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Question of the Day: Dress Code Policies

Legal Update

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Question

Considering the recent protests demanding racial equality, how are employers handling the issue of dress codes and dress code policies?

Answer

Cautiously. As workplaces are reopening and protective personal equipment and mask-wearing requirements collide with a national reckoning of protests and statements for racial equality, employers must ensure that their workplace dress code and dress code policies are neutral, adopted for nondiscriminatory reasons and applied consistently to all employees. In recent weeks, several big-name companies have encountered controversy and public scrutiny for inconsistently enforcing their company's longstanding dress code.

Although private employers have the right to regulate what employees wear to work, employers restricting certain forms of expression risk violating labor and/or employment laws.

Employers must be aware to not violate anti-discrimination protections by prohibiting certain employees and not others for engaging in the same behavior. An example of this would be allowing LGBTQ buttons or other attire supporting marriage equality, *but* prohibiting employees from wearing face masks to express solidarity with the Black Lives Matter movement. Such decisions could implicate state and federal laws prohibiting employers from discriminating on the basis of race or other protected class status. Employers could also face hostile work environment allegations if an inconsistently enforced policy disadvantages people based on race or another protected class.

Likewise, employers must consider protections under the National Labor Relations Act (NLRA). For example, employers should consider whether employees wearing Black Lives Matter masks or apparel are doing so in "concerted activity" as an expression to protest racially discriminatory working conditions. Section 7 of the NLRA grants employees "*the right to self-organization, to form, join, or assist labor*

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

In other words, the NLRA protects employees' rights to organize and speak out about working conditions, without regard to whether an employer's workforce is unionized, public or private. To this extent, an employee's right of expression is not an absolute right and may be limited in "special circumstances." The National Labor Relations Board's "special circumstances" standard is a balancing test of an employer's legitimate justifications for its dress code policy with the potential impact on the employees' Section 7 rights. Whether conduct may be protected under the NLRA requires a case-by-case analysis. Therefore, employers should seek legal counsel when navigating these decisions.

Further, the enforcement of dress code policies could implicate "political speech or activity" protections varying from state to state. Although there is a variance in state protections for "political activity," most of the states' protections focus on conduct during off-duty hours. Federally, private sector employees are not protected under the First Amendment for "free speech" when it comes to their employment. Public sector employees, however, may be protected as long as the issue is of political or social concern and does not involve illegal conduct. Furthermore, incendiary or offensive comments cloaked as "political speech" or "concerted activity" – even during off-duty hours – could violate an employer's anti-discrimination or harassment policies and are not protected.

Takeaways

Employers face a challenge when deciding whether to permit or ban personal statements or certain forms of expressions in solidarity – whether they are doing so to avoid conflict, legal ramifications, bad publicity or low employee morale. In the end, employers should review and ensure their dress code policies are drafted with a keen eye toward creating an inclusive and respectful workplace. More importantly, employers should use an evenhanded approach at enforcing such policies to avoid requirements or prohibitions that may result in a disparate impact on certain individuals or groups of employees.

As always, if you have questions regarding your workplace dress code, or revising your current dress code policy, please reach out to your Fredrikson & Bryon employment law attorney.

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