

Labor & Employment



JANUARY 19, 2021 • NO. 2

Riots and Pandemics: Can an Employer Discipline or Terminate Employees Who Participate in Political Rallies Outside of Work?

The change in administrations has released a flood of protestors, some of whom have engaged in violent acts while at the same time creating potential COVID-19 “super-spreader” events in the workplace. How should—and could—you, as an employer, handle employees who have participated in these rallies? What limits—and rights—do you have to discipline, terminate, or keep employees away from the workplace related to concerns about their off-duty conduct and the pandemic? Some top-level issues you should evaluate related to employees’ attendance at rallies, which intersect with a host of legal and company considerations, include constitutional law; state and local civil law; state and local COVID-19 regulations; and last, but certainly not least, your company’s own employment policies.

Consider this scenario: It is Monday morning and, as you sip your first cup of coffee, your CEO calls and wants to immediately fire three employees who were seen on the weekend news at a political rally that turned violent. Not only did the CEO see them on the news, but she received texts and calls from customers demanding action and questions from company executives who want to know what the CEO plans to do. One of the employees on the news was wearing a company logo jacket while carrying a baseball bat as he forced his way into a government building. Another employee was seen carrying a racially insensitive flag and not wearing a mask while surrounded by hundreds of

mask-less protesters, but showed up for work today. The third employee was seen engaging in property damage.

In addition to wanting to finish your coffee, you already have a hundred other things to do today. Such is the life of in-house lawyers, executives, and human resources professionals in a pandemic. Your mind is racing with how to think through all the ramifications and issues if you fire all of them, none of them, or some of them. Is it lawful? Is it advisable? Is it going to lead to negative publicity for your company if you fire them? Are there options to take other than terminating them? What are the ramifications of doing nothing? What message does that send to customers and other employees? Does being an “at will” employee mean anything these days?

Let’s start by putting some structure around your thinking.

GATHER THE FACTS AND REVIEW YOUR COMPANY POLICY

As with all good employment decisions, we first need to know the facts. What videos are available to view and download? Are there pictures posted of the demonstration that implicate your company or the employees? Were the employees quoted by the media? Do you need to speak with the employees at issue as you generally do before making any final employment decisions?

While you gather the facts, you will need to determine whether each employee is *at-will* or subject to a “just cause” standard or process prior to termination. For example, does the employee have a contract, is the employee subject to a collective bargaining agreement, or is the employee covered by a tenure policy that affords them certain procedural rights prior to termination? Next, you need to review the employee handbook and other company policies to see if any are implicated. Is there a policy regarding off-duty conduct? If not, are there broad policies that apply to this scenario, such as a code of conduct or policy that discourages any conduct that harms the good name or reputation of the company?

Moreover, do the company’s current COVID-19 policies speak to attendance at mass gatherings, or require more generally that employees abide by state and local restrictions, many of which have strict limits on the number of people who can gather together? Did the employee sign a COVID-19 form or self-certification after attending the protest(s) at issue that may contain false information related to these local laws and mask-wearing requirements?

Finally, does the company have core values that it abides by, and do they support a decision to terminate a violator’s employment? You will also need to consider if the company has faced similar situations before to determine how it responded in the past. Between the pandemic and the scope of protests, many, if not most, companies are now facing employment scenarios never seen before.

STATUTES, REGULATIONS, ORDINANCES, AND PUBLIC POLICY

Local and state laws can largely govern how you treat any of the three employees in the scenario laid out above, and this requires a careful reading of all the laws at issue as well as a close examination of each individual’s conduct.

Specifically, assuming you are a private employer not directly subject to federal or state constitutional requirements, what laws are implicated by the CEO’s instruction to fire the employees? Some states and localities prohibit private employers from taking employment actions for “lawful” off-duty conduct or political activities. In the scenario above, some of the conduct at issue here may have been unlawful, but was it “political” as defined in the statute? Is attending a political rally where violent acts were perpetrated enough to negate it as protected activity? Probably not, but it will

depend on the state or local law. Even if constitutional protections do not directly apply, do they form the basis of a claim for wrongful termination based on a “public policy” and, if so, were the employees’ actions protected by those constitutional provisions? Again, some of this activity may be protected, but criminal activity is not.

Next, the laws against discrimination require that the actions cannot be based on the employee’s characteristics protected by federal, state, or local law. This is where company policy and past practice come into play. Is there a policy that speaks to such activity? Is the company aware of situations where employees engaged in similar conduct that resulted in termination? For example, is the company aware of employees coming to work wearing clothes or otherwise displaying the same flag or similarly insensitive symbols? Have others attended demonstrations or mass gatherings that are not political without wearing a mask? Is the company aware of situations where applicants or employees had been accused of off-duty violence or property crimes but were hired or remained employed anyway? The next question is whether these employees are being treated differently than others based upon a protected characteristic and, if so, is there a legitimate business reason for doing so? Are all three employees “similar” just because they attended the same rally?

Finally, are the employees subject to a collective bargaining agreement, employment contract, or policy that alters the at-will nature of the employment relationship or affords them certain procedural rights prior to discipline or termination? What workplace regulations and ordinances are implicated when employees were potentially exposed to others who may be positive for COVID-19, yet reported to work without disclosing it? If your investigation determined the political rally was a “super-spreader” event, what steps do you have to take to ensure the safety and health of other employees and customers that these three individuals came into contact with? Must you report the situation to a government agency? Should you shut down the workplace for several days? Between state and local laws, the Constitution, and COVID-19, there are a myriad of issues that you must carefully consider and navigate.

BUSINESS CONSIDERATIONS

You also need to think through the business ramifications of the employment decisions you will be making. What precedent are you setting? How will customers react? How will other employees perceive the company’s handling of

the situation? It is usually best if you can tie these decisions to business-related considerations. Violence, theft, and unsafe practices all potentially impact the workplace even when the activity takes place outside of work. The activity described above is likely not protected by off-duty conduct or political activity statutes, but each law is written a bit differently. Customers and coworkers have the right to want to avoid working with people who commit crimes openly, display racially insensitive flags, or engage in activities that present a risk to their safety, such as attending mask-less rallies. As with all employment decisions, in determining the appropriate course of action, you should make sure that the issue is properly investigated, consistent with company policy and past practice, and is fair. You need to evaluate the impact of the employment decisions on employee morale and retention as well as the legal and business risks associated with the decisions.

CRISIS MANAGEMENT

Last, but certainly not least, the scenarios depicted in this alert—and the possibility that matters related to them go viral on social media—are a reminder that companies should have crisis management plans in place. As we have continually urged during the past year, you must have a crisis management plan that contemplates future impacts of an immediate response to negative publicity and reputational harm. Have you planned for the fallout from the “crisis,” which is defined as an abnormal and unstable situation that significantly threatens the organization’s strategic objectives, reputation, or viability? Crises are normally determined by how they impact an organization’s people, environment, assets, and/or reputation. Communication is key, and you need to quickly develop the crisis response considering what is important, audience perception, who needs to be addressed, what needs to be said, and method of communication. Equally as important, you are already engaging with your public relations team and procedures to plan for a response that will formulate the long-term message with a focus on rebuilding reputation. This requires a controlled message and clear coaching of the company’s representatives. Having reviewed your crisis management plan with your business teams and legal experts on a periodic basis is a necessity in just these situations.

PREPARE NOW

All signs indicate that these issues may be with us for a while. Here are a few things to consider:

- Determine what state and local laws are applicable to the off-duty conduct of your company’s employees.
- Review state law “public policy” claims to determine what impact, if any, they have on these issues.
- Review your code of conduct and company policies to make sure that, consistent with applicable law, they address off-duty conduct that negatively impacts the workplace or the company.
- Consider messages, bulletins, meetings, and training to educate employees regarding the company’s stance regarding such activities. Ensure that employees are aware of COVID-19 procedures and the ramifications of violating those procedures or making false statements on company forms.
- Make sure that you have worked with your media relations team to ensure that you have messages and plans ready in the event the company’s name makes the national news because its logo is worn by someone engaging in unlawful behavior.

Coming to employment decisions related to these complicated issues requires balancing a host of legal, ethical, cultural, health, and corporate considerations. Please reach out to Blank Rome’s [Labor & Employment](#) group if you would like some guidance navigating these potentially murky and overlapping issues.

For additional information, please contact:

William J. Anthony
212.885.5262 | wanthony@blankrome.com

Brooke T. Iley
202.772.5816 | iley@blankrome.com