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Fasten Your Seatbelt: NLRB Finds Tesla’s Clothing Policy Unlawful

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Earlier this week, the National Labor Relations Board (“Board” or “NLRB”) decided that employers cannot restrict employees from displaying union insignia (e.g., buttons, clothing, pins, and stickers) absent a showing of “special circumstances” in *Tesla, Inc.*, 370 NLRB No. 131 (2022). In connection with this ruling, the Board overruled *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019), which analyzed the lawfulness of facially neutral work rules that regulated the size and appearance of such union insignia under a less exacting standard. Employers with policies that address employee appearance, such as dress code or uniform policies, should review those policies for compliance purposes in light of *Tesla*.

A Summary of the *Tesla* Decision

Tesla had a “team wear” policy that required employees who installed parts in and on the bodies of vehicles at a facility to wear black cotton shirts with the employer’s logo and black cotton pants without buttons, rivets, or exposed zippers. There was one exception. With permission, employees could wear all black clothing as long as the clothing was appropriate for work, would not damage the vehicles, and was otherwise safe. Tesla provided two justifications for the policy. First, the all black attire was needed to help management identify the employees at the facility responsible for installing parts. Other employees at the facility were required to wear different color clothing. Second, the policy was needed to prevent employees from wearing clothing that would cause damage to the vehicles (e.g., scratching the vehicles). Nothing in the policy prohibited the employees from otherwise displaying union insignia, such as stickers. In fact, employees did display such insignia on their work clothes.

The NLRB said that the team wear policy was presumptively unlawful because it “implicitly” did not allow employees to wear union *apparel*. Looking to the U.S. Supreme Court’s decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) and its progeny, the Board opined that the burden fell on Tesla to show there were “special circumstances” to justify the restriction on union insignia. Examples of special circumstances that could justify employer restrictions on union insignia, include union insignia that “may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has

established." The Board ultimately concluded that Tesla failed to show special circumstances existed for its policy. In reaching this conclusion, the NLRB stated that management still could achieve its stated reasons for the policy—identifying employees responsible for installing parts and preventing clothing from causing damage to the vehicles—if employees wore black cotton clothing with a union logo.

In issuing the decision in *Tesla*, the Board felt compelled to overrule the *Wal-Mart Stores* decision. In *Wal-Mart Stores*, the Board decided that employer policies regulating the size and appearance of union insignia should be analyzed by weighing the legitimate justifications for the policies against the potential adverse impact the policies would have on employee rights under the National Labor Relations Act pursuant to the framework set forth in *Boeing Co.*, 365 NLRB No. 154 (2017). According to the NLRB, *Wal-Mart Stores* "arguably" required the Board to analyze Tesla's clothing policy under the *Boeing* standard rather than the more rigorous "special circumstances" standard that the NLRB applied in *Tesla*.

The dissent criticized the majority's decision in *Tesla*, for extending "the same presumption of unlawfulness and the same stringent 'special circumstances' defense standard to *all* employer-apparel policies, including the less restrictive, facially neutral, and nondiscriminatory policy at issue in this case." (Emphasis in original.) "The result of this holding is that, in effect, no employer may lawfully maintain any dress code unless that employer can demonstrate special circumstances," stated the dissent.

Conclusion

The *Tesla* decision marks the first time the Biden NLRB has overturned precedent. Employers should fasten up for additional pro-union changes like this one in the near future. The Board in *Tesla* foreshadowed a couple of potential changes. In one footnote, the Board explained that it recently issued a notice and invitation to file briefs seeking public input on whether the NLRB should adhere to the general standard for analyzing facially neutral workplace policies adopted in *Boeing*. In another footnote, the NLRB said it would be open to reconsidering *Caesars Entertainment d/b/a/ Rio All Suites Hotel & Casino*, 368 NLRB No. 143 (2019) pursuant to which employers can lawfully exercise their property rights to prohibit employees from using employer-owned information technology resources for non-business purposes. Stay tuned.

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