

THE FREE SPEECH MYTH: HOW EMPLOYERS CAN NAVIGATE 5 HIGH-RISK SCENARIOS FOR DEFAMATION CLAIMS IN THE WORKPLACE

Insights
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The Free Speech Myth: How Employers Can Navigate 5 High-Risk Scenarios for Defamation Claims in the Workplace

The concept of “free speech” is often misunderstood in the workplace. While many assume broad protections apply, the First Amendment offers limited coverage in private employment settings. At the same time, routine communications – whether during workplace investigations, for-cause terminations, employee reference checks, off-duty social media activity, or employee departures – can create liability risks if not handled carefully. Here’s our practical guide to navigating five high-risk workplace scenarios and handling sensitive communications with care.

Don't miss our May 20 webinar on this topic. [Register here for The Free Speech Myth: Defamation Risks in Workplace Speech.](#)

Overview: Speech and Defamation in the Workplace

In today's social and political climate, litigation is on the rise in situations where employees claim false statements were made about them. These claims can arise from routine workplace interactions or even off-duty conduct. Employees blame “cancel culture” and off-the-cuff statements as the reason for adverse employment actions or denial of future job prospects. These situations may trigger threats of defamation claims which can have real financial and public

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consequences for an employer. In this article, we will discuss what these claims involve and how they are applied in the workplace.

Free Speech Claims

One of the most common misunderstandings among employees is believing the First Amendment protects their speech at work. Although the concept of free speech is not fully a myth, the First Amendment has very little, if any, direct application outside of public-sector employment.

Notably, protections of off-duty speech differ from state-to-state. Still, the law does not give employees carte blanche to say whatever they want in the workplace or on platforms where their employer may be impacted. An employer retains the right to impose reasonable restrictions on workplace speech to preserve productivity, safety, and a respectful environment. It's a balancing act between creating space for diverse perspectives and maintaining consistency.

Defamation Claims

While most employers strive to create a positive workplace, employers can't avoid discussing negative or unfavorable information about employees in certain situations. This may come up in workplace investigations, discussions leading to an employee's termination, reference checks, and beyond. But what are the risks associated with these sorts of communications?

An unhappy employee may bring a defamation claim under state tort law, but there's a high bar to prove such claims. State laws vary, but an employee bringing a defamation claim will generally need to show:

- the employer made a false statement claiming it to be fact;
- the employer made the statement to a third person;
- the employer was at fault for at least negligence; and
- the employee suffered damages or reputational harm.

Defamation liability typically stems from false statements presented as fact, rather than subjective opinions. Courts tend to permit discovery on these issues which can lead to very public and expensive lawsuits. With this in mind, employers should:



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- avoid negative opinions or overstatements that can escalate conflicts or prompt litigation;
- stick to documented facts; and
- recognize when legal review is warranted.

5 High-Risk Workplace Scenarios

1. Workplace Investigations

Workplace investigations typically arise from allegations of misconduct, policy violations, or discrimination. During an investigation, witnesses make statements, information is gathered and put in writing, conclusions are shared with leadership or sometimes a board or committee, and corrective measures are determined. This can be an emotional process for the employee at the center of it and potentially motivate them to sue for defamation when accusations are made and subsequent disciplinary steps are taken.

Practical Strategy: Ensure investigation communications are made on a need-to-know basis and share findings only with those who have a legitimate business reason to know, such as HR, legal counsel, or direct managers. Be sure to use neutral fact-based language in conversations and in written documentation and avoid overstatements or labels. Be sure not to draw conclusions about the employee being investigated, either in questioning or throughout the process.

2. "For Cause" Terminations

Any for-cause termination carries defamation risk because the underlying decision is inherently based on, broadly speaking, employee misconduct or workplace rule violations. Executive employment agreements, equity or long-term incentive plans, or collective bargaining agreements may include clauses that explain the circumstances that would constitute "cause" for termination. The employee whose career is taking an abrupt and involuntary turn may be motivated to pursue a defamation claim if they believe the termination is based on inaccuracies and those inaccuracies have been spread to third parties.

Practical Strategy: Avoid making character-based statements about the employee, such as calling them dishonest or using other labels. Train your managers and HR staff to keep termination communications factual, brief, and documented in writing. When “for cause” is defined in a contract, be precise about the reasons for the termination or demotion and include supporting documentation or evidence.

3. Employee Reference Checks

When a potential employer calls your organization for a reference check on a former employee or contractor, can you be honest about poor performance, misconduct, or other negative information without taking on liability for a defamation claim? While a negative reference might cause the former employee to lose the new opportunity, truth is a complete defense to a defamation claim. Many states also recognize a qualified privilege for good-faith employment references, which can protect employers who share factual and accurate information. To avoid the potential risks, however, it is a best practice for employers to confirm name, most recent title, and dates of employment during the reference check process, with no other details provided.

Practical Strategy: You should be sure to limit your response to documented and verifiable facts. As a best practice you may want to direct all reference requests to trained HR team members who understand the applicable state laws and legal risks.

4. Off-Duty Social Media Conduct

When word gets back to a manager about something a trusted employee did or said off-duty, particularly on social media, the situation can be disruptive and impact work relationships. This is especially true if the social media activity impacts or references another employee. The employee’s off-duty conduct or social media content may not align with your organization’s workplace policies or views, and the information might come to light from a key customer, competitor, or trade group, or even anonymously. For the employee, any disciplinary action taken in response may feel like an attack on their freedom of speech.

Practical Strategy: Start by checking whether your state limits employer action on off-duty political or personal speech. These laws may surprise you, as some prevent employers from terminating the employment of someone whose posts are even clearly offensive unless you can show the communication caused direct business harm. Determine whether the post caused operational disruption, reputational damage, or significant internal strife. Absent that, discipline may not be legally or strategically justifiable. Be sure to enforce policies neutrally. Whether the post supports or opposes a cause, the focus should be on whether the employee violated your work rules, not the ideology behind the post. Selective enforcement invites discrimination claims.

5. Employee Departures

This scenario presents defamation risk on both sides. An employee who leaves for a competitor may spread false information in the market about your organization. Conversely, false or exaggerated comments your leadership makes to undermine a departing employee's reputation, whether to clients, remaining staff, or the new employer, can support a defamation claim against you.

Practical Strategy: Avoid making disparaging remarks about departing employees, even in informal settings. Comments that appear intended to damage an individual's reputation or interfere with a new employment relationship can increase your litigation risk. On the flipside, if a former employee is making potentially false claims about your organization, you should immediately document the statements. Consult with counsel before responding, so you can assess the risk and determine whether the situation merits legal action.

Avoiding Costly Litigation and Strengthening Your Defense

Across all five of these high-risk scenarios, a few key practices can reduce your liability risk:

- **Stick to documented facts** and avoid general characterizations.

- **Limit sensitive communications** to those with a need to know.
- **Train managers** to treat verbal statements with the same care as written ones.
- **Apply your policies consistently** to reduce the risk of discrimination claims.
- **Consult legal counsel** before your formal communications with employees on sensitive matters, particularly when the stakes are high during for-cause terminations, complicated investigations, or a key employee is leaving for a competitor.

Want to Learn More? [Register here for our May 20 webinar](#) breaking down the myths of free speech in the workplace. We'll do a deeper dive into these five topics and provide concrete strategies to reduce your legal exposure.

Conclusion

If you need assistance navigating any of the above scenarios, in crafting workplace policies, procedures, or training, reach out to your Fisher Phillips attorney or the authors of this Insight. We will continue to monitor developments related to all aspects of workplace law. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information.