Resources

# Clarity on Legality of Work Rules Under NLRA has Arrived!

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Last month, in an effort to clarify what types of employee handbook rules are lawful under the National Labor Relations Act ("NLRA"), the General Counsel of the National Labor Relations Board ("NLRB") issued new Guidance on the topic. Determining which rules are permissible and which may violate the NLRA has troubled both union and non-union employers in recent years due to the Obama-era NLRB's tendency to find that standard handbook rules (e.g. those on basic civility, insubordination, confidentiality, etc.) violate employees' rights to engage in "concerted activity" for "mutual aid and protection" under Section 7 of the NLRA.

**The Former Standard for Analyzing the Legality of Work Rules Proves Unworkable**

The trend of cases finding commonly used handbook rules illegal stems from the application of a standard first articulated by the NLRB in the 2004 case of *Lutheran Heritage.* Under that standard, an employment policy or rule would be contrary to the NLRA if employees could "reasonably construe" the policy or rule as restricting their ability to participate in activity protected by Section 7. Under the Obama-era Board's application of this standard, many rules were struck down and only a few were allowed to survive. Those holdings, though, provided little guidance to employers on how to craft policies without crossing the legal line—a line that seemed to constantly move. As a result, despite the employers' intention that their rules not be construed to limit protected activity under the Act, the Board held that many rules—rules which had been in place for decades—violated the NLRA, and thereby resulted in findings that the employers had engaged in unfair labor practices by maintaining such rules.

**The NLRB Articulates a New Standard for Analyzing Work Rules.**

In December 2017, after turnover on the Board allowed a Republican majority on the NLRB to evolve, the NLRB tried to end the confusion by its decision in *The Boeing Company*. In *Boeing*, the Board replaced the *Lutheran Heritage* "reasonably construe" standard with a two factor balancing test. When faced with a challenge to a facially neutral employer policy, the NLRB will weigh the nature and extent of the *potential* impact on the Act's Section 7 rights against the legitimate business justifications for the rule. When the legitimate business justifications outweigh the potential impact on employee rights, the employer rule will be lawful.

**The NLRB's General Counsel Explains How the New Standard will be Applied**

While the *Boeing* decision provides employers with a significantly more workable standard, it did not provide employers with clear examples as to what specific rules will be deemed lawful versus unlawful. Last month's General Counsel Guidance, which directs the NLRB's Regional Offices on how to process unfair labor practice charges based on work rules, helps to further clarify the standard by describing three categories of rules, with examples and consequences as to each. The categories are: (1) rules that are generally lawful to maintain; (2) rules which will warrant individualized scrutiny and review by the General Counsel's Office; and (3) rules that are clearly unlawful to maintain.

**1. Category 1 – Rules That Are Generally Lawful to Maintain**

Under the Guidance, the General Counsel instructs that the following types of rules should be regarded by the Regional Offices as legal under the NLRA, and that any challenges to them should be dismissed as a matter of course. These are usually lawful, the General Counsel said, because the rule, "when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the Act, or because the potential adverse impact… is outweighed by the business justifications associated with the rule." Among the types of rules which will therefore generally and readily survive NLRB scrutiny under *Boeing*, according to the General Counsel, are:

- ***Civility Rules*** – i.e., rules prohibiting inappropriate conduct, rude behavior, offensive language, or disparagement of company employees;
- ***No-Photography Rules and No-Recording Rules*** – rules prohibiting employees from taking photos or recording conversations at work;
- ***Rules against Insubordination, Non-Cooperation, or On-the-Job Conduct That Adversely Affects Operations*** – i.e., rules prohibiting insubordination, refusal to comply with orders, or other on-the-job conduct that adversely affects the employer's operation;
- ***Disruptive Behavior Rules*** – i.e., rules prohibiting disruptive or disorderly behavior and conduct;
- ***Rules Protecting Confidential, Proprietary, and Customer Information or* Documents** – i.e., rules banning the discussion of confidential, proprietary, or customer information that make no mention of employee or wage information;
- ***Rules Against Defamation or Misrepresentation*** – i.e., rules prohibiting employees from defaming or misrepresenting the employer;
- ***Rules Against Using Employer Logos or Intellectual Property*** – i.e., rules prohibiting employee use of the employer's logos or trademarks;
- ***Rules Requiring Authorization to Speak for Company*** – i.e., rules requiring that only certain people speak for the company or requiring authorization to speak for the company; and
- ***Rules Banning Disloyalty, Nepotism, or Self-Enrichment*** – i.e., rules banning disloyalty and blatant conflicts of interest.

Under the old *Lutheran Village* standard, many of these types of rules were deemed to be capable of being construed as chilling an employee's right to engage in protected concerted activity and thereby held to violate the NLRA. These findings served as basis for many an uproar by many in the business community, as well as a few Board members. Now, under the *Boeing* standard—though always depending on their context—these types of rules will usually survive scrutiny under the NLRA. Thus, while the scales may have tipped toward finding that they are lawful because they appear facially neutral, when considered in context and how they are implied, they can still be found to be unlawful.

**2. Category 2 – Rules That Are "On-the-Line" and Warrant Individualized Scrutiny**

The Guidance also identifies the following types of rules as being subject to a routine case-by-case review, not only by those in the NLRB's Regional Offices, but—unless there is Board jurisprudence applying the *Boeing* test to the rule at issue already mandating a clear outcome—also by the General Counsel's Office via its "Advice" protocols. ("Advice" in NLRB parlance is when a Regional Office seeks advice from the General Counsel's office in Washington, D.C., on whether a complaint should be issued in a particular case, or in types of cases in which the General Counsel requires advice to be sought so that the General Counsel can be comfortable that the NLRA is being consistently applied nationwide.)

- ***Broad conflict-of-interest rules*** that do not clearly and lawfully specifically target fraud and do not unlawfully restrict membership in, or voting for, a union;
- ***Broad confidentiality rules*** that encompass "employer business" or "employee information" (as opposed to otherwise lawful confidentiality rules regarding customer or proprietary information and not unlawful rules directed at information regarding employee wages, terms of employment, or working conditions;
- ***Rules regarding disparagement or criticism of the employer*** (as opposed to otherwise lawful rules regarding disparagement of employees);
- ***Rules regulating the use of the employer's name*** (as opposed to otherwise lawful rules regulating the use of the employer's logo);
- ***Rules generally restricting speaking to the media*** (as opposed to otherwise lawful rules regulating speaking on the employer's behalf);
- ***Rules banning off-duty conduct that might harm the employer*** (as opposed to otherwise lawful rules banning insubordination at work, or unlawful rules banning participation in outside organizations); and
- ***Rules against making false or inaccurate statements*** (as opposed to otherwise lawful rules banning defamation).

**3. Category 3 – Rules That Are "Over-the-Line" and Unlawful to Maintain**

The following two types of rules are the only rules that the Guidance states are generally unlawful. When confronted with such rules, the Guidance directs the Regional Offices to issue unfair labor practice complaints and litigate the matter, absent settlement.

- Confidentially rules specifically regarding wages, benefits, or working conditions; and
- Rules against joining outside organizations or voting on matters concerning employer.

These types of rules very directly proscribe activities that are clearly protected under the Act.

**Actions to Take**

To be sure, these guidelines will help employers draft work rules that will more likely survive under the *Boeing* standard. Importantly, though, words do matter, but so does context. Even well-drafted policies may be flawed if they are not carefully drafted, drafted with wrongful intent, or applied in a manner that runs contrary to the Act.

Therefore, while all employers should review their policies in light of *Boeing* and this Guidance, care should be taken to make sure that they fall as firmly as possible on the legal side of what is now a brighter and more clearly established line. It is also strongly recommended that all policies be first run by—if not drafted by—experienced counsel familiar with the Guidance and the underlying case law.

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