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ALERT: CAN EMPLOYERS LEGALLY BAN EMPLOYEES FROM WEARING BLACK LIVES MATTER ATTIRE IN THE WORKPLACE?

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Currently, our country is in the middle of ongoing protests against police abuse and systemic racism. The Black Lives Matter movement is at the forefront of these nationwide demonstrations. Employers are now having to grapple with employees looking to continue their protests within the workplace by wearing masks or other attire in support of the Black Lives Matter movement. This alert will address how employers have been handling this issue and related employment law issues.

Some companies have prohibited Black Lives Matter attire as against company policy. Starbucks originally banned Black Lives Matter clothing and accessories on the grounds that it could lead to misunderstandings and incite violence. The company required employees to adhere to the pre-existing Starbucks dress code policy, citing the need to create a safe and hospitable environment for customers. Following public backlash, Starbucks changed its policy and now permits employees to wear attire and accessories supporting the Black Lives Matter movement. Starbucks has also created Black Lives Matter shirts that their employees may choose to wear. Other companies have also backtracked on whether Black Lives Matter attire is permitted under their workplace policies.

While some companies have reversed their policies on this issue, others have not. For example, Wholefoods issued the directive that “all team members must comply” with the company’s longstanding dress code, which prohibits clothing with “slogans, messages, logos, or advertising” unrelated to the company. Wholefoods employees who do not comply with dress code policy will receive new attire in compliance with company guidelines. Publix has likewise held steadfast to its policy prohibiting employees from wearing “non-Publix messaging on clothing or accessories.” Other companies have attempted to find a middle ground, maintaining uniform policies but providing employees with approved pins or other attire as a way to express support for the Black Lives Matter movement within the uniform guidelines.

As employers enforce pre-existing company dress code policies, some employees are questioning whether Black Lives Matter attire can be legally prohibited in the workplace. Section 7 of the National Labor Relations Act (the “NLRA”) grants employees “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.” However, the right of expression is not absolute and can be limited in “special circumstances.” In determining whether such special circumstances exist, the National Labor Relations Board (the “NLRB”) has considered whether the company policy outweighs the employee’s Section 7 rights, particularly “the potential impact on NLRA rights” and whether there



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are “legitimate justifications” for the dress code at issue. Applying the special circumstances test, the Fifth Circuit Court of Appeals recently ruled that In-N-Out Burger was not justified in banning employees from wearing Fight for \$15 buttons at work, a reference to the minimum wage. The Court applied the special circumstances standard narrowly to situations in which wearing the attire would either put the employee at risk, damage the workspace, aggravate employee dissension, or interfere with the employer’s public image. However, other authority suggests that employers have more flexibility in prohibiting attire. For example, the NLRB recently ruled that Wal-Mart’s policy of limiting employees to “small, non-distracting” displays of union insignia was permissible. Accordingly, if an employer can show that special circumstances exist justifying the prohibition of Black Lives Matter attire, such a prohibition is lawful.

In addition to NLRA concerns, employers must carefully evaluate issues that could arise under the anti-discrimination laws. For example, Starbucks employees who wanted to wear Black Lives Matter attire cited to past instances where the company allowed baristas to wear LGBTQ pins and pro-marriage equality attire to express their views. Title VII requires employers to provide a discrimination-free workplace, so any dress code policy should be neutral, adopted for nondiscriminatory reasons, and applied consistently to all employees.

Issues surrounding political speech in the workplace, whether specific to Black Lives Matter or otherwise, are bound to recur in our politically-charged climate and require careful consideration – both from a legal and practical perspective. Dilworth Paxson Labor and Employment attorneys have already been providing advice to businesses on this issue and are ready to provide you with the advice necessary to navigate this difficult topic.

For more information on this or any related topic, please contact [Danielle Goebel](#), [Katharine Hartman](#) or any member of Dilworth’s [Labor & Employment Group](#).