

<p>California Department of Justice Office of the Attorney General</p> 	<h1 style="margin: 0;">Legal Alert</h1>	
<p><i>Subject:</i></p> <p style="text-align: center;">Guidance Regarding Speech and Discrimination in the Workplace</p>	<p><i>No.</i> OAG-2023-02</p>	<p><i>Contact for information:</i></p> <p>Chris.Knudsen@doj.ca.gov</p>
	<p><i>Date:</i> 11/3/2023</p>	

The Office of the California Attorney General issues this legal alert to provide guidance regarding speech and discrimination in the workplace.

This is a tumultuous time with events occurring both internationally and domestically that people feel passionately about. In addition, next year will be an election year and people often feel similar passion about the various issues and candidates on the ballot. This legal bulletin is written to remind you of your rights and protections as an employee in the State of California.

General Protections from Discrimination in the Workplace

First, both California and federal law protects all California employees and applicants for employment from discrimination and harassment based on protected characteristics which include race, color, ancestry, national origin, and religion, among others. Both public and private employers are prohibited from taking adverse employment action against employees such as firing, demoting, or refusing to hire applicants, based on these protected characteristics. Employers and also co-workers and supervisors are prohibited from engaging in harassing conduct based on an employee's protected characteristics. Employers also have a duty to take reasonable steps to prevent and correct workplace harassment, including by co-workers and supervisors. Finally, employees and job applicants are also protected against retaliation for reporting or complaining about discrimination or harassment. If you believe you have been a victim of discrimination, harassment, or retaliation, you may file a complaint with the California Civil Rights Department or the federal Equal Employment Opportunity Commission (EEOC). For assistance with this process, you may contact the California Civil Rights Department at contact.center@calcivilrights.ca.gov or by telephone at (800) 884-1684 [TTY (800) 700-2320]. You may contact the EEOC at (800) 669-4000 or obtain information at www.eeoc.gov.

Speech Protections for Employees: Public vs. Private Employers

Whether employee speech is protected in the workplace depends on whether employment is public (*i.e.*, the employer is a governmental agency) or private. Employees of federal, state, or local government entities are generally protected when they are speaking as a private citizen on a matter of public concern. On the other hand, public employees speaking in their official capacities are usually not speaking as citizens, and as such, First Amendment protections generally do not apply. Whether a public employee's speech on a matter of public concern is protected is fact specific and subject to a balancing test weighing the public employee's First Amendment speech right against the public employer's interest in restricting the speech. Courts look at the particular circumstances of the speech including the content, form, and context of the statement to make this determination. This balancing test would apply to situation where a public employer took an adverse action against a public employee for their speech as a private citizen expressing a particular political viewpoint.

There is less protection for employees working for private entities such as corporations because First Amendment protections generally do not apply to private entities. There are exceptions if the private employer is engaged in state action such as a private entity that is working jointly with a governmental entity. In addition, employers are subject to the California Labor Code which prohibits employers from attempting to coerce

employees to adopt or follow or to refrain from adopting or following any particular course or line of political action or political activity. And most private employers are also subject to the National Labor Relations Act which protects certain employee political speech, including speech that may occur on social media, relating to working conditions and collective bargaining.

Employees should also review their employer's policies. Many employers have written policies and codes of conduct that describe what employees can and cannot do using social media. For example, posts on social media that harass other employees based on those employees' race, national origin, religion or other protected characteristics, are likely both prohibited by law and company policy. As mentioned above, employers are required by California law to take reasonable action to prevent and correct workplace harassment.

Higher Education

Professors and teachers in higher education¹ generally have an expanded freedom to investigate and discuss the issues in their academic field and to teach and publish findings without interference. In public institutions, such freedom arises from the First Amendment; in private institutions, it generally is a contractual right based on employment and/or tenure. This academic freedom includes the right to select classroom materials, determine the approach to the subject of their classes, and discuss their subject. In general, professors are permitted to discuss controversial issues, even if the discussion incurs strong disagreement, so long as the material stimulates debate and learning that is germane to the subject matter. However, academic freedom does not protect making inappropriate statements on matters which are unrelated to the subject under discussion or to persistently introduce material which has no relation to the subject.

Unprotected Speech

There is no protection for speech that constitutes incitement, threats of violence or other hate speech. Inciting violence or otherwise threatening an individual or group with harm is likely to lead to serious employment, civil, and criminal consequences.

The Department of Justice is committed to enforcing the law equally for all Californians. All California employees are entitled to workplaces that are free from harassment, discrimination, and retaliation.

¹ This bulletin does not address employment in the K-12 school setting, where school districts are allowed to exercise greater control over speech in the classroom.