

# PUBLICATION

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## New Administration, New NLRB

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**Most people think of the National Labor Relations Board (NLRB), which administers the National Labor Relations Act (NLRA), as the board that governs unionized workplaces. However, the NLRB can regulate non-union employers to the extent that employees have the right under Section 7 of the NLRA to collectively discuss the terms and conditions of their employment. Under the Obama Administration, the NLRB was laser focused on employee handbooks and rules that could be "reasonably construed" by an employee to prohibit the exercise of NLRA rights. And some of the NLRB decisions were just nonsensical, such as the decision that held an employer could not maintain a rule that required employees to treat co-workers and customers with respect. So what test will the NLRB apply under the Trump Administration?**

Unlike a court of law, the NLRB is not bound by its prior decisions. As such, we often see the NLRB change course with its decisions based upon the presidential party in control. For example, in 2007, the NLRB under the George W. Bush Administration held that employees could not use employer email for "union business" in the *Register Guard* decision. In 2014, the Obama NLRB reversed course in the *Purple Communications* decision and held that employees who are otherwise provided with an employer email may use the employer's email system to engage in union and other protected concerted activity.

We are starting to see a significant swing in the NLRB under the Trump Administration.

In 2017, the NLRB issued its decision in the *Boeing Company* case. In that case, the NLRB announced a relaxed, new standard to apply when it reviews workplace rules to determine whether those rules violate employees' Section 7 rights. The focus will now be on a balance between the work rule's negative impact on "employees' ability to exercise their Section VII rights and the rule's connection to the employers' right to maintain discipline and productivity in the workplace." In June 2018, the Office of the General Counsel of the NLRB issued a memorandum providing guidance on handbook rules post-*Boeing* (the "Guidance"). Facially neutral workplace rules will now be divided into three categories. In the Guidance, the NLRB made clear that any workplace rule that specifically bans protected activity or that is issued directly in response to organizing activity will remain unlawful.

### Category One Rules: Lawful Under *Boeing*

Category One rules are facially neutral rules that are generally "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." Examples of Category One lawful rules include:

- civility rules (for example, "Rude, discourteous or unbusinesslike behavior is forbidden.");
- no photography or recording rules;
- insubordination rules;
- disruptive behavior rules;
- some confidentiality rules (for example "Do not disclose confidential financial data, or other non-public proprietary company information."); and

- rules against defamation or misrepresentation.

Identifying the above rules as lawful is a complete reversal of the NLRB's position on such rules as it had decided in its previously issued decisions.

### **Category Two Rules: Case-by-Case Scrutiny Under *Boeing***

Category Two rules are facially neutral 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 Two rules requiring a case-by-case analysis include:

- broad conflict of interest rules that do not specifically target fraud and self-enrichment;
- confidentiality rules broadly encompassing "employer business" or "employee information";
- rules regarding disparagement or criticism of the employer;
- rules regulating use of the employer's name; and
- rules generally restricting speaking to the media or third parties.

### **Category Three Rules: Unlawful Under *Boeing***

Category Three rules 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." Unlawful Category Three rules include confidentiality rules specifically regarding wages, benefits, or working conditions (e.g., a rule stating employees are prohibited from disclosing salaries or the contents of employment contracts is unlawful), and rules against joining outside organizations or voting on matters concerning the employers.

And there is possibly more good news. The *Purple Communications* decision may be overturned. As mentioned above, in that case, the NLRB held that employees who had been given access to their employer's email system for work-related purposes could use the employer email for the purposes of collective bargaining. In August 2018, the NLRB issued a notice of invitation to file briefs in *Caesar's Entertainment Corporation* concerning whether it should overturn *Purple Communications* and return to the previous holding in *Register Guard*. The announcement asked several questions to which the NLRB seeks input. The briefs are due by October 5, 2018. Stay tuned as more good news may be around the bend.

So what does all of this mean? In sum, employers will enjoy the benefits of a more employer-friendly NLRB under the Trump Administration and, therefore, should enjoy greater flexibility in writing and enforcing "*Boeing-approved*" workplace rules. Nevertheless, now is a good time to review your employee handbook to ensure compliance with the NLRB's Guidance. But as you review your rules, keep in mind that the legitimate interest behind any handbook policies should be clear, and it should outweigh any concerns that the rule could impact employees' Section 7 rights. We will keep you informed of further developments as the Trump NLRB is likely to continue its employer-friendly stance.