

Employment Law and Your Business

Can an Employee Be Fired for Protesting?

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2020 is already shaping up to be one of the most divisive election years in recent memory. In the last few months, there have been protests about beach closures, mask requirements, and police reform. Some cities have had consecutive, daily protests for over a month. During this time of heightened political activity and emotions, it is important to be mindful of the applicable laws unique to California employers.

While there are a number of laws in play, we will focus on four: California Labor Code sections 96(k), 98.6(a), 1101, and 1102.¹ Together, Labor Code sections 96(k) and 98.6(a) prohibit employers from discriminating, retaliating, or taking any adverse employment action (up to and including termination of employment) because the employee or applicant engaged in lawful conduct during nonworking hours away from the employer's premises. Labor Code sections 1101 and 1102 concern political activity by employees. Employers are prohibited from making or enforcing any rule or policy that forbids or prevents employees from: (1) participating in politics; (2) becoming candidates for public office; or (3) controlling or directing the political activities or affiliations by Labor Code section 1101. Employers are also proscribed from coercing or influencing, or attempting to influence an employee to engage or refrain from engaging in any particular political action or activity by threatening loss of employment by Labor Code section 1102. While these rules are straightforward, the application of these rules can quickly become difficult and complex.

Let's say Michael and Michelle work for Generic Manufacturing, Inc. Michael decides to participate in a Black Lives Matter protest downtown during non-working hours. At the same time, Michelle decides to engage in a counter-protest against Black Lives Matter at the same location, also while off the clock. Neither wear any particular article of clothing identifying Generic as their employer. Both passionately engage in rigorous political debate, including holding signs, yelling chants, and marching through the streets. Neither engage in any forcible, violent, or otherwise unlawful activity during their participation.

Michelle's supervisor discovered she participated in the event after perusing through her Facebook and Twitter accounts, which contained photos of the protest and posts expressing her strong opinions. Michael's supervisor discovered his participation in the protest after spotting him marching in a news report. Both supervisors are outraged over each employee's participation in the event and want to immediately terminate Michael and Michelle. Can they? Why or why not?

¹ All subsequent references to the Labor Code concern the California Labor Code.

As a practical matter, an employer's decision to terminate or discipline an employee should be based on an objective assessment of both the individual's job performance and the business needs of the company. If the employee is otherwise a solid performer, and if the behavior does not interfere with the operation of the business, an adverse employment decision may be difficult to explain, undermine morale in the workforce and, on balance, have more negative than positive results.

In the above scenario, based on the interpretation of the law, Michael and Michelle would be protected from retaliation for participating in the protest and counter protest on their own time. Additionally, the employer could not discriminate against the employees for tweeting about the movement; or for posting photos and opinions on their personal Facebook pages, or even for discussing the event with coworkers during an employee's rest break. An employee probably cannot walk off the job in order to protest, but if the political activity is otherwise lawful and doesn't interfere with the employee's work, it should be protected.

Moreover, because the United States and California Constitutions both protect the right of the people to peaceably assemble and petition for a redress of grievances, terminating an employee for participating in a political protest might also violate the common law prohibition on terminating employees in violation of public policy.

In sum, it is advisable to seek legal advice before any potential adverse employment action is taken against an employee for their participation in political rallies, demonstrations, or protests.



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