

Employment Law Alert: NLRB Establishes New Standard Governing Workplace Policies

Dec. 21, 2017

On Dec. 14, 2017, the National Labor Relations Board ("NLRB" or the "Board") decided *The Boeing Company*, 365 NLRB No. 165 (2017), expressly overruling *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under the prior *Lutheran Heritage* standard, the Board found that employers violated Section 7 of the National Labor Relations Act ("NLRA" or the "Act") by maintaining workplace rules that would be "reasonably construed" by an employee to prohibit the exercise of Section 7 NLRA rights. In place of the *Lutheran Heritage* "reasonably construe" standard, the NLRB established a **new test** in *Boeing*. Moving forward, when evaluating a facially neutral policy, rule or handbook provision that could potentially interfere with the exercise of NLRA rights, the Board will evaluate: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The NLRB emphasized that it will approach these policy/rules cases with an eye toward "strik[ing] the proper balance between...asserted business justifications and the invasion of employee rights in light of the Act and its policy."

In overruling the *Lutheran Heritage* standard, the NLRB observed that, "[t]hough well-intentioned, the Lutheran Heritage Standard prevents the board from giving meaningful consideration to the real-world 'complexities' associated with many employment policies, work rules and handbook provisions...[and] produced rampant confusion for employers, employees and unions." The Board also announced that in cases moving forward, three categories of rules will be defined to provide greater clarity and certainty to employees, employers, and unions.

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement maintained by Boeing, and rules requiring employees to abide by basic standards of civility. Thus, the Board overruled past cases in which the Board held that employers violated the NLRA by maintaining rules requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace.
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.



- *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

Applying the new standard, the Board concluded that Boeing lawfully maintained a no-camera rule that prohibited employees from using camera-enabled devices to capture images or video without a valid business need and an approved camera permit. The Board majority reasoned that while the rule could potentially affect employee's exercise of NLRA Section 7 rights, that the impact was "comparatively slight" and outweighed by important justifications, including national security concerns, protection of proprietary information and employee's personally-identifiable information, and compliance with federal regulations. Importantly, the Board proffered that "we believe that no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful based on the considerations described above."

This decision represents a major shift away from the decisions of the past several years on employer rules and policies. Employers should be advised, however, that this new, relaxed standard still requires employers to be mindful of rules and policies that may violate the NLRA on their face. Employers should have sufficient justification for maintaining such policies or they will continue to face scrutiny from the NLRB.