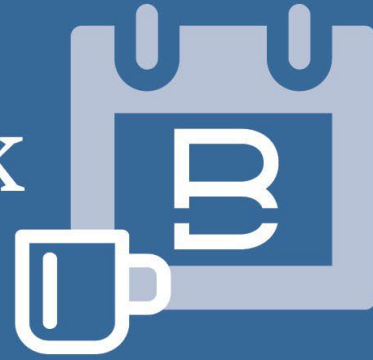


The Work Week

Bassford Remele Employment Practice Group



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Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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Responding to Employee's Off-Duty Conduct

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Social media is a high-speed delivery system for personal opinions, and a single post can spark a digital firestorm. Increasingly, employers are expected to respond—quickly and decisively—to questionable conduct depicted on video or controversial or unpopular posts made by employees on their own time, on their personal accounts. Following the assassination of Charlie Kirk, employees throughout the U.S. experienced significant consequences, such as suspensions, internal investigations, and termination, for comments made on their personal social media accounts. Balancing organizational values, public perception, and legal compliance when evaluating off-duty online conduct by employees can be difficult. Employers are justified in being concerned about public image, employee conduct, and workplace culture—but they must proceed thoughtfully.

Public vs. Private Employers

The First Amendment is often cited as the basis for an employee's ability to express their opinions and views without suffering consequences. However, the First Amendment only applies to government conduct, not the conduct of private employers. Public employers (e.g., cities, counties, state agencies, public schools) should tread carefully before disciplining employees for speech—even if it is controversial. Public employee speech is protected if it addresses matters of public concern and doesn't cause undue disruption to the workplace.

Private employers, on the other hand, are not bound by the First Amendment and have significantly more discretion to take adverse action, especially if conduct violates company policy, undermines the organization's reputation, or breaches workplace standards.

Statutory and Contractual Implications

Even though the First Amendment does not apply to private employers, statutes or ordinances may impact an employer's approach to navigating its employees' off-duty and off-premises conduct. While political views are not a protected characteristic under federal and many anti-discrimination laws, an employee's political activity may very well involve or relate to a protected class. For example, the Minnesota Human Rights Act ("MHRA") prohibits employers from taking adverse employment actions that disproportionately affect protected classes.

Additionally, the National Labor Relations Act (NLRA) protects private-sector employees' right to organize unions, bargain collectively, and engage in concerted activities for better working conditions without employer retaliation.

Another consideration is whether the employee has an employment contract with the employer. Every state, except Montana, follows the at-will employment doctrine, meaning an employer can terminate an employee for any reason or no reason unless statutory exceptions apply. However, if the employer and employee have a formal employment contract, it can override the at-will employment doctrine by specifying the terms and conditions of termination. The contractual terms and conditions will dictate how an employer can respond to the employee's off-duty speech or conduct. Similarly, labor and union contracts may contain provisions related to off-duty conduct.

Legal & Strategic Best Practices

- *Social Media Policy*

Organizations should have a policy that addresses: (a) expectations for employee conduct online; (b) distinguishing between personal and professional accounts; (c) rules around incitement, harassment, or reputational harm; and (d) a reminder that employees may be held accountable for speech that violates workplace values, even off duty. The policy should be consistently and uniformly enforced.

- *Responding to Off-Duty Speech*

Before imposing discipline, employers should conduct a prompt but thorough investigation. As a part of the investigation, the employee should be given a chance to respond. Additionally, employers should review the full context of the post (tone, audience, timing, and topic) to assess whether there are implications of anti-discrimination statutes or unionization. Finally, document the basis for any adverse employment action, such as how the speech violates specific policies.

To reduce legal exposure while protecting organizational values:

- Review and revise policies now, not after a PR crisis.
- Train managers and HR teams on legally sound procedures.
- Consult legal counsel, especially when dealing with politically charged or high-profile cases.

- Document everything—from the triggering event to the investigation and rationale for action.

In today's digital environment, employers cannot ignore off-duty conduct, especially when it becomes part of a public narrative. But reacting solely to public pressure or viral outrage is equally dangerous. The key is to act thoughtfully, document clearly, and apply rules consistently. With sound policies, a measured approach, and an understanding of the legal landscape, employers can protect both their reputations and their people.

Bassford Remele's Employment Practice Group members are keenly aware of the intersection between the legal implications and the business implications employers face when responding to an employee's off-duty activity. We provide practical advice to aid organizations in navigating those difficult situations so that they have the necessary information to make the decisions that impact their organizations. We advise organizations on employment law, free speech, investigations, and policy development.

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