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NLRB Permits Employers to Impose Stricter Workplace Rules

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For a number of years, the National Labor Relations Board (NLRB) has carefully scrutinized employee rules and policies to ensure that they do not violate federal labor law. Earlier this summer, the NLRB general counsel's office issued a memorandum with detailed guidance on its view of the legality of employment policies, work rules and handbook provisions in light of its 2017 *The Boeing Company* decision. The NLRB's current position appears to free employers to implement stricter employee rules than were permissible only a few months ago. At the same time, the NLRB will continue to attack rules that undermine employee rights.

BACKGROUND

The National Labor Relations Act (NLRA) protects employee rights to unionize and collectively bargain. Under Section 7 of the NLRA, employees have the right to engage in "protected concerted activity" — when two or more employees act together to improve the terms and conditions of employment. Employers may not prohibit or thwart such protected activity, or retaliate against employees for participating in it. The NLRA applies to both union and non-union employers.

The NLRB is responsible for enforcing the NLRA. Periodically, the NLRB general counsel issues guidance memoranda with policy changes and updates. These documents reveal important insight into how the NLRB would judge common workplace issues.

EMPLOYEE HANDBOOK RULES: THE OLD STANDARD

Nearly all employers establish workplace rules, policies, and employee handbook provisions to protect business interests. However, such rules may be illegal if they curtail employees' NLRA-protected rights. For example, although employers may prefer strict attendance rules, such rules cannot explicitly ban walkouts or strikes, which may be protected under the NLRA.

In its 2004 *Lutheran Heritage* decision, the NLRB described its three-part test to evaluate the legality of employee rules under Section 7. If the rule did not explicitly restrict activity protected by Section 7, it still could be invalidated if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was adopted in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

In other cases, the NLRB interpreted *Lutheran Heritage*'s first prong even more broadly. Instead of evaluating whether an employee rule *would* be reasonably construed to prohibit Section 7 activities, the NLRB examined whether rules *could* be reasonably construed to chill or discourage Section 7 activities. Therefore, any rule that was deemed overly broad or ambiguous would be considered unlawful.

The NLRB issued a guidance memorandum on this standard in 2015. Applying *Lutheran Heritage*, the NLRB warned that it would invalidate a range of seemingly reasonable rules, such as ones that limited employees' ability to take photos or videos on company property; use employer logos without permission; or disparage the employer or its management. The Board even objected to a rule that cautions employees to use discretion in posting on social media. Employers often struggled to understand whether common sense employee rules were lawful or not.

THE NLRB ANNOUNCES A NEW POSITION AND ALLOWS STRICTER EMPLOYEE RULES AND WORKPLACE POLICIES

In its December 2017 *The Boeing Company* decision, the NLRB significantly altered its interpretation on employee rules by overruling the first prong of *Lutheran Heritage*. Based in part on U.S. Supreme Court precedent, the NLRB concluded that it has too often "failed to give adequate consideration and weight to employer interests in its analysis of work rules." Thus, *Boeing* announced a balancing test for evaluating employee rules. The NLRB will weigh the potential impact on employee NLRA rights against the employer's legitimate justifications for the rules. Moreover, ambiguities in workplace rules would no longer be interpreted against employers.

Boeing divided employee rules into three categories. "Category 1" rules are generally lawful to maintain; "Category 2" rules require individualized scrutiny; and "Category 3" rules are unlawful to maintain. Even this standard, however, left confusion about how the NLRB would evaluate specific workplace rules.

The 2018 NLRB Memorandum is the NLRB's attempt to further clarify the *Boeing* decision. The Memorandum offers examples of lawful and unlawful workplace rules. For most rules, unless Section 7 activity is explicitly forbidden, the NLRB will find that the employer's business interests outweigh any potentially chilling effect on NLRA rights. Those legitimate employer interests include maintaining discipline and productivity; protecting proprietary, confidential, and customer information; and preserving a workplace free from unlawful harassment or violence.

However, the employer does not have complete discretion. Applying an otherwise lawful rule against employees engaged in protected concerted activity is still unlawful. The Memorandum

includes the following examples of employee rules, categorized by the *Boeing* system.

Category 1: Rules that are Generally Lawful to Maintain

Civility

Disparaging the company's employees is prohibited.

Rude, discourteous or unbusinesslike behavior is forbidden.

Employees may not post any statements, photographs, video or audio that reasonably could be viewed as disparaging to employees.

Although the NLRB acknowledges that protected concerted activity may involve criticizing fellow employees or supervisors, requiring civility does not prohibit the core right to criticize management or terms and conditions of employment.

No-Photography and No-Recording

Use of camera-enabled devices to capture images or video is prohibited.

Employees may not record conversations, phone calls, images or company meetings with any recording device without prior approval.

Insubordination or On-the-Job Conduct

Being uncooperative with supervisors or otherwise engaging in conduct that does not support the employer's goals and objectives is prohibited.

Insubordination to a manager or lack of cooperation with fellow employees or guests is prohibited.

Disruptive Behavior

Creating a disturbance on Company premises or creating discord with clients or fellow employees [is prohibited].

Disorderly conduct on Company premises and/or during working hours for any reason is strictly prohibited.

Logos and Intellectual Property

Employees are forbidden from using the Company's logos for any reason.

Do not use any Company logo, trademark, or graphic without prior written approval.

Category 2: Rules Warranting Individualized Scrutiny

According to the NLRB, rules in this category are not obviously lawful or unlawful, and must be evaluated on a case-by-case basis. Examples include:

- Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of employees).

- Rules regulating use of the employer's name (as opposed to rules regulating use of the employer's logo or trademark).
- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work).

Category 3: Rules that are Unlawful to Maintain

Confidentiality Rules Specifically Regarding Wages, Benefits, or Working Conditions

Employees are prohibited from disclosing salaries, contents of employment contracts.

Employees shall not disclose any information pertaining to the wages, commissions, performance, or identity of employees of the Employer.

Employees are prohibited from disclosing to any media source information regarding employment at Employer, the workings and conditions of Employer, or any staff member.

Rules Against Joining Outside Organizations or Voting on Matters Concerning the Employer

The NLRB does not provide examples of these rules, but states that "[i]f a rule is so broad as to be reasonably read as banning joining a union, the impact on core Section 7 rights will be significant." Further, "[b]ecause employers can achieve their goal of preventing self-dealing and other business conflicts of interest without banning membership in outside organizations, and because the right to join a union is a fundamental right under the [NLRA], such a rule will always be unlawful."

NEXT STEPS FOR EMPLOYERS

The recent shift in NLRB interpretation may present an opportunity for employers to further protect legitimate business interests. So long as employers do not explicitly forbid Section 7 activity, employment policies, work rules and handbook provisions will likely be deemed lawful by the NLRB.

Despite this change, employers should remain careful not to implement rigid or overly-aggressive employee rules, both to avoid claims under the NLRA and to avoid unnecessary discord with employees.

If you have questions regarding compliance with the NLRA or any other employment or labor issues, please contact Foster Pepper's Employment & Labor group.