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The Confederate Flag is Down in South Carolina, but It's Up in Your Parking Lot: What Should You Do?

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There has been considerable press lately regarding efforts to remove the Confederate flag from state capitols, and to otherwise remove public displays of Confederate or similar symbols of "southern heritage." What is often left unresolved – and for that reason left to be resolved by employment lawyers and human resources professionals – is how to deal with those displays in the workplace.

As a general principle, employers have tremendous discretion to take disciplinary action against their employees for any reason, so long as the action is not based on a protected trait (such as race, age, sex or otherwise). Some states allow for First Amendment protections for employees, but even those protections are usually relatively limited, and displaying the Confederate flag could easily be said to cause a disruption in the workplace. For that reason, an employee seeking to display the flag has no "right" to display it at work or on his personal vehicle in a parking lot, and employers are well within their rights to instruct employees to remove such displays.

On the other hand, employers who take no steps to address this issue face the risk of employees complaining that co-worker displays of the flag in the workplace create a hostile work environment. Display of the flag alone would likely not provide the basis of a claim. However, in combination with other allegations, it would be relevant, and employers should not ignore it.

Of course, this issue is further complicated by the undefined boundaries of when an employer should act. For instance, if an employer requires that the Confederate flag be taken down, will employees complain if other similar symbols (a bumper sticker, for instance) or different symbols (a rainbow flag, for instance) are not removed? Employers may find themselves in a lose/lose situation.

To that end, employers are encouraged to consult with counsel regarding the delicate business balance of meeting their obligation to assure a workplace free of harassment, and how to avoid these types of employment distractions on the job.