

# Employee Relations LAW JOURNAL

## Workplace Developments

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### **Remote Workforces, Expletives at Work, and Problems with Masks, Shirts, and Hats**

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#### ***When Home = Work: New DOL Guidance on Managing Your Remote Workforce<sup>1</sup>***

The U.S. Department of Labor (“DOL”) has published<sup>2</sup> additional guidance, addressing questions arising from the COVID-19 pandemic under the federal Fair Labor Standards Act (“FLSA”), the Family and Medical Leave Act (“FMLA”), and the Families First Coronavirus Response Act (“FFCRA”).

This guidance is particularly apropos, as more and more employers realize that the “new normal” is a world of remote work, with some employers extending telework on an indefinite basis.

Here are some interesting questions the DOL answered and our take-aways from the guidance.

#### *What Are Some Federal Employment Laws Employers Need to Consider When It Comes to Employees Who Are Teleworking?*

The DOL makes clear that the employment laws that apply to the office, including the FLSA, the Americans with Disabilities Act (“ADA”),

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and the Occupational Safety and Health Act (“OSHA”), are equally applicable to employees working remotely.

- *Keep accurate wage and hour records.* Under the FLSA, employers are still required to maintain an accurate record of hours worked for all employees, including those participating in telework or other flexible work arrangements, and to pay at least one and one-half times the employee’s regular rate of pay for all hours worked over 40 in a workweek to non-exempt employees.
- *What about work equipment?* In most states, if a covered employee is required to provide the equipment necessary to carry out his or her job duties (e.g., computer, internet connection, etc.), the employer is not required to pay for the equipment. However, the cost of providing the equipment may not reduce the employee’s pay below that required by the FLSA.
- *Set work hours.* Employees, especially those who are non-exempt, should have set hours while working from home. Employers are encouraged to work with their employees to establish hours of work and a mechanism for recording hours worked.
- *When is telework an accommodation?* Mandatory telework aside, telework can also be considered a reasonable accommodation under the ADA to a qualified individual with a disability, unless it would cause undue hardship for the employer. On this topic, the DOL directs employers to the U.S. Equal Employment Opportunity Commission’s publication, “Work at Home/Telework as a Reasonable Accommodation,”<sup>3</sup> for additional information.
- *Does OSHA apply to the home office?* According to the DOL, while OSHA does not have any regulations regarding telework in home offices, employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for doing so for injuries and illnesses occurring in a home office.<sup>4</sup>

### *Can Non-Exempt Employees Who Are Teleworking Be Given Flexible Work Hours, So They Can Take Time Out of the Normal Workday for Personal and Family Obligations?*

The DOL guidance indicates that yes, you can provide non-exempt employees with more flexible work hours. Indeed, an employee with

more flexible hours may also be more productive during their actual hours worked.

However, we add that unless the employee has a disability, you are not required to provide flexible hours. If you provide flexible hours to one employee, make sure that you are consistent and provide that same flexibility to others in that job title.

### *If an Employer Provides More Flexible Work Hours, Must It Compensate Employees for All Hours Between Starting Work and Finishing Work?*

No. Generally, all time between the performance of the first and last principal activities of a workday is compensable worktime. However, employers are not required to compensate non-exempt employees teleworking for all hours between starting work and finishing work.

For example, if an employer and employee agree to a telework schedule of 7-9 a.m., 11:30 a.m.-3 p.m., and 7-9 p.m., the employer must compensate its employee for 7.5 hours, not all 14 hours between the first principal activity at 7 a.m. and the last at 9 p.m.

Many employers find it easier to keep nonexempt employees on a set schedule, which coincides with the schedule of the rest of the office or management, because flexible hours can be hard to manage.<sup>5</sup>

### *Do Employers Have to Pay Employees for Hours They Did Not Authorize Them to Work?*

The DOL says yes, an employer must compensate an employee for all hours of telework actually performed. This is true even if the hours worked were not authorized.

We acknowledge this is a challenge for employers. It is lawful to have a policy that says overtime must be authorized, however, if the employee worked overtime without prior authorization, you must pay them for it. Employers may, however, discipline the employee for working overtime without authorization to prevent this from happening again.

### *Must Employers Pay Employees for Hours Worked Even When They Do Not Report Those Hours?*

According to the DOL, an employer is not required to compensate employees for unreported hours of telework that it has no reason to believe had been performed (i.e., where it neither knew nor should have known about the unreported hours).

In most cases, an employer may satisfy its obligation to compensate teleworking employees by providing reasonable time-reporting procedures, and compensating employees for all reported hours.<sup>6</sup>

### ***Consistency is Key for Employee Masks, Shirts, and Hats in the Workplace<sup>7</sup>***

The “not so normal” workplace of 2020 is 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.

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 Black Lives Matter (“BLM”), Biden, or MAGA mask – or a similar shirt or hat – 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 its 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 an employer is going to make rules around work attire, however, it must be consistent. Either it is going to prohibit all designs or messages or insignia, or it should permit them. Employers cannot allow a rainbow or heart mask, and then say no to a BLM, Biden, or MAGA mask, or shirt or hat.

The same is true of any type of pro-union insignia. 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 that 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.

### *Consistency Is Key*

If an employer makes a decision, like Starbucks, to allow employees to promote BLM through a t-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 an employer makes a decision that no insignia will be allowed, that must apply to all employees and all insignia.

***Thanks for the Clarification: NLRB Says No, an Employee Cannot Ordinarily Throw the F-Bomb at His or Her Boss<sup>8</sup>***

How times change. In 2017, a foul-mouthed advocate of purported employee rights delighted in outing on Facebook his boss – a hard-driving banquet manager who clearly did not get the whole employee-relations thing – as a “nasty mother\*\*\*\*er.” (To make his disdain inescapably clear, he also posted something about the boss’s mom.)

The post stated, “Bob is such a NASTY MOTHER F\*\*\*\*ER don’t know how to talk to people!!!!!! F\*\*\* his mother and his entire f\*\*\*\*ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!”<sup>9</sup>

If you have nothing nice to say, don’t say anything at all, right?

Right. The poster was fired, unsurprisingly. The thing was, as the National Labor Relations Board (the “Board” or “NLRB”) held at the time, this rant was protected speech under the National Labor Relations Act (“NLRA”) because it related to working conditions, and because – seriously – there was usually a lot of swearing at this particular workplace anyway. The bottom line, according to the NLRB, is that his employer was not entitled to fire him, his vitriol towards Bob – and, sadly, Bob’s mother – was motivated by his support for the union. The U.S. Court of Appeals for the Second Circuit upheld the NLRB’s order that the employee be reinstated to his job.

*The Standard*

In a return to something like decency, if not sanity, the NLRB’s recent decision in *General Motors LLC*<sup>10</sup> overturned three employee-friendly standards governing confrontations between employees and management in the workplace, and clarified – if this point needed any real clarification – that a worker can be suspended for lobbing the F-word at his supervisor. The NLRB’s recent decision upends three disparate, context-specific standards – one for outbursts with management in the workplace, another for exchanges between employees and postings on social media, and a third for offensive statements and conduct on a picket line.

The NLRB upended these standards and reinforced the older *Wright Line* test. Under that older, simpler test, the NLRB general counsel must first demonstrate that the employee’s protected activity was “a motivating factor” in the discipline or adverse action taken against that employee. The burden then shifts to the employer to demonstrate that it would have fired the worker absent the protected activity, such as by showing

it disciplined other employees involving the same offensive conduct. In other words – back to Bob’s nemesis – if the employee would have been fired for using incredibly abusive language, the National Labor Relations Act is not violated, even if the employee can show that he was motivated in part by his support for the union.

The NLRB eliminated the three context-specific standards, noting that they often clash with anti-discrimination laws. The standards often resulted in employees being permitted to say a range of vulgarities at the workplace, as was the case in *Pier Sixty*. As applied to cases like that, the relevant test applied in decisions such as *Pier Sixty* “often resulted in reinstatement of employees discharged for deeply offensive conduct,” according to the agency.

As the NLRB’s chair explained:

The Board has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today. Our decision in *General Motors* ends this unwarranted protection, eliminates the conflict between the NLRA and antidiscrimination laws, and acknowledges that the expectations for employee conduct in the workplace have changed.

The decision in *General Motors* not only changes the law applied to offensive conduct in the workplace, but also sends a message to employees that they cannot state whatever they feel like in the workplace or on social media, regardless of how upsetting or heated the situation may be. The takeaway: Employers may insist on respectful workplace communications, even if an employee later says that the communication, F-bombs included, was more or less about union issues.

### **Notes**

1. This portion of the column was authored by Barbara E. Hoey and Maria Biaggi.
2. <https://www.dol.gov/newsroom/releases/wbd/wbd20200720-0>.
3. <https://www.eeoc.gov/laws/guidance/work-bometelework-reasonable-accommodation>.
4. DOL Guidance, Q. 12.
5. DOL Guidance, Q. 15.
6. DOL Guidance, Q. 14.
7. This portion of the column was authored by Barbara E. Hoey.
8. This portion of the column was authored by Mark A. Konkel and Nidhi Srivastava.
9. See *National Labor Relations Board v. Pier Sixty, LLC*, Nos. 15-1841-ag (L), 15-1962-ag (XAP) (April 21, 2017).
10. *General Motors LLC*, 14-CA-197985 369 NLRB No. 127 (2020).

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