

Social Media Posts During Turbulent Times: FAQs on Employee Rights and Employer Responsibilities

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Many people have commented on social media regarding the anti-racist movement that has been gaining strength in the wake of police officers killings around the country. Unfortunately, some of these posts are inflammatory, derogatory, offensive, or racist. Even though employees are generally posting on their personal social media pages and are often doing so outside of work time, coworkers and even community-members to employers are increasingly complaining about offensive comments employees are posting on various social media platforms. While sometimes the conduct is so severe that employers can easily determine the appropriate consequences, in other cases employers must balance a variety of legal requirements, employee and public relations concerns, and their own company values. The

following are answers to frequently asked questions about these issues.

Do private-sector employees have free speech rights to make racist or other inflammatory posts or comments?

No. Employees often believe that their statements are protected under the First Amendment. The First Amendment specifically prevents the *federal government* from interfering with freedom of speech, but it does not guarantee that right in private settings, including private workplaces. So, a private-sector employee's comments (whether made in person or in writing on social media) are not shielded from employment consequences under the guise of freedom of speech.

Can employers discharge employees for off-duty conduct on social media or in person?

It depends. Some states prohibit employers from taking adverse employment actions against employees based on lawful off-duty conduct. Currently, California, Colorado, Louisiana, New York, and North Dakota ban employers from firing or retaliating against employees for any off-duty lawful activity, including speech. Arguably, this could include conduct that their employers and coworkers may find offensive. However, even in these states, online speech that attacks immutable characteristics protected by law (age, race, sex, religion, etc.) or constitutes workplace harassment would not be protected under these laws.

In the remaining states, the fact that an employee makes comments or posts on social media outside of work does not preclude an employer from taking action against the employee based on that off-duty conduct.

Employers may not be in a position to police everything employees do outside of work, however, once someone complains to an employer or calls attention to an employee's off-duty comments or actions, it becomes the employer's concern. Employers can create legal, reputational, and cultural risks by ignoring off-duty conduct, particularly if the conduct constitutes harassment based on a protected class. For example, an employee in New York was recently discharged from her employment after a video went viral of her, outside of work, making racist threats to a man in a public setting. Another employee was terminated from his employment when a video emerged of him confronting a man who was stenciling a human rights statement on his own property.

Can employers discharge employees who make offensive political posts or engage in protests?

It depends. More than a dozen states and jurisdictions, including California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, Utah, West Virginia, Seattle (Washington), and Madison (Wisconsin), prohibit employers from retaliating against employees for engaging in political activities. New Mexico protects employees' political opinions. As noted above, some jurisdictions prohibit action against employees for lawful off-duty conduct, including speech. Finally, other states and jurisdictions, including New York, Illinois, Washington D.C., Utah, Iowa, Louisiana, Puerto Rico, Virgin Islands, Broward County (Florida) and Urbana (Illinois) specifically prohibit employers from discriminating against employees based on party membership or for engaging in election-related speech and political activities. Employers may want to consider all state authority that might impact employee conduct related to an employee's political statements (online or in-person). However, employers should also consider whether or not the offensive post or speech is directly tied to an employee's political affiliation. Expressions of racism or other harassment are not political speech.

Can an employer be held liable for offensive social media posts on an employee's personal account?

Yes. An employer may face liability if it is aware of discriminatory harassment—even if it is done through an employee's personal social media use and outside of work hours—if the conduct creates a hostile work environment, depending on the facts and evidence in a particular case.

Can employees post social media complaints about their jobs?

Yes. The National Labor Relations Act (NLRA) and similar state laws protect employees' rights to communicate with one another about their employment. More specifically, employees have the right to engage in "protected activity" regarding their workplaces—sharing grievances and organizing online in protected activity. Under these laws, employees who are fired for posting online complaints about their wages, benefits, tip sharing arrangements, management, hours, or other work conditions could have a strong legal claim under the NLRA.

Beyond NLRA protections, other federal employment laws protect employees from retaliation for claiming that their rights have been violated. If an employee complains online about workplace discrimination, harassment, or other legal violations, that employee may be protected from retaliation.

What are examples of conduct that crosses the line?

Employees may be subject to disciplinary action up to and including termination for social media posts that include:

- Hate speech of any kind (regarding any protected classes),
- Speech that is severe enough to constitute a hostile work environment (regarding any protected classes),
- Threats to employee safety or of workplace violence,
- Trade secrets, and
- Confidential and proprietary company information.

What factors should employers consider before discharging an employee for online activity?

Employers may wish to consider the impact of the employee's conduct on the company and its employees. Considerations include whether coworkers will be forced to work with someone who has made offensive, racist, discriminatory, or hateful comments about their immutable characteristics, like race, sex, or sexual orientation.

In this regard, employers may want to weigh the potential damage to a company's culture and reputation (internally and externally) from condoning the comments/conduct or, on the other hand, of condemning it. Many employers err on the side of standing up against racism.

What other steps can employers take?

Employers may want to:

- Reiterate the company's core values so employees know which behaviors violate organizational principles. Remind employees of the avenues to report inappropriate conduct if they experience or learn of it. In the last few weeks, many companies have publicly issued corporate statements regarding their commitments to tolerance, diversity, social justice, and anti-racism. Companies can enact policies, procedures, and training requirements to ensure that their actions going forward are consistent with the values they have expressed in recent statements.
- Implement or review and update social media policies to make clear that off-duty conduct that violates a company policy or harms the company's reputation may still trigger consequences at work, including termination of employment.
- Promptly investigate any reports of potentially problematic social media posts or other conduct.

Can employers adopt social media use policies?

Yes. Employers should consider adopting social media use policies that address inappropriate and offensive conduct and disseminating these policies to employees. Employers can tell employees that their personal social media accounts, online networking accounts, blogs, and other online communications may be reviewed, and that any inappropriate or offensive content could subject them to discipline up to and including termination. Employers may want to explain in the policy what types of content could create problems, including harassing and bullying behavior or discriminatory or offensive language. Problematic use of social media can

include online conduct that may be associated with the company or that could potentially cause interpersonal problems in the workplace.

As with all employment policies, employers can face liability if they do not enforce their social media use policies consistently. If employees are treated differently for the same or similar conduct without legitimate non-discriminatory explanations, employers may face a risk of employment discrimination claims.

With tensions already running high due to the COVID-19 crisis, the most recent incidents involving police violence and the related protests, the anti-racist movement has come to a head in the United States and around the world. Employers will increasingly see these issues in their workplaces as well and can take steps now to be prepared. In most cases, employers can take actions against their employees' racist off-duty conduct, and employers may need to do so to avoid legal liability and, probably more importantly, to maintain a culture of inclusion.



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