

## Blog Post

# NLRB G.C. Issues Guidance on Handbook Rules

August 7, 2018

Standard employer workplace policies may once again pass muster, following a Memorandum issued this summer by the NLRB Office of General Counsel.

Although Memorandum GC 18-04 is addressed to NLRB personnel, its guidance for how to analyze charges alleging that workplace policies violate the NLRA offers some clarity and reassurance to employers.

Employers may recall that beginning in 2004, the NLRB took issue with a variety of common provisions in employee handbooks, including rules regarding confidentiality, non-disparagement, social media, disruptive conduct toward supervisors and coworkers, and communications with the media and other third parties. The NLRB, in a series of decisions, found that facially neutral policies – even in non-unionized workplaces – would violate employees’ rights to engage in “protected concerted activity.” Such activity would include when two or more employees take action for their mutual aid or protection, including discussing terms and conditions of employment.

Regardless of whether the workplace rule actually prohibited such activity, the NLRB decisions and a General Counsel Report issued in 2015 took the position that an employer violated the Act by enacting a workplace rule if “employees would

---

### Related Work

Employment Training  
and Compliance

---

### Related Offices

Fort Lauderdale

---

### HR Defense Blog

Akerman Perspectives  
on the Latest  
Developments in Labor  
and Employment Law

[Visit this Akerman blog](#)

reasonably construe” the rule as prohibiting such activity.

In December 2017, the NLRB signaled a reversal of that position in its decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017). The Board said that using the “reasonably construe” test failed to account for legitimate business justifications underlying such policies. The *Boeing* decision established a new test for determining the validity of an employer neutral policy by balancing the nature and extent of the potential impact on an employee’s NLRA rights against the employer’s legitimate justifications for the rule.

On June 6, 2018 the General Counsel of the NLRB issued new Guidance tracking the three categories of workplace rules that the Board discussed in the *Boeing* decision and how the lawfulness of each should be evaluated. Category 1 includes Rules that the Board designates as lawful to maintain; Category 2 includes Rules that warrant individualized scrutiny in each case; and Category 3 includes Rules that the Board designates as unlawful to maintain.

The Memorandum also makes clear that the *Boeing* decision only applies to the maintenance of *facially neutral* rules. Rules that specifically ban protected concerted activity or are enacted in response to organizing activity remain unlawful. The Memorandum places the various types of rules into three categories:

### **Category 1: Rules that are Generally Lawful to Maintain**

- Civility Rules
- No-Photography Rules and No-Recording Rules
- Rules Against Insubordination, Non-cooperation, or On-the-Job Conduct that Adversely Affects Operations
- Disruptive Behavior Rules

- Rules Protecting Confidential, Proprietary, and Customer Information or Documents
- Rules Against Defamation or Misrepresentation
- Rules Against Using Employer Logos or Intellectual Property
- Rules Requiring Authorization to Speak for Company
- Rules Banning Disloyalty, Nepotism or Self-Enrichment

### **Category 2: Rules Warranting Individualized Scrutiny**

- Broad Conflict-of-Interest Rules
- Confidentiality Rules Broadly Encompassing “Employer Business” or “Employee Information”
- Rules Regarding Disparagement or Criticism of Employer
- Rules Regulating use of the Employer’s Name
- Rules Generally Restricting Speaking to the Media or Third Parties
- Rules Banning Off-Duty Conduct that Might Harm the Employer
- Rules Against Making False or Inaccurate Statements

### **Category 3: Rules that are Unlawful to Maintain**

- Confidentiality Rules Specifically Regarding Wages, Benefits, or Working Conditions
- Rules Against Joining Outside Organizations or Voting on Matters Concerning Employer

While the Memorandum has provided employers with more predictability and guidance, the classification of the rules and policies in the Memorandum is not an exhaustive list. The Memorandum outlines that the Board has not determined the classification of all rules and

specifically noted that the Board has not made a decision regarding rules addressing “confidentiality of discipline or arbitration, or rules that potentially limit employees’ access to Board processes.” Despite this limitation, the Memorandum has provided a framework for determining how the Board considers the balance between employers’ right to maintain discipline and productivity in the workplace and the negative impact a rule may have on employees’ ability to exercise their Section 7 rights.

Employers who remain unsure of whether their rules will pass muster under the new tests should consult with experienced Labor & Employment counsel.

This information is intended to inform clients and friends about legal developments, including recent decisions of various courts and administrative bodies. This should not be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this email without seeking the advice of legal counsel.