

# Can I Prevent My Employees From Saying That?

## Free(ish) Speech in the Workplace

By Erik Moskowitz

**W**hile employee governance and employment policies may not be of significant concern to small general contractors with only a small workforce of their own employees, most civil contractors and virtually all specialty contractors manage a substantial workforce of employees. The use of independent contractors may be a rising trend, but many heavy and highway contractors still have a large number of traditional employees. Directing and, if necessary, controlling how those employees discuss their work and talk about their jobs on social media is an important consideration.

Because a contractor's reputation matters significantly in winning jobs, what an employee might say on social media can directly affect a company's bottom line. As more and more users flock to the myriad social media platforms to share, and overshare, all their thoughts, dreams, and photos (filtered and unfiltered alike), many employers have begun implementing (or revisiting) their social media policies. The Internet generally, and social media in particular, has become the most accessible medium for employees to post complaints about their jobs, tweet about their co-workers, and air grievances on employer review sites. Moreover, the increased social awareness surrounding workers' rights, workplace harassment, and politics has made employees more willing to share their own (horror) stories and opinions online. So what can employers do to lawfully limit employee speech?

While mention of free speech generally calls to mind the First Amendment, the

Constitution only protects speech from government prohibition. While public employers must adhere to the strictures of the First Amendment when addressing employee speech in the workplace, private employers are not so limited. Private employers often do, and should, place restrictions on employee speech, especially online. That doesn't give private employers a free pass – many state and federal employment laws place limitations on a private employer's ability to regulate their employees' speech – but restrictions are certainly appropriate.

First and foremost, it's important for private employers to keep in mind that employees have the right to talk about their wages, their hours, and their working conditions – among each other and, potentially, online through social media outlets. The National Labor Relations Act (NLRA) prohibits employers, including non-union employers, from restricting such discussions among and by their workforce. Too often employer handbooks and internal policies list "wages" or "salary" as a piece of company confidential information about which employees are prohibited from talking. This may very well run afoul of the NLRA and open an employer to liability.

Additionally, employers generally have a duty to prevent harassment, discrimination, and retaliation in their workplaces. Employee speech, and social media posts, complaining about such activities are protected (and would often fit under the definition of "working condition" speech allowed under the NLRA). Such speech cannot be regulated by, and importantly should not be ignored by, an employer. If

discovered or reported, any social media posts or communications by an employee seemingly intended to harass or discriminate against another employee should be promptly addressed by the employer. And employees complaining publicly about such language should not be reprimanded, but rather encouraged to address such concerns with management to ensure the behavior is addressed.

But beyond those strictures, private employers have significantly freer rein to restrict employee speech. And employers should most certainly restrict certain types of speech, and reprimand or terminate employees who violate such restrictions.

Various state and federal discrimination acts prohibit adverse employment actions (reprimand, demotion, termination) based on, among other things, age, disability, gender, immigration status, military status, genetic information, and, at times, sexual orientation. But employees engaging in hate speech are not a protected class. Nor are employees who engage in open political speech that might not comport with an employer's values. In fact, it is often worth implementing a code of conduct or including a "morality clause" in employee contracts and handbooks in order to address appropriately employee speech should the need arise.

Even if an employee engages in this type of speech (including through social media posting) on their own time away from work, a private employer is often within its rights to make a decision about that employee's continued employment. There are many examples of employers firing employees due to their actions or statements outside of the workplace. Like the gentleman in California who lost his job when Twitter users posted his photo and place of employment after he was identified participating in a white nationalist rally. Or the Yale dean who was fired after calling people "white trash" in Yelp reviews. Or the former chief executive of Mozilla who was forced to resign after his support of a gay-marriage ban became public.

In each of these cases, the employers had to walk the fine line of making an employment decision based on an employee's actions outside the workplace that drew unwanted attention to the employer. Creating a workplace that encourages both equality and freedom of speech can be difficult when an employer wants to restrict certain types of speech that don't align with management values. But, at the end of the day, so long as an adverse job action doesn't arise out of an individual



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whatever offends management might very well be grounds for reprimand. Employers can have a policy to create whatever kind of culture they want inside the business, and to get rid of employees who do not fit in that environment, as long as that policy does not discriminate against a class of people based on otherwise protected characteristics.

To avoid leaving employees guessing about what might put their jobs in jeopardy, when creating a code of conduct and any attendant social media policy, it's important for employers to make the message as clear as possible. Social media policies should also specify the limitations on employee use of company time and resources (including company-issued equipment) for use on social media. A well-drafted policy should also limit discussion of the employer in social media posts, so long as those limits don't prohibit the protected activity that employees are otherwise lawfully allowed to discuss.

