including online. Social media discussions about pay, conditions, or management decisions may qualify for protection under Section 7, limiting employers' disciplinary options. The National Labor Relations Board (NLRB) has scrutinized such cases for over a decade, emphasizing that Facebook or similar forums can serve as modern equivalents of collective conversation.

Privacy and Access to Accounts

More than half of U.S. states restrict employer access to employees' personal social media. These laws typically bar employers from demanding passwords, requiring employees to “friend” supervisors, or viewing accounts through “shoulder surfing.” Many carve out exceptions, such as investigations into misconduct or regulatory compliance obligations—particularly in industries subject to oversight by entities like FINRA. Florida does not have a law specifically prohibiting employers from requesting access to employees' or applicants' social media accounts. Employers with employees in other states should review the laws of those states before seeking information from an employee's private account.

Anti-Discrimination and Harassment Laws

Employers must also consider federal, state, and local laws prohibiting discrimination and harassment based on protected characteristics. Inconsistent disciplinary enforcement can invite Title VII claims alleging disparate treatment. Social media conduct may also constitute actionable harassment when it targets coworkers or fosters a hostile environment, even outside the physical workplace.

In *Okonowsky v. Garland*, 109 F.4th 1166, 1171 (9th Cir. 2024), the court confirmed that Title VII liability can arise from online behavior, emphasizing that “the totality of the circumstances” includes digital harassment. States like Massachusetts and New York explicitly recognize virtual harassment in agency guidance.

Off-Duty Conduct Protections

Some jurisdictions prohibit discrimination based on lawful off-duty conduct. New York's statute, for instance, bars adverse action against employees for political or recreational activities outside work hours, off premises, and without employer resources, unless the activity creates a material conflict of interest. Utah similarly protects lawful expression of personal, religious, or political convictions unless it directly conflicts with business interests. While Florida does not have a law specifically protecting off-duty conduct, employers operating across state lines must account for these variations.

Social Media–Specific Factors

Modern technology complicates fact-finding. Employers should consider:

- Whether emojis or slang carry ambiguous or alternate meanings across platforms.

- Verification of post authenticity—has the employee’s account been hacked, impersonated, or “deepfaked”?
- Whether electronic evidence has been manipulated.
- The need for a fair, impartial investigation before disciplinary action.

Given the rise of AI-generated content, screenshots or reposts may not always reflect genuine employee conduct. A thorough inquiry helps mitigate risk.

Industry- and Role-Specific Concerns

Certain industries impose heightened obligations.

- **Legal field:** Ethics authorities warn attorneys that online statements may inadvertently create conflicts of interest. *D.C. Bar Legal Ethics Op. 370 (2016)*.
- **Financial services:** FINRA requires firms to train personnel on distinguishing personal from business social-media use and to preserve required communications.
- **Healthcare and public service:** Employers may have compelling interests in maintaining public trust. In *Gustilo v. Hennepin Healthcare Sys., Inc.*, No. 0:22-CV-00352-SRN-DJF, 2025 WL 2539116 (D. Minn. Sept. 4, 2025), the court held that a hospital’s need for efficiency and public confidence outweighed an employee’s expressive rights.

Broader Organizational Impacts

Beyond statutory compliance, social media activity can influence reputation, morale, and client relationships. Posts perceived as offensive or divisive may erode goodwill and trust, even absent legal liability. Employers should adopt clear, consistently enforced policies addressing social-media expectations, reporting mechanisms, and disciplinary procedures.

The Bottom Line

Ultimately, when confronting employee online speech, the prudent course is deliberate and informed action. A fact-specific, balanced assessment—considering applicable laws, company culture, and the totality of circumstances—remains the employer’s best defense in this rapidly evolving landscape.

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