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# Buttoning Up Rules on Union Insignia – Board Makes It Easier for Employers to Restrict Size and Scope of Union Buttons For Those With Customer Contact Work

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The Board continues churning out precedent-setting decisions as year-end approaches. Two days before the Christmas holiday, in *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (Dec. 16, 2019), the NLRB applied its new view on handbook rules—the *Boeing* test—to Wal-Mart's policy that employees can only wear "small, non-distracting" union insignia in the workplace, holding that the policy did not run afoul of the Act in customer-facing areas of the store. It did make clear, however, that the policy was unlawful in "employee-only" zones.

The Board identified an important distinction between two types of employer policies regarding union buttons and insignia:

- Where an employer bans the wearing of *all* union buttons and insignia, the Board and Supreme Court has found that such rules are presumptively unlawful. The burden is then placed on the employer to justify the rule on account of "special circumstances"—a very narrow exception.
- Where an employer—as in *Wal-Mart Stores, Inc.*—instead allows certain buttons, but limits the size and/or appearance of union buttons and insignia that employees can wear, the Board has now held that the *Boeing* test for facially-neutral rules applies instead.

While the Board has not overturned the "special circumstances" exception to all prohibitions on union buttons and insignia, this decision *could* foreshadow the potential application of the *Boeing* test to other areas of federal labor law where the Board had previously established separate analyses that had been more difficult for employers to satisfy.

***Factual Background***

Wal-Mart's dress code policy limited, though did not prohibit, the wearing of union insignia for employees. The policy allowed employees to wear "small, non-distracting logos or graphics" no larger than the size of their employee badge. Wal-Mart's justification for its policy was to "enhance the customer shopping experience and protect merchandise from theft or vandalism." Wal-Mart's policy applied to employees both on the selling floor and employee-only backrooms.

***Analysis***

It is well-settled employees have a Section 7 right under the NLRA to wear union buttons and other insignia. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The right is not absolute, but when employers announce a blanket prohibition for wearing such insignia in the workplace, the Board has found that the restriction is presumptively *unlawful*, unless the employer justifies the rule based on "special circumstances." Indeed, as the Board recently held in *In-N-Out Burger, Inc.*, 365 NLRB No. 39 (2017), employers are generally only limited to prohibit all union insignia where displaying such items would (1) jeopardize employee safety; (2) damage machinery or products; (3) exacerbate employee dissension; or (4) unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees. This exception is exceedingly narrow and depends on the circumstances of each case.

Here, however, the Board analyzed the lawfulness of Wal-Mart's policy using the test it set forth for facially-neutral employer policies in *Boeing Company*, 365 NLRB No. 154 (2017), because the rule only limited the wearing of union buttons and insignia; it did not ban them altogether. As a result, according to the Board, the impact on Section 7 rights was relatively slight compared to the *Republic Aviation* line of cases and analysis. As we have discussed in prior posts, under the *Boeing* test, the Board must balance the rule's potential impact on employees' exercise of Section 7 rights against the employer's legitimate justifications associated with the policy.

Applying the *Boeing* test, the Board held that:

- Wal-Mart's policy was **lawful** as applied to the selling floor because the employer's interest in providing its customers a satisfying shopping experience, on balance, outweighed the employees' interest in having *no* restrictions on the size of the insignia they could wear.

- The policy was **unlawful**, however, in "employee-only" zones because "the whole point" of wearing a large or distracting union button was precisely to "catch the attention of coworkers" to communicate a message the Act intends to protect.

***Member McFerran Dissents***

In one of Member McFerran's final dissents, she highlighted how wearing union insignia is "at the core of the activity the National Labor Relations Act is intended to protect" and criticized the majority for applying the less demanding *Boeing* test.

Member McFerran also expressed concern over the Board's sweeping application of *Boeing* into other areas of "well-settled" Board law that require separate analyses.

***Takeaways***

On its face, this decision now makes it easier for employers to restrict the type and manner of union buttons and insignia employees could wear when interacting with clients and customers. As Member McFerran recognized, by the Board applying the *Boeing* test to the insignia-policy at issue, rather than the traditional "special circumstances" test, in the absence of an absolute button ban, the employer's policy will be presumptively valid and the burden instead is placed on the NLRB GC to prove otherwise.

*Wal-Mart* also raises the question of whether the Board will now begin to apply the *Boeing* framework to additional situations where an employer limits Section 7 activity, but does not prohibit it altogether.

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