

NLRB RULES PROHIBITING BLACK LIVES MATTER APPAREL IS LABOR LAW VIOLATION

INSIGHT

The National Labor Relations Board recently ruled that Home Depot USA, Inc. violated federal labor law when it prohibited an employee from wearing a work apron containing a handwritten reference to “Black Lives Matter.” This decision raises a number of important issues involving the rights of employees to display political and social activism at work. All private sector employers should take note of this case and its potential impact on workplace policies and practices.

THE HOME DEPOT CASE

The dispute arose after an employee hand-wrote the initials “BLM” on his uniform to signal support for co-workers he believed were treated unfairly. Importantly, this employee and others had previously raised concerns about alleged employee mistreatment with management. The employer informed this employee that the “BLM” writing on his uniform violated the company’s dress code, which barred employees from wearing political messages unrelated to the workplace. The employee refused to remove the “BLM” reference, and ultimately resigned his employment.

In a 3-1 decision, the NLRB reasoned the employee had the right under the National Labor Rights Act (“NLRA”) to wear the “BLM” insignia as a form of protected, concerted activity because the “BLM” reference was a “logical outgrowth” of prior protests about racial discrimination in the workplace and an attempt to bring attention to those complaints. The Board found the employer violated the NLRA by conditioning the employee’s continued employment on removal of the BLM marking.

“It is well-established that workers have the right to join together to improve their working conditions — including by protesting racial discrimination in the workplace,” said Chairman Lauren McFerran. “It is equally clear that an employee who acts individually to support a group protest regarding a workplace issue remains protected under the law.”

The employer argued without success that it was lawfully attempting to limit the display of “controversial” messages by employees, fearing they would concern customers and possibly be mistaken for a corporate endorsement of the broader movement. The NLRB rejected this argument, noting that NLRB precedent has long refused to yield the exercise of an employees’ protected rights to customer concerns.

SIMILAR CASES, DIFFERENT RULINGS

In May of 2020, Whole Foods told employees that wearing Black Lives Matter apparel violated the company's dress code and prohibited the practice. An administrative law judge of the NLRB ruled in that case that wearing BLM apparel wasn't legally protected activity because it wasn't directly connected to an effort to improve employees' working conditions. The judge noted: "There is simply no evidence that there were any employee concerns, let alone complaints or grievances about 'racial inequality,' or any manner of racially-based discrimination by Whole Foods Market prior to, or at the time they started donning BLM messaging . . . [t]he evidence persuades me that the employer was merely trying to avoid controversy and conflict at its stores, which it believed BLM messaging would invite."

In the *Home Depot* case, on the other hand, the NLRB seemingly found a sufficient nexus between the employees' conduct (writing "BLM" on his uniform) and terms and conditions of employment impacting the employee and his coworkers. While the NLRB's General Counsel argued that all protests of discrimination in the workplace are "inherently concerted" activity, meaning that such conduct is protected activity regardless of whether a "nexus" to employment terms and conditions exists, the NLRB did not decide that issue and instead focused on its finding that the "BLM" reference was an outgrowth of the prior concerted activity by store employees to oppose alleged discriminatory treatment.

TAKEAWAYS FROM THE NLRB'S DECISION

The *Home Depot* decision opens the door to additional cases of this nature being prosecuted by the NLRB's General Counsel, and the decision highlights why a case-specific assessment is necessary when determining whether an employee's social or political activism at work amounts to protected conduct. Employers in the private sector should take this opportunity to review their policies governing dress code and appearance to ensure compliance with the NLRA. Moreover, each situation that calls for possible enforcement of these policies should be carefully analyzed to ensure consistent application and to evaluate potential consequences that employer actions (such as discipline or prohibition of certain messages) may have under the NLRA.

Harris Beach's New York Labor and Employment attorneys are closely watching this and similar matters. If you have questions or concerns about navigating labor laws, please reach out to attorney [Roy R. Galewski](mailto:rgalewski@harrisbeach.com) at (585) 419-8661 and rgalewski@harrisbeach.com; attorney [Daniel J. Palermo](mailto:dpalermo@harrisbeach.com) at dpalermo@harrisbeach.com and (585) 419-8964; or the Harris Beach attorney with whom you most frequently work.

■ AUTHORS

Roy R. Galewski
Member
(585) 419-8661
rgalewski@harrisbeach.com

Daniel J. Palermo
Associate
(585) 419-8946
dpalermo@harrisbeach.com

FALSE CLAIMS ACT ENFORCEMENT HIGHLIGHTS NEED FOR ROBUST COMPLIANCE PROGRAMS

INSIGHT

The U.S. Department of Justice ("DOJ") announced its False Claims Act ("FCA") enforcement statistics for FY 2023 and identified key priorities for FCA enforcement in 2024 and beyond. The DOJ continues to pursue FCA enforcement aggressively, highlighting the need for government contractors and others receiving federal funds to have robust, comprehensive and up-to-date compliance programs in place to minimize their potential exposure to FCA liability.

The FCA permits private citizens to bring lawsuits as whistleblowers (known as *qui tam* relators) alleging violations of the FCA against defendants and to share a percentage of any recovery by the government, thereby creating substantial incentives for whistleblowers to assert claims of fraud against the government. In FY 2023, the DOJ paid whistleblower plaintiffs nearly \$350 million in connection with the resolution of FCA claims. The FCA also imposes treble damages and penalties on those who knowingly present false or fraudulent claims for payment to the United States, posing potentially enormous risk to government contractors and health care providers that routinely submit large numbers of claims for reimbursement to the federal government.

SIGNIFICANT INCREASE IN DOJ-INITIATED FCA CASES IN FY 2023

The DOJ announced that it recovered nearly \$2.7 billion under the FCA and opened 500 new FCA cases in FY 2023 alone. According to the DOJ, this represented the highest number of non-whistleblower-initiated cases ever brought in a single year, and it is a dramatic increase of 64% over the number of government-initiated FCA cases reportedly brought in FY 2022. This suggests the DOJ may have an increasing ability to use new technology to identify and bring FCA cases on its own. The DOJ announced that the federal government and private whistleblowers also entered into 543 settlements and judgments in FY 2023. Roughly half of these settlements related to claims of fraud in government loan programs such as the Paycheck Protection Program ("PPP"), created to provide assistance during the COVID-19 pandemic. According to the DOJ, the total recovery in those cases was less than \$50 million, demonstrating that the DOJ will pursue FCA claims even for relatively small recoveries as a deterrent to others.

Private whistleblowers filed 712 new FCA suits in FY 2023. The DOJ also announced it recovered more than \$2.3 billion in FY 2023 in FCA cases initiated by whistleblowers, representing more than 85% of the nearly \$2.7 billion the DOJ recovered, demonstrating the DOJ's continued significant reliance on private whistleblower actions as an important part of the DOJ's FCA enforcement efforts.

CONTINUED SUBSTANTIAL FCA RECOVERIES FOR HEALTH CARE FRAUD

Based on the FY 2023 results provided by the DOJ, health care fraud continues to be a significant focus of the DOJ's enforcement efforts. The DOJ announced it recovered more than \$1.8 billion in cases involving alleged health care fraud under the FCA in FY 2023, representing more than two-thirds of the total FCA funds recovered last year. Those FCA settlements related to matters involving a wide range of entities and individuals in the health care industry, including managed care providers, hospitals, pharmacies, laboratories, long-term acute care facilities and individual physicians, as well as pharmaceutical companies and medical device manufacturers. A review of FCA settlements in FY 2023 reveals that the DOJ and FCA whistleblowers targeted the following types of fraud, among others:

- Medicare, Medicaid and TRICARE fraud
- Inaccurate diagnosis code reporting under Medicare Advantage (Medicare Part C)
- Knowing submission of inaccurate information or knowing failure to correct inaccurate information
- Unnecessary services and tests
- Kickbacks
- Substandard care
- Billing improprieties
- Claims relating to the opioid epidemic

THE DOJ'S USE OF CIVIL INVESTIGATIVE DEMANDS IN FCA INVESTIGATIONS

The DOJ also announced that it issued more than 1,500 Civil Investigative Demands in FY 2023, seeking documents, interrogatory responses and oral testimony. According to the DOJ, this was the most ever in a single year.

In short, the DOJ's FY 2023 statistics demonstrate that the DOJ and private whistleblowers are continuing to aggressively pursue claims under the FCA and that many new FCA cases are already underway, with more undoubtedly still in the pipeline.

DOJ'S FALSE CLAIMS ACT PRIORITIES IN 2024 AND BEYOND

In addition to the DOJ's announcement, at the Federal Bar Association's *Qui Tam* Conference, DOJ Principal Deputy Assistant Attorney General Brian Boynton identified some of the DOJ's top FCA enforcement priorities for FY 2024 and beyond:

CYBERSECURITY FRAUD

The FCA will be the DOJ's primary mechanism to ensure that government contractors and grant recipients follow federal cybersecurity requirements, consistent with the Civil Cyber-Fraud Initiative, started in 2021. In his remarks, Mr. Boynton stated that the DOJ "will continue to dedicate resources to investigating companies that fail to comply with their cybersecurity obligations" and that those cases will "be a significant area of enforcement in the coming years."

COVID-19 PANDEMIC RELIEF FRAUD

The DOJ announced it will also continue to use the FCA to pursue alleged fraud in connection with PPP loans and other federal assistance provided in the aftermath of the COVID-19 pandemic, even though Mr. Boynton acknowledged that many recoveries in those cases are “fairly small.” Among the DOJ-initiated claims in this area was a claim against a loan processor for failing to implement appropriate fraud controls to comply with Bank Secrecy Act and Anti-Money Laundering requirements.

HEALTH CARE FRAUD

To no one's surprise, the DOJ advised it will continue to pursue allegations of health care fraud as a top FCA priority. In his remarks, Mr. Boynton emphasized that one area of focus is on kickbacks providing financial inducements to generate health care referrals, including alleged violations of the Anti-Kickback Statute and the Stark Law.

NURSING HOME FRAUD

The DOJ identified various types of alleged fraud schemes involving nursing homes, including medically unnecessary rehabilitation therapy, the misuse of antipsychotic medications, medically unnecessary lab tests and grossly substandard care.

CLAIMS AGAINST PRIVATE EQUITY FIRMS AND OTHER THIRD PARTIES THAT CAUSE THE SUBMISSION OF FALSE CLAIMS

Mr. Boynton also emphasized that the DOJ will seek to hold third parties accountable under the FCA “if their conduct played a significant and foreseeable role in” the submission of false claims. As an example, coding consultants and billing specialists may find themselves in the DOJ's crosshairs if they cause providers to improperly inflate payments by upcoding or otherwise submitting unsupported claims.

Mr. Boynton specifically singled out private equity and venture capital firms that cause the submission of false claims either by directly attempting to influence health care provider treatment decisions or, more indirectly, by setting revenue targets and benchmarks that influence patient care decisions so as to maximize reimbursement. Investors should beware.

WHAT YOU NEED TO KNOW

The DOJ has made abundantly clear that it will continue to use the FCA to aggressively pursue fraud claims, particularly in the areas of cybersecurity compliance, PPP loans, health care and nursing home fraud and third-party conduct allegedly resulting in the submission of false claims. In today's environment, government contractors and others receiving federal funds would be well-advised to review the DOJ's aggressive FCA enforcement activity and make sure their compliance programs are current and functioning properly to minimize the risk of potential FCA liability.

It is also worth mentioning again the United States Supreme Court's decision in June 2023 in the consolidated cases of *United States ex rel. Schutte v. SuperValu, Inc.* and *United States ex rel. Proctor v. Safeway, Inc.* ([the subject of a prior alert](#)), in which the Court held that a FCA defendant's subjective intent is critical in determining whether a defendant violated the FCA. In light of the Court's ruling and the DOJ's continued aggressive FCA enforcement, government contractors and others submitting claims for federal funds should consider contemporaneously documenting their interpretations of complex, ambiguous regulations relating to reimbursement, since a reasonable, good-faith interpretation of an ambiguous regulation may help in defending against potential FCA liability.

Harris Beach's Government and Compliance attorneys are closely watching these and related issues. If you have questions or want more information about steps to take to minimize the risk of FCA liability, please reach out to attorney [Terrance P. Flynn](mailto:tflynn@harrisbeach.com) at (716) 200-5120 and tflynn@harrisbeach.com; attorney [Peter M. Hoffman](mailto:phoffman@harrisbeach.com) at (516) 880-8112 and phoffman@harrisbeach.com; attorney [Christopher C. Palermo](mailto:cpalermo@harrisbeach.com) at (914) 298-3032 and cpalermo@harrisbeach.com; or the Harris Beach attorney with whom you most frequently work.

This alert is not a substitute for advice of counsel on specific legal issues.

Harris Beach has offices throughout New York state, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as Washington D.C., New Haven, Connecticut and Newark, New Jersey.

■ AUTHORS

Terrance P. Flynn

Member

(716) 200-5120

tflynn@harrisbeach.com

Peter M. Hoffman

Member

(516) 880-8112

phoffman@harrisbeach.com

Christopher C. Palermo

Member

(914) 298-3032

cpalermo@harrisbeach.com

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