

Consistency is Key - for Employee Masks and T-Shirts in the Workplace

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On Tuesday July 21, 2020, Kelley Drye's Labor and Employment Practice hosted a webinar focused on best practices for navigating challenges of the "not so normal" workplace of 2020. A workplace where employers are challenged with new rules, laws, risks, and social issues brought on by the pandemic and a supercharged social and political climate.

Two news stories since Tuesday made these challenges real.

As we discussed in our webinar, employers are clearly navigating uncharted waters, including (one we discussed at length) the Black Lives Matter (BLM) movement and employers approach to handling activism in the workplace.

Now with the pandemic - this includes 'management' of face masks - which have become part of workplace attire for virtually everyone.

Whether it is appropriate for employees to wear a BLM mask or shirt to work lies with the employer. And, there is no one 'right' answer for every company.

As a legal matter, an employer has the right to regulate what your employees wear to work, especially if they are in public or customer facing roles. The simplest way to do that is through the use of uniforms or a dress code, and as masks continue to be a necessary part of work attire, masks too can be treated as part of the uniform.

If you are going to make rules around work attire, however, you must be consistent. Either you are going to prohibit all designs or messages or insignia, or you should permit them. Employers cannot allow a rainbow or heart mask, and then say no to a BLM, or Biden, or MAGA mask, shirt or hat.

The same is true of any type of pro-union insignia. As we covered during the webinar, employers must be aware of their obligations under the National Labor Relations Act, because union messages also fall under activism in the workplace.

When it comes to activism in the workplace there is no "right" approach because every business is unique and employers have to make policies that best serve their business. There are certainly businesses where employers may (and can) lawfully decide that it is best not to allow employees to wear BLM masks or shirts with outside slogans, because they want everyone to appear neat and uniform—this is lawful!

Employers who set rules around attire, including political t-shirts or masks, must be consistent in the application of the rules. The recently filed case against Whole Foods, involving an employee's claims

of being disciplined for wearing a BLM mask, illustrates the hazards of an inconsistent approach.

If you make a decision, like Starbucks, to allow employees to promote BLM through a tee shirt while at work, be prepared for other employees to request “equal time,” (i.e., be permitted to wear a shirt promoting the group or slogan they align with their ideology). And if there is an organizing drive, it is very possible that employees may want to display union slogans on their work attire.

- Remember: consistency is key: If you make a decision that no insignia will be allowed, that must apply to all employees and all insignia.

To view a recording of our webinar NOT NORMAL: Challenges of a Changed Workplace, [click here](#).