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Navigating the Intersection of Employee Expression & Social Justice in the Retail Workplace

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Retailers on the Front Lines

- Have valuable brands (lot of time and money goes into developing a “brand” with the public)
- Interact with/sell to wide swath of the public (across racial, political, etc. lines)
- Conduct by one employee at one location can make national news

**ALL COMBINE TO PUT RETAILERS ON THE
“FRONT LINE”**

Retailers Want to Control Their Brand and Messaging

- Business is to sell product
- Want to control their image
- Generally do not want to offend or anger large segments
- Control messages and conduct of employees at work or that can be attributed to employer
- In contrast, some employees want to use the platform for their own message that conflicts with employer

Ability to Control Messaging and the Workplace

This presentation will examine 3 situations that recently have confronted employers:

- 1) What employees wear while at work (including uniforms, buttons, and masks)
- 2) What employees post on social media
- 3) Employee attendance at rallies or protests when scheduled to work

Control of At-Work Attire

- Employers generally may control employee appearance at work
 - May adopt and enforce dress codes
 - Prohibit various forms of expression in the workplace
 - i.e. require uniforms, prohibit “flair”
- No private 1st Amendment right (except potentially under S.C. and Conn. state law)
- Cannot be discriminatory (i.e. treat one race or gender differently)

The National Labor Relations Act (NLRA)

The NLRA = The Exception

- Applies only to hourly employees (non-supervisors/managers)
- Applies to both unionized and non-unionized workforces
- Protects “protected concerted activity”
 - Generally two or more employees (acting in concert)
 - Concerning terms and conditions of employment
 - Not outside of protection (not defaming, threatening, etc.)

National Labor Relations Board (NLRB) Precedent

- Protects the right of employees to wear union buttons and insignia
- Not an absolute right
 - “special circumstances” exception
 - i.e. safety, damage machinery or products, unreasonably interfere with public image, necessary to maintain discipline
- Applies to retailers and their public-facing employees
 - e.g. “Fight for \$15” buttons

Special Rules for Retailers

- Content neutral restriction that permitted some insignia but limits size and content—NLRB says different analysis
- Permitted buttons and insignia of a certain size (smaller than name tag)
- “Logo or graphic must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional messaging” (Walmart example)
- **Only applies in public areas (i.e. not in warehouse)**

Does the Standard Apply to the Social Justice Movement?

- Will depend if the specific cause can be tied to the employees' "terms and conditions of employment"
- A case can be made for BLM (systemic racism in employment)
- Less likely for other social justice causes

Note: If the social justice issue satisfies the "term and condition," then the opposing view likely does also

Application of the Standard

- Only for required for non-supervisors/managers
- Do you have an attire policy?
- Does the employee “face the public”?
- Does the “cause” implicate “terms and conditions”
- Permit some insignia but control the size and content
 - i.e. no bigger than employee’s name tag (assuming decent sized name tag) (face masks??); no threatening or demeaning language
- No “special circumstances” (i.e. fights, disruption, etc.)

Standard Is Subject To Change

- The NLRB is an inherently political organization
 - 5 Board Members (3 from President's party, 2 from opposition)
 - Increasing swings in recent decades
 - Presidential election will have significant effects
- NLRB administers by precedent instead of formal regulations
 - Much easier to change standards (no formal review process like regulations)
 - Decisions often are highly fact-specific

Difficult Situation for Employers

- Policy may be legal but still face public criticism
 - Starbucks
 - Wawa
 - Calls for boycotts
- Recent Goodyear example:
 - Acceptable—BLM, LGBT
 - Unacceptable—Blue Lives Matter, All Lives Matter, MAGA attire, Political affiliated slogans
 - President Trump calls for boycott

Whole Foods Litigation

- Putative class action filed in federal court in Mass. alleging that Whole Foods violated Title VII by not allowing BLM face masks
- Whole Foods has argued
 - Enforcing neutral attire policy
 - Not based on race—applies to everyone regardless of race
 - Political/viewpoint and not race
 - Would have to allow Blue Lives Matter, etc.
- Plaintiffs
 - Focus on “lax enforcement”—Sponge Bob masks, etc.
 - Equate BLM to race

No Easy Answers

- Be proactive (plan for different scenarios)
- Be consistent
- Involve internal clients and make them aware of the risks

Do Not Be Caught by Surprise!

Employee Social Media Posts

- Has been an issue for some time, particularly given the polarization—become even more so in recent weeks
- Remember—no private 1st Amendment right

Employer generally has wide discretion to discipline or discharge an employee for his or her personal social media posts

Important Exceptions

- State law (California, NY, Colorado)
 - Statutorily protect employees from retaliation for *lawful, off-duty* conduct including political activism
- Equal Employment Laws (does it bleed into employment-based harassment or discrimination)
 - Particular concern when managers make inappropriate posts
- NLRA (is it protected concerted activity?)
 - NLRB has protected some egregious conduct (even comments based on race)

Attendance at Protests/Rallies

- Attendance at protests and rallies during non-work time
 - Some state laws protect legal, non-work conduct
 - Is it protected concerted activity under the NLRA?
- Missing Scheduled Work to Attend = More Problematic
 - Generally can terminate if employer chooses
 - Again, the NLRA is the exception

NLRA Protection for Missing Work to Attend a Rally

- Remember—only for non-supervisory/management employees and only if related to “terms and conditions of employment”
- Standard is not clear
 - NLRA generally does not protect non-strike leaving of work
 - Decisions finding attendance at political rallies not to be a “strike”
 - Conflicting decisions and NLRB GC advice memos
- Big issue—can political advocacy be tied to concerted concerns about terms and conditions of employment? Is there a nexus with work concerns?

“Day Without Immigrants” Example

- Conflicting decisions and actions by the NLRB and ALJs
- Planned one-day event at a specific, planned time—some analogy to a “strike”
- Not a clear connection to work “terms and conditions”
 - More a focus on political issues—deportations of immigrants, etc.
 - Effort to stretch and find a “nexus” with employees’ work
- Clear—do not discriminatorily enforce attendance policy
 - Do not discipline or terminate for attendance at such an event if not similarly discipline other employees for similar conduct

Application to Social Justice Movement

- Fact-specific analysis (factual background matters)
- Attendance at one-off BLM rally could have sufficient nexus to terms and conditions of work to qualify for protection
 - Like “Day Without Immigrants,” attendance could be tied to combatting racism in the workplace
- Less likely that some other social justice causes would have a sufficient nexus to the workplace

**Most Employers Have Acted Cautiously On
This Issue!**

Opposition to the Social Justice Movement

- Laws generally do not like differing treatment
- If employees supporting social justice causes are protected, then opponents likely have the same protections
- Opponents to social justice causes likely have a stronger argument for protection if an employer allows a social justice proponent to do something (wear statement mask, etc.) that it disciplines the opponent for

Questions or Comments?

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