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NLRB's Recent Activity Constrains Employer Dress-Code Rights, Increases Joint-Employment Exposure

A flurry of late-summer activity from the Biden-dominated NLRB has produced at least two noteworthy changes for employers regarding displays of union insignia, and joint-employer status. In Tesla, Inc., 370 NLRB No. 131 (Aug. 29, 2022), a divided Board overruled its own 2019 decision regarding employers' authority to restrict the wearing of union clothing or insignia, holding that employers must prove "special circumstances" that justify any restriction. And in a September 7, 2022 notice of proposed rulemaking, the Board issued a proposed rule that would rescind its own 2020, Trump-era guidance on when an employer can be considered a "joint employer" to another entity's employees under the NLRA, instead substituting a relaxed standard that could affect *any* employer that regularly deals with vendors, contractors, franchisees, or staffing agencies.

In Tesla, the Board revisited the question of when an employer may restrict the right of employees to wear union clothing or insignia, by requiring uniforms or other designated clothing. Prior Board precedent had held that employers could not use uniform or designated-clothing requirements to avoid the display of union insignia and garb, without showing "special circumstances" (such as the need to production and discipline, ensure safety, maintain an image that does not alienate customers, or to stop offensive message displays, such as pro-union slogans using profanity). However, a 2019 Board decision reached a more pragmatic conclusion, holding that "special circumstances" were not necessary where the employer applied a facially neutral workplace policy, and did not completely restrict the use of union insignia. (That 2019 decision, in Wal-Mart Stores, Inc., let stand a Wal-Mart policy that restricted employees who interacted with customers to wearing only "small, non-distracting" insignia no larger than the size of a name badge.)

Tesla presented the Board with a clothing policy which required employees in the general assembly area of an auto manufacturing plant to wear company-issued "team wear" (or other supervisor-approved black cotton clothing), when working with unfinished vehicle bodies, in order to avoid damage to the cars' new paint jobs caused by buttons, zippers, rivets, or other clothing items. As part of the "team wear" policy, Tesla prohibited union t-shirts, but did allow production employees to wear union stickers on their "team wear" t-shirts—consistent with the 2019 Wal-Mart decision, which simply limited the type, size, and appearance of the union display.

Overruling Wal-Mart, the Board's 3-2 Tesla decision made it clear that the "special circumstances" test does not just apply when an employer seeks to completely prohibit union displays; instead, an employer will be forced to show "special circumstances" justifying its

restrictions *any* time it seeks to limit union displays, whether those limitations are partial or total. Two members of the Board dissented from the decision, noting that by applying the "special circumstances" test to *any* kind of restriction on union displays, the Board effectively made it impossible for an employer to maintain any kind of uniform or dress code without showing "special circumstances"—sacrificing employer interests (such as an orderly workplace) in favor of employee rights to display union insignia.

In the wake of the Tesla decision, employers should revisit their dress codes—especially any restrictive provisions put in place after the 2019 Wal-Mart decision—to determine the extent of any restrictions on union apparel or insignia displays, and consider whether those restrictions can meet the Board's demanding "special circumstances" test.

Little more than a week after the Tesla decision made it more difficult for employers to control their workforce dress codes, the Board issued a Notice of Proposed Rulemaking, aimed at broadening the test for joint employment between employers and third-party entities (such as staffing agencies, contractors, and suppliers) whose employees are, or could be, subject to the employer's control. Under the Board's own 2020 Rule, an employer "shares or codetermines" the terms and conditions of another employer's employees (the Board's traditional language for joint-employer status) *only* when it "possessed and exercised…substantial direct and immediate control" over at least one essential term or condition of employment—for example, where the employer, through its own managers, directed, disciplined, gave performance reviews, or terminated the other employer's employees. Key to the Board's 2020 Rule was the idea that a potential joint employer not only had to have to *ability* to exercise control over another employer's employees; it had to in fact *use* that ability, regularly and continuously. Under the 2020 Rule, it was not enough that an employer could set terms and conditions for another party's employees, if it never used that power. The 2020 Rule also allowed employers to exercise authority over another party's employees "sporadically," in isolated instances, or in de minimis ways, without triggering joint-employer exposure under the NLRA.

The 2022 Proposed Rule, however, makes it clear that the Board intends to return to a much more lax test for joint employment, under which *any* ability—whether exercised or not—to directly or indirectly control even one essential term or condition of employment, will render an employer a "joint employer" over another party's employees. Under the Board's proposed rule, an employer that has the "authority to control" or to "exercise the power to control" another party's employees, is considered a joint employer—whether that control is exercised directly or indirectly (for example, by communicating work assignments to the other employer's managers, or overseeing that job tasks are being performed properly). The proposed rule also takes a broad view of what amounts to "essential terms and conditions" of employment—including "wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision;

assignment; and work rules and directions governing the manner, means, or methods of work performance." In short, under the new proposed rule, almost any authority an employer reserves over a third party's employees may trigger joint-employer status for organizing and bargaining purposes.

These new developments call for a review of fundamental aspects of the workplace. Employers should review their dress codes in the wake of the Tesla decision, to assure that they are in compliance with updated Board precedent regarding union garba and displays; and to ensure that any restrictions on union clothing and insignia are rooted in the sort of "special circumstances" that have passed legal muster. In the face of the 2022 Proposed Rule, employers should revisit their contracts and operating practices with staffing agencies, vendors, contractors, suppliers and franchisees to identify contractual provisions or day-to-day practices (including scheduling, setting performance expectations, providing direct instruction and training, or imposing discipline on another employer's employees) that might invite a joint-employer finding. More generally, this recent activity should put employers on notice that the NLRB's aggressively pro-labor leanings under the Biden Administration are likely to continue, and make it increasingly important to remain alert to new Board new developments, promptly review new NLRB decisions and guidance with counsel and human-resources personnel, and develop and implement responsive strategies quickly.