

# PUBLICATION

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## Post Boeing NLRB Guidance on Employee Handbook Rules Bring Common Sense and Flexibility to Employer Work Rules

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**On June 6, 2018, the NLRB's Office of General Counsel issued its Guidance Memorandum on Handbook Rules Post-Boeing. This guidance arose out of the NLRB's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017) which overruled its prior decision in *Lutheran Heritage Village -Livonia*, 343 NLRB 646 (2004).**

Since *Lutheran Village*, employers tried to discern the Board's distinction between permissible and impermissible policies, only to eventually conclude that they may be better off without an employee handbook or with a handbook which was not as robust as desired because it seemed that many of the policies were construed by the NLRB as being in violation of the NLRA.

Employment attorneys advising employers faced their clients' frustration with what seemed like legally mandated ignorance of common sense. This continued until the *Boeing* decision in December 2017, when after a change of administration the Board's newly formed majority, overruled *Lutheran Village's* standard to work rule evaluation. In *Boeing*, the NLRB's decision created clarity and predictability, long absent during the chaos wrought by *Lutheran Village*. This paper will describe the post-*Boeing* opportunities which the Board has given to employers to ensure their employee handbooks do not violate the Section 7 rights of its employees.

Section 7 of NLRA provides:

The rights of employees, both in union and non-union workplaces, are set forth principally in Section 7 of the NLRA, which provides in part as follows:

Section 7. Employees shall have 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Examples of the rights protected by this section are the following:

- Forming or attempting to form a union among the employees of a company.
- Joining a union whether the union is recognized by the employer or not.
- Assisting a union to organize the employees of an employer.
- Going out on strike to secure better working conditions.
- Refraining from activity on behalf of a union.

Section 8(a)(1) forbids an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Any prohibited interference by an employer with the rights of employees to organize, form, join, or assist a labor organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection, or to refrain from any or all of these activities, constitutes a violation of this section.

This is a broad prohibition on employer interference, and an employer violates this section whenever it commits any of the other unfair labor practices.

Employer conduct may, of course, independently violate Section 8(a)(1). Examples of some violations of Section 8(a)(1) are:

- Threatening employees with loss of jobs or benefits if they should join or vote for a union.
- Threatening to close down the plant if a union should be organized in it.
- Questioning employees about their union activities or membership in such circumstances as will tend to restrain or coerce the employees.
- Spying on union gatherings, or pretending to spy.
- Granting wage increases deliberately timed to discourage employees from forming or joining a union.

Under *Lutheran Village's* now overruled interpretation, an employer would be in violation of Section 7 of the NLRA if a charging party could establish that employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Under subsection (a) mentioned above, i.e., the "reasonably construe" test, the Board found unlawful those policies that employees MIGHT POSSIBLY interpret as prohibiting protected concerted activity permitted in Section 7, while ignoring an employer's lawful purposes in promulgating the rule. Most of the Board's decisions post-*Lutheran Village* and pre-*Boeing* involved this reasonably construe test.

The Board's application of the *Lutheran Village* reasonably construe test was often dependent on invisible distinctions. For example, the Board found unlawful those handbook rules that required employees to be respectful of others and the Company; prohibited employees from using loud, abusive or foul language; and recommended that employees not discuss HR investigations with other employees because, the Board reasoned, employees may construe the rules as validly limiting their right to organize or refrain from organizing under Section 7.

Despite the decisions, the Board found some provisions lawful, such as each employee is expected to work in a cooperative manner with management/supervisors, co-workers, customers and vendors; no abusive or threatening language to anyone on the company premises; and be thoughtful in all your communications and dealings with others. These examples and many others created almost insurmountable uncertainty. Employers were fearful that if they were found by the Board to have violated employees' Section 7 rights, the employees would be entitled to Section 7 rights to the employer's detriment.

Post-*Boeing* and the NLRB Guidelines issued in June 2018, the Board is required to balance: (i) the nature and extent of the potential impact on NLRA rights and (ii) legitimate justifications associated with the rules.

The *Boeing* decision and Guidelines established three categories of rules.

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

More specifically, the Board described these categories of Rules that the Board deems lawful to maintain only if (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 interpretation of the rule.

### **Civility Rules**

The Board has placed this type of rule in Category 1.

- Conduct that is inappropriate or detrimental to company operations or that impedes harmonious interactions and relationships will not be tolerated.
- Behavior that is rude, condescending or otherwise socially unacceptable is prohibited.
- Employees may not make negative or disparaging comments about the professional capabilities of an employee or physician to employees, physicians, patients, or visitors.

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

- Disparaging the company's employees is prohibited.
- 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.

### **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.

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.
- Employees may not record telephone or other conversations they have with their coworkers, managers or third parties unless such recordings are approved in advance.

### **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:

- Being uncooperative with supervisors or otherwise engaging in conduct that does not support the employer's goals and objectives is prohibited.
- Insubordination to a manager or lack of cooperation with fellow employees or guests is prohibited

### **Disruptive Behavior Rules**

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

- Boisterous and other disruptive conduct.
- 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

### **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:

- Information concerning customers shall not be disclosed, directly or indirectly or used in any way.
- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendor or customers.
- Divulging customer-private information to employees or other individuals is prohibited.
- No unauthorized disclosure of business secrets or other confidential information.

### **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* malice. Examples of such rules are:

- Misrepresenting the company's products or services or its employees is prohibited.
- Do not email messages that are defamatory.

### **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.
- Do not use any Company logo, trademark or graphic without prior written approval.

### **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.

### **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.
- 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.

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

Category 2 Rules that warrant individualized scrutiny in such cases 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.

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. Some examples of Category 2 Rules are:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union.
- Confidentiality rules broadly encompassing employer business or employee information (as opposed to confidentiality rules regarding customer or proprietary information, or confidentiality rules more specifically directed at employee wages, terms of employment or working conditions).
- Rules regarding disparagement or criticism of the *Employer* (as opposed to civility rules regarding disparagement of employees).
- Rules regulating use of the employer's name (as opposed to rules regulating use of employer's logo/trademark).
- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media *on the Employer's behalf*).
- Rules banning off-duty conduct that might harm the Employer (as opposed to rules banning insubordinate or disruptive conduct at work, or rules specifically banning participation in outside organizations).
- Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements).

Category 3 Rules that the Board deems to be unlawful to maintain because they would prohibit or limit NLRA approved conduct, and the adverse impact on NLRA rights is not outweighed by justification associated with the rule.

### **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**

- Employees are prohibited from disclosing salaries or contents of employment contracts.
- Employees shall not disclose any information pertaining to the wages, commissions, performance or identity of employees of the Employer.

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.

#### **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. 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.

In addition to these three categories, the Board can differentiate among different types of NLRA activities (some of which may be deemed central to the Act and others more peripheral), and business justification with a client, immediate relevance to employees or the business or those having more peripheral importance. The Board can also take into consideration different industries and work settings.

The Board also stated that it will continue to analyze the rules from the employees' perspective.

Under the new makeup of the Board, it is anticipated that the Board will review the handbook rules from the perspective of and obviously reasonable employee who is aware of his legal rights, but who also interprets work rules as they apply to the everydayness of his job.

The Board will no longer interpret ambiguities of any rule against the drafter and that ambiguities will be analyzed as described in the previous paragraph only if reasonable employees would read the rule as applying to Section 7 activity and not merely if employees might possibly read it that way.

The *Boeing* decision and NLRB Guidelines present opportunities for employers revising their employee handbooks, policies and rules which are fair, clear and predictable with respect to interpreting interference with Section 7 rights.

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