The Work Week

Bassford Remele Employment Practice Group

February 2, 2026

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

Bassford Remele Labor & Employment Practice Group

Navigating Off-Duty Social Media and Protest Conduct: Legal Risks and Practical Guidance for Employees

Employees' off-duty speech—particularly on social media and in connection with public protests—can create significant legal, operational, and reputational risks for employers. The recent controversy involving Lexie Lawler, a Florida nurse reportedly terminated and subsequently barred from nursing practice in Florida by the state licensing board after viral comments about Press Secretary Karoline Leavitt's pregnancy, underscores the high-stakes environment employers face when off-duty speech intersects with workplace values, patient or customer trust, licensing requirements, and public backlash. Although employers must comply with a patchwork of Constitutional, statutory, and common law constraints, they also retain legitimate interests in protecting their operations, workforce, and brand. This article outlines key risk areas and offers practical steps for employers to manage off-duty social media and protest conduct.

Legal Risks Related to Disciplining or Not Disciplining Employees for Off-Duty Conduct

Employers face risks both from taking action and from failing to act. A balanced, policy-driven approach that considers applicable law, consistency, and proportionality is essential. When considering discipline for an employee's off-duty speech or conduct, employers should consider the following legal risks:

(a) Wrongful termination or retaliation claims: Private-sector employees may allege termination in violation of public policy, statutory rights, or anti-retaliation provisions if

discipline is tied to protected activity, such as whistleblowing, concerted activity about workplace conditions, or political/legal protections that may exist under state law;

(b) Discrimination and harassment theories: If an employer disciplines employees disparately for similar conduct, or if the conduct relates to protected characteristics, employees may assert discrimination or disparate treatment.

(c) Whistleblower protections: Disciplining speech that touches on patient safety, public health, compliance, or other protected whistleblowing topics can trigger statutory protections.

(d) Off-duty lawful conduct statutes: Several jurisdictions restrict adverse action based on lawful off-duty conduct vis-à-vis state statutes, subject, of course, to exceptions. Employers should assess local requirements before taking disciplinary action.

(e) National Labor Relations Act (NLRA) considerations: Employee speech that constitutes protected concerted activity (also referred to as exercising one's "Section 7 rights") about terms and conditions of employment may be protected, even when expressed on social media, if not so egregious as to lose protection under the Atlantic Steel doctrine.

(f) Just cause and progressive discipline: Employers with unionized workforces need to be keenly aware of the progressive disciplinary policies and/or any applicable just cause standard articulated in a governing collective bargaining agreement before taking action.

(g) Defamation or invasion of privacy counterclaims: Heavy-handed monitoring or public disclosures about discipline may create exposure.

(h) Licensing and professional standards: In regulated industries (e.g., healthcare), discipline or reporting triggered by off-duty conduct must align with licensing board standards and mandatory reporting obligations; missteps can create legal and regulatory complications.

Just as taking disciplinary action against an employee for off-duty conduct can create legal risk, so can an employer's inaction. Employers should consider the following ramifications of failing to act when an employee's off-duty conduct adversely impacts the employer's workplace, operations, or reputation:

a) Hostile work environment or harassment allegations: When an employee's off-duty conduct creates or reinforces a hostile work environment for coworkers, an employer's failure to address such conduct can lead those coworkers to assert claims under state or federal law.

b) Negligent retention or supervision: Retaining an employee whose off-duty conduct indicates risk to patients, customers, or coworkers can increase liability if harm subsequently occurs in the workplace, especially where an employer knew or should have known of the risk.

Copyright © 2026 Bassford Remele, All rights reserved.

c) Brand and stakeholder harm: Viral incidents can damage reputation, customer trust, investor relations, and recruiting and retention of talented employees.

d) Compliance and accreditation risks: In healthcare and other regulated industries, tolerating conduct inconsistent with professional standards can affect accreditation or trigger regulator scrutiny from an increasingly optic-driven federal government.

Although the risks are many for employers, so, thankfully, are the resources. Employers should take care to triage and document the off-duty conduct, including preserving evidence and assessing the nexus between the conduct and the workplace. To ensure consistency amongst past practice and potential comparator situations, apply policies consistently and dispassionately to the facts while evaluating prior responses to similar conduct to mitigate the risk of disparate treatment. Tailor the level of discipline to the severity of the conduct, the employee's role within the company and any sensitivity that role may have. Work closely with employee and labor relations HR staff and counsel, if necessary, to assess any laws that may apply to the off-duty conduct, including protected concerted activity under the NLRA, whistleblower protections, Title VII and other anti-discrimination laws, and jurisdiction-specific laws governing political speech. For those industries with regulated or licensed roles, employers should consult their compliance or risk managers and, if needed, counsel regarding any reporting obligations and for assistance navigating licensing issues. Finally, working closely with communications or media staff to craft and limit internal and external statements to what is necessary and accurate will limit risk and prolonged adverse exposure to your brand's reputation.

First Amendment/Free Speech Considerations for Employers

Employees often rest upon their "First Amendment rights" without actually understanding when that Constitutional protection applies. To be sure, the First Amendment generally restricts government action, not private employers. Private employers typically may discipline off-duty speech consistent with applicable statutes and policies, with the important caveat that state-specific laws may have limitations and/or protections for, say, political speech or activity. For public-sector employees, Constitutional constraints will apply and any discipline must satisfy the standards balancing the employee's speech as a citizen on matters of public concern against the employer's interest in workplace efficiency and harmony. Public-sector employers should consult counsel for a jurisdiction-specific analysis.

Practical considerations for employers including determining whether the employee's off-duty conduct relates to terms and conditions of employment or otherwise constitute personal views wholly separate and apart from workplace issues. Employers should apply content-neutral standards consistently, focusing on the impact (e.g., threats, harassment, disclosure of confidential or proprietary information) rather than on the employee's personal viewpoint. Finally, ensuring HR and managerial staff are trained on and understand the limits of free speech in private workplaces and the special rules for public employers will proactively mitigate risk.

Copyright © 2026 Bassford Remele, All rights reserved.

Handling Employee Speech and Protests Related to ICE

The past few weeks have seen the American populace highly engaged in political activity, including protests and social media speech, related to tactics utilized by the Department of Homeland Security's Immigration and Custom Enforcement (ICE) officers. ICE-related speech and protests are frequently high profile and politically sensitive, and may implicate discrimination, immigration, and labor protections. Employers should be aware that discussions about workplace treatment of immigrants or related working conditions may qualify as protected concerted activity, and adverse actions that appear to target employees based on national origin, citizenship status, or perceived immigration status can trigger liability. Because protests may affect employee attendance, employers should review their attendance and scheduling policies for neutrality and uniformly apply them. Finally, off-duty speech or protests that escalate to threats, doxxing, or harassment require prompt risk management.

Clear, consistently-enforced policies are the cornerstone of risk management in this arena. Policies set expectations, clarify what off-duty behaviors can affect employment when they harm legitimate business interests, and reduce the risk of disparate treatment claims when objective and applied uniformly.

Employers can proactively mitigate risk by drafting and reviewing policies to include: time, place, and manner restrictions for protests on company property; policies that require pre-clearance for use of company logos or uniforms off-duty; attendance and no-call/no-show rules; facially-clear policies prohibiting threats, harassment, or discrimination against employees based upon protected classes or immigration-related traits; security policies that protect employees and the workplace alike and address doxxing or threats with appropriate measures; and policies specific to regulated and licensed roles to include that such positions are subject to additional standards and the potential requirement for state licensing board reporting. Early involvement by counsel, HR, security, and communications can further mitigate risk, especially when ICE-related speech or conduct goes viral or otherwise implicates operational risk.

Action Checklist for Employers

(a) Audit policies: Update off-duty conduct, social media, anti-harassment, confidentiality, and time, place, and manner restrictions for clarity and legal compliance.

(b) Train leaders: Educate HR, compliance, and managers on NLRA, anti-discrimination, whistleblower, and jurisdiction-specific off-duty protections; distinguish private vs. public employer constraints.

(c) Prepare protocols: Establish a cross-functional rapid response team and playbooks for viral incidents, including evidence preservation, legal review, and communications.

(d) Ensure consistency: Implement a decision matrix to evaluate severity, role sensitivity, nexus to the workplace, and past practice/potential comparators.

Copyright © 2026 Bassford Remele, All rights reserved.

(e) Document thoroughly: Capture decision rationales, legal analyses, and investigation steps; maintain confidentiality.

(f) Review offer letters and codes of conduct: Incorporate acknowledgments of policy coverage for off-duty conduct that materially impacts the workplace.

(g) Engage counsel early: Particularly where protected activity, licensing, or multi-jurisdictional issues are involved.

Conclusion

Off-duty social media and protest activity will continue to challenge employers. By adopting clear, content-neutral policies, training decision-makers, analyzing legal protections, and responding proportionally and consistently, employers can navigate these incidents while balancing legal obligations with the need to maintain a safe, respectful, and trustworthy workplace. The stakes, especially in licensed professions and high-trust roles, warrant careful planning and disciplined execution when incidents arise.

Bassford Remele's Employment group continues to monitor employment law developments and trends during these extraordinary times of nation-wide protests and strengthening political dissonance. We are available to help with proactively reviewing your company's policies and guidelines, as well as provide training to management, to ensure legal compliance and minimize risk should an employee's off-duty conduct impact the workplace. Please reach out with any questions or if you need assistance.

LEARN MORE ABOUT OUR EMPLOYMENT PRACTICE »»

Copyright © 2026 Bassford Remele, All rights reserved.