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With Tesla Decision, NLRB Rules Dress Codes Unlawful That Restrict Pro-Union Apparel

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Is your dress code policy still lawful? On Aug. 29, the National Labor Relations Board ("NLRB"), in a 3-2 decision, ruled in *Tesla Inc.*, 370 NLRB (2022) that workplace dress codes and uniform policies that prevent employees from wearing pro-union apparel of any type, even if facially neutral, are presumptively unlawful.

Tesla had a policy requiring employees to wear Tesla-provided or all black clothing while at work. When workers at its Fremont, California, facility began wearing pro-union apparel, Tesla instructed them to stop wearing such items in violation of its dress code. The UAW challenged this ban and NLRB prosecutors brought a broad complaint in August 2017 that included this issue.

In its holding, the NLRB, with Democratic members Lauren McFerran, David Prouty, and Gwynne Wilcox in the majority, held that such policies, even if facially neutral, are presumptively unlawful and violations of Section 7 of the National Labor Relations Act, unless such policies are justified by "special circumstances." With this decision the NLRB overruled the Trump Board's holding in *Wal-Mart Stores, Inc.*, 368 NLRB 146 (2019).

The previous standard in the *Wal-Mart* decision drew a distinction between an employer's complete ban on union insignia and an employer's mere regulation of the type and/or manner in which employees donned union insignia, for which employers had much wider latitude to regulate. Now, any union insignia donned by an employee – no matter how big, distracting, or gaudy – is protected unless the employer can demonstrate that "special circumstances" exist justifying the employer's regulation of such activity. Republican NLRB members Marvin Kaplan and John Ring, who were part of the *Wal-Mart* majority, dissented in the *Tesla* decision.

To illustrate what qualifies as a "special circumstance," the NLRB pointed to another decision, *Komatsu*, 342 NLRB 649 (2004), which outlined employee safety, quality control, public image, and workplace decorum as possible justifications for broad dress code restrictions.

On their face, these categories could conceivably be used to justify any employer restriction. In practice, however, employers likely will be hard-pressed to demonstrate special circumstances in

most cases. Indeed, the NLRB made it clear in *Tesla* that in any case "involving a restriction on the display of union insignia, the NLRB "[will] engage in a rigorous, fact-specific inquiry to determine whether the employer actually established the presence of special circumstances in the context of its workplace." For example, in the case at hand, the NLRB rejected Tesla's reason for banning metal buttons, which it claimed might scratch and damage cars. The rejection of this reasoning makes it clear that justifications will likely be met with skepticism and employers must be careful moving forward.

Employers should be aware that this decision affects both union and non-union workplaces. In light of this decision, employers with written dress code policies might want to review their current policies and handbooks to ensure they do not interfere with the right of employees to wear or display union insignia in the absence of special circumstances. Likewise, employers may also want to make sure this is not an issue in practice and that supervisors are aware of these changes so that employees are not wrongfully disciplined.

Finally, employers should expect more decisions like this one from the NLRB in coming months. The pro-labor agenda signaled by this Board and the Biden administration seems to be finally playing out. This decision is not only a marked transformation from the previous Board, but a clear indication that more aggressive measures and changes are on the way.

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