

Tesla decision affirms rights to wear union insignia

By

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According to a recent Gallop poll, 71% of Americans approve of labor unions – the highest level of popularity since 1965. Retail, service, health care, and transportation industries have all experienced an increase in union formations this year. According to the National Labor Relations Board, during the first nine months of fiscal year 2022, union representation petitions increased by 58%, and unfair labor practice charges increased by 16%.

According to the Economic Policy Institute, an independent, nonprofit think tank that researches the impact of economic trends and policies on U.S. workers, employers are charged with violating federal law in 41.5% of all union election

campaigns. While Sections 7 & 8(a) of the National Labor Relations Act clearly enumerate the rights of workers to unionize and identifies employer illegal interference, NLRB law on what constitutes an unfair labor practice is extensive and evolving.

For instance, on Aug. 29, the NLRB ruled that Tesla's enforcement of its "team-wear" policy during the union's 2017 organizing campaign was unlawful. Tesla required workers to wear a black shirt with the Tesla logo or a supervisor-approved plain black shirt. This policy was generally not enforced, and workers regularly wore non-black shirts with non-Tesla emblems. However, when workers began wearing black shirts with the union logo during the beginning of the union's organizing campaign, Tesla began strict enforcement of the "team-wear" policy.

The NLRB's Tesla decision reaffirmed that an employer's attempts to restrict the display of union insignia are unlawful, ordering Tesla both to cease enforcement of its overly broad policy and to rescind or revise the policy. In doing so, the NLRB overturned its 2019 *Wal-Mart Stores* decision, which recognized a distinction between employer policies that completely prohibit the display of union insignia and rules that partially restrict it. The NLRB applied different standards in these otherwise difficult-to-distinguish circumstances and acknowledged that overruling *Wal-Mart Stores* will restore clarity to this area of NLRB law.

To reiterate, the now-applicable rule is: Any limitation on the display of union insignia is presumptively unlawful, and the employer bears the burden to show special circumstances that make its restrictive rule necessary to maintain production or discipline. This recent NLRB decision serves as a reminder to employers to stay abreast of ever-changing and nuanced labor law as the current trend of worker unionization continues.

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