



GRAY REED[®]
ATTORNEYS & COUNSELORS

DON'T PUSH THE NATIONAL LABOR RELATIONS BOARD'S BUTTONS: "FIGHT FOR \$15" CAMPAIGN WINS IN THE FIFTH CIRCUIT

by Fred Gaona & Angela Brown
Gray Reed & McGraw LLP
July 18, 2018



The Fifth Circuit Court of Appeals recently ruled in favor of fast-food workers participating in the "Fight for \$15" campaign, a national movement advocating for a \$15 per hour minimum wage and other improvements for low-wage workers. Affirming a decision by the National Labor Relations Board (NLRB), the court mandated that In-N-Out Burger, Inc. allow employees to display "Fight for \$15" buttons while on the job, even though wearing the buttons violated the restaurant chain's strict uniform policy.

The fast-food restaurant chain, In-N-Out Burger, owns and operates more than 300 fast-food restaurants in California, Texas and other western states. The restaurant has a detailed appearance code and specifically excludes the wearing of any type of pin or stickers. In April 2015, employees in Austin, Texas, were forced to remove buttons featuring a symbol of the Fight for \$15 campaign—a button with the number "15" superimposed on an image of a raised fist. After employees were instructed to remove the buttons because they were not part of the official uniform, the employees filed an unfair labor practice charge with the NLRB.

In rejecting In-N-Out Burger's petition for review of the NLRB's decision, the Fifth Circuit noted the history of labor laws, specifically the National Labor Relations Act (NLRA), protecting the rights of employees to wear buttons, pins and stickers relating to the terms and conditions of employment, unions and other protected matters. The Fifth Circuit also rejected the employer's "special circumstances" defense that claimed that the "no pins or stickers" rule protected the company's public image and contributed to the safety of the food products. In reaching this conclusion, the Fifth Circuit distinguished a prior NLRB decision that enforced a hotel chain's ban on uniform adornments in public areas of the hotel where the company had gone to great lengths to create a "special atmosphere." In the present case, the Fifth Circuit was persuaded that the uniform policy was not narrowly tailored enough and that In-N-Out Burger had required its employees to wear buttons at Christmas and during fundraising periods for its non-profit foundation.

Bottom Line for Employers

In-N-Out Burger, Inc. v. NLRB serves as a reminder that the NLRA allows employees the right to promote protected activity, including the right to self-organize and wear buttons and pins related to their conditions of employment and unionization under certain circumstances. And while the "special circumstances" defense is available, companies must narrowly tailor and design uniform requirements that meet the NLRA's rigid standards.

ABOUT THE AUTHORS



Fred Gaona, Counsel - fgaona@grayreed.com

Fred has extensive litigation experience with all types of employment disputes, including claims under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the Fair Labor Standards Act and numerous state statutes. He earned his J.D. from Ohio State University College of Law.



Angela Laughlin Brown, Associate - abrown@grayreed.com

Angela focuses her practice on white collar criminal and regulatory matters. She has represented numerous corporate and individual clients in high stakes litigation before federal courts, the SEC and other regulators. Prior to joining Gray Reed, Angela was a Professor of Law at Texas Tech University School of Law and focused her teaching and scholarship on matters of federal civil procedure and evidence. She earned her J.D. from Northeastern University School of Law.

DALLAS

1601 Elm Street, Suite 4600
Dallas, TX 75201
T: 214.954.4135 F: 214.953.1332

HOUSTON

1300 Post Oak Blvd., Suite 2000
Houston, TX 77056
T: 713.986.7000 F: 713.986.7100