

# HR Insights

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## Free Speech in the Workplace

The First Amendment protects Americans' freedom of expression, but it doesn't prevent a private employer from setting its own rules or terminating an employee for saying something the organization doesn't like. Although employees don't have a constitutional right to free speech at work, employers should still be aware of any laws that protect workers' speech in certain situations.

Employment relationships are presumed to be "at will" in every state except Montana, which means employers can terminate an employee at any time, for any reason, with or without notice. However, workers often misunderstand the right to free speech in the United States, assuming it applies to the workplace. This article summarizes the First Amendment and addresses current trends impacting free speech in the workplace.

### Free Speech Overview

The First Amendment protects five freedoms: speech, religion, press, assembly and the right to petition the government. Americans are guaranteed this protection at birth. Freedom of speech applies to various forms of expression, including:

- Speech
- Written works
- Clothing
- Symbolic speech

The First Amendment applies to government employees but not those working for private organizations. However, this doesn't mean that private employers can suppress all forms of employee speech. For example,

private sector employees have the right to engage in concerted activity under the National Labor Relations Act (NLRA) in union and nonunion settings. Concerted activity examples include talking with co-workers about wages or working conditions and starting a petition for better working hours.

Employees also have the right to discuss possible unlawful conduct in the workplace. For example, some federal laws protect employees who complain about harassment, discrimination and workplace safety violations from adverse employment actions, such as termination.

State laws vary, so employers should seek legal counsel to understand if any laws enhance workers' rights to discuss certain topics in the workplace or off duty.

### Workplace Trends

The American workplace is continually evolving and shaped by various drivers. To prepare for situations concerning First Amendment rights, employers can explore the following free speech trends and consider how they may influence their own workplace or workforce:

- **Social media**—In today's digital era, many employees have social media accounts and post about their lives, which may include time both on and off the clock. Employee posts may be protected if the employee

discusses working conditions and other labor relations matters. In some states, this includes employee speech made off the clock. Social media policies are a measure that can help employers set the tone and establish post guidelines and expectations. Although employers may be inclined to monitor employee social media activity, they should be aware of the potential legal pitfalls that come with it. For example, several states do not require employees to disclose if they have a social media account. As more organizations employ a distributed workforce, email and other communication tools must also be considered, as the employer has access to and owns anything shared in those channels. Employers should ensure workplace policies can't be perceived as restricting protected employee activity.

- **Pay transparency**—As more states adopt pay transparency laws, compensation is top of mind for many employees. The NLRA protects employees' right to discuss employment terms and conditions. For example, workers could discuss their wages with each other and then ask for raises if they determine they're not being paid enough.
- **LGBTQ+ rights**—Expressive conduct and speech help many LGBTQ+ individuals affirm their identities, exercise autonomy, and participate equally. Courts acknowledge that speech or expression revealing one's sexual orientation or gender identity holds significant value and is entitled to First Amendment protections.
- **Political speech**—Free speech laws vary by state, and political expression is one topic that's increasingly receiving protection in the workplace. For example, California labor codes do not allow employers to make or enforce any policy that attempts to control the employee's political activity. It's also illegal for any employer to threaten or

discharge an employee because of their political activity.

- **Manager training**—Employees with an issue or concern often take it up with their supervisors instead of HR. Many workers expect their managers to be able to handle and respond to workplace concerns, including those involving free speech. To prepare for those situations and avoid discrimination or other related claims, employers should offer training to front-line managers. Ongoing training should outline how to acknowledge a complaint, escalate the complaint to be investigated and make proper adjustments or corrections to reduce the chances of the problem happening again.

### Employer Takeaways

The bottom line is that most employees do not have a constitutional right to free speech at work. However, employers should continue to monitor trends shaping today's workplace and consider how they may impact employment practices.

To avoid compliance issues, employers should familiarize themselves with the various policies that protect employees: the National Labor Relations Board, the Occupational Safety and Health Administration, and the U.S. Equal Employment Opportunity Commission. Agencies are constantly revising priorities and policies, so staying on top of the latest rules is essential.

Contact Employco USA, Inc. for more information about these workplace trends.