PUBLICATION

Should You Revise Your Workplace Conduct and Dress-Code Policies in the Wake of an Election Year?

Summer 2024

In an election year, and in a climate where employees are more expressive about their opinions and beliefs, particularly regarding social movements, many employers wonder if and where to draw the line on limiting political and "social activism" speech in the workplace. Employee discussion and support of political and social topics can lead to thoughtful conversations but can also be both disruptive and divisive. Some employers rely on dress code policies and/or "conduct in the workplace" policies to limit and/or prohibit political and social speech in the workplace to prevent disruption. While these policies may be well-intentioned, depending on the facts, they can run afoul of the National Labor Relations Act (the NLRA). This article provides some guidance for employers grappling with balancing the need to foster respectful workplaces with tensions that can result from political speech and social activism in the workplace setting.

A case recently decided by the National Labor Relations Board (the Board), which administers the NLRA, is particularly relevant. In that case, an employee resigned after being told that he could not wear his employer-issued apron to work with "BLM" written on it. The employer found these actions to be prohibited political speech under their policies. Ultimately, the Board held that the employee writing "BLM" on his company-issued uniform was protected by the NLRA. You can find details about this case here: "NLRB Finds That Writing 'BLM' on an Employee Uniform is Protected by the NLRA." The Board's finding is instructive for employers seeking to enforce dress code and code of conduct policies.

According to Section 7 of the NLRA,

"Employees shall have 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, and shall also have the right to refrain from any or all such activities . . .."

In other words, employees have the right to engage in union-related activities and activities that do not involve a union when those activities are undertaken for their "mutual aid or protection." Section 7 makes it illegal for employers to interfere with, restrain, or coerce employees who exercise their Section 7 rights. Importantly, the NLRA applies to both union and nonunion employers.

These Section 7 rights are known as "protected concerted activities." For employee activity to be protected concerted activities, two things must be present. First, there must be at least two employees involved – this could be two or more employees banding together to bring about change in the workplace or a single employee bringing a concern on behalf of other employees. Second, the subject of the discussion or activity must relate to employee working conditions. There is an exception when individual activity is a "logical outgrowth" of protected concerted activities. For example, imagine that a group of employees complain to management that there is reverse racism in the workplace. The allegation of racism is not resolved, and then a single employee wears an "All Lives Matter" T-shirt in the workplace. Under this scenario, the Board could (and probably would) find that the single employee's action was protected as a "logical outgrowth" of protected concerted activity even though the specific act of donning the shirt was not concerted.

The Board's recent decision that wearing BLM on a company-issued apron is protected under the NLRA does not mean that any and all political and social speech and commentary are protected. The Board decision also does not categorically hold that employer policies restricting political speech in the workplace are unlawful. Instead, the inquiry is fact-specific. But we can glean from the Board's decision that the bar to find that a work rule prohibiting political speech goes overboard and interferes with an employee's Section 7 right in the workplace, is quite low. Similarly, the Board has held that dress codes that prohibit or limit employees from wearing union logos/insignia are unlawful unless special circumstances exist. The Board will review these policies under its decisions that are broad and protect most instances of employees donning protected insignia or shirts. Again, this is a case-by-case analysis, but employers should consider whether the button, T-shirt, etc. is related to protected concerted activity.

When considering whether to discipline employees under dress code or workplace conduct policies or to instruct the employees to cease political speech or insignia, employers should ask:

1. Is the employee's speech/action connected to the workplace or working conditions?
2. If so, how strong is that connection?
3. Does the speech/activity relate to concerns or issues raised by employees?

Employers should consider prior unresolved issues raised in the workplace and whether the most recent actions are a logical outgrowth of those prior concerns. They should also review their handbooks and workplace policies given the Board's expansive view of protected concerted activities. Further, employers should conduct regular training for leaders and decision-makers, as well as develop a communication plan on how to address the potential uptick of these issues in the wake of the current election season and media coverage related to litigation/attacks on DEI efforts and the election.

Ultimately, diversity of thought in the workplace should be encouraged, and leads to a better work environment, so long as such discussions are not disruptive. Feel free to contact the authors or others in the Labor & Employment Group at Baker Donelson for additional guidance on how to balance these goals.