

STATE LAWS POTENTIALLY PROTECTING EMPLOYEE BLOGGING

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In the following jurisdictions, state law expressly or implicitly bans employers from restricting *some kinds* of speech—which may well include blogging—by their employees:

Note: Italicized material in brackets is the author’s interpretation of the law, usually based on the cases decided under the law. Some of the precedents are lower-court precedents or federal court precedents, which may eventually be rejected by the state supreme court.

Cal. Labor Code § 1101: No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) Forbidding or preventing employees [*or applicants for employment*¹] 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 [*i.e., activities involving the “espousal of a candidate or a cause,” including broad social movements such as the gay rights movement,² but perhaps not activities to improve labor conditions at the particular employer³ or advocacy of forcible or violent conduct⁴*] or affiliations of employees [*or applicants for employment*⁵].

[*There might be an exception “when the employee’s political activities are patently in conflict with the employer’s interests.”*⁶]

Cal. Labor Code § 1102: No employer shall ... attempt to coerce or influence his employees through or by means of threat of discharge ... to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity [*see § 1101 bracketed text*].

[*The following two statutes probably do not secure any extra protection employees beyond what is provided by § 1101. Though they could be interpreted as prohibiting “dis-*

¹ Gay Law Students Assn. v. Pacific Tel. & Tel. Co., 595 P.2d 592, 610 n.16 (Cal. 1979).

² Gay Law Students Assn. v. Pacific Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979).

³ Henry v. Intercontinental Radio, Inc., 155 Cal. App. 3d 707, 715 (1984) (suggesting that such speech might not be covered); see also Keiser v. Lake County Superior Court, 2005 WL 3370006, *11 (N.D. Cal.).

⁴ Lockheed Aircraft Corp. v. Superior Court, 171 P.2d 21, 24 (Cal. 1946).

⁵ Gay Law Students Assn. v. Pacific Tel. & Tel. Co., 595 P.2d 592, 610 n.16 (Cal. 1979).

⁶ Smedley v. Capps, Staples, Ward, Hastings & Dodson, 820 F. Supp. 1227, 1230 n.3 (N.D. Cal. 1993) (stating, in my view incorrectly, that *Mitchell v. International Ass’n of Machinists*, 196 Cal. App. 2d 796 (1961), suggested such a rule).

charge from employment for lawful conduct,” the likelier interpretation—and the one that lower California courts have generally adopted—is that the statutes merely let the Labor Commissioner take assignments of any claims already secured by existing law, such as § 1101 claims or right to privacy claims.^{7]}

Cal. Labor Code § 96(k): The Labor Commissioner ... shall, upon the filing of a claim therefor by an employee ..., take assignments of: ... Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises.

Cal. Labor Code § 98.6(a): No person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in [Cal. Labor Code § 96k] and [Cal. Labor Code § 1101]

Colo. Rev. Stats. Ann. § 24-34-402.5(1): [No employer may] terminate the employment of any employee due to that employee’s engaging in any lawful activity [*including speech*^{8]} off the premises of the employer during nonworking hours unless such a restriction:

(a) Relates to a bona fide occupational requirement [*such as the employee’s duty of loyalty to his employer*^{9]} or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees [*such as “certain high profile members of [the employer’s] staff”*^{10]}, rather than to all employees of the employer; or

(b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest [*i.e., a “situation in which regard for one duty tends to lead to disregard of another”*^{11]}....

Conn. Gen. Stat. § 31-51q: [No employer may] discipline or discharge [an employee] on account of the exercise by such employee of rights guaranteed by the first amendment [*to speak on matters of public concern, and not to express purely personal employee grievances*^{12]} ..., provided such activity does not substantially or materially interfere with the

⁷ See *Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72, 80-84 (2004) (so holding as to both § 96(k) and § 98.6); 83 Ops. Cal. Atty. Gen. 226, 228, 230 (2000) (taking this view as to both provisions); *Barbee v. Household Automotive Finance Corp.*, 113 Cal. App. 4th 525, 533-36 (2000) (taking this view, but considering only § 96(k)); *Paloma v. City of Newark*, 2003 WL 122790 (Cal. Ct. App.) (unpublished) (like-wise); *Hartt v. Sony Electronics Broadcasting & Prof. Co.*, 69 Fed. Appx. 889, 890 (9th Cir. 2003) (like-wise).

⁸ *Gwin v. Chesrown Chevrolet, Inc.*, 931 P.2d 466 (Colo. Ct. App. 1996) (employee’s demand to an off-the-job lecturer for a refund of money paid to attend the lecture); *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458 (D. Colo. 1997) (letter to the editor of a newspaper criticizing the employer).

⁹ *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1462 (D. Colo. 1997) (finding such a duty was breached by employee’s writing a letter to a newspaper complaining about alleged mistreatment of employees and poor customer service). The *Marsh* court noted that publicly accusing one’s employer of undermining *safety* wouldn’t breach the duty of loyalty, but accusing the employer of mistreating employees and reducing customer service did breach the duty of loyalty.

¹⁰ *Marsh*, 952 F. Supp. at 1463.

¹¹ *Marsh*, 952 F. Supp. at 1464.

¹² *Cotto v. United Technologies Corp.*, 738 A.2d 623, 632 (Conn. 1999); *Daley v. Aetna Life & Casualty Co.*, 734 A.2d 112, 124-25 (Conn. 1999). Even if an employee’s complaints about the employer might be

employee's bona fide job performance or the working relationship between the employee and the employer

D.C. Stat. § 2-1402.11(a): [No employer may discriminate against employees or prospective employees] based upon the actual or perceived ... political affiliation [defined in § 2-1401.02(25) as “the state of belonging to or endorsing any political party”] of any individual [No cases interpreting this.]

La. Rev. Stat. § 23:961: [N]o employer having regularly in his employ twenty or more employees shall

make, adopt, or enforce any ... policy ... preventing any of his employees from ... participating in politics, or from becoming a candidate for public office ... [nor]

adopt or enforce any ... policy which will ... tend to control or direct the political activities or affiliations of his employees, nor ...

attempt to coerce or influence any of his employees by means of threats of ... loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character....

[“[T]he actual firing of one employee for political activity constitutes for the remaining employees both a policy [prohibiting the activity] and a threat of similar firings.”¹³]

[There is no exception even when the employee's speech alienates customers, and thus makes the employee “a detriment to his employer.”¹⁴]

[Violation of the law is a misdemeanor, and also civilly actionable.]

N.Y. Labor Law § 201-d:

(1) (a) “Political activities” shall mean (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group

(b) “Recreational activities” shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material [such as discussing politics over dinner in a restaurant¹⁵]

(2)(a) ... [No employer may discriminate against an employee or prospective employee] because of ... an individual's [legal] political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property [except when the employee is a professional journalist, or a government employee who is partly funded with federal money and thus covered by federal statutory bans on politicking by government employees] ...¹⁶

of interest to the general public, they aren't protected if the employee's motivation is simply resolving his own employment problems.

¹³ Davis v. Louisiana Computing Corp., 394 So.2d 678, 679-80 (La. App. 1981).

¹⁴ Davis v. Louisiana Computing Corp., 394 So.2d 678, 679 (La. App. 1981).

¹⁵ Cavanaugh v. Doherty, 243 A.D.2d 92, 100 (1998). The employee's speech didn't qualify as “political activities” under the New York statute, so it seems that the court was treating it as a “recreational activity” instead.

¹⁶ See Richardson v. City of Saratoga Springs, 246 A.D.2d 900, 902 (1998) (applying this as written).

(c) ... [No employer may discriminate against an employee or prospective employee] because of ... an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property

(3) [This section] ... shall not be deemed to protect activity which ... creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest [*such as when the German National Tourist Office fired an employee for becoming known as the translator of some Holocaust revisionist articles*¹⁷]....

N.D. Cent. Code 14-02.4-03, -08: [No employer may discriminate against an employee or applicant] because of ... participation in lawful activity off the employer's premises [*presumably including speech*] during nonworking hours

[unless that participation is] in direct conflict with the essential business-related interests of the employer ...

[or] contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer.¹⁸

Pennsylvania: *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 900 (3d Cir. 1983), held that, under Pennsylvania law, private employers couldn't fire employees for "political expression and association" unless the employees' activities substantially interfere with the employee's job (see the Connecticut statute for a similar test). But it's not clear whether *Novosel* is still good law. See *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 619 (3rd Cir. 1992) (noting criticism of *Novosel*, though concluding that there was no need in that case to decide whether to overrule *Novosel*); *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 843-44 (Pa. Super. 1986) (seemingly reaching the opposite result from *Novosel*, but not expressly discussing *Novosel*).

29 Laws of Puerto Rico Ann. § 140: Any employer who performs any act of prejudicial discrimination against [an employee because he is] ... affiliated with a certain political party, shall be guilty ... of a misdemeanor¹⁹

S.C. Code Ann. § 16-17-560: Whoever shall assault[,] intimidate[, or discharge from employment] any citizen because of political opinions or the exercise of political rights and privileges guaranteed to every citizen of the United States by the Constitution ... thereof²⁰ [*for instance, if the citizen refuses to contribute to a political action commit-*

¹⁷ See *Berg v. German National Tourist Office*, 248 A.D.2d 297, 297 (1998).

¹⁸ See *Hougum v. Valley Memorial Homes*, 574 N.W.2d 812, 822 (N.D. 1998) (concluding that a mortuary chaplain's off-duty act of masturbating in a public restroom stall, if legal, might be covered by the statute notwithstanding the "direct conflict with ... essential business-related interests" and bona fide occupational qualification exceptions, and leaving the decision to the jury); *Fatland v. Quaker State Corp.*, 62 F.3d 1070, 1072-73 (8th Cir. 1995) (concluding that employer could "prohibit[] employees ... from operating off-hours businesses that would benefit from confidential information that the employees' positions within the company would enable them to secure from competitors").

¹⁹ See *Santiago v. People*, 154 F.2d 811, 813 (1st Cir. 1946) (applying this as written).

²⁰ See *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 818 (4th Cir. 2004) (en banc) (concluding that "the exercise of political rights and privileges guaranteed to every citizen of the United States by the Constitution ...

*tee*²¹] [possibly limited to “matters directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political campaign contributions, and the right to vote”²²] ... shall be guilty of a misdemeanor [and be civilly liable²³]....

Rev. Code Wash. 42.17.680(2): No employer ... may discriminate against an ... employee in the terms or conditions of employment for ... (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee. [This prohibits flat “no political activities” rules, as well as retaliation for supporting or opposing a particular candidate, proposition, party, or committee.²⁴]

Seattle, Wash. Municipal Code §§ 14.04.030, 14.04.040 bans discrimination against employees or applicants based on “political ideology,” defined as “any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group,” and (emphasis added) “includ[ing] membership in a political party or group and includes **conduct, reasonably related to political ideology, which does not interfere with job performance,**” a phrase that may well include a broad range of political speech.

Madison, Wisc. Municipal Code §§ 3.23(2)(cc), 8(a) bans discrimination against employees or applicants based on “political beliefs,” defined as “one’s opinion, manifested in speech or association, concerning the social, economic and governmental structure of society and its institutions,” which is to “cover all political beliefs, the consideration of which is not preempted by state or federal law.”

Urbana, Ill. Code of Ordinances §§ 12-39, 12-62 bans discrimination against employees or applicants based on “political affiliation,” defined as “[t]he state of belonging to or endorsing any political party or organization or taking part in any activities of a political nature.”

In the following jurisdictions, state laws ban employers from restricting off-duty use of “lawful products” by employees. It’s possible, though far from certain, that a court would treat restricting employee blogging as a restriction on the use of a “lawful product” (either a computer or blogging software).

thereof” does not include on-the-job speech, though not opining on how the statute would apply to off-the-job speech, or how the “political opinions” prong would apply to on-the-job speech).

²¹ Culler v. Blue Ridge Elec. Coop., 309 S.C. 243, 246 (1992).

²² Vanderhoff v. John Deere Consumer Products, Inc., 2003 U.S. Dist. LEXIS 25808, *7 (D.S.C.) (concluding that display of the Confederate flag is thus not covered). Note that this is just a federal district court case, and thus not very influential precedent; moreover, the California Supreme Court has interpreted similar language in the California statute differently, see note 3 and accompanying text.

²³ Culler v. Blue Ridge Elec. Coop., 309 S.C. 243, 246 (1992).

²⁴ Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123, 1127 (Wash. 1997).

820 Ill. Consol. Stats. 55/5: (a) [No employer may discriminate against an employee or applicant] because the individual uses lawful products off the premises of the employer during nonworking hours[, except when ... the use of the product] impairs an employee's ability to perform the employee's assigned duties. [*No cases interpreting this.*]

Mont. Code Ann. § 39-2-313(2), (3): ... [A]n employer ... may not discriminate against an [employee or prospective employee] because the individual legally uses a lawful product [defined as "a product that is legally consumed, used, or enjoyed and includes food, beverages, and tobacco"] off the employer's premises during nonworking hours ... [except when the behavior:]

(a)(i) affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees; or

(a)(ii) conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment; [or when]

(b) [the employee], on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products [*No cases interpreting this.*]

Nev. Rev. Stat. § 613.333: [No employer may discriminate against an employee or applicant] because he engages in the lawful use in this state of any product outside the premises of the employer during his nonworking hours, if that use does not adversely affect his ability to perform his job or the safety of other employees.... [*No cases interpreting this.*]

N.C. Gen. Stat. Ann. § 95-28.2(b): [An employer may not discriminate against an employee or prospective employee] ... because the prospective employee or the employee engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees.... [*No cases interpreting this.*]

Wisc. Stat. Ann. §§ 111.321, 111.35: ... [N]o employer ... may engage in any act of employment discrimination ... against any individual on the basis of ... use ... of lawful products off the employer's premises during nonworking hours [except when the use of the product] ...

(b) Creates a conflict of interest, or the appearance of a conflict of interest, with the job-related responsibilities of that individual's employment

(c) Conflicts with a bona fide occupational qualification that is reasonably related to the job-related responsibilities of that individual's employment [*No cases interpreting this.*]

Notes about these laws generally:

Unions as employers: Unions have the federal statutory right to fire union employees who openly disagree with the union's political activities. *Thunderburk v. United Food & Commercial Workers' Union*, 92 Cal. App. 4th 1332, 1343-46 (2001).

Newspapers as employers: Newspapers have the First Amendment right to bar their reporters from engaging in any political activity. *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1127 (Wash. 1997); but see *Ali v. L.A. Focus Publication*, 112 Cal. App. 4th 1477 (2003) (rejecting the claim that a newspaper "has the unfettered right to terminate an employee for any [outside-the-newspaper] speech or conduct that is inconsistent with the newspaper's editorial policies"). See also *Cotto v. United Technologies Corp.*, 738 A.2d 623, 627 (Conn. 1999) (acknowledging that in some circumstances, the statute "may conflict with the employee's own free expression rights"). The same probably also applies to other employers that are themselves speakers, see, e.g., *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 892, 904-06 (1st Cir.1988) (en banc).

Firings for union-related political activity: State-law claims for firing caused by union-related political activity are preempted by federal labor law. *Rodriguez v. Yellow Cab Coop.*, 206 Cal. App. 3d 668, 673-80 (1988); *Henry v. Intercontinental Radio, Inc.*, 155 Cal. App. 3d 707, 713-15 (1984).

Bona fide occupational qualification (BFOQ): Say that a statute lets employers discriminate based on an employee speech if such discrimination is justified by a "bona fide occupational qualification"; and say that an employee's speech offends and thus alienates customers or coworkers. May the employer then fire the employee, essentially arguing that refraining from speech that offends people is a bona fide requirement of the job?

This is hard to tell, but it's possible that courts will say "no." BFOQ is a term of art that originated in sex discrimination law and religious discrimination law under Title VII of the Civil Rights Act of 1964 (and similar statutes), which let employers discriminate based on sex and religion where sex and religion is a BFOQ. And in that context, BFOQ is defined to *exclude* concern about customer/coworker hostility to employees of a particular sex or religion (or preference for employees of another sex or religion).

an employer may *not* rely on customer/coworker preference or hostility in deciding that sex or religion is a BFOQ.

In the Equal Employment Opportunity Commission's words, "the preferences of coworkers, the employer, clients or customers" "do not warrant the application of the bona fide occupational qualification exception." 29 C.F.R. § 1604.2(a)(1)(iii) (1996); see also, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *Bohemian Club v. Fair Employment & Hous. Comm'n*, 187 Cal. App. 3d 1, 21 (1986); *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196, 1201 (N.D. Tex. 1983). And this is so even when sex- and religion-blind hiring may cause the employer real economic loss, because of this coworker/customer preference.

This suggests, therefore, that even if an employee's speech—like the employee's sex or religion—alienates customers or coworkers, the employer nonetheless may not defend firing the employee for the speech based on a “bona fide occupational qualification” argument.