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Briefly
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SIGNIFICANT CHANGES TO REQUIREMENTS FOR PAYMENT OF FLSA MINIMUM WAGE TO TIPPED EMPLOYEES

Carol R. Merchant

"[T]hese new regulations are going to require employers to be more vigilant in monitoring how tipped employees are spending their time, and the amount of time spent in various activities."

On October 28, 2021, the U.S. Department of Labor announced a final rule that sets limits on the amount of time an employer can claim tip credit towards the minimum wage for tipped employees. This regulation replaces a regulation issued in December, 2020.

Section 3(m) of the FLSA permits an employer to take a tip credit towards its minimum wage obligations for tipped employees equal to the difference between the required cash wage of at least $2.13 per hour and the federal minimum wage of $7.25. This recently-issued final rule defines when an employer can pay $2.13 per hour and when they are required to pay the tipped employee the full minimum wage of $7.25.

In making a determination as to when an employer can and cannot pay a tipped employee $2.13 per hour, an employer must divide a tipped employee's work duties into three categories:

1. Tip-producing work for which an employee can always be paid $2.13 per hour;
2. Directly supporting work for which an employee can be paid $2.13 per hour provided the amount of time spent in such work is not a substantial amount of time; and
3. Work that is not part of a tipped occupation and which must be compensated at the full minimum wage, currently, $7.25 per hour.

Tip-producing work is defined as "all aspects of the work performed by a tipped employee when they are providing service to customers." This would include taking orders, refilling drink glasses, processing payments, and removing dishes or other items from the table during the meal. The Department's longstanding position has been and continues to be that general food preparation, including salad assembly, is not part of the tipped occupation of a server, and time spent in such activities must be compensated at the full minimum wage, currently $7.25 per hour. However, a server's tip-producing table service may include some work performed in the kitchen for their customer akin to garnishing plates before they are taken out of the kitchen and served, such as adding dressing to pre-made salads, scooping ice cream to add to a pre-made dessert and placing coffee into the coffee pot for brewing.

Directly supporting work is work that does not itself generate tips but that supports the tip-producing work of the tipped occupation because it assists a tipped employee to perform the work for which the employee receives tips. Directly supporting work would include, for example, work performed by a tipped employee such as a server or busser in a restaurant before or after table service, such as rolling silverware, setting tables, and stocking the busser station, which is done in preparation of the tip-producing customer service work. Idle time spent waiting for the arrival of customers is also considered directly supporting work.

The time spent in directly supporting work can only be paid at the $2.13 per hour rate if the amount of time spent in such work *is not substantial*. As defined in these new regulations, an employee has performed directly supporting work for a substantial amount of time if: (a) the employee performs directly supporting work for more than 20% of their time or (b) the directly supporting work exceeds 30 continuous minutes. Any time in excess of 20% per week or for a continuous period of time that exceeds

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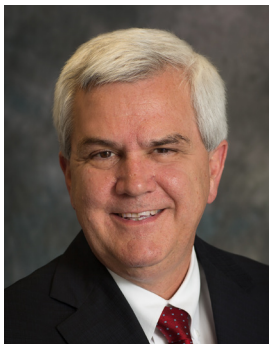
NLRB CHALLENGES KROGER'S BAN ON BLM BUTTONS AND APPAREL



Howard B. Jackson

"The National Labor Relations Act provides that employees can engage in concerted activity for mutual aid and protection in matters that concern wages, hours and working conditions [including] racial mistreatment in employment ..."

In November, the Seattle office of the National Labor Relations Board ("NLRB" or "Board") filed a Complaint against Kroger subsidiary Fred Meyer Stores based on it having banned employees from wearing Black Lives Matter clothing, buttons, or apparel. How can a private employer be precluded from preventing what seems to be political speech in the workplace? Understanding the context and specific allegations made by the Board will shed some light on this.

The Board alleged in its Complaint that before June of 2020, Kroger had maintained and enforced facially neutral dress code and appearance policies. In the administration of those policies management had allowed employees to wear a variety of non-work related buttons and other personal apparel.

The Board further alleged that beginning in around June of 2020, Kroger employees at stores throughout the State of Washington began wearing personal apparel that said "Black Lives Matter" or "BLM" at work. The purpose of this activity, per the Board's claims, was to "protest against racial discrimination in employment generally as well as over their specific store-related concerns, including their perception that" Kroger management had not responded adequately to protect employees after reports of racist treatment by customers and co-workers.

In response to the activity Kroger began prohibiting the display of Black Lives Matter or BLM under its dress code. The Board alleges that Kroger changed its dress code to specifically prohibit wearing BLM clothing or apparel.

The allegation that *the employees engaged in the activity for the purpose of protesting against racist treatment in the workplace* brings the matter within the ambit of the NLRB. The National Labor Relations Act ("NLRA" or "Act") provides that employees can engage in concerted activity for mutual aid and protection in matters that concern wages, hours and working conditions. Racial mistreatment in employment is obviously a working condition. And the Board alleges that the employees involved were acting in concert with each other to bring attention to the subject of racial mistreatment at work. Accordingly, the Board alleges that the employees' activity was protected under the Act as concerted activity directed toward protesting an alleged working condition – being subjected to racial mistreatment at work that tended to go unaddressed.

Understanding that a concerted protest by employees against alleged racial discrimination may constitute protected activity under the Act, raises an interesting question for employers in some circumstances. How is the employer to know the employees' motive? In the Kroger situation, for example, if the employees had made it clear that they were wearing the clothing and displaying the apparel because they were upset over how the Seattle police department treated African-Americans in its policing practices, then their actions would not have been protected under the Act. They would not have been protesting an alleged working condition.

While it may not be easy in all situations, one implication is that it may be important for the employer to understand the employees' motivation. In most cases a simple, polite, and direct discussion with the employees involved should suffice to understand their motivations.

As a practical matter, it remains clear that employers can adopt and enforce facially neutral dress code policies. "Facially neutral" means that the language of the policy itself does not discriminate against protected categories of persons or against protected activities. For example, the policy could not say that personal interest items such as sport team buttons are permitted while buttons that support unions are not.

Assuming that the dress code policy as written is facially neutral and legally complaint, there remains the question of how and under what circumstances it can be lawfully enforced. The short answer is that the policy cannot be enforced in a manner that is discriminatory on the basis of protected status (for example, race, sex, age, disability) or on the basis of protected activity (for example, where the activity involves a complaint against unlawful activity or, as in the Kroger case, concerted activity related to a working condition).

If you are a private employer that is not unionized, when faced with an issue related to dress code enforcement, then analyze whether the employee activity relates to a protected status, or to a protected activity. If the answer to either is yes, then you will want to tread lightly.

There is another wrinkle if you are a unionized employer. In that situation, an employer may not implement unilateral changes to working conditions. Thus, for example, if there has been a past practice of allowing employees to wear or display personal items, then an employer may not unilaterally implement a dress code policy prohibiting such, nor begin more strictly enforcing an existing policy.

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"CHANGES TO MINIMUM WAGE TO TIPPED EMPLOYEES" continued from page 1

30 minutes must be paid for at the full minimum wage rate, currently $7.25 per hour.

Work that is not part of the tipped occupation must always be paid for at the full minimum wage. Examples contained in the regulation of such work include preparing food, including salads, cleaning the kitchen or bathrooms, and cleaning the dining room (other than immediately around the individual employee's workstation).

In practical terms there are several specific issues that an employer is probably going to need to address.

The issue that is probably of most importance is with regard to the requirement that any amount of time in excess of 30 continuous minutes spent in tip supporting duties must be compensated at the full minimum wage. Employers routinely have tipped employees report to work before the establishment opens for customers in order to do preparatory work such as rolling silverware, setting tables, etc. If an employee clocks in for work more than 30 minutes before the establishments opens, then all time in excess of 30 minutes will have to be compensated at the full minimum wage, not $2.13 per hour. Additionally, if the tipped employee does not start waiting on customers for a period of time after opening, this time gets added to the time spent in directly supporting work.

Specific examples of scenarios where this comes into play may be helpful. If a server began work at 10:00 am, the restaurant opened for business at 11:00 am, and the server only began waiting on his or her first customer at 11:30 am, the server would have to be paid for 1 hour at $7.25 per hour -- 1.5 hours from clock-in to first customer less the 30 minutes of allowable time. Similarly, if a server's last customer left at 8:30 pm and the server remained until the restaurant's closing time of 10:00 pm, the server would have to be paid for 1 hour at $7.25 per hour because the server spent more than 30 minutes in directly supporting duties, as there was no customer to be served. The same scenario might occur in the afternoon if a server spent more than 30 minutes waiting for customers to come in. Again, any idle time waiting for customers that is in excess of 30 continuous minutes will require payment of the minimum wage, not $2.13 per hour.

Employers must also be wary of tipped employees spending *any* amount of time in work that is not part of the tipped occupation. If, for instance, a server spends 15 minutes making salads or cleaning bathrooms, then all such time must be paid at the full minimum wage, not $2.13 per hour.

And, of course, employers must also monitor total weekly hours spent in directly supporting hours versus total hours to ensure that tipped employees do not exceed the 20% tolerance for such duties, as hours exceeding the 20% tolerance must also be compensated at the minimum wage even if the 30 continuous minute requirement is not exceeded.

As is evident, these new regulations are going to require employers to be more vigilant in monitoring how tipped employees are spending their time and the amount of time spent in various activities. In all likelihood, there are going to instances where tipped employees will have to be paid the full minimum wage for certain amounts of time, where in the past all of their time would have been paid for at $2.13 per hour.

This new and final rule will go into effect on December 28, 2021.

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