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A More Tailored Approach: Second Circuit Rejects NLRB's Dress Code Standard

Labor Relations Update on **September 14, 2026**

On September 2, 2026, in *Siren Retail Corp., d/b/a Starbucks Reserve Roastery v. NLRB*, the U.S. Court of Appeals for the Second Circuit vacated and remanded the National Labor Relations Board's ("NLRB" or "Board") 2024 decision finding that Starbucks unlawfully prohibited workers at a Manhattan coffee shop from wearing union pins and shirts. The Court rejected the NLRB's standard for analyzing workplace dress code rules established in *Tesla, Inc.*, 371 NLRB No. 131 (2022), and remanded the case for further consideration.

Background

The seminal 1945 Supreme Court decision *Republic Aviation Corp. v. NLRB* recognized that workers have a protected right under the National Labor Relations Act ("NLRA" or "Act") to wear union insignia in the workplace while acknowledging that employers have legitimate reasons to restrict that right. These competing interests must be balanced. Pursuant to *Republic Aviation*, the Board has long applied a standard whereby a workplace dress code will not violate the Act if "special circumstances" – such as safety or image concerns – justify the employer's restriction on workers' rights.

In 2019, a Republican-majority Board eliminated the "special circumstances" test in favor of a more general and employer-friendly balancing test that considered the overall impact of a dress code policy on workers' rights. As we reported here, three years later in 2022, a Democrat-majority Board rejected the 2019 decision and adopted the current standard in *Tesla*. The 2022 Board returned to the "special circumstances" test but with an additional layer of scrutiny. The *Tesla* standard creates a rebuttable presumption that *all* dress code policies violate the Act, including facially neutral policies that do not address union insignia. To overcome the presumption, the employer must prove "special circumstances" and show that the policy was narrowly tailored to minimize interference with workers' rights.

The Second Circuit's Decision

The underlying case arose from a 2022 unfair labor practice charge filed by Starbucks Workers United alleging that Starbucks violated the Act by prohibiting employees from wearing black union shirts over their workplace uniforms. Applying the *Tesla* standard, the NLRB found no special circumstances justified the restriction and held that Starbucks' three dress code policies violated the Act.

On appeal, the Second Circuit rejected *Tesla*, reasoning that the standard fails to properly balance worker and employer interests as required by *Republic Aviation*. Instead, the *Tesla* test effectively applies a strict scrutiny standard that does not properly consider an employer's legitimate business interests. The Second Circuit further explained that, consistent with the longstanding "special circumstances" test, a strict presumption of unlawfulness should apply only where there is evidence that a dress code policy was adopted with a discriminatory purpose. The Court suggested the Board consider adopting a three-factor test rooted in the "special circumstances" framework that weighs (1) the extent a dress code policy intrudes on workers' rights; (2) whether the policy is neutral and enforced consistently; and (3) the underlying context and circumstances.

The Court also addressed the applicability of *Loper Bright Enterprises v. Raimondo*, the 2024 Supreme Court decision overturning the *Chevron* doctrine requiring deference to a federal agency's reasonable interpretation of the statutes it administers (discussed here). As we previously reported, in 2025 the Supreme Court declined to review a Ninth Circuit decision applying *Loper Bright* to the NLRB, leaving open the question of how deferential courts will be to the Board's interpretation of the NLRA. While acknowledging that the NLRB may retain some interpretive discretion, the Court declined to defer to the Board here, reasoning that its job is to ensure the agency acts within its authority and pointing to the Board's misinterpretation of *Republic Aviation*.

Takeaways

The Second Circuit is now the second federal appellate court to reject the Board's 2022 *Tesla* decision. In November 2023, the Fifth Circuit vacated the original NLRB decision against Tesla on similar grounds. While employers should remain mindful that the Board follows a policy of non-acquiescence – meaning *Tesla* remains good law as applied by the NLRB until overturned by the Supreme Court or revisited by the Board – we expect the now Republican three-member majority Board to overturn *Tesla* and either revert to the 2019 test that eliminated "special circumstances" or adopt a different test, such as the three-factor test advanced by the Second Circuit in this case.

Indeed, as we recently reported, NLRB General Counsel Crystal Carey announced her policy objectives and priorities in a memorandum issued to regional offices in late August. Her objectives include revisiting the standard for evaluating workplace dress code policies, and she noted that she has already urged the Board to reconsider *Tesla*.

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