

WHEN EMPLOYEES SPEAK OUT: AN EMPLOYER'S PLAYBOOK FOR RESPONDING TO CONTROVERSIAL OPINIONS

Insights
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Many people feel emboldened to publicly share their views on all sorts of controversial topics these days – politics, international relations, religion, culture, or any number of other incendiary areas where there are bound to be disagreements and emotional reactions. What happens, however, when an employer learns that one of its applicants or employees has publicly expressed a controversial opinion on a difficult subject? Where can you draw the line? And should you? This Insight provides employers with the guardrails you should consider when dealing with this issue and provides some practical guidance for navigating the situation. You can also visit our [Election Season Resource Center for Employers](#) to review all our thought leadership and practical resources.

First Things First: Should You Look?

Quite commonly, employers are forced to decide how to react to an applicant or employee making controversial statements because some third party – another employee, a member of the public, or an anonymous source – brings it to your attention. “Did you see what one of your employees just said in that online post? I hope your company doesn’t want to continue to associate with someone who believes that!”

But other times, employers stumble upon opinions they almost wish they hadn’t seen because of online searches that capture Google results and social media profiles. Employers should go into such an exercise with their eyes wide open, almost expecting to find something

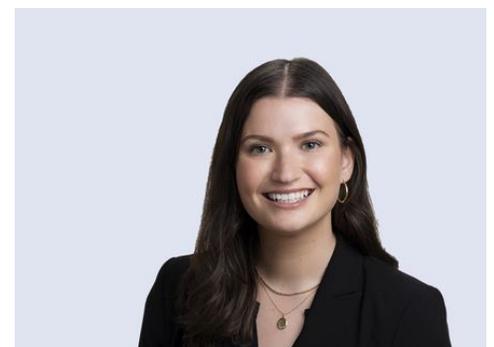
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controversial. A recent [study](#) conducted by the Pew Research Center found that, in the past year alone, nearly 46% of U.S. social media users have been politically active on their accounts. This activity can range from passively changing a profile picture to demonstrate support for a cause to actively encouraging others to take action regarding important issues. In other words, if you go looking, you're probably going to find something.

Before you do anything else, work with your legal counsel to determine the extent to which you want to conduct (or have third parties conduct on your behalf) general online background searches of your applicants or employees. Even looking at LinkedIn profiles before hiring a worker could cause you to unearth unpopular or controversial stances given the increasing willingness of professionals to express their personal views in public (and seemingly professional) settings. If you do want to conduct this exercise, make sure it is done consistently and carried out by personnel trained in HR/legal matters.

What Can You Do? Legal Guardrails

So now you're at the point where you are aware of some unpopular opinion by an applicant or employee, regardless of how you found out. What can you do?

At-Will Employment

Let's start with the basics. In the U.S., nearly all states adhere to the at-will employment doctrine. Under this doctrine, an employer (or employee) may terminate the employment relationship at any time, for any reason, with or without cause, so long as that reason is not otherwise prohibited by law. This means a private sector employer may terminate someone's employment or rescind a job offer for any reason, so long as that reason is not otherwise illegal or doesn't fall into a general public policy or implied contract exception that exists in some states. This grants employers considerable discretion in most instances to rescind a job offer or terminate someone whose controversial statements they prefer not to be associated with.

First Amendment

"But I have a First Amendment right to say whatever I want!" is a common refrain you might hear from applicants or employees who face workplace repercussions for the things

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they say. However, the First Amendment's "Freedom of Speech" guarantee generally does not apply to private employers disciplining its employees for engaging in prohibited conduct. The Constitutional freedoms found in the Bill of Rights and elsewhere generally restrict state action by the government and not private employers deciding how to manage their workforces.

Proxy for Discrimination

It's common knowledge that employers can't take adverse employment actions against an individual based upon their membership in a protected class, such as their race, ethnicity, religion, or national origin. An issue could arise, then, if an employee or applicant publicly expresses a controversial opinion that directly touches on or is related to their membership in a protected class – and an employer decides they want to rescind a job offer or discipline an employee because of that opinion.

Off-Duty Conduct Laws

Certain states also have some type of off-duty conduct law that protects an employee's lawful activity off the employer's premises during non-working hours. These state laws vary in the level of protection they offer employees, but they definitely could apply in situations where an employer learns of an individual expressing controversial opinions in a public setting.

- In Connecticut, for example, certain types of employers are prohibited from discharging employees for exercising their First Amendment rights provided that such activity does not substantially or materially interfere with the employee's bona fide job performance or with the working relationship between the employee and the employer.
- In Louisiana, employers with 20 or more employees are prohibited from enforcing or adopting any rule or policy to control or direct the political activities or affiliations of its employees. Moreover, these Louisiana employers are also prohibited from using threats of termination in case an employee supports, or becomes affiliated with, any particular political faction or participates in political activities of any nature or character.
- In California, employers are also prohibited from coercing or influencing employees, through threats of discharge, to

adopt, follow, or refrain from adopting or following any political action or activity. Additionally, an employee terminated, suspended, or demoted for lawful conduct occurring during nonworking hours and off the employer's premises may be entitled to reinstatement and/or reimbursement for lost wages.

- Colorado also prohibits an employer from wrongfully terminating an employee for engaging in any lawful activity off the premises of the employer during nonworking hours, unless such activity relates to a bona fide occupational requirement or is necessary to avoid a conflict of interest.
- There are also a number of laws, including in Missouri, New Mexico, and Washington, D.C., which prohibit employers from discriminating against an employee with respect to employment because of the employee's present or past political affiliation or lack of affiliation.

This is not a comprehensive list. You will want to check with your employment counsel to determine whether any other laws exist in your jurisdiction that could prevent you from taking action against employees or applicants in these situations. And while the application of these laws to private employee conduct is still developing, off-duty conduct laws are beginning to provide protection over conduct that has long been otherwise unprotected.

What *Should* You Do?

Once you have a firm grasp on what the law allows in the jurisdiction in which you operate, you are left with a choice about whether your organization *wants* to take action in such situations. Some considerations to take into account:

- **Employee Morale** – How will your other employees react if they learn that you are disciplining or firing coworkers for such activity?
- **Court of Public Sentiment** – Could your company face backlash if the job recession or termination reaches the news? Or, alternatively, face backlash if you *don't* take action?
- **Egregiousness of Public Statement** – Not all controversial statements are on the same level. Some can be much more egregious than others and demand immediate

action, while others could be considered relatively mild. The statement itself should weigh into your decision.

- **Overall Reach of the Statement** – Did your employee make the statement on a Facebook account with 12 followers? Or did they make a fiery speech that made the nightly news and went viral?
- **Company Values** – Align your response with your company’s core values and mission statement. Any actions you take should reflect the ethos and principles your company stands for.
- **Diversity and Inclusion** – You will want to work with your DEI leaders to ensure that you are taking appropriate action with respect to the specific public statement in question. Your opinion about and reaction to the statement could be challenged in ways you weren’t able to consider without a broader perspective.
- **Connection to Job** – You also should take into account whether the public statement relates to a topic that could somehow be connected to your organization’s mission or the worker’s job – which heightens the pressure you would be under to respond.

Once you take all relevant factors into account, make sure **your company consistently applies your workplace conduct policies**. If you don’t have such policies, now is the time to develop them. And if you do have policies in place, you will want to work with your legal counsel to ensure they are up to date given that the [legal standards have recently shifted when it comes to how workplace conduct can be addressed](#).

Have your managers ensure they **coordinate with HR staff or legal personnel** before taking action to ensure consistency and compliance with the law. Consistency is key – if some employees are punished for voicing their opinions about particular issues when other employees are not, this opens the door to potential litigation down the road.

Conclusion

At one point or another, you may have to deal with a situation where a worker or applicant expresses a controversial personal opinion that may not align with the

ethos of your company. Navigating this properly is of critical importance to minimize risks of litigation.

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