

## **Stop Talking and Get Back to Work! Legal Limitations in Restricting Employee Speech**

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In recent years, there has been uptick in the number of claims by employees that employers are illegally prohibiting them from engaging in protected speech. Federal agencies such as the Equal Employment Opportunity Commission, the National Labor Relations Board, and state governments have also been more closely looking at this issue. Among these claims are allegations that employers prohibit employees from talking about wages and working conditions, from posting thoughts or opinions on the internet, or from discussing ongoing internal or external investigations.

The National Labor Relations Act (“NLRA”) is one of the main sources of law that informs what type of employee speech is protected. The NLRA protects employees, even non-union employees, who engage in speech related to employment terms, organizing, or politics that affect the workplace. This includes how much money they make, whether a supervisor is treating them poorly, and more. In many cases, employees are even permitted to talk to employer’s business partners, investors, vendors, suppliers and advertisers during work time about their concerns. But the NLRA is not the only law that protects employee speech. Many states are passing laws in order to promote pay equity that protect employees who talk about their wages or working conditions.

Outside of the NLRA, all employers should be aware that any speech relating to a protected activity, such as a complaint of illegal activity, discrimination, or harassment, is likely protected. Usually we see these allegations arise in whistleblower or retaliation complaints which often carry with them heavy fines and penalties. In recent years, policies regarding keeping investigations strictly confidential or prohibiting employees from speaking to each other about certain workplace complaints have come under attack by federal agencies and in state and federal courts.

### ***What Will Not Fly***

However, there are times when an employee may be disciplined or discharged even if they might be engaged in speech that might seem protected by law. In most cases, employee

discussions cannot interfere with job performance, assuming that you treat others who are not engaged in protected speech in the same way. For example, if you generally let people talk at least some while working, you could not prevent a similar amount of talking relating to wages or employment policies. Additionally, the conversation or online postings cannot violate other company policies; for example, discrimination and harassment, confidentiality or threatening or intimidating behavior policies. Be aware, however, that some amount of heated conversation is permissible under the NLRBs standards. When in doubt, send the employee home for the day and seek counsel. Finally, any speech or online post that is defamatory or otherwise legally actionable may not be protected.

### ***Walk the Walk***

Perhaps the most avoidable mistake a company can make is to fail to cultivate a culture where managers are informed and understand when to refrain from prohibiting protected speech. Most often, it is lower level managers that tell an employee to stop talking about their pay or to keep something confidential. It is far better to have a manager consult with you about whether an employee should be disciplined for talking than to face legal action.

### ***Check the Handbook***

The first place a plaintiff's attorney or agency will look for evidence of misconduct is the employee handbook. Make sure your handbook is reviewed by counsel annually and pay particular attention to sections on confidentiality, social media, speaking with the media, employee conduct, and discipline.

### ***Phone a Friend***

When in doubt seek outside counsel that can give you an unbiased assessment of your risks. It is understandable to be defensive and angry when inflammatory statements or seemingly unprofessional behavior affects your company. But slowing down and seeking counsel before taking action will help you make the best decision in the long run to protect the company and its reputation.