

Firing Workers When Political Expression Goes Too Far

By Allen Smith, J.D.

January 15, 2021

Political expression by employees takes many forms—from friendly office banter to shouting matches that disrupt the workplace. Off-duty political expression can run the gamut, too, from yard signs supporting certain causes or candidates to unlawful activity, such as what the nation witnessed on Jan. 6 at the U.S. Capitol building.

When can employees who've engaged in disruptive political expression be disciplined? Employers must tread carefully, as there are constitutional protections for public-sector employees and some state law protections for private-sector workers. But employees who break the law, violate an employer's policy, disrupt work or harm an employer's reputation all may be subject to discipline, including termination, legal experts say.

Businesses in states that protect off-duty or political conduct usually don't fire an employee for peaceful political expression, according to Sarah Platt, an attorney with Ogletree Deakins in Milwaukee. Such expression might include displaying campaign bumper stickers, attending a political candidate's rally or creating social media posts in favor of a candidate.

[See SHRM's new resource page, [Politics in the Workplace](http://www.shrm.org/ResourcesAndTools/Pages/politics-in-the-workplace.aspx) (www.shrm.org/ResourcesAndTools/Pages/politics-in-the-workplace.aspx)]

If conducted in a civil manner, political expression is a part of diversity at work, said James L. Banks Jr., general counsel for the Society for Human Resource Management in Alexandria, Va.

That said, Platt noted that "private employers are increasingly taking action in response to employees' violent, harassing or discriminatory expression, even if off duty."

Under federal law, there are few limitations on a private employer's right to fire an employee due to the employee's off-duty political expressions or participation in protests, noted Colin Barnacle, an attorney with Nelson Mullins in Denver, and Roy Wyman, an attorney with Nelson Mullins in Nashville, Tenn., in a joint e-mail.

Often, workers in the private sector assume they will be protected by the right to free speech under the First Amendment. "They are wrong," said Dominique Camacho Moran, an attorney with Farrell Fritz in Uniondale, N.Y. "The First Amendment protects against government action—not action by private employers."

As a result, there's greater protection for those who work for public employers, Banks said.

Nonetheless, employers must heed state laws, such as those in California and Colorado, that protect lawful off-duty conduct, Barnacle and Wyman stated. In addition, some states, such as California and New York, protect employees from discrimination based on their political affiliations and activities.

Some state laws have surprising provisions. For example, Connecticut extends First Amendment protections to private-sector employees.

Many of the states' off-duty activities laws are drafted broadly, potentially covering any lawful off-duty conduct. So mere attendance at a political protest or rally without any unlawful conduct could be protected by these laws.

Unlawful Actions

"The story changes, however, where the employee engages in criminal activity during the political protest or rally," Barnacle and Wyman noted.

For example, those who committed illegal acts when protesting at the U.S. Capitol wouldn't be entitled to the protections of lawful off-duty activities statutes and could be lawfully terminated, Barnacle and Wyman said.

"A word of caution—employers must take care to determine the actual illegality of the off-duty conduct," they added. "Employers are encouraged to properly investigate the matter."

In some cases, investigations may involve collecting copies of publicly available social media posts and interviewing witnesses. "It is helpful to confront the accused employee about the situation to give [him or her] an opportunity to correct any facts that form the basis for the employment decision," Platt said.

Policy Violations

"Focus on the impact on the workplace, not the content of the expression," Platt said. "Employees who are distracting co-workers from getting their work done or who cause other employees to feel uncomfortable or threatened may be disciplined." Employers may look to their policies to determine if political expression violates an existing policy, such as an anti-harassment policy, she said.

"Most employers do not take disciplinary action against employees who are communicating professionally and respectfully," she added.

Employers should enforce civil discourse in the workplace, Banks said, as it's difficult to enforce a rule about not discussing politics at all in the workplace. Employees instead may be disciplined for screaming, he noted.

"Remind employees that, while political debate may come up from time to time, employees are expected to treat each other with respect, and discriminatory language and conduct will not be tolerated," said Arielle Eisenberg, an attorney with Cozen O'Connor in Miami.

An employer can ask a worker to take down a campaign sticker or button from his or her cubicle, but this may be a slippery slope. If a worker can talk about a favorite TV show, Banks asked, how different is it for the employee to share who his or her favorite political candidate is?

Moreover, policies must be applied impartially and unlawful discrimination must be avoided, he added.

If an employer fires an employee because he or she wore a political badge to work in violation of the company's dress code policy, the employer should uniformly apply that policy to others, said Christopher Braham, an attorney with McDermott Will & Emery in Los Angeles.

Moran cautioned that the National Labor Relations Act (NLRA) protects the right of employees to wear and distribute fliers, buttons, stickers and other items that relate to the terms and conditions of employment, unionization and other protected activity.

Harm to Employer's Reputation

Moran noted that there is an exception to the NLRA's protection of employees' right to wear buttons when the buttons would jeopardize employee safety or unreasonably interfere with the employer's public image.

"Before adopting a policy that limits political expression, employers should consider the legal and practical consequences for adopting the policy, enforcing the policy and the litigation risks of such a policy," she said.

Termination for political expression likely is lawful, even if the expression takes place off duty, if the worker identifies himself or herself as an employee of the company and the expression negatively reflects on the organization, Banks noted.

Balancing Act

Employers should encourage diversity in thought, including political expression, according to Barnacle and Wyman.

They recommend that employers highlight their commitment to:

- A diverse and dynamic workplace, which will lead to ingenuity, greater production and workplace satisfaction.
- Policies regarding respectful workplaces, anti-discrimination and anti-harassment practices, anti-workplace violence, and their codes of ethics and business conduct.

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