NECA LEGAL ALERT

# NLRB EMBRACES STRINGENT REVIEW OF EMPLOYER DRESS CODES

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On August 29, the National Labor Relations Board (NLRB or the Board) overturned a 2019 decision concerning the lawfulness of employer-promulgated dress codes and workplace apparel policies. In *Tesla, Inc.*,[1] the Board majority held that a workplace rule or policy that limits an employee's ability to wear union insignia and logos is presumptively unlawful unless the employer can show that special circumstances exist to justify its rule, such as a valid safety concern.

## Background

Both the Supreme Court and the NLRB have long held that the display of union insignia or logos is protected by Section 7 of the National Labor Relations Act (NLRA). However, the Court also noted that Section 7 rights are not absolute thus the NLRB has been tasked with balancing the rights of employees to engaged in protected activity and the rights of an employer to run its business and maintain discipline. Accordingly, where an employer sought to prohibit the display of union insignia or logos, the employer had to show there were some special circumstances justifying such a prohibition.

In its 2019 decision, *Wal-Mart, Inc.*,[2] the NLRB distinguished between workplace apparel policies that expressly prohibit any display of union insignia and those which merely impose a limitation on such a display such a size, placement, or style. In that case, the Board explained that an outright prohibition on displays of union insignia would be presumptively unlawful and subject to the special circumstances test, however, a mere limitation would be subject to a lesser standard so long as the policy still afforded the employee a meaningful opportunity to display union insignia.

On Monday, the Board overturned the *Wal-Mart* decision and expressly held that **any** prohibition or restriction on an employee's ability to display union insignia will be presumed unlawful. This includes facially neutral dress codes that only implicitly prohibit the wearing of non-company logos. This does not mean that the employer can never require uniforms. Mandatory uniforms can be ok so long as there is no prohibition against the display of union insignia as part of the uniform policy and it fits a special circumstance as listed below.

## What This Means For NECA Members

A dress code is now presumed unlawful even if it includes no express prohibition on union-specific logos. For example, Tesla's "team-wear policy" required certain employees to wear company-issued black shirts and occasionally permitted those employees to wear an alternative plain, black shirt, with a supervisor's permission. During a 2017 union organizing campaign, some employees began wearing a black cotton shirt with a small union campaign slogan.

1 *Tesla, Inc.*, 370 NLRB No. 131 (Aug. 29, 2022)
2 *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019)

Pursuant to the Board's ruling in *Tesla,* where an employer's dress code prohibits the display of union insignia, the burden falls on the employer to demonstrate special circumstances to justify such a prohibition. Demonstrating the requisite special circumstances is difficult. The Board previously enumerated a non-exhaustive list of special circumstances that satisfy this burden:

- Ensuring employee safety
- Preventing damage to machinery or products
- Avoiding exacerbation of employee dissension
- Maintaining an established public image

Although these categories are seemingly broad and the Board made clear these are not the only categories of special circumstances, in practice satisfying the special circumstances test may be difficult without appropriate justification. For example, Tesla explained that its prohibition was to avoid damage to vehicle components on the production line and for supervisors to easily identify which employees worked in which classifications. The Board rejected these justifications because Tesla had no evidence that cotton t-shirts of any kind have ever damaged a vehicle and did not explain why the absence of union insignia facilitated the identification of workers based on shirt color.

Prior to *Wal-Mart* in 2019, the Board applied the special circumstances test to industries that rely on electrical contractors and workers. These cases illustrate the difficulty of satisfying the special circumstances test. In one case, the Board rejected an employer's argument that union stickers on company-issued hardhats detracted from professionalism and made it difficult to determine if the hardhat was broken or ineffective.[3] In another case, an employer violated the NLRA when it insinuated there would be discipline for an employee wearing a union hat because it violated a company policy regarding advertising.[4] Finally, in a third case, the Board rejected the employer's claim that the insignia was distracting employees and creating quality and efficiency concerns.[5]

Employers need to take extra care in promulgating and enforcing workplace dress code policies. Employers may still promulgate workplace apparel policies but should be wary that any prohibition on the display of non-company logos and insignia will be presumed unlawful. Even where a legitimate business reason exists that would satisfy the special circumstances test, the time and cost of making such a showing can be significant.



3 *Windemuller Elec.,* 306 NLRB 664 (1992)
4 *Earthgrains Co.,* 336 NLRB 1119 (2001)
5 *Fabri-Tek, Inc.,* 148 NLRB 1623 *enforcement denied* 352 F.2d 577 (8th Cir 1965)