



## Can You Fire an Employee for Off-Duty Conduct?

by Marie D. DiSante and Denisha P. McKenzie

Following the 2016 Presidential election, activism on both sides of the political spectrum has been widespread. Individuals are utilizing social media platforms, protests and marches, consumer pressure tactics, and a variety of other public campaigns as an advocacy tool to support their ideologies. Regardless of one's political beliefs, no one can deny that the First Amendment is in full force and effect. The First Amendment however, applies only to the government, not private employers.

California employers should be aware that an employee's off-duty conduct may have an effect on their company's public image. In some cases, the termination of an employee for their off-duty conduct may be warranted. Given today's political climate, employers across the nation have been thrust into the limelight because of the off-duty conduct of their employees. To say the least, a company's response in dealing with the conduct of employees, even while off duty, can affect the overall image of the company, increase or decrease its customer base, and result in legal claims by affected employees for wrongful termination, discrimination, and retaliation. It is hard to know exactly where to draw the line on an employee's off-duty political conduct. There is no doubt that whatever decision the employer makes, it can have long-term effects on its business operations.

There are several statutes under California law which specifically prohibit an employer from making an adverse employment decision based on an employee's exercise of lawful, off-duty conduct, including participation in political activities or political action. See *Labor Code* sections 96 (k), 98.6, and 1102. In fact, employees may be entitled to reinstatement and damages (plus attorneys' fees) for any lost wages incurred as a result of a termination based on lawful, off-duty conduct. *Id.* These laws have the effect of causing employers to second-guess instituting any action against an employee where the conduct at issue occurred off the company's premises during non-working time but harmed the company's reputation. However, taking no action may not be the best course of action in every situation.

To take real examples from recent headlines, what should an employer do when its employee is identified as an active supporter of the KKK and makes the news for violent participation in the Charlottesville march? Do employers have the authority to fire an employee who posts messages on social media which advocate for the murder of persons who voted to support President Donald Trump? Can an employee be fired for a Facebook post which equates Hurricane Harvey as "direct karma" for the people in a state where a majority of its citizens typically vote Republican? Can an employer terminate an employee for a Twitter post which characterizes all White people as "racists" or all Muslims "terrorists"?

What should an employer do with the more innocuous social media post that suggests everyone should #takeaknee or #istand? If an employee says they "stand" in a post, does that mean they support police brutality against African Americans, or that they support the Constitution, or does it mean they want respect shown for the American flag for the people who served in American troops? One could argue a social post of this nature is up to interpretation. The facts are not as clear.

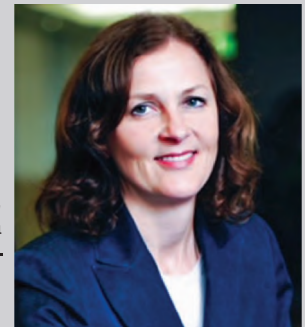
The exercise of lawful off-duty political conduct does not give an employee the blanket right to participate in a racist and incendiary group such as the KKK on the weekends, then interact with members of the company's diverse workforce and serve the company's customer base during the week. Every employer has a substantial interest in ensuring that the employees who represent their companies do not, on their off time, support the murder and destruction of an entire race, political group, or religion. While it is true that various laws are intended to protect off-duty conduct and speech, employers must be able to draw the line somewhere. The continued employment of individuals who advocate for hatred, violence and bigotry (regardless of their political leanings) can be viewed by the public as an official sanction of the employee's off-duty conduct.

Even with the threat of legal claims brought by employees for alleged wrongful termination, *these are risks that employers must sometimes take to preserve the overall, long-term image and success of their company.* Most termination decisions are based on a cost-benefit analysis. Employers should assess what is the risk of firing the employee versus not firing the employee? In making a determination, employers must not gloss over the reality of the harm and detriment imposed by an employee's off-duty conduct. In situations like this, many employees (and plaintiff's lawyers) recognize that the chances are slim that a jury will actually find in favor of a litigant who claims he or she was wrongfully terminated based on their active affiliation with the KKK, promotion and incitement of violence, or expression of racists and bigoted beliefs on the weekends.

Nowadays, there are many debates going on about whether employers have the right to terminate employees for exercising their free speech, their political freedom, or some other pseudo-intellectual argument designed to protect an employee's job despite the fact that he or she did something offensive while off duty. Regardless of the circumstances, each situation should be handled carefully and methodically. Employers should hire competent legal counsel to address these issues when they arise. Part of the analysis must include an assessment of what is: (1) in best interest of the company, (2) the social and political implications of the conduct at-issue, and (3) legal liability risks associated with deciding to terminate or even to keep the employee who engaged in the conduct.

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