

What to Do If an Employee Is Arrested During a Protest

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As protests continue around the country over racial injustice, employers may be unsure about what to do if workers are arrested. What if employees don't show up for work? Can employers enforce or relax their attendance policies, support employees who participate in protests, or monitor off-duty conduct?

Here's what employment attorneys had to say: Employers should apply their attendance policies consistently, understand the differences between an arrest and a conviction, and review state and local laws on political expression and off-duty conduct.

Companies may want to choose not to discipline employees who miss work due to being arrested for participating in protests. Lance Witcher, an attorney with Ogletree Deakins in St. Louis, said employers should "recognize in this environment that the optics of taking action against an employee arrested for protesting are poor."

But be careful. Meagan Garland, an attorney with Duane Morris in San Diego, said employers that decide to relax or deviate from their policies should be careful about appearing to support some political positions and not others.

"Be evenhanded," Garland suggested. She mentioned that some states, such as California, have laws that protect employees when they engage in political activities and lawful off-duty conduct. Employers in those jurisdictions would still be well within their rights to take adverse action against employees for off-duty activity if they participate in activities that go against the employer's core values, such as engaging in hate speech.

No Call, No Show

Employees who are arrested during a protest may not be able to notify their manager before the start of their shift, which could violate the company's attendance policy.

So what should an employer do if an employee is a "no call, no show?"

"Employers should administer their attendance policies fairly and consistently," said Jill Vorobiev, an attorney with Reed Smith in Chicago. If there is an exception in the policy for situations where the employee cannot reach the employer, the absence likely could be excused. However, she said, if the employer has a no-fault attendance policy that provides for automatic discipline, an absence may count against an employee who is unable to get word to the employer.

If an employer does take a hard line toward an employee who violates the company attendance policy under these circumstances, said Andrew Melzer, an attorney with Sanford Heisler Sharp in New York City, there could be recourse available for the employee if the employer acts more leniently toward other workers who have also missed work without calling in or if the employer uses the circumstances as an excuse to punish the employee for an unlawful reason.

"There may be a company personal-leave policy that could allow time off for attending a peaceful protest," said Terese Connolly, an attorney with Barnes & Thornburg in Chicago. "In these cases, the employee would have to follow the policy's notice, scheduling and other requirements," she said, noting that managers would still need to enforce the policy the same way they would for other requests that fall under it.

Arrest vs. Conviction

Employers should understand the difference between an arrest and a conviction and any limitations on the actions they can take under federal, state and local law.

Even after an arrest, an individual is still presumed innocent of the crime. "An arrest is simply probable cause to believe someone committed a crime, while a conviction is proof beyond a reasonable doubt," explained Eric Sussman, an attorney with Reed Smith in Chicago.

The Equal Employment Opportunity Commission's (EEOC's) enforcement guidance (http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VB2) from 2012 states that an employer may make an employment decision based on the conduct underlying the arrest, if the conduct makes the employee unfit for his or her position. Notably, it is the conduct—not the arrest—that is relevant.

The EEOC takes the position that blanket policies that do not look to the underlying conduct may have a disparate impact on black and Latino males, because they have higher rates of arrests and convictions, noted Witcher and Sean Oliveira, who is also an attorney with Ogletree Deakins in St. Louis.

Witcher and Oliveira explained that a conviction is more reliable as evidence of conduct than merely an arrest, but in either case, the EEOC recommends the employer perform an investigation to determine what the underlying conduct was and whether it is job-related.

"Individualized assessment is the key," they said.

Employers should also note that some state and local laws prohibit discrimination based on certain criminal records. Under New York law, for example, employers can't ask about arrests that have been cleared in the employee's favor. However, Melzer noted, employees and job applicants may be required to disclose criminal convictions, and convictions can be the basis for denial of employment in certain cases.

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Many locations also have specific rules for inquiring about the criminal history of job candidates and current employees, Garland said. For instance, some jurisdictions prohibit employers from asking job candidates about criminal convictions until a conditional job offer has been made.

If a current employee was arrested at a protest and is out on bail, the employer could inquire about the nature of the incident but shouldn't take adverse action based solely on the arrest, she said.

Protected Speech and Off-Duty Conduct

Employee safeguards for off-duty conduct and political expression vary based on location and whether someone is a government employee or a private employee. Public employees are generally protected by the First Amendment, whereas employees who work for private employers are not. For employees of private businesses, Melzer said, state and local laws may provide clear protections or could allow for creative arguments that political protests and similar activities are covered.

"All employees who participate in protests should generally follow commonsense measures to mitigate the risk, both personally and professionally," Melzer said. He noted that such measures may include:

- Protesting during nonwork hours or seeking permission to protest during work hours.
- Seeking time off in accordance with employer policies.
- Reviewing employee handbooks and other potentially relevant policies.
- Not wearing employer uniforms or insignia.
- Ensuring that the views they express—including on social media—are not attributed to or associated with their employer.

"How an employer may react to an arrest depends on the applicable state law, the nature of the crime, the employee's specific job duties and the strength of the facts against the employee," Connolly said. If an employee's conduct impacts his or her ability to perform the job—and the employer's investigation confirms that the conduct did in fact occur—the employer might be able to suspend or even fire the employee, she said, noting that employers may want to seek counsel to assist with the analysis.

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