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Blog Post

NLRB Clarifies Standard for Reviewing Workplace Policies, Finds Confidentiality and Media Contact Policies Lawful

November 4, 2019

Applying its new standard for determining whether employer policies violate the National Labor Relations Act (NLRA), a divided National Labor Relations Board (Board) upheld policies prohibiting employee disclosure of client and vendor information and contact with the media. The Board's decision provides additional guidance about their new, employer-friendly standard of review.

Section 7 of the NLRA guarantees employees the right to organize, to form, join, or assist labor unions, and to engage in "concerted activity" to improve their work conditions. The Act prohibits employers from interfering with these rights. Among other things, the Board reviews select employer policies and rules to ensure that they do not unlawfully interfere with employees' Section 7 rights.

In 2017, the Board significantly revised its standard for reviewing these policies. Previously, the Board had looked to whether a policy could hypothetically interfere with employees' Section 7 rights. The Board's new test, adopted in *Boeing Co., 365 NLRB No. 154*, is more deferential to employer business justifications, seeking review from the perspective of a reasonable employee aware of their legal rights. In *Boeing*, the Board adopted a three tier classification for rules and policies under review: Category 1 rules are lawful, Category 2 rules require

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individualized scrutiny, and Category 3 rules are unlawful to maintain.

Clarified Burden of Proof under Boeing

In *LA Specialty Produce Co., 368 NLRB No. 93*, the Board recently applied the *Boeing* test for the first time, providing clarity and insight into how the Board will review these issues going forward. In *LA Specialty Produce Co.*, the Board explained for the first time that the Board's General Counsel bears the burden of proving that the challenged rule or policy would be interpreted by a reasonable employee as interfering with their Section 7 rights. This marks a sharp contrast from the pre-*Boeing* standard which focused on whether any hypothetical interference with Section 7 rights could occur. If the General Counsel is unable to meet this higher initial burden, the rule or policy in question is lawful and no further analysis is needed.

If the General Counsel is able to demonstrate that a reasonable employee would interpret the rule or policy as interfering with the Section 7 rights, the Board then balances the rule or policy's potential interference with Section 7 rights and the employer's asserted justifications for the rule or policy. Where that balance favors the employer's justifications over potential interference with Section 7 rights, the rule or policy will be considered unlawful. On the other hand, if the interference with Section 7 rights outweighs *any* possible justification, the rule at issue will be unlawful.

Applying the Boeing Test to Confidentiality Policies

Two policies were under review in *LA Specialty Produce Co.* The first prohibited employee disclosure of certain confidential and/or proprietary information, including customer or vendor information. In pertinent part, it read, "[e]very employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and

proprietary of [Respondent] including but not limited to client/vendor lists." While acknowledging that the employer had a substantial justification in not disclosing customer and vendor information, an administrative judge found that, as written, the rule could prevent employees from appealing to customers during a labor dispute. On this basis, the judge found the Confidentiality Policy interfered with the employees' exercise of Section 7 rights.

A divided Board reversed, finding that the right to contact vendors or customers to elicit support during a labor dispute did not permit employees to divulge information expressly kept confidential by the employer. Applying the *Boeing* test, the Board found that a reasonable employee would not interpret the Confidentiality Policy as interfering with exercise of Section 7 rights and, therefore, the rule is lawful without balancing the employer's purported justification for the rule.

Applying the Boeing Test to Media Contact Rules

The second policy under review restricted employee responses to media inquiries. It provided, "[e]mployees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or an event that may affect our organization."

Applying *Boeing*, the Board found that a reasonable employee would interpret this rule as simply prohibiting employees, when approached by the media for comment, to speak on the Company's behalf. Therefore, the Board found that the Media Contact Rule did not interfere with Section 7 rights, as employees have no right to speak on behalf of their employer.

In reaching this conclusion, the Board rejected the argument that the policy prohibited employees from

speaking to the media in general, highlighting that all portions of the policy should be reasonably read together.

Dissent Pushes Back

The Order was joined by Chairman John Ring and Members William Emanuel and Marvin Kaplan (each appointed by President Trump). In a strongly worded dissent, Member Lauren McFerran (appointed by President Obama) voiced her continued opposition to *Boeing* and explained that she would have found that both policies unlawfully chilled employees' Section 7 rights. The dissent also explained that the practice of classifying rules and policies into three categories based on lawfulness will "categorically exempt [such rules] from scrutiny," permitting the Board to broadly classify all similar rules going forward.

Substantively, employers should view the Board's affirmation of *LA Specialty Produce Co.'s* policies narrowly. Employee policies that prohibit employees, in their individual capacity, from communicating with the media will likely be considered unlawful. Similarly, policies that prohibit employees from contacting third parties (including customers or vendors) for support during a labor dispute will likely be considered unlawful.

Union and non-union employers should take this opportunity to review their handbooks and policies to ensure that they comply with Section 7. Akerman Labor and Employment attorneys are available to provide guidance to employers on these and other Section 7 concerns.

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