NLRB Reversal On Union Apparel Is A Warning For Employers

By **Sarah Boxer, Christopher Engler and Jarad Lucan** (September 15, 2022)

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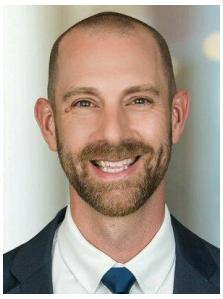

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On Aug. 29, the National Labor Relations Board reversed Trump-era case law and significantly limited when employers may restrict union insignia on clothing in the workplace.

The case, Tesla Inc.,[1] arose after Tesla prohibited employees at a manufacturing facility from wearing clothing bearing union insignia during a union organizing campaign.

Tesla maintained a team-wear policy that required production associates to wear black clothing imprinted with Tesla's logo. Tesla asserted that its dress code protected vehicles by eliminating zippers, buttons and other damage-causing features.

It also asserted that its dress code aided in visual management of employees by having each classification of employee wear a different color. Production associates were prohibited from wearing clothing with any other logo or emblem, although they were occasionally permitted to substitute the assigned Tesla apparel with all black clothing with no zippers or other damage-causing features.

During a union organizing campaign in 2017, some employees wore black shirts with union logos or slogans instead of the apparel with Tesla's logo or all black clothing. The substitute clothing did not have zippers or other damage-causing features. When Tesla began enforcing its team-wear policy and prohibited the union insignia apparel, the union and some employees filed a charge with the NLRB, claiming that Tesla had interfered with the employees' rights to express support for a union.

In its decision, the NLRB revived its pre-2019 special circumstances analysis for assessing employer dress codes. Under that analysis, employers presumptively violate the National Labor Relations Act when they limit the display of union insignia on employee clothing without establishing special circumstances to warrant such a restriction.

The NLRB had previously replaced this analysis with a less stringent standard in its 2019 Wal-Mart Stores Inc. ruling, but in the new Tesla decision the NLRB expressly and retroactively overruled its previous ruling.

In Wal-Mart Stores, the NLRB had declined to apply the special circumstances test in analyzing Wal-Mart's policies of allowing employees to wear logos or graphics, including union insignia, only if such logos or graphics were not distracting and were no larger than the size of the employee name badge.

Instead of deeming such policies presumptively improper even when facially neutral, the NLRB utilized a balancing framework that weighs the nature and extent of employees' rights under the NLRA, including their rights to express support for a union, with the employer's justifications underlying the policy. The NLRB had previously adopted this balancing framework in other contexts.

In its Tesla decision, however, the NLRB rejected the balancing test and held that the special circumstances test must be met even where, as here, the employer has a facially neutral policy requiring its employees to wear uniforms or other designated clothing. The key factor for employers to consider is whether their rationale for a uniform policy will constitute a special circumstance.

In readopting this test, the NLRB noted that special circumstances have been established by employers in prior cases where the display of union insignia would jeopardize employee safety, damage machinery or products, exacerbate employee dissension, unreasonably interfere with the employer's public image, or when necessary to maintain decorum and discipline among employees.[2]

Cases interpreting whether uniform requirements or clothing restrictions meet the special circumstances test are highly fact specific.

For example, the NLRB's past application of the special circumstances test to uniform policies aimed at maintaining an established public image has turned on whether the board agreed that the employer sought to create a specialized customer experience other than simply being a retail store or customer-facing establishment.

While the NLRB in its 2006 W San Diego ruling upheld an upscale hotel's dress code policy that prohibited uniform adornments in order to maintain its trademark chic atmosphere and guest experience, it more recently rejected In-N-Out Burger's argument that its public image built in part on its standard white uniforms justified a restriction on personal buttons.[3] In affirming the NLRB's 2018 decision in In-N-Out Burger, the U.S. Court of Appeals for the Fifth Circuit noted that the public image exception is "exceedingly narrow."[4]

In the Tesla case, the NLRB concluded that Tesla's stated reasons for its team-wear policy — avoiding damage to vehicles and facilitating visual management — did not constitute special circumstances.

With respect to the first reason, the NLRB noted that Tesla's managers had admitted that the union-insignia clothing had not damaged any vehicles. As opposed to buttons or pins, which had a likelihood or history of damaging vehicles, the NLRB did not believe that embroidered clothing created a similar risk.

With respect to the second reason, the NLRB pointed out that the union-insignia apparel did not interfere with visual management so long as the employees wore the correct color of clothing.

Although maintaining visual management of employees has not been previously recognized as a basis for a special circumstance that could warrant a restrictive dress code, the NLRB confirmed that employers may be able to justify a restriction or limitation on employee dress by showing special circumstances beyond those already identified by the board.[5]

Although the facts of this case are somewhat unique, the NLRB clearly intended its ruling to have wide applicability to employers. This is evidenced in its discussion of Tesla's defenses.

Tesla argued that it did not prohibit all union insignia, just insignia sewn onto clothing, because employees were permitted to wear union stickers on their clothing.

The NLRB dismissed this fact as irrelevant. It stated that the NLRA entitles employees to use a variety of means of communication to show their support for a union, and that an employer is not allowed to choose which means of communication are available to employees — even if both means are equally effective.

Tesla also argued that its team-wear policy was nondiscriminatory because it prohibited all noncompany clothing, not just union insignia.

The NLRB rejected this argument, finding that a dress code would violate the NLRA if it prevents employees from displaying union insignia, even if the policy was neutrally applied to all nonconforming clothing and did not target union insignia specifically.

The Tesla ruling therefore provides multiple cautionary takeaways for employers:

- A facially neutral dress code is not necessarily foolproof. An employer will still need to determine whether special circumstances exist to justify any restriction on union insignia.

- The question of whether special circumstances exist is highly fact-specific, particularly for employers seeking to utilize a dress policy to maintain its public image. An employer seeking to maintain a uniform dress policy among its public-facing staff will need to consider whether it meets the NLRB's narrow criteria.

- The NLRB is ready and willing to assert a broad interpretation of employees' NLRA rights to communicate support for a union. Employers should be cautious about taking action to limit such communication even in situations unrelated to clothing.

- An employer should not start enforcing a dress code only after a union organizing campaign has begun. Although this factor was not a focus of the NLRB's analysis, the timing of Tesla's decision to ramp up enforcement could be seen as suspect.

In light of this ruling, employers should take care in creating and implementing any uniform or dress code policies and exercise caution prior to taking any disciplinary action in response to perceived violations of such policies, particularly where employee clothing bears reference to labor organizations, unionizing or other terms or conditions of employment.

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[1] Tesla, Inc. 370 NLRB No. 131 (2022).

[2] See, e.g., Komatsu America Corp., 342 NLRB 649, 650 (2004).

[3] Compare W San Diego, 348 NLRB 372 (2006), with In-N-Out Burger, 365 NLRB No. 39, slip op. at 5 (2017), enfd. 894 F.3d 707 (5th Cir. 2018), cert. denied 139 S.Ct. 1259 (2019).

[4] In-N-Out Burger, 894 F.3d at 716-17.

[5] Tesla, Inc. 370 NLRB No. 131, n. 29.