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## Can I Fire an Employee Who Stormed the Capitol?

*Law@Work Blog*

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**Adam Gersh**

As all eyes were focused on the U.S. Capitol Building and insurgency on January 6<sup>th</sup>, back home, employers now face questions about whether they can discipline employees who participated in the siege or other off-duty conduct that contravenes the employer's world view. The answers to these complex questions depend both on state law, the terms of employment, whether the conduct was lawful, and whether the conduct is otherwise protected.

Broadly, non-government employees who are employed on at "at-will basis" can be terminated for any reason or for no reason, unless they are otherwise protected by law. For example, as most employers know, employees cannot be terminated or disciplined if the employment action is discrimination against someone in a protected class and/or retaliation for engaging in protected conduct. By implication, this means "at will" employees can be disciplined or terminated for engaging in lawful off-duty conduct unless that conduct is otherwise protected. For instance, New Jersey law protects certain employees who use tobacco and cannabis off duty, but it does not protect employees who engage in the type of insurgency we saw on January 6, 2021, even if the employee acted lawfully. This means that a New Jersey employer can terminate or take action against an employee for participating in the siege on the Capitol, but cannot terminate an employee who smokes marijuana when they are not at work (provided the employee is not under the influence or otherwise impaired while on duty and the use does not impair an employer's federal contract). Colorado, on the other hand, has a broader off-duty conduct statute that protects a range of lawful off-duty activity, meaning it is unlikely that employers in Colorado can terminate an employee who participated in the siege on the Capitol in a lawful manner. These are just two very broad examples but employers need to keep in mind that many states have a variety of off-duty conduct protections.

Employees who are employed pursuant to employment contracts, union bargaining agreements, and governmental entities may have specific rules that impose a higher standard for discipline or termination. For example, many union contracts restrict employers from disciplining employees for anything other than just cause arising from the employee's conduct at work. In a unionized workplace it is likely an employer could not terminate or reprimand an employee who participated in the siege on the Capitol and in a lawful manner.

Employers should also keep in mind that the National Labor Relations Act protects employees who engage in protected concerted activities, whether in person or online, and employees who express support for (or opposition to) unions. These protections, among other things, offer protections to employees who desire to form or support a union.

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### **Savvy Employer Takeaways**

In most instances, private employers can take actions against employees who engage in lawful off-duty conduct that the employer finds offensive, unless that conduct is otherwise protected by law or doing so would violate a the employee's employment contract. Nonetheless, each situation requires an individual analysis of applicable law, the terms of employment, whether the conduct was lawful, and whether the conduct is otherwise protected. Employers must also weigh how such an action, or failure to take action, will influence the culture and productivity of their organization.

**Questions? Contact Adam E. Gersh.**

### **ATTORNEYS MENTIONED**

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