Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

DC Riot Raises Employer Issue Of Off-Duty Acts In Pandemic

By **Paul Huston** (January 19, 2021, 6:10 PM EST)


Paul Huston

The Capitol riot presented many American employers with a relatively uncommon issue: May an employer discipline an employee for off-duty conduct and if so, to what extent?

What if the conduct is political? Will the employer in that case face liability for violating an employee's free-speech rights?

Alternatively, what if the off-duty conduct presents a risk not because of political affiliation, but because it is a mass gathering that presents a risk of COVID-19 exposure to the entire workplace?

Does the employer have an obligation to discipline an employee for participating in a superspreader event?

Employers are more concerned than ever about the off-duty activity of their employees, and rightly so.

In the COVID-19 era, what used to be within the realm of "not my business," is now very much the employer's concern.

An employee's attendance at a large political gathering is one thing — but if that attendance could infect an entire workforce, then the employer's obligation to maintain a safe workplace is implicated.

Employment Protections for Political Activity

Perhaps the most common reaction to news that an employee has been terminated for engaging in political activity is that such a move violates the protections offered in the First Amendment.

While some state-provided employment protections may apply to certain political activity, the First Amendment offers no protection from adverse employment action in the private sector.

The First Amendment covers only government action, not actions by private employers. Unless a federal law or policy is in play, therefore, First Amendment protection is not at issue.

But this does not mean that there are no protections for political speech or activity in the private sector.

Many states expressly offer employment protections for political activity.

In California, for example, Section 1102 of the Labor Code[1] provides that no employer may "coerce or influence [or attempt to do so] his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

This same Labor Code chapter prohibits employers from making any rule or policy that prevents an employee from "participating in politics," or has the effect of "controlling or directing ... the political activities or affiliations of employees."[2]

Other states have similar protections. Connecticut expressly prohibits employers from terminating employees based on the exercise of their First Amendment rights, unless such activity interferes with the employee's job performance or the working relationship between the employer and employee.[3]

Similarly, New York labor law[4] prohibits employers from taking any action against an employee on the basis of that employee's lawful political activities, provided the activity is outside of working hours, off-premises, and without the use of the employer's property.

Louisiana,[5] Minnesota[6] and Washington, D.C.,[7] maintain similar laws. Most states have laws covering, at the very least, protections for employees' right to vote and prohibitions against employers tending to influence the same.

What, then, should an employer do when an employee's public political activity reflects poorly on the employer — where, for example, the employee is caught on national television wearing their company badge during the activity — or risks the perception of tacit approval of the employee's conduct by failing to act?

In cases like the Capitol riot, which involved a political gathering that resulted in lawlessness, state law provides no protection. A violent riot is itself unlawful. Violent conduct, unlawful assemblies and riots are never protected — even under the broader First Amendment standards.

Whether a particular employee's conduct was unlawful typically requires a close analysis — i.e., what did the employee actually do? — but absent patently unlawful conduct, employers should be very careful in making any termination, demotion, or other adverse employment decision based solely on an employee's off-duty political activity.

From Politics to the Duty to Maintain a Safe Workplace

The federal Occupational Safety and Health Administration requires employers to maintain a workplace that is free from serious recognized hazards.

In the COVID-19 era, the definition of a safe workplace, and an employer's obligations to maintain compliance with OSHA standards has taken on new meaning.

But how does the obligation to maintain a safe workplace translate to treatment of employees who are attending lawful, protected gatherings that run the risk of becoming a superspreader event?

The danger there does not exist on the employer's premises—at least not until the employee who

attended the mass gathering returns to work. And by that point, it may be too late.

The most prudent course of action here is to balance, or attempt to balance, the competing rights and obligations in play.

An employee has both a right to lawful, off-duty political activity, and the employee's coworkers have a right to a safe work environment.

To protect both of these rights, employers can require compliance with state and local regulations — e.g., stay-at-home orders — and require potential exposure-based quarantining before returning to work.

Applied neutrally across the board, these policies will not run afoul of political speech protections because they are not targeting the political aspect of the conduct, they are instead targeting the public aspect of the conduct.

If the employee participated in an online political rally via Zoom, there would be no issue. If the employee participated in a large party unrelated to any political activity, the employee would be subject to the same quarantine policy.

If the public gathering was unlawful — for example, a violation of a statewide stay-at-home order — the employer would likely be within its rights to discipline the employee for engaging in unlawful behavior that could endanger the workplace.

Either way, the policy should be politically agnostic should universally apply to all activity that risks exposure to the workforce, not just political gatherings.

Employers facing a decision to discipline or terminate an employee based on their off-duty political activities unrelated to a coronavirus-spreading safety issue should consider very carefully the particular facts and circumstance of the case, and consult with counsel to ensure they understand the applicable laws in their area.

Though recent news may leave some with the impression that an employer can simply terminate an employee for political activity without fear of reprisal, that is certainly not the law in many areas of the country and does not account for state-specific protections that employees may invoke.

While employers are well advised to exercise diligence in responding to off-duty conduct that impacts the safety of the workplace, they should take care to be familiar with the boundaries prescribed by state and local laws before disciplining employees for lawful, political activity.

Paul Huston is an associate at Mintz Levin Cohn Ferris Glovsky and Popeo PC.

[1] Cal. Lab. Code Section 1102.

[2] Cal. Lab. Code Section 1101.

[3] Conn. Gen. St. § 31-51q.

[4] New York Labor Law § 201-d

[5] R.S. § 23:961

[6] Minn. Stat. § 10A.36

[7] D.C. Code § 2-1401.01