

A New Need For "Uniform" Policies: NLRB Reverses Course, Provides Greater Protection To Employees Who Display Political Slogans On Work Uniforms

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By: Weston Kulick, Thomas Reilly

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Most private employers probably believe they can exercise a great degree of control over what their employees wear, especially if those employees engage with clients or customers every day. In particular, most private employers probably feel that they can prohibit their employees from wearing, writing, or otherwise showing political or similar slogans on their work uniforms or generally on their person. After all, private employees do not have traditional First Amendment free speech rights in the workplace, and private employers have a vested interest in protecting customer and client relationships.

From 2020 up until about a month ago, the National Labor Relations Board (NLRB) agreed. In 2020, the NLRB issued a decision holding that Whole Foods did not violate the labor rights of its employees when it disciplined them for wearing accessories containing the "Black Lives Matter" slogan. Rather, the NLRB concluded that Whole Foods had the right to avoid the "controversy and conflict" that the messaging "would invite." The NLRB's decision seemed quite clear: whatever employees might be permitted to do outside of work, they were not free to express their private political opinions on company time.

Critically, the NLRB is a federal agency and its members are appointed by the President. Unlike courts, the NLRB is not bound by the concept of precedent -- a legal principle by which courts abide and that requires them in most instances to adhere to prior decisions. Instead, the NLRB's decisions often depend on the political persuasion of its members, which in turn depend on the political preferences of the President. Consequently, the NLRB can and often does revisit prior issues and change course.

As is its prerogative, the NLRB seems to have reversed course on the issue of employees displaying political slogans on their work uniforms. In a decision dated February 21, 2024, the NLRB held that Home Depot had violated federal labor law by prohibiting an employee from wearing an apron with the slogan "BLM" (Black Lives Matter) written on it. Although it did not reference the prior Whole Foods decision, the NLRB appeared to distinguish it by noting that the Home Depot employee was engaged in "concerted activity" under the National Labor Relations Act because the employee chose to display the insignia amid numerous complaints of racial discrimination by other employees and customers at the employee's work location. The Board explained that workers "have the right to join together to improve their working

conditions -- including by protesting racial discrimination in the workplace." Moreover, "an employee who acts individually to support a group protest regarding a workplace issue" is protected under federal labor law.

The NLRB's explanation notwithstanding, the decision is a clear departure from its prior holding in Whole Foods and a warning to employers who are overzealous in policing employee dress and political activity.

In general, employers should follow several basic principles to guide decisions in this area:

1. Employees who engage in activity designed to address discrimination or other such issues *in the workplace* are protected by federal labor law from disciplinary action.
2. Employees who engage in activity designed to address discrimination or other social issues, *in general*, may not necessarily be protected in all instances, although employers still should exercise caution and consult with their counsel before taking any action.
3. Employers should enforce dress codes and other policies *uniformly*. To the extent employers do not enforce dress codes and other similar policies clearly, consistently, and equally, they are opening themselves to discrimination and retaliation claims, and potential NLRB claims.

Porzio's team of employment and labor attorneys are ready to assist employers in reviewing, preparing, and revising policy documentation and employee handbooks to align with the NLRB's new guidance.