Labor Board Finds Nothing Special About Burger Chain's Uniforms

WHAT EMPLOYERS NEED TO KNOW ABOUT LATEST UNIFORM POLICY DECISION

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The National Labor Relations Board recently ruled that In-N-Out Burger's uniform policy, which forbids employees from wearing buttons, pins, or stickers on their uniforms, violated Section 8(a)(1) of the National Labor Relations Act. Although the popular burger chain argued "special circumstances" justified the policy – namely that it wanted to create the public image of a "sparkling clean" restaurant – the Board rejected that line of reasoning in its March 21, 2017 ruling.

This case reiterates two major points. First, it doesn't matter if an employer is unionized or not; nearly all private employers are subject to the National Labor Relations Act (NLRA). Second, while some "special circumstances" might justify limited prohibitions on the display of certain buttons, employers bear the burden of proving those circumstances exist and that their prohibitions are narrowly tailored to address only those circumstances.

This decision is not the best news for employers, who may be left wondering whether the National Labor Relations Board's (NLRB's) decidedly pro-union stance will begin to shift given the change in administration. To understand the current state of the law and where things might be going, read on.

Employer Thought Buttons Weren't "Sparkling"
Since 2012, employees in restaurant and retail establishments have led the "Fight for Fifteen" cause: the effort intended to pressure state and local legislators to raise the minimum wage to $15.00 per hour or for employers to raise their wages voluntarily, while also pressuring employers to accept union representation. One such group to take on the fight worked for In-N-Out Burger, the popular fast food chain operating in the Southwest and Western U.S. To aid their cause, some of the employees in an Austin, Texas location wore "Fight For $15" buttons on their uniforms.

In-N-Out's uniform policy forbade any pins, buttons, or stickers apart from a company-issued nametag that had to be clean and not worn-looking. The company's goal was to present the image of a clean restaurant where all employees dress alike. According to In-N-Out's business philosophy, its intention was to form a distinguishing brand identity with bright white uniforms and strict grooming requirements for employees. In the words of the company, they wanted customers to always feel like they were in a "sparkling clean environment."

Following the policy, a supervisor instructed one of the employees to remove a "Fight for $15" button. In a separate incident, a supervisor told another employee he was not permitted to wear the button because it was not part of the uniform. Aided by a union organizing committee, the employees filed an unfair labor practice charge and accused the company of interference with their Section 7 rights to act together for mutual aid and protection.

NLRB Forces Employer To Allow Buttons

The Board did not take kindly to In-N-Out's policy, noting that in previous decisions to uphold an employer's right to restrict union insignia under the "special circumstances" exception, the employer demonstrated such restriction was necessary to achieve safety or particular business objectives, such as the presentation of a distinct public image. However, the Board went on to say these policies are "presumptively invalid" and the burden is squarely on the employer's shoulders to prove otherwise.

In these kinds of cases, the Board balances the employee's right to engage in union activities against the employer's right to maintain discipline or achieve its legitimate business objectives. The NLRB looked to prior cases examining the same issues to determine how it should rule in the *In-N-Out* case.

It first examined a 1982 decision against Burger King, where it found similar "special circumstances" did not exist to justify a ban on union organizing buttons – although it is worth noting the Board's decision was overturned in 1984 by the 6th Circuit Court of Appeals. The court disagreed with the Board and found the restaurant met the criteria for special circumstances by maintaining a consistent, non-discriminatory dress code policy to project a clean, professional image to the public.

The NLRB then examined three more recent cases where the public image exception was allowed, claiming that each had "unusual" facts justifying a ban. In a 2004 case involving Pathmark Stores, the Board permitted a supermarket to restrict a butcher from wearing a t-shirt with the words "Don't Cheat About The Meat," agreeing the message could lead customers to fear they were being cheated by the supermarket. In 2007, it permitted a construction company to bar a worker from wearing a hardhat depicting a person urinating on a "non-union" rat, ruling the sticker was "unquestionably vulgar and obscene," and the prohibition was narrowly tailored to address only that particular sticker.

In the most unique case involving the W Hotel in San Diego, the Board permitted the employer to ban a button stating "Justice NOW! JUSTICIA AHORA! H.E.R.E. LOCAL 30." The NLRB found special circumstances existed because the hotel marketed itself as providing a unique experience – referred to as "Wonderland" – where guests could fulfill their fantasies and "get whatever they want." The company asked its workers to essentially perform theater and create a make-believe environment, serving as actors on a stage with the guests as audience members.

According to the Board, In-N-Out's situation was much more similar to the Burger King case than any of the other three "unusual" cases. It did not believe the burger chain sufficiently explained how

any of the other three "unusual" cases. It did not believe the burger chain sufficiently explained how its practice of prohibiting the buttons was necessary to uphold its business model, and was not convinced the buttons would adversely affect the business in any way.

What The Ruling Means To Employers

There are two main lessons you can learn from this decision. First, most private employers are covered by the NLRA, even those that are not unionized. Therefore, the uniform policy standards established by the Board likely apply to your workplace. Second, the burden of establishing special circumstances always rests on the employer. The Board has found three circumstances justifying the proscription of union insignia:

- when its display may jeopardize employee safety or damage machinery or products;
- when its display might exacerbate employee dissension; or
- where it unreasonably interferes with a public image which the employer has established as part of its business plan, through non-discriminatory appearance rules for its employees.

As usual, the devil is in the details. The *In-N-Out* decision makes clear that public image restrictions require a narrowly tailored prohibition. Customer exposure to insignia alone is not a special circumstance, nor is the requirement that an employee wear a uniform.

What's Next?

The employer in this case could appeal the decision to a federal court of appeals in the hope of overturning the Board's decision, as happened in the *Burger King* case cited above. But such a decision could take several years, and a reversal is by no means a certainty.

Some may wonder whether President Trump's election to the White House will spark a change at the NLRB, leading to rulings that are less pro-union in nature. While it seems certain that a change will come, it will not come overnight. Although President Trump quickly appointed Republican Philip Miscimarra as interim chairman of the NLRB, the chairman does not set the agenda for board decisions. That responsibility falls to the Board's General Counsel, a position currently occupied by Obama-appointee Richard Griffin. He will continue to determine which cases are heard by the Board until the end of his four-year term in November 2017. Even if the president fills the two vacant spots on the Board with Republicans this summer, it could take months before new cases address some of the controversial decisions of the Obama Board.

Most importantly, even if there is a change in leadership and direction with a Republican majority, there is no guarantee that a Trump-era NLRB will significantly alter the uniform policy test applied in the *In-N-Out* case. For these reasons, you would be wise to follow the lessons taught by this case for the foreseeable future.

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