CLIENT ALERTS & INSIGHTS

NLRB Overturns a Trump-Era Precedent; Employers Cannot Ban Union Insignia

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On August 29, 2022, the National Labor Relations Board (the "Board") issued a precedent-shifting decision ruling that it was unlawful for Tesla Inc. to prohibit employees from wearing shirts bearing union insignia. Tesla Inc., 370 NLRB No. 131 (2022).

In the 3-2 ruling, the Board reestablished old precedent confirming that when an employer interferes *in any way* with its employees' right to display union insignia, the employer must prove "special circumstances" that justify its interference. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). Previously, employers were not bound by the "special circumstance" test when evaluating the lawfulness of an employer's dress code policy that partially restricted the display of union buttons and insignia. *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019). The Board in *Wal-Mart* found that "[w]here…the [e]mployer maintains a facially neutral rule that limits the size and/or appearance of union buttons and insignia that employees can wear but does not prohibit them," the Board should apply a different test articulated in *Boeing* rather than the "special circumstances" test. Under *Boeing*, if an employer's facially lawful rule or policy, when reasonably interpreted, would potentially interfere with the exercise of employees' Section 7 rights, the Board must balance the following two factors: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Id.*

The Board in *Tesla* found that the decision in *Wal-Mart* upset the "proper balance" in evaluating workers' rights to display union insignia and employers' rights to control their workforce dress code policies. In the new ruling, the Board evaluated Tesla's dress code under *Republic Aviation* finding that Tesla's dress code policy-which allowed production associates to wear only black shirts with the Tesla logo or, on occasion, all-black shirts-interfered with associates' Section 7 rights to display union insignia. Accordingly, Tesla's dress code policy was presumptively invalid, and Tesla had the burden to establish "special circumstances" to justify its interference. The Board has found special circumstances that justify employer restrictions on union insignia and apparel in many different circumstances, such as "when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Tesla* at 13 (citing *Komatsu America Corp.*, 342 NLRB 649, 650 (2004)). Tesla argued that its policy aimed to prevent employees' clothing or apparel from damaging or mutilating its vehicles. Specifically, Tesla provided testimony indicating that a raised metal emblem caused mutilation to a vehicle. Nonetheless, the Board found that Tesla did not demonstrate "special circumstances" that justify prohibiting production associates from wearing black union shirts as cotton shirts would not jeopardize employee safety or damage the production of vehicles. Further, the Board indicated that Tesla did show a legitimate interest in preventing raised metal emblems on shirts from causing

damage; however, Tesla's dress code policy "goes far beyond simply prohibiting employees from wearing shirts with metal emblems and therefore is not narrowly tailored to address that concern as required under the special circumstances test." The Board ultimately found Tesla in violation of Section 8(a)(1) of the Act.

In light of *Tesla*, employers should review their dress code policy and any "special circumstances" that may permit restricting the display of union insignia in the workplace to evaluate whether the policy complies with this revival of a less restrictive policy.

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