

Can Employers Fire Rioters? Employers' Rights in Policing Employee Off-Duty Conduct and Employment Law Consequences of the Capitol Riots

Article By:

Sarah J. Platt

Jimmy F. Robinson, Jr.

Within days of the January 6, 2021, riot at the U.S. Capitol, employees who were observed as part of the mob entering the Capitol were discharged by their employers. Some of the individuals involved in the events at the Capitol were knowingly filmed as part of the insurrection (and many were seen posing for selfies).

A photograph of a rioter wearing clothing with the word “Auschwitz” prominently displayed has been widely disseminated. Other rioters were photographed and videoed carrying Confederate flags or nooses. In some instances, employers saw images of their employees and took action in response. For example, one rioter was reportedly discharged by his employer after an image circulated of him storming the Capitol while still wearing his employee badge around his neck.

In addition to those who directly participated in the breached at the Capitol, before and after the riot, employees discussed—on social media—the events and expressed their views in support of or in opposition to the insurrection, or on the issue of wearing masks or shirts expressing threatening or offensive views.

Even if most of the conduct occurred outside the workplace, coworkers—and often community members—who have seen images of employees involved in the riot, expressing support for the riot, or wearing masks or clothing with some of the messages of the rioters, are voicing complaints to employers.

Private employers have [significant discretion](#) to discharge employees, even for off-duty conduct, especially conduct that is unlawful. While public employers may have less discretion, they tend to have more rules that specifically outline what constitutes unlawful off-duty behavior. And while some states have laws that protect political speech or lawful off-duty conduct, those laws would not protect employees from discharge for their illegal or violent conduct or threats. Most states, for instance, would not prohibit employment actions based on some of the clothing with logos and insignias that rioters were wearing. The following are answers to frequently asked questions about these issues.

Do private-sector employees have free speech rights to make anti-Semitic, racist, or other inflammatory statements or social media messages?

No, not under federal law. Employees often have the mistaken belief that their statements enjoy blanket protection under the First Amendment. The First Amendment specifically prevents the federal government from interfering with freedom of speech, but it does not guarantee that right in private settings, including in private workplaces (and social media platforms). Therefore, a private-sector employee's speech (whether made in person or in writing on social media) are not shielded from employment consequences under the mantle of freedom of speech. Such employee expression would also include the wearing of t-shirts, sweatshirts, or masks with offensive or harassing messages, as were seen in images from the Capitol riot. With the rise of social media, employers have quickly become aware of employees' off-duty behavior from the reports of other employees. After the neo-Nazi, white-supremacist rally in Charlottesville, Virginia, August 11–12, 2017, it took only a few hours for participating individuals to be identified and for employers to be called to take action against them.

Note that Connecticut state law extends freedom-of-speech protections to private employees. As noted below, other state laws prohibit discrimination based on lawful off-duty conduct, which could include speech. Even there, in the case of the riot at the Capitol, an employer might be able to take action based not on an employee's speech but based on the employee's unlawfully entering of the Capitol building.

Can employers discharge employees for off-duty conduct?

It depends. Some states have laws that ban employers from taking adverse employment action against employees based on lawful off-duty conduct. Presently, California, Colorado, Louisiana, New York, and North Dakota prohibit employers from firing or retaliating against employees for off-duty lawful activity, including speech. Arguably, this could include conduct that their employers and coworkers may find offensive. However, even in these states, illegal conduct, including unlawful entry into the U.S. Capitol, looting, or violence, would not be protected.

In the remaining states, laws do not exist that would preclude an employer from taking action against an employee based upon the employee's off-duty conduct.

In fact, employers may face legal, reputational, and cultural risks by ignoring off-duty conduct, especially where the conduct may constitute harassment of a member of a protected class. For example, some rioters were seen carrying the Confederate flag, brandishing nooses, and wearing t-shirts or displaying tattoos with unquestionably offensive—and in some cases threatening—slogans like “Camp Auschwitz.” Rioters also apparently erected a gallows with a noose outside the Capitol. These symbols and messages are historically significant and threatening based on race and religion. Images of a coworker carrying or wearing these symbols may cause other employees to be uncomfortable in the workplace, and, in most states, may form the basis for employment action.

Can employers discharge employees who participate in protests?

It depends. Employees who participate in legitimate, peaceful political protests are protected by law in over a dozen states and jurisdictions, including in California; Colorado; Guam; Louisiana; Minnesota; Missouri; Nebraska; Nevada; South Carolina; Utah; West Virginia; Seattle, Washington; and Madison, Wisconsin. Those jurisdictions bar employers from retaliating against employees for engaging in political activities. New Mexico protects employees' right to express their political

opinions. As previously noted, some jurisdictions protect employees' lawful off-duty conduct, including speech. Other states and jurisdictions—including the District of Columbia, Illinois, Iowa, Louisiana, New York, and Utah; Puerto Rico; the U.S. Virgin Islands; Broward County, Florida, and Urbana, Illinois—specifically prohibit employers from discriminating against employees based on their political party membership, election-related speech, or political activities.

However, the events of January 6, 2021, went beyond a political protest to illegally storming the Capitol. Such illegal conduct would not be protected. Further, threats and expressions of racist violence or harassment are not political speech. So while employers may consider applying their policies and expectations consistently to peaceful protesters on different sides of an issue, conduct that is not comparable (e.g., storming into the U.S. Capitol as compared to peacefully attending a rally) need not be treated the same. After the events that occurred in Charlottesville, Virginia, in 2017, employers have grappled with how to make sure that they are protecting their employees and their companies' reputations while not disciplining employees for lawful off-duty conduct.

An employer may wish to consider various factors prior to taking adverse action against an employee for off-duty activity, including how the employee's conduct may reflect on the company and its employees. Such considerations may also include whether employees will be required to work with a coworker who has made offensive, racist, discriminatory, or hateful comments regarding an employee's immutable characteristics, such as race, sex, or sexual orientation. More importantly, an employer may want to consider whether the employee engaged in violent conduct such that the employee will be seen as having a propensity for violence that could make coworkers feel unsafe. Moreover, this violent off-duty conduct could put the employer on notice and potentially give rise to negligent retention claims.

In sum, employers may want to assess the potential damage to a company's culture and reputation (both internally and externally) that may follow from condoning or condemning employee comments and conduct. Many employers have chosen to err on the side of standing up against racism, anti-Semitism, and threats to safety and democracy.

© 2024, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., All Rights Reserved.

National Law Review, Volumess XI, Number 15

Source URL: <https://www.natlawreview.com/article/can-employers-fire-rioters-employers-rights-policing-employee-duty-conduct-and>