

NLRB Edits Its Rules on Employee Handbooks

December 19, 2017

The National Labor Relations Board took steps in a decision, announced December 14, to bring predictability and reasonableness to the vexing question of whether certain employer policies, rules and handbook provisions violate the National Labor Relations Act. These rules will now be measured not only for their tendency to limit the employee exercise of protected concerted activity, but the legitimate business reason for the rule will also be considered in passing on its validity. The Board also announced it will categorize the rules it reviews in order to provide better guidance on what is acceptable. Employers may therefore want to revisit any policies which were rescinded or watered-down in reaction to the approach the Board formerly took under the Obama Administration, and to identify the legitimate business reason supporting the need for certain rules.

Under the Obama-era Board, if rules could reasonably be interpreted to prohibit employees from engaging in concerted activity protected by the Act, then the rule was invalid. Thus, for example, employer rules prohibiting "loud or abusive language" or requiring employees to "work harmoniously" with others were declared invalid, because employees might construe them as a prohibition against engaging in contentious debate about unionization. In addition, other decisions reached the opposite result on very similar rules, leaving employers bewildered about how seemingly common-place rules would be judged.

Under the new approach, declared in the Board's decision in *Boeing Company*, 365 NLRB No. 154, the analysis will not stop at the question of whether the rule could be interpreted as infringing on protected rights, but additionally the Board will consider the nature and extent of the infringement balanced against the legitimate justification for the rule. Therefore a slight or tangential impact on protected rights should not invalidate a rule where there is a legitimate business interest to support it.

The Board applied this new approach to the case in front of it, which dealt with Boeing's rule against cameras in the workplace. The Board considered this rule to have only a slight impact on protected concerted activity—for example, while it might prohibit an employee from photographing a workplace protest, it would not prohibit the underlying protest itself. This impact was balanced against Boeing's justification including protection of proprietary and trade secret information, protection of personally identifiable employee information, compliance with federal export control regulations and other federal contractor requirements, and security against terrorism and other attacks. In light of these justifications, the



Board found the rule was valid.

In its effort to provide future guidance, the Board announced it would catalog the rules it reviews under this new framework. The Boeing "no camera" rule was identified as falling in category I (rules which do not infringe on protected rights or where infringement is outweighed by legitimate justifications). Rules requiring "harmonious interactions and relationships" or basic standards of civility are also identified as falling in this category. Category III rules will be those which are unlawful, such as a rule against employees discussing wages or benefits with each other. Category II will be those that fall in between and require individualized assessment.

There obviously are myriad rules and policies not directly addressed in the examples given by the Board in Boeing, noted above. The catalog will grow as more rules are examined in cases applying this new approach.

The approach announced in Boeing leaves intact the prohibition against discriminatory enforcement of a neutral rule such that it only applies to protected concerted activity, and also the prohibition against adopting new restrictive rules of conduct in response to union organizing efforts. The Boeing framework for analysis also underscores the importance of the employer being able to articulate the reasons for a rule, and to act in accordance with those reasons, particularly for potentially controversial rules like no cameras or no recordings.

If you have questions about this alert, please contact your Lathrop Gage attorney or the attorney listed above.