

Employers Have Broad Leeway To Fire Capitol Rioters

By **Anne Cullen**

Law360 (January 8, 2021, 9:27 PM EST) -- Several businesses have already cut ties with workers who took part in Wednesday's insurrection at the U.S. Capitol, and while sacking someone for something they did outside of work could give rise to legal liability, experts say most employers have wide latitude to send Capitol rioters packing.

At least five employees across the country have already been fired, suspended or resigned under workplace scrutiny because of the role they played in the deadly riot in D.C. that aimed to block lawmakers' formal certification of the U.S. presidential election results.



Supporters of President Donald Trump scale the West wall of the U.S. Capitol on Wednesday amid an insurrection that left five dead. (AP Photo/Jose Luis Magana)

As those involved continue to be identified online and pursued by law enforcement in the wake of the chaos, which left five dead, experts say that businesses, especially in the private sector, have broad discretion to take disciplinary action when a photo surfaces online of someone on their roster amid the fracas.

"If it's a private-sector employer, I think they're going to have a great degree of freedom of action to decide on whatever response, including termination, that they think is appropriate," said Jason Schwartz, co-head of Gibson Dunn & Crutcher LLP's labor and employment practice.

Unlike the public sector, there are no First Amendment free speech protections for workers in private industry. Plus, most workers in America are at-will, meaning their employers can fire them for any reason not against the law, such as bias based on race, sex or age.

Annapolis employment attorney Joyce Smithey, who represents both workers and businesses, said that for private employers, canning someone for even attending a protest is generally above board.

"Assuming you're in an at-will jurisdiction — which the vast majority of jurisdictions in the U.S. are — the general rule is you can fire people for attending protests, so long as they don't relate to protesting something related to the workplace," Smithey said.

With journalists, observers and rioters themselves sharing video and photo evidence of the slew of federal laws being broken on Wednesday, experts said employers have plenty of documentation to make their case for disciplinary action or termination.

"Even if it's not your feet up on the speaker of the house's desk, when they're disobeying the instructions of the police, crossing barricades and trespassing on the Capitol grounds, they're in the middle of a crime," Schwartz said. "So if you're an employer and you want to do something about it, there's probably going to be a pretty good record upon which you could act."

Some attendees even spoke with the media about how they stormed the Capitol building and supported the violence that ensued, bolstering any business' case for discipline. "For the employer, you have your documentation in a bow," said Duane Morris LLP employment partner Jonathan Segal.

Lawyers also noted that the conduct doesn't need to rise to the level of criminality to cost someone their job.

For people who may not have been seen breaking into a federal building, but may have been caught on camera wearing or showing support for the hateful imagery — as many rioters on Wednesday brandished nooses and sported Nazi symbols — experts said that can be enough to get them in hot water.

"Even if it's less than something criminal but doesn't put your organization in a positive light, if it's purely employment at-will, the employer has the ability to let that person go," according to Edgar Ndjatou, director of employee advocacy group Workplace Fairness.

Being pictured next to one of the nooses outside the Capitol and appearing to support that message is enough to jeopardize someone's job, experts said.

Segal noted that this kind of imagery is hate speech, "not a difference of political opinion," and something he said "would be a legitimate reason, a good reason" to fire someone. "I don't want someone that publicly embraces hate in my workplace," he said.

So far at least five businesses have publicly stated that they have taken action against an employee who was documented playing a role in the insurrection, with the New York City MTA becoming the latest to join the fray on Friday, confirming it had suspended a Metro-North worker who had taken part in the Capitol riot.

The Metropolitan Police Department recently circulated a flyer naming the individual as a person of interest after he was photographed among the mob that broke into the Capitol.

The employee, which the MTA didn't name, is covered by a collective bargaining agreement, and an MTA source said it will be moving ahead with a company trial under the terms of that pact to charge the employee with violating federal law and using a sick day to do it.

"Effective immediately this individual has been suspended from Metro-North without pay and will be disciplined in accordance with his collective bargaining agreement pending an investigation," according to a statement from MTA senior advisor Ken Lovett. "This alleged conduct is abhorrent and goes against the values of Metro-North, New York and the nation."

Even in an organized workplace, insurrectionists won't be shielded from disciplinary action, lawyers said. "Even where there's protection, it's not absolute," Segal said.

Paul Davis, Associate General Counsel, is no longer employed by Goosehead.

— Goosehead Insurance
(@followgoosehead) January 7, 2021

Several other employers took disciplinary steps on Thursday, including Texas-based Goosehead Insurance, which **fired in-house attorney** Paul Davis for his apparent involvement in Wednesday's events. His dismissal was based on videos and images he shared on social media that showed the lawyer standing outside the Capitol with others declaring his intent to get into the building.

A photo he uploaded later said he had been teargassed, though Davis insisted after he was fired that he was "peacefully demonstrating" and didn't "storm the Capitol" like others in the fray. Goosehead shared the news about Davis' termination in posts on its Facebook, Twitter and LinkedIn accounts Thursday morning, but did not respond to requests for comment.

NEW: A Maryland company has terminated one of its employees after he was apparently captured in a picture during the mob riot in the Capitol yesterday. @wbaltv11
pic.twitter.com/flxRhdmP3P

— Tre Ward (@TreWardWBAL) January 7, 2021

Navistar Direct Marketing in Maryland also announced Thursday that it had fired an employee who was photographed wearing his work badge after breaking into the Capitol building, sharing a statement that said the company supports an "employee's right to peaceful, lawful exercise of free speech" but that it would cut ties with "any employee demonstrating dangerous conduct that endangers the health and safety of others."

Former Pennsylvania state representative Rick Saccone, who shared images of himself outside the Capitol on Wednesday on his Facebook page, resigned from his adjunct post at Saint Vincent College after he was the subject of an investigation related to the incident, according to a statement circulated by the school.

We have been made aware of a video posted today from Washington, D.C., by an individual who has, on occasion, served as an adjunct faculty member at Saint Vincent College. (1/3)

— Saint Vincent College
(@MySaintVincent) January 7, 2021

"As a result of that investigation, Dr. Saccone has submitted and we have accepted his letter of resignation, effective immediately. He will no longer be associated with Saint Vincent College in any capacity," the statement said.

Also on Thursday, the Allentown, Pennsylvania, public school district said in a statement that an unnamed teacher had been "temporarily relieved of his teaching duties" for being "involved in the electoral college protest" this week pending the outcome of an internal investigation.

Experts say the pink slips will keep coming. "Over the coming days, lots of people are going to be identified and there will be concern by their employers and concern by the employers' customers and clients," Schwartz said.

--Additional reporting by Michele Gorman. Editing by Leah Bennett.