

Blog Post

Workplace Civility Legal Again

January 5, 2018

Rules mandating workplace civility and protection of confidential business information — recently the target of the National Labor Relations Board — are lawful again. Non-union employers take note: no longer will the Board automatically find an unfair labor practice for policy, work rule and handbook provisions that employees would construe as prohibiting protected concerted activity. Based on The Boeing Company *decision* issued last month, the newly re-constituted Board will now seek to strike a balance between employer and employee rights. The endorsement of workplace civility rules aligns with the EEOC’s 2016 Select Task Force on Harassment recommendation encouraging the NLRB to reconsider its position and support such rules.

The *Boeing Company* decision represents a marked retreat from the Board’s 2004 decision in *Lutheran Heritage Village-Livonia* when the NLRB signaled that it would find innocuous employer rules attempting to protect its property or business or promoting workplace civility violated the NLRA if employees would merely “reasonably construe the language” to prohibit “Section 7” activities—activities such as the right to unionize or engage in collective action, to discuss wages, terms and conditions of employment and to air and investigate their grievances. Following *Lutheran Heritage*, the Board prosecuted dozens of unfair labor practice charges over benign workplace rules asking employees to “work harmoniously,” “to conduct themselves in a positive and professional manner,”

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“to keep customer and employee information secure” and to “refrain from inappropriate discussions about the company.” The Board’s Obama-era General Counsel had even issued a detailed memorandum cataloging scores of decisions finding various workplace rules unlawful, *even if they had never been applied to restrict employees’ rights under the NLRA and were not issued in response to union activity.*

In its December 14, 2017, 3-2 decision in *The Boeing Company*, the new Republican majority Board reversed the decision of an Administrative Law Judge that found Boeing’s policy restricting camera-enabled devices such as cell phones on its property in violation of the NLRA. The ALJ had applied the *Lutheran Heritage* analysis to the no-camera rule. Under that analysis, rules would violate the NLRA if any of the following existed: (1) employees would reasonably construe the Rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the Rule had been applied to restrict the exercise of Section 7 rights. The ALJ had found that under the first prong of that analysis, employees would reasonably believe that the rule prohibited them from possessing cell phones that could take pictures to support bargaining demands or gather evidence for grievances. The ALJ gave no weight to Boeing’s concern that photographs could be taken that undermined its obligation to keep national security matters secret, safeguard its confidential information and trade secrets, and protect the privacy of its employees.

The Board’s decision scrapped the first prong of the *Lutheran Heritage* test. The Board enunciated a new standard for facially neutral rules that requires the Board to strike the proper balance between the employer’s business justification and employee rights under the NLRA. Finally, the Board will now consider the employer’s justification for imposing rules. Past decisions invalidating rules promulgated in response to union activity or that

were *actually* applied to restrict Section 7 rights will not be impacted by the *Boeing* decision. In announcing its decision, the Board delineated three categories of Rules:

- Category 1 includes Rules that the Board designates as lawful either because, when reasonably interpreted, they do not prohibit or interfere with the exercise of Section 7 rights; or the potential impact on protected rights is outweighed by the justifications associated with the rule. Boeing's no-camera requirement and rules calling for employees to abide by basic standards of civility fit in this category.
- Category 2 includes rules that warrant individualized scrutiny as to whether the rule would prohibit or interfere with employees' Section 7 rights and, if so whether any adverse impact on such protected rights is outweighed by legitimate justifications.
- Category 3 includes Rules that the NLRB will designate as unlawful because they would limit Section 7 rights and the adverse impact on these rights is not outweighed by its justifications. An example would be a rule that prohibited employees from discussing wages with each other.

Although the *Boeing* decision portends future unfair labor practice litigation to begin the process of pigeon-holing Rules into the categories that will or will not require the Board's scrutiny in future cases, employers can be at ease in knowing that most rules designed to promote workplace civility and security of its property and information will fit into Category 1. Other types of rules will now require a balancing test—a balance that includes consideration of the employer's reasons for implementing the rules. However, rules enacted in response to union activity or applied to restrict employees from engaging in protected activity will still be subject to unfair labor practice charges. Despite the employer-friendly decision, employers should take the opportunity to

review their rules and policies to avoid being the test cases.

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