

NLRB Blesses Wal-Mart Policy Restricting Union Insignia at Work

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Just before Christmas, the National Labor Relations Board (“NLRB”) evaluated two dress code policies limiting - but not prohibiting - employees from wearing union insignia at work. *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019). The NLRB applied its *Boeing* test to analyze Wal-Mart’s logos or graphics policy. (see *Boeing* alert [here](#)). The NLRB upheld the policy in customer areas but ruled the policy for non-sales areas violated the National Labor Relations Act.

The policies at issue allowed employees the right to wear “small, non-districting logos or graphics ... no larger than the size of [the employee] name badge.” Under that policy, employees were allowed to display union insignia, including past instances where employees wore a small button in support of the union. However, a button that was larger than the name badge was not permitted.

In both the sales area where customers are present and the non-sales area only accessible by employees, the policies infringe upon the employees’ right to wear union buttons or insignia, as originally protected by the Supreme Court in *Republic Aviation Corp. v. NLRB*, 3234 U.S. 793 (1945). However, that protection is not absolute. While, the NLRB found that the restriction interfered with employee rights to display some union insignia, the adverse effect was relatively minor because employees remained free to wear any union message that otherwise fit within the size and appearance restrictions in the policies. In fact, evidence showed that employees were permitted to wear certain union buttons that were not larger than the name badge.

Determining that the policies were facially neutral despite the minor infringement, the NLRB turned to its recent decision in *Boeing* to determine whether they were lawful. Under *Boeing*, the NLRB considers two factors when analyzing facially neutral policies: (1) the nature and extent of the potential impact upon employees’ rights and (2) the employer’s legitimate justification associated with the policy. If the justifications outweigh the restrictions, the policy is lawful.

Regarding application of the policies on the sales area where customers are present, Wal-Mart provided evidence showing that restricting such insignia to a size smaller than the name badge enhanced the customer experience and customer service because the name badge was the “most visible thing to the customer”, allowing customers to easily identify employees when seeking assistance. Additionally, the unobstructed name badge allowed asset protection personnel to easily identify employees. Wal-Mart provided evidence that thieves had dressed in company uniforms to effectuate various types of theft in the past, showing that the uniform alone was not always enough to identify those threats. Thus, the unobstructed name badge assisted in anti-theft efforts. The NLRB found that these facts represented a compelling interest to justify the policies’ restrictions on wearing logos or insignia and outweighed the comparatively minor adverse impact on employees’

rights to wear such insignia. Thus, as applied to employees on the sales floor, the policies were lawful.

However, the company's justifications were greatly diminished when applied to employees working away from the sales area in loading docks or other employee only areas. The customer identification justification is inapplicable and Wal-Mart was unable to present evidence justifying a similar asset protection justification in those areas. Asset protection personnel also had more freedom in non-customer areas to confront individuals they did not recognize. Claims that the insignia could distract coworkers came "uncomfortably close to an admission of a purpose to interfere with Section 7 activity" because the NLRB recognized the purpose of the insignia or buttons is to catch coworkers' attention. Regardless, a claim of reduced productivity due to such distractions was too speculative to justify a restriction in the non-customer areas. Therefore, the NLRB found the policies were unlawful as applied in non-sales areas.

For more information on this topic, contact a member of the firm's [Labor & Employment Practice Group](#).

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