

The NLRB's Latest Target? Dress Codes and Already Rescinded Policies

Labor & Employment Law Update

on July 13, 2016

The Federal Court of Appeals for the First Circuit recently upheld a National Labor Relations Board decision finding a car dealership's dress code ban on "pins, insignias, and message clothing" was, in and of itself, an unfair labor practice. The case is another in a long line of NLRB decisions striking down policies as unfair labor practices because, the board claims, employees *might* interpret them as infringing upon their right to unionize or engage in other concerted activity protected by Section 7 of the National Labor Relations Act.

The board concluded the dealership's interest in maintaining its public image did not justify the outright ban. Adding insult to injury, the Board found a second violation for the dealership's failure to properly repudiate overly restrictive policies contained in an earlier version of its handbook.

The NLRB had earlier challenged several provisions in the dealership's handbook. The dealership worked closely with the NLRB to draft new NLRA-compliant policies and issued a whole new handbook. In fact, the NLRB's own General Counsel stipulated that, with the exception of the dress code policy, the new handbook was NLRA-compliant. So, even though the employer rescinded the offending policies and replaced them with policies the NLRB explicitly approved, the employer was still found to have engaged in an unfair labor practice because it had *previously* maintained policies the Board viewed as overly restrictive and the employer did not properly repudiate those policies.

The Board ordered the employer to issue a notice that specifically addressed the policies it found to be unlawful, advised employees of their Section 7 rights, and assured employees there would be no future interference with those rights. The Federal Appeals Court upheld the Board's ruling, concluding that to be relieved of liability for unlawfully restrictive policies, even policies that have since been discontinued or appropriately revised, an employer must "signal unambiguously to employees that it recognizes it has acted wrongfully, that it respects their Section 7 rights, and that it will not interfere with those rights again."

Notably, no employees were alleged to have actually suffered discipline or any other adverse action under the ban. The policies alone formed the basis for finding the employer liable for two distinct unfair labor practices.

In light of the NLRB's aggressive approach, employers are again reminded to review handbooks and employment policies regularly. Anything the Board believes employees could reasonably interpret as improperly constraining Section 7 activity could form the basis for an unfair labor charge. If any of your policies are questionable, consult legal counsel to determine how best to revise those policies to bring them into compliance and, if necessary, to devise a strategy to effectively repudiate any policies that run afoul of the Board's broad interpretation of Section 7 rights.

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