

PUBLICATION

NLRB Establishes New Standard for Analyzing Employers' Policies

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In a significant victory for employers, the National Labor Relations Board (NLRB) has issued a decision creating a new framework for evaluating workplace rules that implicate the National Labor Relations Act (NLRA).

In December of 2017, the NLRB, which now has a Republican majority, revisited the standard used to evaluate the legality of workplace rules under the NLRA, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Under the old standard, articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), a workplace policy that on its face did not violate the NLRA was still illegal if an employee would "reasonably construe" the policy as restricting his or her rights under the NLRA. Further, the employer's justifications for having the policy were not part of the analysis, creating a very strict standard for employers.

Under the new standard, recently articulated in a December 2017 decision, *The Boeing Co.*, 365 NLRB No. 154 (2017), the inquiry is not limited to whether employees might "reasonably construe" a workplace rule as violating their rights under the NLRA. Instead, when faced with "a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights and (ii) legitimate justifications associated with the rule." If the employer's legitimate justifications for the rule outweigh its potential impact on employees' rights under the NLRA, the rule will be designated as lawful to maintain.

Further, the Board elected to "delineate three categories of employment policies, rules and handbook provisions" to inject some predictability into the balancing test outlined above and its operation in future cases. Those categories are as follows:

- 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.
- 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.

In the *Boeing* case, the Board was faced with a work rule that "restrict[s] the use of camera-enabled devices such as cell phones on [the employer's] property." The Board noted that "*Boeing's* no-camera rule does not explicitly restrict activity protected by Section 7 of the NLRA, it was not adopted in response to NLRA-protected

activity, and it has not been applied to restrict such activity." In upholding this workplace rule under the new standard, the Board found that Boeing's justifications for the rule, which were rooted in safety and security, were "legitimate" and "compelling." On the other hand, the Board determined that the rule's negative impact on protected rights was minimal. For example, if several employees want to conduct a protest, the rule would prevent them from photographing the protest but would not prevent the main protected activity – the protest itself. Thus, the Board held that the employer's justifications for the rule outweighed the potential adverse impact on protected rights such that the rule fell in Category 1 above and was found to be lawful.

This decision is good news for employers, as it provides clearer guidance on evaluating workplace rules that implicate the NLRA, including no-camera or recording rules, civility standards, and social media policies. If you are considering implementing or revising one of these policies or any similar workplace rule in light of the Board's recent decision, please contact the Baker Donelson attorney with whom you regularly work for guidance and more information about the new standards.