The Rise of Social Media: How to Embrace Free Expression Without Losing Your Job

The last few decades have seen unprecedented growth in technology. That development helped spur the rise of social media platforms such as Facebook, Twitter, Instagram, Snapchat, Tumblr, Yelp, Imgur, and Pinterest. Like it or not, social media use is now common in workplaces around the globe; the public sector in California is certainly no exception. But defining the proper scope of social media use and its impact in the workplace presents some challenges. Below is a brief overview.

The First Amendment. Conversations about hot-topic issues, which used to occur in break rooms or at watercoolers, now happen with greater regularity on social media. This includes topics like racial profiling, officer-involved shootings, taxes, political campaigns, and immigration, to name just a few. Public employees do not lose their constitutional right to engage in political activity and to speak freely about matters of public concern just because they enter public employment. However, a public agency has broader discretion to restrict speech when it acts as an employer, even if such restrictions must still be directed at conduct that could affect operations.

Speech moving from the workplace to social media doesn’t materially change the analysis of whether it is protected under the First Amendment. Public
employees are only protected when they speak as private citizens on matters of public concern. Although straightforward in principle, it is often hard to apply in practice. Some courts will place greater emphasis on certain facts than others. In one case, for example, an employee spoke as a private citizen when testifying under subpoena to federal authorities about information learned through public employment. *Lane v. Franks* (2014) 573 U.S. 228. But in two other cases, the courts held that the employees were not acting as private citizens and were not protected. *Garcetti v. Ceballos* (2006) 547 U.S. 410 (employee exposed government inefficiency and misconduct in a work memo to supervisors); *Hagen v. City of Eugene* (9th Cir. 2013) 736 F.3d 1251, 1257-1258 (employee raised safety concerns pursuant to his official job duties).

Even when speaking as a private citizen on a matter of public concern, courts still use a balancing test to see if free speech interests outweigh any potentially detrimental effect on the employer. The protected speech must be a substantial or motivating factor for the adverse employment action. The burden then shifts to the agency to present adequate justification for treating the employee differently from other members of the general public, or to show it would take the adverse action even absent the speech. The agency must reasonably believe the speech is disruptive and show that it resulted in an actual disruption or the reasonable likelihood of disruption and that the personnel action was based on the disruption and not the speech. *Waters v. Churchill* (1994) U.S. 661, 681.

Speech occurring in non-work areas and on the employee’s own time weigh in the employee’s favor, but threats are clearly not protected. *Lovell v. Poway Unified School District* (9th Cir. 1996) 90 F.3d 367, 371. Speech which contains mere “hyperbole” of the sort found in “nonmainstream political invective” is not considered a true threat even if it is crude or insulting and includes some violent content. *Bauer v. Sampson* (9th Cir. 2001) 261 F.3d 775. See also *Rodriguez v. Maricopa County Community College Dist.* (9th Cir. 2010) 605 F.3d 703 (racially disparaging remarks were not a threat). Although social media speech unrelated to one’s own work may be protected, it still must touch on a matter of public concern, and it must not harm the employer’s reputation. *City of San Diego v. Roe* (2004) 543 U.S. 77 (a police officer who posts sexually explicit videos of himself in uniform proclaiming himself to be in law enforcement was not protected).
The Fourth Amendment. The Fourth Amendment protects public employees from unreasonable searches and seizures in instances where the employee has a reasonable expectation of privacy. This is more limited than you may think. For example, in *City of Ontario v. Quon* (2010) 560 U.S. 746, the Supreme Court held that a City’s review of transcripts of an employee’s private text messages on a City provided device was not an unreasonable search. The City argued that it conducted the search to ensure it was not paying for extensive personal communications. The Court found this was permissible. It held that the City’s review of two billing cycles’ worth of text message transcripts, with redactions for text messages sent during off-duty hours, was not excessively intrusive and was an appropriate way to make that determination. Courts may extend this holding in *Quon* beyond text messages to cover social media use on other agency-issued devices.

Protected Concerted Activity. The National Labor Relations Act protects the rights of most non-management private-sector employees to engage in “concerted activity for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. §151-169. These protections extend to concerted activities that take place through social media. An employee is engaging in concerted activity if they act with or on the authority of other employees, and not solely by and on their own behalf. This can include discussing wages, benefits or working conditions, or disclosing workplace discrimination or harassment. Workers can’t be fired for social media posts that are considered protected concerted activity, including using social media to organize or form a union.

Unfortunately, the line is not as clear as you might think here, either. The National Labor Relations Board (NLRB) is the federal agency that enforces violations of the NLRA. The state Public Employment Relations Board (PERB) looks to the NLRB for guidance in enforcing similar state bargaining laws, such as the Meyers-Milias Brown Act. In the last decade, the NLRB’s general counsel has issued several advice memos on social media use by employees. These memos help provide clarity on what is not protected. For example, workers can be fired for social media posts that are defamatory or embarrass or otherwise disparage the employer. This includes any posts that are intended to harass, threaten or bully other employees. Workers can also be fired for statements that don’t concern their terms and conditions of employment. Even if they do, workers can still be fired if they are
“individual gripes” that don’t call for or initiate any employee group action.

**Social Media Policies.** Some public agencies have social media policies that provide guidance on what use is appropriate, and to prevent inappropriate use that could expose the agency to viral attacks or compromise their network systems. Policies often affect terms and conditions of employment and are therefore mandatory subjects of bargaining with the employee organization. For example, the policy may require employees to acknowledge receipt of the policy and sign a form that is placed in their personnel file or say that employees are subject to discipline for personal social media use on work time.

Policies frequently address who can access and use the agency’s own social media accounts (this is often a social media manager, public affairs officer, public information officer, or some other public communications person), what content and use is appropriate, who has access to the log-in information, when disclaimers or disclosures are to be given, and when content should be removed. Policies should also clarify what content is considered a public record. The California Supreme Court held that content that relates to public business, even if sent or received on personal devices and accounts, may be public records subject to disclosure under the California Public Records Act. *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608. Policies should say who is responsible for identifying, managing, preserving, and disclosing such records when requested.

Policies might say who can access the agency’s technology infrastructure using either personal or agency-issued devices, under what circumstances, and if any particular social media platforms or content is expressly permitted or prohibited. It also might define to what extent employees can use personal social media accounts to communicate official agency business. Some policies could even subject employees to possible discipline for using personal social media accounts for non-agency business on non-work time. If so, it needs to be precise (not general or ambiguous) about what conduct is prohibited (e.g., threats, operational disruptions, etc.) and should reference any applicable employee misconduct policies for greater clarity. It should say what happens in the event of a violation, including when an employee may be subject to discipline, and when computer or technology system usage, access, and related privileges can be revoked or suspended.
**Labor Code § 980.** California state law (AB 25) prohibits employers from requiring or requesting an employee or applicant to: (1) disclose a social media username or password, (2) access personal social media in the employer’s presence, or (3) divulge any personal social media activity, except as part of an investigation of employee misconduct. *Cal. Labor Code* §980. It is also unlawful for an employer to discharge, discipline, threaten, or retaliate against an employee for refusing to comply with a request that violates §980. Keep in mind these protections do not apply with respect to agency-issued devices.

**Conclusion.** Public employees should feel free to embrace social media, especially for personal use on personal devices during non-work hours. But do so cautiously. It’s important to recognize the limitations. What you believe is “free speech” might not actually protect you from an adverse employment action. Certain conduct can lead to discipline including termination. The mere fact that the conduct occurred through social media does not by itself insulate a public employee from possible consequences.
Did You Know

Paid Leave for Organ and Bone Marrow Donors

California law requires employers with 15 or more employees to provide paid leave for employees who donate an organ or bone marrow to another person. The paid leave is up to 30 business days for an organ donation and up to 5 business days for a bone marrow donation in a 1-year period. Employers can require employees to first use up to 2 weeks of their own accrued paid leave for organ donation and up to 5 days of accrued paid leave for bone marrow donation. This includes vacation time. Healthcare benefits must be maintained during this period. It is not considered a break in service. Employers must reinstate employees after organ donor leave unless the job would not otherwise be available. Examples of this would include an end of a limited-term assignment or temporary project, or a reduction in force (layoffs). The leave does not count against you under the California Family Rights Act. You still have your right to a full 12 weeks of unpaid CFRA leave.

Effective January 1, 2020, Assembly Bill 1223 requires employers to give an additional 30 business days of unpaid leave in a 1-year period for the purpose of donating an organ to another person. This is measured from the date the employee’s leave begins over the next 12 months. Employees must exhaust all available sick leave first and provide written verification of their organ donor status and the medical necessity for the organ donation.
News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

- 2.3% - CPI for All Urban Consumers (CPI-U) Nationally
- 2.8% - CPI-U for the West Region
- 3.0% - CPI-U for the Los Angeles Area
- 2.9% - CPI-U for the Riverside Area (from November)
- 2.6% - CPI-U for San Diego Area (from November)
- 2.5% - CPI-U for San Francisco Bay Area

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: This is a question about AB5 going into effect as of January 1, 2020. The Agency uses contract personnel for non-specialized jobs to fill in for full time and part-time work. The contractors have been with the Agency for over a year. If the Agency must consider them employees under AB5, would that contract position have to be posted for Agency employees so they could apply for the position if they wanted to?

Answer: It may, but that depends in large part on the Agency’s promotion and recruitment rules. The Agency’s first step is to determine if the worker must be converted to an employee. AB5 treats most workers as employees by default and places the burden on the employer to prove otherwise. The Agency must be able to show that: (A) the worker is free from control and direction from the employer with respect to performance of the work, practically, and contractually; (B) the worker performs work that is outside the Agency’s usual course of business; and (C) the worker is engaged in an independently established trade, occupation, profession or business.

If the answer to all three is yes, the Agency may not have to convert the worker after all. If not, the Agency must decide if they need this work performed.
and if so under what terms. If by an 
employee, the next question is what 
type. This may mean a provisional, 
limited-term, non-classified, part-time, 
or other non-permanent or non- 
benefited position. If the Agency 
converts the contractor to this type of 
employment, existing employees won’t 
be interested.

But if the Agency decides to covert the 
contractor to an existing job classification 
and they don’t follow any existing 
promotion or recruitment rules, there 
may be a grievance. For example, there 
may be a rule that requires notification to 
staff about open recruitment, to give 
preference to qualified in-house staff in 
rankings or interviews, or to allow staff 
who needs a medical accommodation to 
transfer or demote into the vacancy, etc. 
You won’t be able to challenge the 
Agency’s conversion of the contractor to 
employee, but you may be able to 
challenge any rules that are violated.

Once you learn what the Agency decides 
to do, contact your professional staff, 
who can help determine if there’s been a 
violation. Also, keep in mind that AB5 is 
a brand-new law in California. Some 
private-sector employers are pursuing a 
2020 ballot initiative to stop the law from 
taking effect. It’s possible the Agency will 
look for a short-term fix until it’s decided.

Question: I work in Finance. We were 
just discussing the 9/80 work schedule.

Management has already allowed one 
person in our Department to work this 
schedule. We asked various times if the 
rest of us can have that option too and 
we have been turned down by both our 
Director and our Manager. We feel that 
we are being discriminated against, 
especially if they have already let 
someone else work it. Why can’t they 
offer it to us too? We want the 
Association to bring this matter up to 
Human Resources and our Director. 
How should we go about this?

Answer: Management generally has the 
right and discretion to determine work 
schedules, unless your MOU has specific 
language that says otherwise. If not, the 
Association can propose language on 
work schedules in the next MOU 
negotiations. The employee’s initial 
work schedule is almost always set by 
management. It is usually determined 
based on the needs of the department 
and the nature of the position.

This probably isn’t discrimination. 
Ordinarily, you must show disparate 
treatment based on a protected characteristic (e.g., age, race, gender, 
etc.). You also must suffer from an 
adverse employment action. Another 
employee having a different work 
schedule might not qualify, even if you 
can show that any favoritism is based on 
one of those protected characteristics.
The better approach is to appeal to your management’s sense of fairness. If it is a morale issue, you can raise this concern with management, Human Resources, or both, either informally or through a labor-management meeting. You can also contact professional staff to help communicate these concerns directly. If it’s operationally feasible and they care about morale in the Department, they may work with you to find a solution. Management’s flexibility may hinge on operational needs, which can and do differ from one department to the next.

Question: I’m a Fire Inspector. I believe I should be in the CalPERS Safety Retirement, not the Miscellaneous. My position was once designated as a Safety position, but it is currently designated as a Miscellaneous. How do I get my position put back into the proper retirement formula? What information do I need to collect? I have our previous MOU that designated my position as safety. I also have my job description and an email from the City about the move from Safety to Miscellaneous. What is the process and who do I contact to get this started? Can my Association help or am I on my own?

Answer: Local safety CalPERS members have a higher retirement formula compared to local miscellaneous members. State law defines a local safety member to include all local police officers, county peace officers and school safety officers, county peace officers and school safety members.

To qualify, one of the determining factors is whether the job would regularly require that you place your personal safety at risk in performing your job duties. For the most part, there isn’t a lot of debate about which positions should be designated as safety and which as miscellaneous. But there are typically a few that could arguably meet the safety designation. Contact your professional staff, who can walk you through the steps to see if you qualify.

The Agency usually won’t be the one to initiate this review, though. If you do meet the test, it’s best to reach out to your current employee Association for help first. They can help you raise this with management or H.R. Depending on your case, the Agency may agree that you’re mis-designated, but it is usually up to you to do the legwork. The materials you have are a great place to start. The fact that the position was previously designated as safety should help bolster your case. It’s worth asking why it was converted to miscellaneous in the first place. This may provide some indication as to whether the Agency will support converting it back to safety.

Question: Management approached us last week regarding altering the Sick Leave Article of our MOU and specifically the sick leave buy-back
provision. Each year, we can cash-out a set number of sick leave hours if we’ve used less than a specified number of sick leave hours in the preceding year. We heard them out but have not yet agreed. Can you provide some insight on any tax issues with how this section is currently written? Management said members who opted not to buy-back sick time will now be taxed if this language remains unchanged. They want to add language saying that we must make an “irrevocable election” or else everyone will be taxed on the full buy-back amount regardless of whether they receive any cash-out. It doesn’t seem right. Is this correct? Do we have to agree to this change? Should we?

Answer: This is not uncommon. Many agencies in California are proposing to modify existing programs as you’ve described. That’s because the IRS issued an advisory opinion about whether the ability to cash out leave hours is a taxable event. In that opinion, the IRS held that because the value of those hours is available for cash-out, that availability is considered income and a taxable event regardless of whether the employee ever received any cash-out.

Agencies have since had their leave buy-back programs audited. In at least one case, the IRS found the program was non-compliant and imposed a tax liability as a result. To avoid a similar outcome, agencies often propose adding an “irrevocable election” into existing buy-back programs so that employees won’t be taxed on the cash value of hours they didn’t cash out but could have. Instituting an irrevocable election prevents any hours that weren’t cashed out from being taxable (in the eyes of the IRS), for example to those who don’t elect any cash-out, or who cash-out less than the full amount they are eligible for.

The Association doesn’t have to agree to add an irrevocable election, but the Agency must still comply with the law and tax those who don’t cash-out but could have. This is often worse than simply agreeing to an irrevocable election in the first place. Refusing to agree will probably result in employees being taxed across the board, regardless of whether an employee cashes out or not. The irrevocable election takes some getting used to, but it often works out better in the end. Contact professional staff for help with any proposed language changes to your program.

Question: I’ve recently returned from pregnancy and parental leave but I’m still breast feeding. My supervisor has been harassing me about my time to pump. Are they allowed to do this? I don’t want to grieve or be too assertive about the issue. But I do want to know what my rights are. I also want to be able to know when they cross the line, and what I should say or do when that happens. Do you have any advice?
Answer: State law requires all employers to provide a reasonable amount of break time to accommodate an employee who needs to express breast milk during duty hours. Management must provide you with a room or other location, other than a toilet stall, near your work area, so that you can express breast milk privately. The break time shall, if possible, run concurrently with any break time that you already get. If it doesn’t run concurrently with the rest time, it shall be unpaid. This is the legal minimum.

You may be able to negotiate a temporary accommodation to meet your individual needs. This can include scheduling lactation breaks during the day and making up the time needed for the break at the beginning or the end of your shift. Your supervisor may ask you about the time you need for lactation because they can control your work hours. It’s often wise to contact your immediate supervisor and H.R. ahead of time to get a written plan in place to minimize confusion. Your supervisor shouldn’t inquire beyond your ability to get the work done or disparage your need to lactate.
DOES YOUR PORTFOLIO FIT YOUR RETIREMENT LIFESTYLE?

Most portfolios are constructed based on an individual’s investment objective, risk tolerance, and time horizon.

Using these inputs and sophisticated portfolio-optimization calculations, most investors can feel confident that they own a well-diversified portfolio, appropriately positioned to pursue their long-term goals.¹

However, as a retiree, how you choose to live in retirement may be an additional factor to consider when building your portfolio.

Starting a Business?

Using retirement funds to start a business entails significant risk. If you choose this path, you may want to consider reducing the risk level of your investment portfolio to help compensate for the risk you’re assuming with a new business venture.

Since a new business is unlikely to generate income right away, you may want to construct your portfolio with an income orientation in order to provide you with current income until the business can begin turning a profit.

Traveling for Extended Periods of Time?

There are a number of good reasons to consider using a professional money manager for your retirement savings. Add a new one. If you plan on extended travel that may keep you disconnected from current events (even modern communication), investing in a portfolio of individual securities that requires constant attention may not be an ideal approach.² For this lifestyle, professional management may suit your retirement best.

Rethink Retirement Income?

Market volatility can undermine your retirement-income strategy. While it may come at the expense of some opportunity cost, there are products and strategies that may protect you from drawing down on savings when your portfolio's value is falling—a major cause of failed income approaches.

1. Diversification and portfolio optimization calculations are approaches to help manage investment risk. They do not eliminate the risk of loss if security prices decline.
2. Keep in mind that the return and principal value of security prices will fluctuate as market conditions change. And securities, when sold, may be worth more or less than their original cost. Past performance does not guarantee future results. Individuals cannot invest directly in an index.

The content is developed from sources believed to be providing accurate information. The information in this material is not intended as tax or legal advice. It may not be used for the purpose of avoiding any federal tax penalties. Please consult legal or tax professionals for specific information regarding your individual situation. This material was developed and produced by FMG Suite to provide information on a topic that may be of interest. FMG Suite is not affiliated with the named broker-dealer, state- or SEC-registered investment advisory firm. The opinions expressed and material provided are for general information, and should not be considered a solicitation for the purchase or sale of any security. Copyright 2019 FMG Suite.
HELP is dedicated to assisting and promoting our youth and members in our community to reach their highest level of potential. Higher education enables individuals to expand their knowledge and skills and improve one’s quality of life. To assist and promote that our youth and members reach their full potential, HELP has created our annual scholarship. The HELP Scholarship is only available to registered HELP members & their children.

APPLY TODAY

www.helplac.org/help-scholarship

"It is truly an honor and a blessing to receive the HELP Stone T. Leonard scholarship. I am grateful and will pursue this towards the day you will be calling me Doctor Anissa Muhammad. Thank you HELP."

- Anissa Muhammad

"Thank you for the HELP Stone T. Leonard scholarship. I really appreciate it and the financial assistance will help me out toward paying for my school necessities."

- Desiree Rocha

"This scholarship means so much to me. Graduating high school and going into college can be very scary, but knowing that I have the financial support from the HELP Stone T. Leonard Scholarship is awesome and I’m truly grateful."

- Viany Campos
Save with these incredible HELP Membership Perks

Your HELP membership is simply amazing. And in addition to the benefits that are already yours, we have added these HELP Perks with hundreds of merchants and thousands of discounts. Members can access savings at both national and local companies on everyday purchases such as tickets, electronics, apparel, travel and more. HELP members have the opportunity to save, on average, over $2,000 per year. HELP Perks can save you enough to pay for your membership for years to come.

<table>
<thead>
<tr>
<th>RECEIVE EXCLUSIVE DISCOUNTS</th>
<th>What Members Are Saying:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apparel</td>
<td>&quot;HELP Perks pays for my membership!&quot; -Linda S.</td>
</tr>
<tr>
<td>Insurance &amp; Protection</td>
<td>&quot;I received 8% off my Verizon cell phone bill!&quot; -Michael W.</td>
</tr>
<tr>
<td>Automotive</td>
<td>I saved 30% on movie tickets on date night with my husband. -Janet P.</td>
</tr>
<tr>
<td>Books, Movies, Music</td>
<td></td>
</tr>
<tr>
<td>Real Estate &amp; Moving</td>
<td></td>
</tr>
<tr>
<td>Cell Phones</td>
<td></td>
</tr>
<tr>
<td>Sports &amp; Recreation</td>
<td></td>
</tr>
<tr>
<td>Electronics</td>
<td></td>
</tr>
<tr>
<td>Tickets &amp; Entertainment</td>
<td></td>
</tr>
<tr>
<td>Finance</td>
<td></td>
</tr>
<tr>
<td>Travel</td>
<td></td>
</tr>
</tbody>
</table>

Enjoy preferred member pricing on some of your favorite brands and services.

To sign up, simply login at helpac.org, scroll down, and click Membership Discounts Icon. If you don’t already have an account, follow the simple signup instructions on the screen.

These benefits are for HELP members. All offers or promotions are subject to change without notice.

www.helplac.org