

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 18-04

June 6, 2018

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Peter B. Robb, General Counsel /s/

SUBJECT: Guidance on Handbook Rules Post-*Boeing*

In its decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), the Board reassessed its standard for when the mere maintenance of a work rule violates Section 8(a)(1) of the Act. Overturning the first prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board established a new standard that focused on the balance between the rule's negative impact on employees' ability to exercise their Section 7 rights and the rule's connection to employers' right to maintain discipline and productivity in their workplace. This memorandum contains general guidance for Regions regarding the placement of various types of rules into the three categories set out in *Boeing*, and regarding the Section 7 interests, business justifications, and other considerations that Regions should take into account in arguing to the Board that specific Category 2 rules are unlawful.

Regions should note that not only did the Board in *Boeing* add a balancing test, but it also significantly altered its jurisprudence on the reasonable interpretation of handbook rules. Specifically, the Board severely criticized *Lutheran Heritage* and its progeny for prohibiting any rule that *could* be interpreted as covering Section 7 activity, as opposed to only prohibiting rules that *would* be so interpreted.<sup>1</sup> Regions should now note that ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included.<sup>2</sup>

Regions should also note that the Board in *Boeing* did not alter well-established standards regarding certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests. For instance, *Boeing* did not change the balancing test involved in assessing the legality of no-distribution,

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<sup>1</sup> *Boeing Co.*, 365 NLRB No. 154, slip op. at 9 n.43 (Dec. 14, 2017).

<sup>2</sup> *See id.*, slip op. at 9 & n.43.

no-solicitation, or no-access rules.<sup>3</sup> The decision similarly did not deal with the “special circumstances” test of apparel rules, although it may apply to aspects of apparel rules that are alleged to be unlawfully overbroad.<sup>4</sup>

The Board in *Boeing* specifically noted that the decision only applied to the mere maintenance of facially neutral rules. Rules that specifically ban protected concerted activity, or that are promulgated directly in response to organizing or other protected concerted activity, remain unlawful. Moreover, the Board held that the *application* of a facially neutral rule against employees engaged in protected concerted activity is still unlawful.<sup>5</sup> A neutral handbook rule does not render protected activity unprotected.

Finally, Advice has not yet determined *Boeing*'s effect on rules regarding confidentiality of discipline or arbitration, or rules that potentially limit employees' access to Board processes. Thus, when presented with such rules, Regions should submit the case to Advice.

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

The types of rules in this category are generally lawful, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the Act, or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule.

Charge allegations alleging that rules in this category are facially unlawful should be dismissed, absent withdrawal. However, Regions should be cautious about dismissing allegations regarding rules that are not specifically listed here as Category 1 rules. If a Region believes a rule not listed below should fall in this category, the Region should submit the case to Advice.

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<sup>3</sup> See *Boeing Co.*, 365 NLRB No. 154, slip op. at 8 (Dec. 14, 2017) (relying on doctrine regarding those types of rules as support in overturning *Lutheran Heritage*).

<sup>4</sup> See *Long Beach Memorial Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66, slip op. at 1–2 (Apr. 20, 2018) (finding hospital's restrictions on wearing union pins overbroad and unlawful without reference to *Boeing* test).

<sup>5</sup> See *Boeing Co.*, 365 NLRB No. 154, slip op. at 16 (Dec. 14, 2017). However, it is possible that the Board will, in a future case, also change the prong of *Lutheran Heritage* that suggested that, once a facially lawful rule has been applied to protected activity, the rule *itself* becomes unlawful. See *id.* (noting that application of a facially lawful rule to protected concerted activity would still be unlawful, but not suggesting such application would affect the lawfulness of the rule itself).

In addition, if a Region believes that special circumstances render a normally-lawful rule under Category 1 to be unlawful, e.g., due to a unique industrial setting, the history of the rule's application, or direct evidence of employee chill, the Region should submit the case to Advice.

Again, the Board made clear in *Boeing* that merely maintaining a facially lawful rule does not determine whether the rule was applied lawfully.<sup>6</sup> Thus, simply because a rule falls in Category 1 does not mean an employer may lawfully use the rule to prohibit protected concerted activity or to discipline employees engaged in protected concerted activity.

### **A. Civility Rules**

The Board has placed this type of rule in Category 1. The following examples were the civility rules at issue in *William Beaumont Hospital* that were incorporated by reference in *Boeing*:

- “Conduct . . . that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated.”<sup>7</sup>
- “Behavior that is rude, condescending or otherwise socially unacceptable” is prohibited.<sup>8</sup>
- Employees may not make “negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors.”<sup>9</sup>

In addition, the following examples should be considered lawful civility-type rules:

- “Disparaging . . . the company’s . . . employees” is prohibited.<sup>10</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 1 (Apr. 13, 2016) (incorporated by reference in *Boeing Co.*, 365 NLRB No. 154, slip op. at 5 n.15).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, slip op. at 21–22.

- Rude, discourteous or unbusinesslike behavior is forbidden.
- Disparaging, or offensive language is prohibited.
- Employees may not post any statements, photographs, video or audio that reasonably could be viewed as disparaging to employees.

*Impact on NLRA Rights:* In *Boeing* the Board found that these types of rules, when reasonably interpreted, would not prohibit or interfere with the exercise of rights guaranteed by the Act. Indeed, the vast majority of conduct covered by such a rule, including name-calling, gossip, and rudeness, does not implicate Section 7 at all. In addition, the Board held that even if some rules of this type could potentially interfere with Section 7 rights, any adverse effect would be comparatively slight since a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility.<sup>11</sup> For instance, while protected concerted activity may involve criticism of fellow employees or supervisors, the requirement that such criticism remain civil does not unduly burden the core right to criticize. Instead, it burdens the peripheral Section 7 right of criticizing other employees in a demeaning or inappropriate manner.

As Chairman Miscimarra noted in his dissent in *Cellco Partnership*, the reason a rule against disparaging coworkers should be lawful is that “disparagement” describes statements that attack the person. To “disparage” means “to describe someone as unimportant, weak, bad, etc.” or “to lower in rank or reputation,” and its synonyms include “badmouth,” “belittle,” and “put down.”<sup>12</sup> Employees are capable of exercising their Section 7 rights without resorting to disparagement of their fellow employees; thus the impact of such a rule on NLRA-rights is comparatively slight.<sup>13</sup>

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<sup>10</sup> *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 11–12 (Feb. 23, 2017) (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that under his *William Beaumont* test the rule was lawful).

<sup>11</sup> *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15 (Dec. 14, 2017).

<sup>12</sup> *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 12 (Feb. 23, 2017).

<sup>13</sup> *Id.*

*Legitimate Justifications:* The Board has held that this rule type advances substantial employee and employer interests, including the employer’s legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity, patient care (in hospitals), and other legitimate business goals.<sup>14</sup> In addition to healthcare facilities, industries that rely on close teamwork or that are particularly vulnerable to toxic work environments may have further legitimate interests in promoting civility. In addition, nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace.

*Balance:* Given the substantial legitimate interests behind such rules, and the little, if any, effect on NLRA rights, the Board has placed civility rules in Category 1.

### **B. No-Photography Rules and No-Recording Rules**

The Board in *Boeing* placed no-photography rules in Category 1. The specific rule at issue there was:

- “[U]se of [camera-enabled devices] to capture images or video is prohibited . . . .”<sup>15</sup>

No-recording rules should similarly fall in Category 1. Such rules include:

- Employees may not “record conversations, phone calls, images or company meetings with any recording device” without prior approval.<sup>16</sup>
- Employees may not record telephone or other conversation they have with their coworker, managers or third parties unless such recordings are approved in advance.

*Impact on NLRA Rights:* The Board in *Boeing* determined that no-photography rules have little impact on NLRA-protected rights, since photography is not central to

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<sup>14</sup> *Boeing Co.*, 365 NLRB No. 154, slip op. at 17–19, 19 n.89.

<sup>15</sup> *Id.*, slip op. at 5.

<sup>16</sup> *Whole Foods Market Inc.*, 363 NLRB No. 87, slip op. at 6–7 (Dec. 24, 2015) (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that the rule was lawful).

protected concerted activity.<sup>17</sup> However, such rules may occasionally chill employees from taking pictures of their protected concerted activity, or from taking pictures of their working conditions as part of a larger protected concerted campaign. No-recording rules implicate the same logic, but it is also possible that no-recording rules may *promote* Section 7 activity by encouraging open discussion and exchange of ideas.<sup>18</sup>

*Legitimate Justifications:* Employers have a legitimate and substantial interest in limiting recording and photography on their property. This interest may involve security concerns, protection of property, protection of proprietary, confidential, and customer information, avoiding legal liability, and maintaining the integrity of operations.<sup>19</sup> Restricting audio recordings can also encourage open communication among employees.<sup>20</sup>

*Balance:* Given the substantial legitimate interests behind such rules, and the small risk that the rules would interfere with peripheral NLRA-protected activity, the Board has deemed no-photography rules always lawful. The same analysis applies to no-recording rules, and thus such rules should be in Category 1.

Note that, although the Board in *Boeing* addressed rules prohibiting the use of camera-enabled cell phones to take photographs, it did not address the use or possession of cellphones for communication purposes. The Division of Advice has concluded that a ban on mere possession of cell phones at work may be unlawful where the employees' main method of communication during the work day is by cell phone.

**C. Rules Against Insubordination, Non-cooperation, or On-the-job Conduct that Adversely Affects Operations**

Almost every employer with a rulebook has a rule forbidding insubordination, unlawful or improper conduct, uncooperative behavior, refusal to comply with orders or perform work, or other on-the-job conduct that adversely affects the employer's operation. Some examples are:

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<sup>17</sup> *Boeing Co.*, 365 NLRB No. 154, slip op. at 19.

<sup>18</sup> *Whole Foods Market Inc.*, 363 NLRB No. 87, slip op. at 6–7 (Miscimarra dissenting).

<sup>19</sup> *Boeing Co.*, 365 NLRB No. 154, slip op. at 17–19.

<sup>20</sup> *Whole Foods Market Inc.*, 363 NLRB No. 87, slip op. at 7 (Miscimarra dissenting).

- “Being uncooperative with supervisors . . . or otherwise engaging in conduct that does not support the [Employer’s] goals and objectives” is prohibited.<sup>21</sup>
- “Insubordination to a manager or lack of . . . cooperation with fellow employees or guests” is prohibited.<sup>22</sup>

*Impact on NLRA Rights:* The vast majority of activity covered by these rules is unprotected, and employees would not usually understand such rules as covering protected concerted activity. Indeed, even prior to *Boeing* the Board has always been careful to note that employees would not, without more, read rules against improper or unlawful conduct as applying to Section 7 activity.<sup>23</sup> Even rules that prohibit employees from engaging in any conduct that merely “does not support” the employer would not reasonably be understood by employees to cover Section 7 activity, absent language that explicitly lists examples of protected concerted activity that is covered.<sup>24</sup>

*Legitimate Justifications:* An employer has a legitimate and substantial interest in preventing insubordination or non-cooperation at work. Furthermore, during working time an employer has every right to expect employees to perform their work and follow directives.

*Balance:* Where insubordination rules lack any reference that would indicate Section 7 activity is forbidden, the Board should not presume any impact on NLRA rights. And, even where there is some ambiguity, it is likely that the employer’s interest in maintaining discipline and production will outweigh any chilling effect.<sup>25</sup>

Note, however, that rules that indicate that the employer could consider protected concerted activity to be a type of unsupportive conduct are in Category 2 below.

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<sup>21</sup> *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

<sup>22</sup> *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 459 n.3 (2014) (finding this rule lawful under *Lutheran Heritage*).

<sup>23</sup> See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–89 (1999).

<sup>24</sup> See *Lafayette Park Hotel*, 326 NLRB at 825.

<sup>25</sup> See *Boeing Co.*, slip op. at 7 n.30 (Dec. 14, 2017) (citing *Lafayette Park Hotel*, 326 NLRB at 825) (noting approvingly Member Hurtgen’s concurrence that even where a rule chills the exercise of Section 7 rights, it can nonetheless be lawful if it is justified by significant employer interests, like a ban on solicitation during working time).

#### **D. Disruptive Behavior Rules**

Disruptive behavior rules are also common in employer handbooks. Some examples of such rules are:

- “Boisterous and other disruptive conduct.”<sup>26</sup>
- Creating a disturbance on Company premises or creating discord with clients or fellow employees.
- Disorderly conduct on Hospital premises and/or during working hours for any reason is strictly prohibited.

*Impact on NLRA Rights:* The majority of conduct covered by this type of rule is unprotected roughhousing, dangerous conduct, or bad behavior. Thus, employees often will not interpret such rules as applying to Section 7 activity.<sup>27</sup> On the other hand, some such rules might, depending on the context, appear to apply to classic core protected concerted activity such as walk-outs, protests, picketing, strikes, and the presentation to management of petitions or grievances, since these activities are often considered disorderly or disruptive. Indeed, such activity is often engaged in *because* it is disruptive—in order to draw attention, underline seriousness, or be used as an economic weapon. Nevertheless, even if employees would read such rules as applying to strikes and walkouts (as opposed to only unprotected conduct), employees would not generally refrain from such activity merely because a rule bans disruptive conduct. Rule or no, in these circumstances employees know that they are discomfiting their employer and are acting anyway.<sup>28</sup>

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<sup>26</sup> *Component Bar Products*, 364 NLRB No. 140, slip op. at 6 (Nov. 8, 2016) (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that under his *William Beaumont* test the rule was lawful) (citing *Tradesmen International*, 338 NLRB 460, 460–61 (2002) (finding lawful rule that prohibited “disloyal, disruptive, competitive, or damaging” conduct)).

<sup>27</sup> See, e.g., *First Transit, Inc.*, 360 NLRB 619, 629 (2014) (finding under *Lutheran Heritage* that in context, rule banning “fighting . . . and other disruptive behavior” would not be read as applying to Section 7 activity).

<sup>28</sup> In the classic example of *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), for instance, it is exceedingly unlikely the employees would have stopped to consider a rule against disruptions before walking out, since they knew already that their employer did not wish them to do so.



*Legitimate Justifications:* Rules of this type discourage conduct that would result in injury to employees and others. Such rules enhance workplace productivity and safety by preventing fighting, roughhousing, horseplay, tomfoolery, and other shenanigans. Depending on the workplace, such rules may also address issues created by yelling, profanity, hostile or angry tones, throwing things, slamming doors, waving arms or fists, verbal abuse, destruction of property, threats, or outright violence.

*Balance:* This type of rule clearly applies most directly to the employer's substantial interests in safety and productivity, and employees would reasonably understand the rule not to be about protected concerted activity. Moreover, even if employees did understand rules of this type to apply to protected concerted activity, the rule likely would not chill employees from engaging in such activity due to the nature of the activity covered. Accordingly, the legitimate interests advanced by such rules outweigh the potential adverse impact on Section 7 activity caused by the mere maintenance of the rule.<sup>29</sup>

Note that a no-disruption rule may not be applied to discipline employees for a strike or walkout in some circumstances. Furthermore, no-disruption rules that explicitly ban walk-outs or strikes are not Category 1 rules.

#### **E. Rules Protecting Confidential, Proprietary, and Customer Information or Documents**

Certain types of confidentiality rules also belong in Category 1, e.g., rules banning the discussion of confidential, proprietary, or customer information that make no mention of employee or wage information:

- “[I]nformation concerning customers . . . shall not be disclosed, directly or indirectly” or “used in any way.”<sup>30</sup>
- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendor, or customers.

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<sup>29</sup> See *Component Bar Products*, 364 NLRB No. 140, slip op. at 6 (Miscimarra, dissenting, applying his *William Beaumont* dissent to a disruption rule).

<sup>30</sup> *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (June 10, 2016) (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that under his *William Beaumont* test the rule was lawful).

- “Divulging Hotel-private information to employees or other individuals” is prohibited.<sup>31</sup>
- No unauthorized disclosure of business secrets or other confidential information.

*Impact on NLRA Rights:* The vast majority of conduct affected by these types of rules is unrelated to Section 7. Even under *Lutheran Heritage*, a broad ban on discussing confidential or proprietary information, or trade or business secrets, was not thought to affect Section 7 rights unless terms and conditions of employment were specifically included.<sup>32</sup>

As for a ban on discussing customer information, the terms of an employer’s customer relationships are not subject to collective bargaining, and employees would not generally understand this type of rule as applying to legitimate public relations campaigns or boycotts.<sup>33</sup> Even if employees considered a particular rule of this type to apply to protected conduct, any impact would only affect peripheral rights. To the extent employees may sometimes concertedly engage in NLRA-protected activity that implicates customer information, such as contacting customers about a labor dispute, such conduct usually only occurs in limited circumstances as part of a broader campaign, and must accord with *Jefferson Standard* in order to be protected. Moreover, even if employees so interpreted a rule, it would be unlikely to cause employees to refrain from engaging in a boycott or PR campaign entirely. Any effect would be on a peripheral right to use customer information to better implement or focus such a campaign.

In addition, employees do not have a right under the Act to disclose employee information obtained from unauthorized access/use of confidential records, or to remove records from the employer’s premises.<sup>34</sup> Accordingly, where the rule is specifically about accessing or disclosing confidential employee records or documents (as opposed to disclosing employee information), the rule will also not affect Section 7 rights.

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<sup>31</sup> *Lafayette Park Hotel*, 326 NLRB 824, 824 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999)

<sup>32</sup> *See id.* at 826; *Super K-Mart*, 330 NLRB 263, 263 (1999).

<sup>33</sup> *Schwan’s Home Service*, 364 NLRB No. 20, slip op. at 16 (Miscimarra dissenting).

<sup>34</sup> *See Macy’s, Inc.*, 365 NLRB No. 116, slip op. at 3 (Aug. 14, 2017); *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 8 n.28, 8–9 (Feb. 23, 2017) (Miscimarra, dissenting in part and concurring in part).

*Legitimate Justifications:* Employers have an obvious need to protect confidential and proprietary information, as well as customer information. Customer information may include records of past purchases, which may affect an employer's decisions concerning inventory and marketing, among other things. Customers also routinely provide businesses with their personal information, such as credit card numbers, with the reasonable expectation that the business will protect that information. Employers have a compelling interest in prohibiting the disclosure of such information to protect their business reputation and avoid significant legal liability.<sup>35</sup>

*Balance:* Given the substantial legitimate interests behind such rules, and the little, if any, adverse impact on NLRA-protected activity, these rule types should be in Category 1.<sup>36</sup>

#### **F. Rules against Defamation or Misrepresentation**

Rules prohibiting defamation or misrepresentation should be placed in Category 1, notwithstanding that defamation that occurs in the course of Section 7 activity is legally protected if not engaged in with *New York Times*<sup>37</sup> malice. Examples of such rules are:

- “[M]isrepresenting the company’s products or services or its employees” is prohibited.<sup>38</sup>
- Do not email messages that are defamatory.

*Impact on NLRA Rights:* Much like civility rules, rules banning defamation will not likely cause employees to refrain from protected concerted activity. The vast majority of conduct covered by these rules is unprotected. Even concerted defamatory speech to improve working conditions can be unprotected if the defamation is

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<sup>35</sup> See *Schwan’s Home Service*, 364 NLRB No. 20, slip op. at 16 n.34 (Miscimarra, dissenting in part) (noting that Target had incurred \$162 million in expenses as a result of a data breach involving customer information).

<sup>36</sup> *Id.*

<sup>37</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1963).

<sup>38</sup> *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 10 (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that under his *William Beaumont* test the rule was lawful).

intentional.<sup>39</sup> And, notwithstanding the technical legal definition of “defamation,” in general parlance that term is synonymous with making intentionally false and disparaging statements. Similarly, “misrepresentation,” while perhaps not necessarily being malicious, is defined as a false statement “usually with an intent to deceive or be unfair.”<sup>40</sup> Employees will generally understand that these types of rules do not apply to subjectively honest protected concerted speech. As the Board noted in *Boeing*, employee rules should not be expected to be perfect, especially where requiring such perfection negatively affects employees themselves because it prevents employees from knowing their employer’s conduct rules.<sup>41</sup>

Even if such a rule affects employee speech, it only affects employees’ peripheral Section 7 right to engage in unintentional defamation of coworkers or supervisors. Employees might use a bit more caution when speaking, but these rules would not generally engender the self-censorship the Supreme Court was concerned about in *Linn*.<sup>42</sup>

*Legitimate Justifications:* Employers have a significant interest in protecting themselves, their reputations, and their employees from defamation and slander. Businesses often live or die off their reputation, and there is a reason that under normal circumstances a party can recover civil damages for defamation. Promoting honesty among employees creates a healthy working environment and reduces the chance of a defamation lawsuit against the company. The justifications for this rule also overlap with the justifications for civility rules, in that harming coworker reputations can create a toxic workplace atmosphere.

*Balance:* While a rule against defamation, slander, or misrepresentation may technically cover some activity that is protected by the law, the majority of behavior it covers is unrelated to the NLRA.<sup>43</sup> Like civility rules, these types of rules would

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<sup>39</sup> See *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 61 (1966).

<sup>40</sup> *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 10 (Miscimarra dissenting) (quoting <http://merriam-webster.com/dictionary/misrepresent> (last viewed Feb. 24, 2017)).

<sup>41</sup> *Boeing Co.*, 365 NLRB No. 154, slip op. at 2 (noting the negative effects of requiring employers to anticipate and carve out every possible overlap with NLRA coverage).

<sup>42</sup> See *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. at 58–63.

<sup>43</sup> See *id.*

generally not affect core Section 7 rights, and to the extent they do, the chilling effect is outweighed by legitimate and substantial interests.<sup>44</sup> It is thus unreasonable to require employers to understand and articulate the difference in their rules between malicious defamation and simple defamation.

### **G. Rules against Using Employer Logos or Intellectual Property**

Traditional rules prohibiting employee use of employer logos and trademarks also belong in Category 1. Examples of such rules are:

- Employees are forbidden from using the Company’s logos for any reason.<sup>45</sup>
- “Do not use any Company logo, trademark, or graphic [without] prior written approval.”<sup>46</sup>

*Impact on NLRA Rights:* Most activity covered by this rule is unprotected, including use of employer intellectual property for unprotected personal gain or using it to give the impression one’s activities are condoned by the employer. Although some protected concerted activity might fall under such a rule, including fair use of an employer’s intellectual property on picket signs and leaflets, usually employees will understand this type of rule as protecting the employer’s intellectual property from commercial and other non-Section 7 related uses.

Furthermore, even where employees would reasonably interpret such a rule to apply to fair use of an employer’s logos as part of protected concerted activity, it is unlikely that the rule would actually cause them to refrain from so using them. The types of protected concerted activity implicated by these rules are usually fairly advanced in terms of employee organization, and employees are unlikely to be deterred from fair use of a logo on a picket sign by a rule in an employee manual.

Finally, even in the event employees did refrain from fair use of an employer’s logo or intellectual property, such chill would have only a peripheral effect on Section 7

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<sup>44</sup> See *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 11–12 (Miscimarra, dissenting).

<sup>45</sup> *Boch Honda*, 362 NLRB No. 83, slip op. at 1–2 (Apr. 30, 2015) (finding rule unlawful under *Lutheran Heritage*), enforced, 826 F.3d 558 (1st Cir. 2016).

<sup>46</sup> *Giant Food LLC*, Case 05-CA-064793, et al., Advice Memorandum dated Mar. 21, 2012, at 4 (finding that under *Lutheran Heritage* this rule was unlawfully overbroad).

rights. While employees might refrain from using the logo as part of their protected concerted activity, it would not stop the protected concerted activity itself.

*Legitimate Justifications:* Employers have a significant interest in protecting their intellectual property, including logos, trademarks, and service marks. Such property can be worth millions of dollars and be central to a company's business model. Failure to police the use of such property can result in its loss, which can be a crippling blow to a company. Employers also have an interest in ensuring that employee social media posts and other publications do not appear to be official via the presence of the employer's logo.

*Balance:* Because rules against the use of logos and intellectual property generally will not cause employees to refrain from NLRA-protected activity, and even if they did the employer's legitimate interests would outweigh the peripheral Section 7 rights at issue, this type of rule should be in Category 1.

#### **H. Rules Requiring Authorization to Speak for Company**

Rules requiring authorization to speak for the company or requiring that only certain persons speak for the company fall into Category 1. Examples of such rules are:

- The company will respond to media requests for the company's position *only* through the designated spokespersons.
- Employees are not authorized to comment for the Employer.

*Impact on NLRA Rights:* Where the rule merely regulates who may speak on behalf of the company, there will normally be no impact on Section 7 rights.

*Legitimate Justifications:* Employers have a significant interest in ensuring that only authorized employees speak for the company. Controlling a company's message in response to a crisis or other developing events can be vital to weathering the crisis, and doing so often demands that only a prepared spokesperson or public relations firm comments for the employer. This is especially true for media companies or other employers that regularly find themselves in the public eye.

*Balance:* Absent any impact on Section 7 rights, and in light of the substantial employer interests at stake, rules of this type should fall in Category 1.

## **I. Rules Banning Disloyalty, Nepotism, or Self-Enrichment**

Rules banning these types of conflicts of interest have generally been deemed lawful, even prior to *Boeing*:

- Employees may not engage in conduct that is “disloyal . . . competitive, or damaging to the company” such as “illegal acts in restraint of trade” or “employment with another employer.”<sup>47</sup>
- Employees are banned from activities or investments . . . that compete with the Company, interferes with one’s judgment concerning the Company’s best interests, or exploits one’s position with the Company for personal gain.

*Impact on NLRA Rights:* The Board has historically interpreted rules banning disloyalty and blatant conflicts of interest to not have any meaningful impact on Section 7 rights.

*Legitimate Justifications:* Employers have a legitimate and substantial interest in preventing conflicts of interest such as nepotism, self-dealing, or maintaining a financial interest in a competitor. Such usurpation of corporate opportunities, pitting the pecuniary interest of employees against their employer’s, can have a serious detrimental effect on an employer’s revenue. Conflicts of interest can also undermine a company’s reputation and integrity, and cause employees to doubt the fairness of personnel actions. Financial institutions, law offices, and other professional industries will likely have particularly significant reasons for avoiding these types of conflicts of interest.

*Balance:* Since rules banning these types of activity do not meaningfully implicate Section 7 rights, and are substantially justified by legitimate employer interests, these types of rules fall in Category 1.

Note that where a conflict of interest rule goes beyond restricting these types of activities, it will fall in Category 2 or 3, below.

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

Rules in this category are not obviously lawful or unlawful, and must be evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications.

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<sup>47</sup> *Tradesmen International*, 338 NLRB 460, 460 (2002).

Often, the legality of such rules will depend on context. In interpreting the context of rules, the Board has noted that general or conclusory prohibitions do not have to be perfect, and do not have to anticipate and catalogue every instance in which activity covered by the rule might be protected by Section 7.<sup>48</sup> Rather, such rules should be viewed as they would be by employees who interpret work rules as they apply to the everydayness of their job.<sup>49</sup> Other contextual factors include the placement of the rule among other rules, the kinds of examples provided, and the type and character of the workplace. Finally, the Board in *Boeing* noted that evidence that a rule has actually caused employees to refrain from Section 7 activity is a useful interpretive tool.<sup>50</sup>

Some of the rules in this category clearly would be read to preclude some Section 7 activity, and the key question then is whether the employer's particular business interest in having the rule outweighs the impact on Section 7 rights. In considering that question, the ease with which an employer could tailor the rule to accommodate both its business interests and employees' Section 7 rights should be a relevant factor.

In the absence of any Board jurisprudence applying *Boeing* to a Category 2 rule, Regions should submit all Category 2 rules to Advice. The submissions may be in the form of an email, outline, or brief memorandum. Regardless of format, the submission should include the rule at issue and any related rules, the employer's asserted justification for the rule, any evidence of the rule actually chilling employee protected conduct, and pertinent past enforcement of the rule. The submission should also include any factors raised by the parties or identified by the Region that weigh in favor of either the rule's negative impact on protected concerted activity or the employer's legitimate business interests furthered by the rule. Finally, the submission should include the Region's proposed balancing of the factors and recommended conclusion.

Some possible examples of Category 2 rules are:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment (*see* Section 1-I, above) and do not restrict membership in, or voting for, a union (*see* Section 3-B, below)

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<sup>48</sup> *See Boeing Co.*, 365 NLRB No. 154, slip op. at 9, n.41.

<sup>49</sup> *See Boeing Co.*, 365 NLRB No. 154, slip op. at 3, n.14 (Kaplan, concurring) (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)).

<sup>50</sup> *See id.*, slip op. at 15.



- Confidentiality rules broadly encompassing “employer business” or “employee information” (as opposed to confidentiality rules regarding customer or proprietary information, *see* Section 1-E, above, or confidentiality rules more specifically directed at employee wages, terms of employment, or working conditions, *see* Section 3-A, below)
- Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of employees, *see* Section 1-A, above)
- Rules regulating use of the employer’s name (as opposed to rules regulating use of the employer’s logo/trademark, *see* Section 1-G, above)
- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media *on the employer’s behalf*, *see* Section 1-H, above)
- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work, *see* Sections 1-C and 1-D, above, or rules specifically banning participation in outside organizations, *see* Section 3-B, below)
- Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements, *see* Section 1-F, above)

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

Rules in this category are generally unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on the rights guaranteed by the NLRA outweighs any justifications associated with the rule. Regions should issue complaint on these rules, absent settlement. However, if a Region believes that special circumstances render lawful a rule that normally would fall in Category 3, it should submit the case to Advice.

#### **A. Confidentiality Rules Specifically Regarding Wages, Benefits, or Working Conditions**

The Board has placed this type of rule in Category 3.<sup>51</sup> The following are examples of some confidentiality rules that Chairman Miscimarra stated would be unlawful under his *William Beaumont* test, and that should be included in Category 3:

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<sup>51</sup> *Boeing Co.*, 365 NLRB No. 154, slip op. at 15.

- Employees are prohibited from disclosing “salaries, contents of employment contracts . . . .”<sup>52</sup>
- Employees shall not disclose “any information pertaining to the wages, commissions, performance, or identity of employees of the Employer.”<sup>53</sup>

In addition, rules that expressly prohibit discussion of working conditions or other terms of employment should be considered Category 3 rules, for substantially the same reasons.

- Employees are prohibited from disclosing to “any media source” information “regarding employment at [Employer], the workings and conditions of [Employer], or any . . . staff member.”<sup>54</sup>

*Impact on NLRA Rights:* Most discussion of wages and benefits will likely be protected and concerted. Moreover, discussions and coordination between employees, unions, and others regarding working conditions and wages is a core NLRA right.

*Legitimate Justifications:* There are no legitimate interests in banning employees from discussing wages or working conditions that are sufficient to overcome Section 7 rights.

*Balance:* This type of rule has a serious adverse impact on the central NLRA right of employees to contact one another and discuss working conditions and employment disputes, which is not outweighed by any employer interest, and is thus always unlawful.<sup>55</sup>

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<sup>52</sup> *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.5 (June 14, 2016) (although the majority found this rule unlawful pursuant to *Lutheran Heritage*, Chairman Miscimarra, concurring, would have found it unlawful under his *William Beaumont* dissent).

<sup>53</sup> *Schwan’s Home Service*, 364 NLRB No. 20, slip op. at 17 (June 10, 2016) (Miscimarra concurring).

<sup>54</sup> *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.5.

<sup>55</sup> *Boeing Co.*, 365 NLRB No. 154, slip op. at 15.

**B. Rules Against Joining Outside Organizations or Voting on Matters Concerning Employer**

*Impact on NLRA Rights:* Rules regulating membership in outside organizations cover some unprotected activity, but also clearly encompass protected activity. A core aspect of protected concerted activity under the NLRA is that employees may desire to have “outside organizations,” specifically unions, represent them.<sup>56</sup> Where an employer’s conflict-of-interest policy includes a rule that would be interpreted as restricting membership or work for a union, it would naturally cause more timid employees to refrain from such activity.<sup>57</sup> Employees may be more reluctant to go to meetings, sign authorization cards, or join employee committees. For instance, in *Cellco Partnership*, Chairman Miscimarra, concurring with the Board majority, argued that under his *William Beaumont* test a rule banning membership in an outside organization that might interfere with work was unlawful, since employees would readily understand such a rule to apply to unions.<sup>58</sup> Similarly in *Cellco*, Chairman Miscimarra concurred with the Board majority that a rule requiring employees to remove themselves from discussing or voting on any matters concerning the employer was also unlawful.<sup>59</sup> Thus, bans or other limitations on membership in, or work for, outside organizations that would be interpreted as covering unions will have a significant impact on core rights under the Act.

*Legitimate Justifications:* Employers have a legitimate and substantial interest in preventing nepotism, self-dealing, fraud, or maintaining a financial interest in a competitor, and rules against these “conflict of interest” activities fall in Category 1, above. However, rules specifically prohibiting membership in outside organizations or participation in any “voting” concerning the employer do not address those concerns, or at least do not address them narrowly so as to accommodate legitimate concerns without infringing on significant Section 7 rights.

*Balance:* If a rule is so broad as to be reasonably read as banning joining a union, the impact on core Section 7 rights will be significant. Where the employer’s legitimate

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<sup>56</sup> *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 10 (Feb. 23, 2017) (Miscimarra, concurring).

<sup>57</sup> *See id.* (while the Board in this case found the conflict of interest rule unlawful under *Lutheran Heritage*, Chairman Miscimarra, in concurrence, would have found it unlawful under his *William Beaumont* test).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

goals can be served by a narrower rule, an overbroad rule should be unlawful. Because employers can achieve their goal of preventing self-dealing and other business conflicts of interest without banning membership in outside organizations, and because the right to join a union is a fundamental right under the Act, such a rule will always be unlawful.

Please contact the Division of Advice, or your AGC in Operations, if you have questions about this Memorandum.