

NLRB Strikes Down Tesla's Dress Code Policy, Reaffirming Employees' Right to Wear Labor Union Insignia at Work

On August 29, 2022, the National Labor Relations Board (NLRB or Board) reaffirmed employees' right to don union insignia in the workplace and found that Tesla, Inc., the electric vehicle manufacturer, violated federal labor law by maintaining an ostensibly neutral dress code policy. The NLRB ordered Tesla to rescind its policy or revise it "to make clear that it does not prohibit production associates from wearing black union shirts." Tesla must also post a notice of the policy change and employees' rights at the Fremont, California facility in question.

Tesla's dress code policy mandated that production employees "wear the assigned team wear," including black cotton shirts with Tesla's logo and black cotton pants with no buttons, rivets, or zippers. Tesla provides newly hired production associates with two pairs of pants, two short-sleeve shirts, two long-sleeve shirts, and a sweater. Production leads and supervisors received red and white shirts, respectively. Tesla claimed that the policy was intended to aid in the "visual management" of employees and to lower the risk of employees' clothing causing mutilations to the vehicles, despite any evidence that such damage had occurred. Around the time of a Union organizing campaign, some employees began wearing shirts with the Union's campaign slogan, "Driving a Fair Future at Tesla," on the front and Union initials on the back.

In striking down Tesla's dress code policy, the majority relied upon *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), in which the U.S. Supreme Court affirmed that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the [employer's] curtailment of that right is clearly violative of the Act." The NLRB majority found that Tesla's policy was presumptively invalid because it imposed a limitation on employees' right to display Union insignia. The majority emphasized, "an employer is not free to restrict one statutorily projected means of communication among employees, so long as some alternative means remains unrestricted."

The NLRB overruled *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019), and reverted to the standard set forth in *Stabilus, Inc.*, 355 NLRB 836 (2010), in which the Board applied *Republic Aviation* and held that employers must make a showing of "special circumstances" to justify a limitation on employees' ability to wear pro-Union attire. The *Tesla* majority rejected the reasoning of the two dissenting Board members, who would have upheld Tesla's policy because it was non-discriminatory and because employees retained the ability to display "union insignia in other ways, such as by attaching to their team wear a sticker with the Union's logo and/or a pro-union slogan."

This case represents an important reminder that even a facially-neutral workplace policy can violate the National Labor Relations Act if it can be construed to restrict employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Employers should also be mindful that their employees possess such rights even in a non-unionized workplace.



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