

DEAR LITTLER: CAN A BOSS FIRE SOMEONE FOR OFF-DUTY POLITICAL ACTIVITIES?

By: Zoe Argento

Dear Littler: I saw one of my employees on the local news the other night participating in a political rally over the weekend. We try to maintain a tension-free workplace. Can I discipline him for this conduct? Can I at least institute a policy prohibiting this kind of behavior going forward?

–Concerned Boss in Sacramento

Dear Concerned Boss,

Although you pose simple questions, the issues they raise are surprisingly complicated. Before discussing some of the legal ramifications, it's worth noting that your concerns may become more common in the current political and social climate. Tensions remain high following the contentious 2016 election cycle.¹ Many Americans appear motivated to engage in ongoing political advocacy or other activism, both in opposition to and in support of potential changes associated with the incoming administration.

While you do not indicate what type of rally your employee attended, that may not make much difference. Whether your employee leads a neo-Nazi group, marches with Black Lives Matter, volunteers at Planned Parenthood, or protests in the Women's March on January 21, the analysis would be largely the same.

With that in mind, let's turn to your questions. You suggest two responses to the employee's behavior: adverse action against the individual and implementation of a policy banning such conduct in the future. The risks associated with these actions depend, among other things, on the employee's location, the legality of his conduct, the employee's contract,² the nature of your business, and the characteristics of the individual.

State Law Protections for Lawful Off-Duty Conduct

State laws in several jurisdictions, including California, prohibit employers from taking adverse action against employees because of legal activities off-the-clock. For example, at least half of the states and the District of Columbia prohibit discrimination against employees who use tobacco or other lawful

¹ See Kevin M. Kraham, *Addressing Post-Election Tensions in the Workplace*, Littler Insight (Nov. 18, 2016) available at <http://www.littler.com/publication-press/publication/addressing-post-election-tensions-workplace>.

² Employment contracts or collective bargaining agreements would be relevant to an employer's decisions in this situation. We assume that there are no such contracts here. We also assume that you work for a private employer. Public employers would be subject to different rules in such a situation, because government employees generally have free speech rights protected by the First Amendment.

products outside work hours.³ Two states, Indiana and North Dakota, preclude employers from making employment decisions based on whether an applicant or employee owns firearms.⁴ And at least two jurisdictions, Delaware and the District of Columbia, protect employees not only on the basis of their sex or pregnancy, but also on the basis of their reproductive health decisions. In these locations, it is unlawful for an employer to make employment decisions based on an employee's use of contraception or planned or intended initiation or termination of a pregnancy.⁵

More relevant to your inquiry are state laws that prohibit employers from taking adverse action against employees because of their off-duty lawful political activities. In California, employers may not coerce employees, discriminate or retaliate against them, or take any adverse action because they have engaged in political activity.⁶ Similar prohibitions exist in other states, including Colorado, Louisiana, New York, South Carolina, and Utah. Connecticut actually extends First Amendment protection of free speech to the employees of private employers.⁷ Some of these laws provide exceptions for public or religious employers or for off-duty employee conduct that creates a material conflict with respect to the employer's business interests.⁸ Under such laws, and absent some exception, the proposed termination or demotion of this employee because of his lawful, off-the-clock political activity would be illegal.⁹ Some states also explicitly ban the type of policy you are considering. At least three states—California, Louisiana, and Colorado—prohibit employers from adopting any policy, rule or regulation that forbids or prevents employees from engaging or participating in politics or from running for office.¹⁰

Labor Law Protections for Political Speech

Beyond potential state-law complications, federal law may also affect your decision. Indeed, both of your suggested responses to the employee's behavior could run afoul of the National Labor Relations Act (NLRA).

Section 7 of the NLRA—which applies to both unionized and non-unionized non-supervisory employees in the private sector—provides that “[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.”¹¹ The U.S. Supreme Court has interpreted this provision to mean that employees may organize as a group to “improve their lot” outside the employer-employee relationship.¹² Employees’ participation in political advocacy would therefore be protected if it relates to labor or working conditions. Such advocacy can include contacting legislators, testifying before agencies or joining protests and demonstrations. If the means used are not illegal, an employer would generally be barred from retaliating against employees who participate in these political activities outside the workplace.¹³

3 Such states include, for example, Connecticut, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming.

4 Ind. Code § 34-28-8-6; N.D. Cent. Code § 62.1-02-13.

5 Ind. Code § 34-28-8-6; N.D. Cent. Code § 62.1-02-13.

6 al. Lab. Code §§ 98.6(a), 1102. The law also covers employees who are family members with people who have engaged in conduct protected by the law. Cal. Lab. Code § 98.6(e).

7 Conn. Gen. Stat. § 31-51q.

8 Relatedly, Illinois and Michigan ban the gathering or keeping of records about an employee's off-duty and off-site associations, political activities, communications and other extracurricular activities, unless the employee consents in writing.

9 For purposes of this discussion, we assume the employee's conduct at the rally was entirely lawful.

10 See Cal. Lab. Code § 1101; Colo. Rev. Stat. § 8-2-108; La. Rev. Stat. Ann. § 23:961.

11 U.S.C. § 157.

12 *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 564–65 (1978).

13 See also Ilyse Schuman and William E. Trachman, *Election 2016: Political Speech and Activity in the Workplace*, Littler Insight (Sept. 29, 2016) available at <http://www.littler.com/publication-press/publication/election-2016-political-speech-and-activity-workplace>.

Depending on the nature of the activities your employee engaged in and his role in your organization, it may violate the NLRA to penalize him. If the employee participated in a rally concerning sick leave, minimum wage, or immigration reform, for example, that conduct would likely be protected.¹⁴

Similarly, workplace rules or policies that dissuade non-supervisory employees from exercising their rights to advance their “mutual aid or protection” can violate Section 7.¹⁵ The National Labor Relations Board takes the position that just having such a rule, even if it isn’t enforced, is illegal because it could have a chilling effect on employees’ exercise of their rights. Consequently, your proposal to broadly ban off-duty political or other advocacy would be problematic under federal law even in states that do not prohibit such policies.

As a practical matter, your decision to terminate or discipline an employee should be based on an objective assessment of both the individual’s job performance and your business needs. If the employee is otherwise a solid performer, and if his behavior does not interfere with the operation of your business, an adverse employment decision may be difficult to explain, undermine morale in your workforce, and, on balance, have more negative than positive results.

In sum, with so many variables at work, there are no simple answers to your questions. As frustrating as an employee’s political conduct or opinions might be, employers should proceed with caution before penalizing employees at work for their lawful, off-duty conduct.

¹⁴See Ronald Meisburg, N.L.R.B., Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Memorandum GC 08-10 at 8, 12 (July 22, 2008) (noting that “partial or intermittent strikes, sit-down strikes, and work slowdowns are unprotected regardless of the employees’ objectives”) available at <https://apps.nlr.gov/link/document.aspx/09031d4580145ee5>.

¹⁵See Richard F. Griffin, Jr., N.L.R.B., Report of the General Counsel Concerning Employer Rules, Memorandum GC 15-04 (Mar. 18, 2015) available at <http://apps.nlr.gov/link/document.aspx/09031d4581b37135>.