Let's talk politics

An employee's right to engage in political activity

By Sarah Abraham and William Jhaveri-Weeks

In recent years, and particularly in the last six months, employees across the country have lost jobs and job offers because of statements they have made about controversial political topics, including the Hamas attack on Israel and the ensuing war in Gaza. Employers have scrutinized employees' personal social media accounts for statements that might evidence a religious or racial bias, drawing lines about which comments are disqualifying for employment.

This article discusses the laws protecting an employee's right to engage in political activity in and outside of the workplace. The article begins with California Labor Code sections 1101 and 1102, which protect employees from efforts to control their political activities or affiliations. It then turns to other laws that may apply when employees are disciplined or terminated in connection with political speech. The article also discusses the availability of injunctive relief as a tool to stop interference with political activity. Throughout, the article discusses practical considerations for plaintiffs' lawyers in evaluating potential enforcement of these rights, including issues such as whether attorneys' fees are recoverable. Certain protections available only to public employees (e.g., the First Amendment) are outside the scope of the article.

Protected "political activity" under California Labor Code sections 1101 and 1102

California has two long-standing sections of the Labor Code that protect employees' right to engage in "political activity." (See Lab. Code, §§ 1101-02.) Under Labor Code section 1101, an employer must not "make, adopt or enforce any rule, regulation, or policy.... controlling or directing, or tending to control or direct the political activities or affiliations of employees." (Lab. Code, § 1101, subd. (b).) Under Labor Code section 1102, an employer cannot "coerce or influence or attempt to coerce or influence [its] employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." (Lab. Code, § 1102.) Labor Code sections 1101 and 1102 do not distinguish between political activity at the workplace and political activity outside of work (*cf.* Labor Code § 96k, discussed below.) Presumably an employer has some rights to control political expression in the workplace that it would not have with respect to off-duty conduct. Under the case law, a key inquiry for evaluating potential claims under these statutes is whether the employer acted with a "political motive." Thus, a neutral policy that treats all viewpoints similarly might pass muster, while one that seems intolerant of a particular viewpoint would be more likely to be found "politically motivated."

"Political activity" defined

The term "political activity" is interpreted broadly. It "connotes espousal of a ... cause, and some degree of action to promote the acceptance thereof by other persons." (*Gay Law Students Ass'n v. Pac. Tel. & Telc. Co.* (1979) 24 Cal.3d 458, 487.) A survey of cases gives a flavor of what type of political statements may be protected "political activity" under these laws.

In *Gay Law Students Association*, a foundational California Supreme Court decision from over forty years ago, "the struggle of the homosexual community for equal rights" was found to be political activity. The court observed that the topic of gay rights, at that time, "incited heated political debate," and that "attempt[ing] to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals" was political activity. The court held that employees who alleged they were discriminated against for defending gay rights stated a cause of action under Labor Code sections 1101 and 1102. The Court noted in a footnote that these sections might apply to job applicants, as well as employees, despite the use of the word "employee" in the statute. (*Id.* at 487 n.16; see also *Soroka v. Dayton Hudson Corp.* (1991) 18 Cal.App.4th 1200, 1216 [describing *Gay Law Students* as holding that these statutes protect applicants].)

Much more recently, in *Napear v. Bonneville International Corp.*, 2023 U.S. Dist. LEXIS 128137, at *28 (E.D. Cal. July 24, 2023), the plaintiff, a talk show host, was asked on his personal public Twitter account for his view on the Black Lives Matter movement, as protests were ongoing over George Floyd's death.

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He responded with a tweet saying: "ALL LIVES MATTER…EVERY SINGLE ONE." His employer terminated him and "issued a public statement explaining that plaintiff's 'recent comments about the Black Lives Matter movement do not reflect the views or values'" of the employer, "and noting that the tweet's timing of occurring days after George Floyd's death 'was particularly insensitive.'" The court held that the allegation that the employer's political disagreement with the employee's view was the reason for the termination stated a claim for violation of Labor Code sections 1101 and 1102.

Also, from within the last couple of years, in *Surdak v. DXC Technology*, 2022 U.S. Dist. LEXIS 229114 (C.D. Cal. Dec. 20, 2022), an employee posted on his personal Twitter account a quote attributed to Lyndon Baines Johnson about voting for the democratic party, with the quote using the "N" word. Another employee complained, and the employer investigated. The plaintiff complained in the investigation that the company was trying to censor his personal political comments outside of work, and the company fired him. The court denied the employer's motion for summary judgment, holding that a jury could find that the employer had a political motive, such as punishing political views contrary to the employer's.

In *Nava v. Safeway Inc.* (July 31, 2013) Cal.App.Unpub. LEXIS 5452, a ten-year Safeway employee tore down a poster in the workplace titled "Gay/Lesbian Pride Month" which "focused on the life of Harvey Milk, whose picture was displayed." The employee explained to managers that "he took down the poster because he was 'extremely bothered' by the political agenda Safeway was apparently promoting by displaying the poster (e.g., same-sex marriage)." Two managers who heard the employee's explanation reacted by "expressing 'disapproval' of [the employee's] position, and Safeway terminated the employee a week later. The court of appeal (in an unpublished decision) reversed the trial court's dismissal of the action, holding that these facts stated a claim under Labor Code sections 1101 and1102. The court reasoned that the employee's "political views and advocacy relating to a cause or issue such as same-sex marriage would come within the definition of political activity," and concluded that the "abrupt" termination following the employee's long tenure and the "hotly contested" nature of the issue could prove causation.

Practicalities of enforcement of sections 1101 and 1102

The California Supreme Court has twice held that violations of section 1101 or 1102 can be enforced through a private right of action. In *Lockheed Aircraft Corp. v. Super. Ct. of L.A. Cnty.* (1946) 28 Cal.2d 481, 486, the court held that violation of either section was a violation of an implied term in any employment contract. Later, in *Gay Law Students*, 24 Cal.3d at 488-89, the Court relied on *Lockheed* for the conclusion that a private right of action exists for violation of Labor Code sections1101 and 1102. Despite these holdings, the subsequent case law involving cases asserting a direct cause of action under these statutes is limited. If the claim truly sounds in contract, the damages may be less expansive than under other available causes of action. In addition, sections 1101 and 1102 do not create any explicit right to recover attorneys' fees or costs.

Bringing a tort claim for wrongful termination in violation of public policy (WTVPP) appears to be a more frequent

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vehicle for pursuing a violation of sections 1101 and 1102. To succeed in such a claim, the plaintiff generally must prove that the termination was contrary to a well-established public policy delineated in a statute or constitution and that benefits the public at large. (See generally, *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.) Thus, a termination that violates sections 1101 and 1102 lends itself well to this theory. In *Navas* and *Napear* (discussed above), the respective plaintiffs in those cases pled both a direct violation of sections 1101 and 1102 and also a claim for WTVPP, while in *Surdak*, the plaintiff alleged only WTVPP. An employee who succeeds in a WTVPP claim may seek compensatory damages, including for lost wages and benefits and emotional distress damages, as well as punitive damages. However, this tort claim also does not, on its own, provide a basis for recovering attorneys' fees and costs. This claim may also not be available for certain harms short of actual termination.

Injunctive relief

For employees who wish to put a stop to employer policies that infringe on Labor Code sections 1101 and 1102, injunctive relief may be available, including under the Unfair Competition Law. (Bus. & Prof. Code, § 17200 et seq.) In one recent interesting example, Uber drivers filed a class action against Uber alleging that Uber was unfairly pressuring drivers into supporting the company's position on Proposition 22 (which would have permitted Uber to classify the drivers as independent contractors) in an upcoming election. (See *Valdez v. Uber Techs., Inc.*, CGC-20-587266 (S.F. Super. Ct., filed Oct. 22, 2020).) The complaint asserted direct claims under sections 1101 and 1102, as well as a UCL claim, and sought injunctive relief to prevent Uber from engaging in the challenged practices. The plaintiffs also filed a motion for a temporary restraining order. The case was met with an anti-SLAPP motion by Uber, protesting that its *own* right to engage in political speech was protected. The Court denied the plaintiffs' motion for a temporary restraining order in the run-up to the election, and after the election passed (with Prop 22 passing), the case was dismissed by agreement.

Other potential causes of action to consider

A number of other causes of action may be available under the circumstances in which employees are penalized for political speech.

Anti-discrimination laws

Sometimes an opposition to an employee's political view also involves a negative view of a protected category to which that employee belongs (national origin, race, ethnicity, religion, etc.), so the Fair Employment and Housing Act ("FEHA") and Title VII may be implicated. An employer would seem to violate these statutes if it takes adverse action against an employee based on the employer's assumption that an employee holds a particular belief because of his or her membership in a protected group, or if it treats employees of protected categories differently when they engage in similar political activity. (See, e.g., EEOC Factsheet, "Anti-Arab, Anti-Middle Eastern, Anti-Muslim, and Antisemitic Discrimination are Illegal," available at https://www.eeoc.gov/sites/default/files/2024-01/AntiMuslimBiasFactsheet.pdf.) These laws permit an employee to recover compensatory damages (including emotional distress damages), punitive damages, and attorneys' fees and costs.

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They also apply not only to employees, but also to job applicants.

Retaliation – Labor Code section 1102.5

If an employee complains about a violation of Labor Code sections 1101 and 1102 and then suffers an adverse action as a result of complaining, she may have a claim under Labor Code section 1102.5, subdivision (b), which states, in part: "An employer ... shall not retaliate against an employee for disclosing information . . . . to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance. . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute. . . ." Thus, complaining about what the employee believes to be an impermissible restraint on political expression may be protected activity under section 1102.5. This section, too, provides a basis for recovering attorneys' fees and costs. It also provides the employee with advantageous burden-shifting benefits. (See *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 [once employee proves by a "preponderance of the evidence" that the protected activity was a "contributing factor" to adverse employment action, burden shifts to the employer to prove "by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in" the protected activity, citing Labor Code § 1102.6].)

PAGA

The Private Attorneys' General Act ("PAGA") may be an important addition to a section 1101 and 1102 case because it authorizes recovery of attorneys' fees and costs, and is available whenever there has been a violation of a provision of the Labor Code, including Labor Code sections 1101 and 1102. Labor Code sections 1101 and 1102 are specifically identified in PAGA as being subject to the PAGA Notice procedures under Labor Code section 2699.3, subdivision(a). (See Labor Code § 2699.5.) In addition, PAGA provides for recovery of civil penalties.

Labor commissioner protection for lawful off-duty conduct

Labor Code section 96, subdivision (k) authorizes the labor commissioner to enforce "[c]laims 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." California courts have interpreted this as a procedural statute that allows the labor commissioner to exercise jurisdiction over recognized rights (such as the constitutional right to freedom of speech), but does not create substantive rights for employees. (See, e.g., *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 84 [Labor Code § 96, subd. (k) does not support a claim for wrongful termination in violation of public policy].)

The labor commissioner can enforce violations of Labor Code section 98.6, which forbids an employer from discharging or otherwise taking adverse action against an employee or applicant for engaging in conduct described in certain sections of the Labor Code, including sections 96(k), and 1101 and 1102. An employee subject to adverse action in violation of this section "shall be entitled to reinstatement for lost wages and work benefits," as well as a civil penalty to the employee of up to $10,000. In addition, if the employer takes adverse action against the employee within 90 days of the protected activity, there is a rebuttable presumption in favor of the employee's claim – this is a new amendment to the law that took effect this year. It appears to be an open question whether private litigants can sue directly under Labor Code section 98.6. However, this section could form the basis for a PAGA action. (See *Hamilton v. Juul Labs, Inc.*, 2021 U.S. Dist. LEXIS 15695, at *9, 32 (N.D. Cal. January 27, 2021) [denying defendant's motion to dismiss plaintiff's claim for PAGA penalties where plaintiff plausibly alleged that employer's policies were unlawful under Labor Code sections 96(k) and 98.6].)

Labor Code § 432.7 – Consideration of arrests for political activity

If an employee is arrested for political activity outside of work, such as while attending a protest, an employer cannot consider "any record of arrest or detention that did not result in conviction" to determine "any condition of employment including hiring, promotion, [or] termination...." (Lab. Code, § 432.7.) Note, however, that exceptions exist under the statute for individuals released pending trial.

Attorneys' fees under Civil Code of Civil Procedure § 1021.5

Code of Civil Procedure 1021.5 provides a potential basis for recovering attorneys' fees if the plaintiff's claim results in enforcement of an important public right affecting the public interest.

In summary, we hope this article will be a helpful starting point for employees and their attorneys evaluating potential claims for adverse employment actions related to political activity.


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