Labor and Employment Alert: NLRB Finds That Wearing a "Fight For $15" Pin is Protected Activity

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The National Labor Relations Board (NLRB) recently found a regional fast-food chain's uniform policy, which prohibited employees from wearing any type of buttons, pins or stickers not provided by the restaurant, to be in violation of NLRA Section 8(a)(1). Specifically, a supervisor at one of In-N-Out Burger's Austin, Texas locations asked an employee to remove a pin affixed to their uniform containing the phrase "Fight for $15," which was in reference to the movement towards a $15 minimum wage. The board found the pin to be protected union insignia under Section 8(a)(1).

In ruling that In-N-Out Burger's uniform policy violated Section 8(a)(1), the NLRB affirmed its position that an employer-ban on union insignia in the workplace requires the employer to carry the burden of proving the existence of special circumstances warranting an exception to the rule. According to the board, special circumstances allowing a ban on union insignia exist where wearing the insignia would jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established as part of its business plan. In addition to establishing a special circumstance, the employer must also prove the prohibition is narrowly tailored to the proposed special circumstance. In so ruling, the board found In-N-Out Burger's desire to maintain a well-groomed and "very clean" business model where all employees dressed alike was insufficient to qualify as a special circumstance that was narrowly tailored so as to except it from violating Section 8(a)(1).

Interestingly, the board found that the "Fight for $15" button neither exacerbated employee dissension nor unreasonably interfered with the public image established by In-N-Out Burger as part of its business plan. The board reasoned that the button did not impede on the team-oriented environment sought by In-N-Out Burger, nor did it distract customers away from the well-groomed and clean image strived for by the company. The board also re-affirmed its stance that an employer's status as a retailer, alone, does not qualify as a "special circumstance," nor can a retail employer establish a special circumstance by showing that it requires employees to adhere to a uniform policy.

The board's ruling serves as a stark reminder that an employer's desire to maintain a certain image or professionalism may not withstand an employee's rights under Section 8(a)(1). At the same time, it is worth noting that Acting NLRB Chair Miscimarra, though agreeing that In-N-Out Burger failed to provide evidence of a special circumstance based on its public image, stated that he "disagree[es] with any implication that conventional products (such as hamburgers, french fries and soft drinks) could never warrant maintenance of a public image that, in turn, could constitute a 'special circumstance' justifying a restriction on buttons and pins." Miscimarra's comment serves as an indication that a Trump NLRB may be more willing to uphold a ban on union insignia under the right circumstances. Contact your Vorys lawyer if you have questions about how this ruling may affect your dress code or other workplace policies.