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#\$!%@ – Profanity in the Workplace – What Are Employer Responsibilities?

Often, when profanity is used in the workplace, managers and supervisors are reluctant to address it for fear that they will be seen as prudish or part of the speech police. However, employers need to carefully consider their response to profane or ...

Richard D. Alaniz, JD • Sep. 10, 2018



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The use of profanity in everyday conversation has become pervasive, especially with Gen Xers' and millennials, but others as well. We can all point to well-known politicians and celebrities that all too often use profanity in their daily dialogue. Recently, it has become a badge of honor for the Hollywood crowd. When profanity is used outside of the workplace, as part of social interaction, as distasteful as it may be, it has no legal significance. It can be a totally different issue when used in the workplace.

Often, when profanity is used in the workplace, managers and supervisors are reluctant to address it for fear that they will be seen as prudish or part of the speech police. However, employers need to carefully consider their response to profane or obscene language when used by employees.

As discussed later, in some circumstances, cursing or the use of offensive language is considered protected activity under the National Labor Relations Act. And this law applies in both union and non-union workplaces. In other cases, profane language,

when tolerated and pervasive in the workplace could create a hostile work environment that carries with it legal liability under anti-discrimination laws.

Why You Must Address Profanity

A recent federal court case in Portland, Oregon, involved an employee with strong Christian beliefs who was subjected to workplace profanity that included the use of God's and Jesus Christ's names in cursing. The employee had informed those that used such profanity that she found the language offensive because of her religious beliefs. The jury found the company liable for permitting a hostile work environment based upon her religion. Religion is one of the fundamental categories deemed protected under the provisions of Title VII of the Civil Rights Act.

Virtually every workplace will have one, two, or perhaps even several employees who use crude, obscene or profane language. This may sometimes include supervisors. Many workplaces will also have employees who find such language deeply offensive. Balancing those competing concerns, while at the same time staying in compliance with all relevant laws can be a tricky task. Employers must actively address the issue before significant problems arise. Ignoring obscene or crude language can harm customer relations, cause the business to appear unprofessional, and even worse, put employers at risk of claims of allowing a hostile work environment, as was found in the Portland case referenced above. In one recent case, the National Labor Relations Board overturned an employee's termination for profanity where it found the company "had a general laxity toward profanity in the workplace."

Workplace Profanity

In some workplaces, profanity may be common and accepted conduct. In others, it may be clearly unacceptable. And in some organizations, it may be both. At a restaurant for example, cursing and sexual banter in the kitchen, while not appropriate, may be a regular occurrence. However, the same language would be considered unprofessional, inappropriate and unacceptable in front of customers. Obscene language that may be occasionally heard on a shop floor is almost always considered unacceptable in the front office.

Another challenge with managing potentially offensive language in the workplace is its subjectivity. What one person may find shocking or profane may not be a problem for someone else. While profanity and obscenities have different degrees of offensiveness, certain words or phrases are clearly improper and cannot be tolerated in the workplace. For example, ignoring slurs about race, gender, ethnicity,

disability, or sexual orientation as well as sexual innuendos, can form the basis for claims of unlawful harassment and hostile work environment. In certain circumstances, profanity can even form the basis for claims of workplace violence. According to the U.S. Department of Labor's (DOL) "Workplace Violence Program" approximately 2 million persons are victims of non-fatal workplace violence every year. The DOL considers "verbal abuse including offensive, profane and vulgar language" to be included in the forms of violence among coworkers. Such conduct, if tolerated, would certainly be strong evidence of a hostile working environment.

Employee Profanity on Social Media

Employee communications on social media sometimes include profanity or obscene remarks. Perhaps the rationale is that since it is done in cyberspace, it is not quite so personal. The question is whether such Facebook comments can be considered profanity in the workplace if they somehow relate to work, to a co-worker, or company management. The NLRB has addressed the issue in several cases and more often than not concluded that the conduct was protected under Section 7 of the NLRA because it related to working conditions or the comments were in support of another employee's criticism of management.

What Action Employers Should Consider

The issue of profanity in the workplace can seem like a no-win proposition for employers, therefore to some, ignoring it may sometimes appear the easiest approach. However, as seen in the cases discussed, ignoring profanity can leave an organization vulnerable to complaints, lawsuits, and perhaps worst of all, permitting a workplace to become hostile to customers and/or employees. Obviously, a proactive approach is a better course both legally and operationally. It should include the following: Consider your industry, employees and culture. These are all critical considerations in dealing with such a subjective issue. There are no hard and fast rules, with the possible exception of banning the use of racial, ethnic, gender-based, disability-based and religious slurs. These have almost always led to complaints and more often than not, legal action. Otherwise, employers should consider how their organization operates on a day-to-day basis, what is considered normal and acceptable for their industry, how much contact employees have with customers, and similar practical factors. But that is not to say that tolerance of profanity should be the operating rule in any workplace.

Because this is such a subjective area of employee relations, employers should develop policies to quickly escalate issues up the management chain whenever issues

including workplace profanity arise.

- **Put your Policies in Writing**

Workplace profanity policies should be as specific as possible and clearly stated in the employee handbook. The policies should be addressed in employee orientation as well as in periodic training. They should also set forth the disciplinary measures for violation of the rules.

Today, employees who are called to account for violating company profanity rules sometimes try to claim First Amendment protections of freedom of speech. However, the First Amendment does not apply in the workplaces of private employers. Profanity thus has no constitutional protection in the private workplace.

- **Train Managers and Supervisors**

Your managers and supervisors should receive training about how to respond to profanity in the workplace. An isolated outburst should be distinguished from a pattern or routine use of profanity. In addition to learning how to properly respond to employee concerns, they should clearly understand that use of profane language by them in front of employees is totally unacceptable. They must lead by example.

Conclusion

Like jokes and other idle banter, profane or obscene language can be a non-issue to some, while seriously offending others. Employers need to carefully consider what will be acceptable in their particular workplace. What may be tolerated in one, could lead to legal claims in another.

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