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Handling Hashtags in the Workplace

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The hashtags associated with our current social and political landscape are powerful. From #BlackLivesMatter to #BlueLivesMatter, #ImWithHer to #ImWithHim and #NeverHillary to #NeverTrump, if a picture is worth a thousand words, then these and other hashtags can be worth tens of thousands. So what happens when hashtags – along with the words and emotions they generate – move into the workplace? How do employers respond? There is no one-size-fits-all answer, but the scenarios below provide some guidance.

Personal/Sick Leave: The events surrounding these hashtags can give rise to requests for leave. In general, such requests will be decided by the employer's written policies. To avoid charges of disparate treatment, employers must ensure leave requests are handled the same among employees of different races, gender and national origin. Also, temporary leave can, under certain circumstances, be a reasonable accommodation under the Americans with Disabilities Act, as amended. Accordingly, if an employee requests leave, for example, to cope with the mental or emotional stresses of an event, an employer needs to respond as it would to any request for accommodation under the ADA. The employer needs to engage in the interactive process, inquire as to the reasons for and length of the requested leave, and then determine if the accommodation is reasonable under the circumstances. The Family Medical Leave Act should also be considered if the leave request is related to a serious health condition of the employee or the employee's immediate family member.

Wage and Hour: There are circumstances where employers may simply allow employees to work from home or away from the office. This working time is almost always considered compensable time under the Fair Labor Standards Act, meaning the employee must be paid for it. If an employee is non-exempt, the employer must track all of this time and ensure it is compensated at the employee's regular hourly rate (or overtime rate if the employee works more than 40 hours in any given week). In some situations, the away-from-office work may be intermittent, such as taking phone calls or checking e-mails. Employers must ensure that employees are reporting all hours worked, and employers should have employees acknowledge/confirm all hours worked in writing.

Race, Gender, Religion: These are hot-button topics that routinely find their way into the workplace. A fact made even more likely by the political and current events of the last few months. Race, gender and religion are characteristics protected by Title VII. Employers must therefore stay proactive and ensure employment decisions are not based on them. Whether hiring or disciplining an employee, employers must have legitimate reasons for their actions. Written policies help guard against charges of discrimination, but again, employers must make sure their written policies are uniformly enforced across the workforce, regardless of race, gender or religion. Written policies are most effective when it can be shown that the employee had earlier received the written policy. Accordingly, employers should have employees acknowledge in writing their receipt and understanding of all workplace policies both at the start of their employment and after any substantive updates or changes.

Group Activities and Social Media: Section 7 of the National Labor Relations Act protects employees' right to discuss workplace conditions, and those protections apply with equal force to online activities. Take, for example, a Facebook post about a political candidate's stance on wages in the workplace; if two or more employees comment on this post, their activity is likely protected by Section 7 of the NLRA. If an employer fired

the employees because of their comments, the employer could face an investigation by the National Labor Relations Board, which enforces the NLRA. Importantly, the NLRA applies to virtually all employers; it is not limited to those employers with unions or union activities. To guard against charges, it is advisable that decision makers limit their online interactions with employees, much like they generally limit interactions away from the workplace outside of normal office hours.

Office Closings: Organized marches, protests and political conventions may affect traffic routes or office accessibility. If an employer receives advanced notice of an event, office closings may be appropriate. Similar to a parade, celebration of a sports team or a holiday, employers may wish to close early or not open at all. If an employer receives little to no advanced notice, office closings may still be appropriate. However, an employer should also consider extending office hours in the event a traffic route is blocked or employees express concerns about moving through large crowds.

If you have any questions or need any additional information about how best to handle a specific situation in the workplace, please contact the author or your regular Baker Donelson attorney.