

## Blog Post

# New Year Cheer from the NLRB

January 6, 2020

The National Labor Relations Board (NLRB) delivered two New Year's gifts to employers regarding deferral to arbitration and restrictions on union buttons.

## Arbitration Deference

In its latest [decision](#), the NLRB overturned a 2014 decision and returned to its earlier standards established when deciding whether to defer to an arbitrator's decision in grievances over discharges and disciplines. This decision relaxes the standards for deferral to an arbitrator's resolution, and may lead to a decrease in the likelihood that an employer will be confronted with defending an unfair labor practice before the NLRB after winning an arbitration award. Having an unfair labor dispute resolved through arbitration rather than through the NLRB may provide employers with resolution of an employee's grievance in a more predictable and controlled forum.

Deferral to arbitration of an employee's grievance over discharge or a disciplinary action is a two-step process. The NLRB first determines whether to defer the processing of the unfair labor practice to the arbitration procedures outlined in a collective bargaining agreement. Should an arbitration decision be issued, the NLRB will then determine whether to defer to the arbitrator's ruling. The NLRB will look to the standards reinstated in this decision to determine whether deferral is appropriate. Those

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standards are whether: (1) the arbitration proceedings were fair and regular, (2) the parties agreed to be bound, (3) the contractual issue was factually parallel to the unfair labor practice issue, (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (5) the decision was not clearly repugnant to the purposes and policies of the NLRA.

Additionally, the NLRB also decided to shift the burden of proof to the party contesting deferral, generally the employee and the union.

### **Union Buttons and Insignia**

In a decision involving a big-box retailer, the NLRB upheld the retailer's policy that allowed employees to wear only "small, non-distracting" union insignia, no larger than the employee's name badges, while on the selling floor. The NLRB applied earlier precedent, balancing employer business needs with their employees' organizing rights. In doing so, the NLRB held that the employer could apply these restrictions where employees interacted with customers, because the employer had "legitimate justifications" for limiting the size of visible union logos that outweighs the adverse impact on employees' right to engage in protected union conduct.

Contact your Akerman attorney if you need guidance regarding the restored arbitration standards or employer policies on union attire as we move into the New Year.

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