Employee Speech Protection
State Legal Protections Compared

New York Law

New York law contains legal protections for certain political, recreational, and religious activities, and for workers who use cannabis while off-duty and away from the employer's premises. A recent amendment also allows employees to refuse to participate in meetings or view material that presents the employer's views on political matters, including membership in a union. However, the statute is thoroughly riddled with exceptions and carve-outs.

- **Political, Recreational, Religious Activity, and Cannabis** – NYLL § 201-d protects against discrimination because of:
    - Political activities off the employer's premises, without use of the employer's property, if legal (with certain statutory exceptions)
    - Use of consumable products, including cannabis, outside work hours, off premises, and without use of the employer's property
    - Recreational activities outside work hours, off premises, and without use of the employer's property
    - Membership in a union or exercise of organizing rights;
    - Refusal to attend employer-sponsored meetings or to view communications that communicate the employer's opinion on religious or political matters.

  HOWEVER – the statute is riddled with exceptions and limitations, including:
    - No protection for activity that creates a "material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest." (None of these terms are defined in the statute.)
    - No liability if the employer BELIEVES that adverse action was required by law, required by the employer's OWN policy, or the employee's actions were deemed by the employer OR A PREVIOUS EMPLOYER to constitute poor performance.
    - No protection where a "professional service contract" (undefined) limits off-duty conduct.
    - No limit on requirements limited to managerial or supervisory employees.
    - Several other exceptions apply

California Law

The California Labor Code has a number of broad employee protections that explicitly protect certain forms of speech. Other sections establish broad protections that may be implicated by employer policies that are overly broad. In *Doe v. Google*, a group of Plaintiffs alleged that their employer maintained confidentiality agreements, rules, and policies that were so restrictive that they implicated a broad range of Labor Code protections.

- **Political Speech and Activity** – Cal. Lab. Code § 1101 provides that "no employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for

public office. (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees." "Political activities" has been construed to mean "espousal of a candidate or a cause." *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 487 (1979).

- **Whistleblower Protections** – Cal. Lab. Code. § 1102.5 provides that "[a]n employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation[.]" § 1102.5(a).
- **Wages & Working Conditions –** California law offers several employee protections for speech about wages and working conditions. Despite some overlap with NLRA doctrine, these are not preempted because they "fit comfortably within [California's] police powers and address conduct affecting individual employees, as distinct from the NLRA's focus on concerted activity." *Doe v. Google, Inc.*, 54 Cal. App. 5th 948, 948 (1st Dist. 2020).
    - Cal. Lab. Code § 1197.5, part of the California Equal Pay Act, prohibits restrictions on sharing one own wage information, or other employees' wage information, for purposes of reporting an equal pay violation: "An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, [or] inquiring about another employee's wages[.]" Cal. Lab. Code § 1197.5(k).
    - Cal. Lab. Code § 232 provides that no employer may "[r]equire, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages." § 232(a). The term "wages" includes "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." *See* Cal. Lab. Code § 200(a).
    - Cal. Lab. Code § 232.5 provides that no employer may "[r]equire, as a condition of employment, that an employee refrain from disclosing information about the employer's working conditions." The statute provides the following limitation: "This section is not intended to permit an employee to disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege without the consent of his or her employer." § 232.5(d). "Working conditions" have been held to mean things like "attire, proper behavior, break room condition, elevator maintenance, seat comfort, temperature, lighting, uniforms, hair requirements, breaks, restroom facilities, and 'even one's required attitude.' In an enrolled bill report, contained within the legislative history material, working conditions are described as '(e.g., hours, workplace safety, benefits)." In an analysis from the Senate Rules Committee, the reference to working conditions is followed by '(e.g., hours, uniforms, occupation, safety).'" *Fleeman v. Cty. of Kern*, No. 120CV0321NONEJLT, 2021 WL 2634477, at *8 (E.D. Cal. June 25, 2021).

- **Restraints on Competition** – Cal. Bus. & Prof. Code § 16600: "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Courts have construed overly broad employer confidentiality policies to operate as a "de facto noncompete provision" where they prevent an employee from speaking about any aspect of their employment or the work they do, or to use information or knowledge that they acquired on the job. *Brown v. TGS Mgmt. Co., LLC*, 57 Cal. App. 5th 303, 316-19 (2020).