Hospitality Update

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Baristas and Buttons: *NLRB v. Starbucks*

By Craig A. Cowart (Memphis)

The next time you stop in for your morning "must-have" caffeine, take a look at your Starbucks barista. He or she is likely to be wearing the familiar "Starbucks green" apron and black pants. Your barista may also be sporting a number of pins and buttons touting Starbucks products and promotions. Who knows what those pins and buttons will say?

You may not be able to predict what pins and buttons your barista will be wearing. But, after a recent federal appeals court ruling there is one thing you can know for sure. There won't be more than one pro-union pin on the uniform. The court told Starbucks that it was okay to limit employees to wearing only one pro-union button with their uniform at work.

So, how did this ruling come about? And what does it mean for you?

Background

Beginning in 2004, the Industrial Workers of the World (IWW) undertook a highly visible campaign to unionize Starbucks hourly employees. The campaign focused on four Starbucks stores in New York. The union held protests, attempted to recruit Starbucks employees, and made numerous statements to the media.

In response, Starbucks mounted an anti-union campaign in an effort to restrict the growth of pro-union sentiment. The National Labor Relations Board (NLRB) found that Starbucks engaged in a number of restrictive and illegal policies, including: prohibiting employees from discussing the union or the terms and conditions of their employment; prohibiting the posting of union material on bulletin boards in employee areas; and, discriminating against pro-union employees regarding work opportunities.

Who's Got The Button?

Needless to say, the IWW's efforts to unionize Starbucks employees created a challenge for the company. In the midst of the IWW's efforts to unionize Starbucks employees and the company's attempts to counter those efforts, Starbucks initially prohibited employees from wearing pro-union buttons with their uniforms at work. After the NLRB attacked that practice, Starbucks reached an informal settlement agreement with the NLRB and began precluding the wearing of more than one pro-union button at a time.

After Starbucks managers requested that employees wearing multiple pro-union buttons remove all but one of the buttons, another dispute arose. The NLRB ruled that the Starbucks dress code limiting employees to wearing only one pro-union button on their work clothes was an unfair labor practice. The NLRB ruling on the one-button policy (along with rulings – beyond the scope of this article – concerning the terminations of two employees) was reviewed by the U.S. Court of Appeals for the 2nd Circuit. On review, the 2nd Circuit concluded that "the [NLRB] has gone too far in invalidating Starbuck's one button limitation."

But, what did the court look at in reaching that conclusion?

The Court's Analysis

The 2nd Circuit began its analysis of the one-button policy by acknowledging that the National Labor Relations Act protects the right of employees to wear union insignia at work. Normally, preventing employees from wearing union insignia is a violation of the Act. But the court reasoned that Starbucks could overcome this presumption of illegality by showing "special circumstances," which could include "maintaining a certain employee image (especially with respect to uniformed employees)."

So, to determine if Starbucks could meet the "special circumstances" test, the court took a look at the Starbucks dress code and company practices related to employees wearing different types of buttons or pins. The Starbucks dress code for employees is comprehensive and includes rules about appropriate types and colors of shoes, pants, socks, shirts, undershirts, and jewelry. According to the Starbucks' employee handbook, the purpose of the dress code is to ensure that employees "present a clean, neat, and professional appearance appropriate of [sic] a retailer of specialty gourmet products."

The court took particular notice that Starbucks encourages employees to wear multiple pins and buttons issued by Starbucks, advertising company products and promotions. The NLRB was contending that allowing employees to wear multiple pro-union buttons did not seriously harm Starbuck's interest in employee image because "the Company . . . encouraged employees to wear multiple buttons as part of that image."

Starbucks, on the other hand, argued that allowing employees to wear an unlimited number of pro-union buttons would convert them into "personal message boards" and would "seriously erode" the information conveyed by Starbucks-issued pins promoting company products. In fact, the record before the court revealed that one employee attempted to display eight union pins on her pants, shirt, hat, and apron during work.

In making its decision, the court found that Starbucks is "entitled to oblige its employees to wear buttons promoting its products, and the information contained on those buttons is just as much a part of Starbucks's public image as any other aspect of its dress code." The court also found that Starbucks is entitled to avoid the distraction from its message that a number of union buttons would risk.

The 2nd Circuit found that Starbucks met its burden of establishing that the one-button restriction is a necessary and appropriate means of protecting its interest in conveying a particular public image through the messages contained on employee buttons. Accordingly, the court ultimately found that Starbucks "adequately maintains the opportunity to display pro-union sentiment by permitting one, but only one, union button on workplace clothing."

So, if Starbucks can tell its baristas to only wear one pro-union button on their work clothes, what does that mean for your company?

The Bottom Line

Companies should tread carefully when taking actions that could be perceived as discouraging unionization. But if you can show that limited and selective uniform restrictions are a reasonable and necessary way to protect your public image, you can limit the display of pro-union insignia. You do that in a number of ways, including what you say in your employee handbook, how and where you advertise, and how new employees are oriented.

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The Benefits Of J-1 Workers – And The Costs

By Andria Lure Ryan (Atlanta)

Many hospitality employers use the Exchange Visitor Program which is intended to promote mutual understanding between the people of the United States and the people of other countries by educational and cultural exchanges. Under the Mutual Educational and Cultural Exchange Act of 1961, foreign students are allowed to enter the United States under J-1 visas as part of a specific training and internship program or as part of a college exchange program.

Since the primary purpose is education and cultural exchange, host organizations must provide training, oversight, and similar learning activities, and must not use J-1 workers to displace American workers or to serve a specific labor need.

But in utilizing this laudable program, employers must be careful not to violate the wage/hour laws. A recent case clearly sets out the problem areas. *Jatupornchaisri, et. al. v. Wyndham Bonnet Creek.*

Were The J-1 Workers "Employees"?

Chaturong Jatupornchaisri and five other southeast Asians from Vietnam and Thailand filed a complaint against the Wyndham Bonnet Creek Resort, alleging that the resort violated the Fair Labor Standards Act (FLSA) and Florida Minimum Wage Act. The workers claimed the resort recruited them and other J-1 visa holders (in direct violation of the Exchange Visitor Act regulations) to fill housekeeping positions at the resort, where they worked full time from January 2010 to October 2011.

But the crux of the workers' case is their claim that the resort violated the minimum wage provisions of the FLSA and state law by failing to reimburse them for the expenses they incurred in obtaining their J-1 visas, as well as travel expenses. The workers also allege that the resort improperly deducted rent from their wages.

The resort filed a motion to dismiss the workers' claims, stating that because the purpose of the Exchange Visitor Act is education, not labor, that the workers fell outside of the purview of the FLSA because they are effectively interns, not employees. The court disagreed and held that the workers sufficiently alleged that they were treated as employees of Wyndham Vacation regardless of their immigration status, and that the manner in which the workers were actually treated, not simply the goals of the Exchange Visitor Act, must be determined by a trial.

Hidden Costs

This case has implications beyond the coverage of J-1 workers under the FLSA and the state minimum wage act. This lawsuit is brought under the federal Fair Labor Standards Act and state law and is not specific to immigrant workers, although there have been a large number of these types of cases filed around the country on behalf of H2A and H2B workers. The lawsuit has two basic counts – 1) that the employer failed to reimburse the immigrant workers for their pre-employment expenses (incurred in their home countries – visa, transportation and recruiter fees) and 2) that the employer *improperly* deducted the costs of housing and transportation while these workers were in the U.S.

Several federal courts, including the U.S. Court of Appeals for the 11th Circuit, which covers Florida where the *Wyndham* case was brought, have held that when the employer pays workers for their first workweek of employment, it must reimburse them for the cost of transportation, visa, and border-crossing to the extent these costs cut into the workers' minimum wage for hours worked in the first workweek of employment. The practical effect of these decisions is that employers must reimburse the out-of-pocket expenses paid by these employees in the first workweek of employment and then collect it back over time, (if ever) so as not to violate the minimum wage laws.

Hospitality employers that hire workers under these visa programs must be careful to fully comply with the obligation to pay minimum wage under both the federal FLSA and any state minimum wage laws. As the federal court in the *Wyndham* case has indicated, these workers are likely going to be determined to be employees and therefore subject to these stringent requirements.

For more information contact the author at ARyan@laborlawyers.com or 404.231.1400.

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We end where we began – back at Starbucks for your morning caffeine fix. As you take note of the buttons your barista may or may not be wearing, remember to keep your eyes open wherever you are. You never know the next little thing – like a one inch button – that will impact the HR landscape.

For more information contact the author at CCowart@laborlawyers.com or 901.526.0431.

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Office Locations

Atlanta phone 404.231.1400
Boston phone 617.722.0044
Charlotte phone 704.334.4565
Chicago phone 312.346.8061
Cleveland phone 440.838.8800
Columbia phone 803.255.0000
Dallas phone 214.220.9100
Denver phone 303.218.3650
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Phoenix phone 602.281.3400
Portland phone 503.242.4262
San Diego phone 858.597.9600
San Francisco phone 415.490.9000
Tampa phone 813.769.7500
Washington, DC phone 202.429.3707

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