

Employee Benefit Plan Review

National Labor Relations Board's "BLM" Ruling Requires That Companies Review Dress Codes and Other Workplace Policies: A 5-Step Guide

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The National Labor Relations Board (Board or NLRB) has ruled that a national retailer must allow customer-facing employees who want to write “Black Lives Matter” on their uniforms to do so – and it may have opened Pandora’s Box when it comes to allowing the public display of political and social causes in the workplace.

The decision applies to both unionized and non-unionized companies, so all employers need to review this important development. This article provides a summary of the decision and a five-step guide to compliance.

WHAT HAPPENED?

Antonio Morales worked for a large retailer in the Minneapolis area. He wrote the initials “BLM” on his uniform in a show of support for co-workers he believed were being treated unfairly. He and other employees discussed the alleged mistreatment among themselves and also brought their concerns to management’s attention. Eventually, Morales sent an email to a group of employees and management representatives, objecting to alleged conduct and calling for a broader discussion about racial injustice and discrimination in the workplace.

Following this email, management representatives informed Morales that wearing

“BLM” was in violation of the company dress code, which prohibited workers from wearing political messages unrelated to the workplace. They informed Morales that he could not work unless and until he removed the “BLM” initials. Morales refused, resigned his employment, and filed an unfair labor practice charge with the NLRB.

BOARD RULING OPENS PANDORA’S BOX

The NLRB held that the employer violated federal labor law by directing Morales to remove “BLM” and enforcing its dress code policy to prohibit him from wearing it. The Board also held that the employer constructively discharged Morales – essentially, that Morales had no choice but to resign.

According to the NLRB, Morales’ wearing “BLM” and his refusal to remove it was protected concerted activity. The Board said the action was a “logical outgrowth” of Morales’ (and other employees’) prior complaints of alleged discriminatory conduct and their efforts to remedy that alleged conduct.

Dating back to at least 2008, the NLRB has emphasized that political and social messaging can be protected conduct when there is a

nexus between the messaging and employees' terms and conditions of employment.

That concept is not new.

What is new, however, is what appears to be a significant expansion of the required "nexus" between political messages and the workplace.

LARGER ISSUES AT PLAY LEAD TO BROAD RULING

The employer in this case argued that the Black Lives Matter movement is a larger social cause that was borne out of protesting injustices directed at and impacting the black community by law enforcement. Therefore, it argued, there is not a sufficient nexus between BLM and the workplace for Morales' wearing of BLM on his uniform to be protected.

The NLRB avoided taking a position on the origins of BLM and its immediate nexus to the workplace. However, it concluded that opposing racially discriminatory treatment in the workplace is undoubtedly protected conduct and the BLM movement, whatever its origins, certainly represents opposition to racial injustice.

The NLRB therefore concluded that Morales wearing "BLM" on his uniform was protected – but would not have necessarily been protected standing alone. The key factor: because it was a "logical outgrowth" of Morales' prior conduct in opposing discriminatory treatment in the workplace. Essentially, because Morales engaged in prior protected activity (complaining about race discrimination), his wearing of "BLM" can be connected to that activity, even if it also represents a broader movement with concerns unrelated to the workplace.

ANOTHER BRICK IN THE WALL

The Board's decision here is yet another endorsement of the General Counsel's prosecutorial agenda. You may recall that the then-Acting General Counsel issued

a memorandum in 2021 specifically calling upon the NLRB's Regional Directors to "robustly enforce" the NLRA in cases involving (among other things) "employees' political and social justice advocacy when the subject matter has a direct nexus to employee's interests as employees."

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In recent months, the Board and its Regional Directors have shown a penchant for adopting the views of the Board's General Counsel's memoranda. This includes actions in cases involving employee handbooks and the employee status of student-athletes.

WHAT SHOULD EMPLOYERS DO NOW? A 5-STEP GUIDE

1. *Review Your Dress Code Policy:* You should immediately review your policies related to dress and appearance. The NLRB held that the employer's dress code policy was facially neutral because it prohibited political messages "unrelated to the workplace." Thus, you should review and, if necessary, revise policies to prohibit all forms of political messaging that are unrelated to the workplace. Work with your labor counsel to ensure compliant policies, including consideration of state law which might place limitations on the ability to restrict employee political speech/conduct.
2. *Ensure Consistency in Practice:* It is one thing to maintain a neutral policy. It is another thing altogether to stay consistent in enforcing the policy.
3. *Carefully Consider the Message Being Sent:* The NLRB's decision represents a clear expansion of what constitutes a sufficient "nexus" between a political message and the workplace. Thus, you need to carefully and thoughtfully consider the message represented by an employee's otherwise political display. Does it touch on wages, hours, or other terms and conditions of employment? Is the employee the only one wearing this message? Have there been previous issues with or complaints by the employee (and others) which can logically be considered connected to the political display? You should carefully consider each of these questions before taking action. When in doubt, consult with counsel.
4. *Be Open and Honest with Employees:* Let's be real – employees are going to talk about politics and social causes in the workplace. A recent survey found that approximately 50% of respondents indicated they would talk about political issues this year during election season. It is not practical or possible for employers to eliminate that fact. Thus, an early and open discussion with employees about your policies related to political

The NLRB specifically noted that employees were allowed to personalize their uniforms and display certain messages which could easily be compared to the "BLM" display at-issue, including employee displays of LGBTQ pride symbols. Thus, the employer's prohibition on Morales displaying "BLM" on his uniform appeared, in the NLRB's view, to single out a particular message. You should therefore ensure that you are consistently enforcing your policies so as to avoid the appearance of disparate treatment.

discourse is a great way to get in front of this issue.

Recognize that there is likely a significant diversity of opinion in the workplace and we do not want to discourage employees from having honest and respectful conversations with one another when appropriate. However, that discussion should also emphasize the importance

of minimizing disruptions and your organization's stance on prohibiting discriminatory treatment.

5. *Prepare for a Bumpy Election Year.* The NLRB's decision sets the stage for what is likely to be a contentious election season. It adds an extra layer of complexity for employers looking to minimize disruptions caused by

political and social disagreement while still complying with applicable law.

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