

Client Alert **Employment & Labor**

Dramatic Changes in the NLRB's Approach to Workplace Civility Rules Affect Union and Non-Union Employers

The National Labor Relations Board (“NLRB” or the “Board”) and its General Counsel have dramatically changed, in favor of employers, the standard that Board agents enforcing the National Labor Relations Act (“NLRA” or the “Act”) will use when determining whether workplace civility rules in human resource policies and employee handbooks violate the Act. This change affects virtually all employers, because the NLRA governs the workplace rules and employee handbooks of most employers, regardless of whether or not they are unionized.

From 2004 to 2017, the Board reviewed facially neutral civility rules contained in workplace policies and employee handbooks under the standard set in the NLRB’s *Lutheran Heritage Village-Livonia* decision. In essence, this test asked whether or not the rule in question *could* be interpreted in a way that interfered with an employee’s rights, under Section 7 of the Act, to engage in concerted protected activity concerning terms and conditions of employment. This test left most employer rules governing workplace behavior – for both union and non-union employees – subject to attack and invalidation under the NLRA.

In December 2017, the NLRB overruled its standard in *Lutheran Heritage* with the *Boeing* decision. In *Boeing*, the Board held that the relevant question was not whether the workplace rule *could* interfere with Section 7 rights, but rather whether the rule *would* interfere with such rights. This new *Boeing* standard sought to balance two considerations for each challenged workplace rule: (1) the rule’s negative impact on employees exercising their Section 7 rights, and (2) the employer’s legitimate justifications in maintaining the rule for workplace discipline and civility.

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Maintaining pro-employer momentum, on June 6, 2018, NLRB General Counsel Peter B. Robb published his new Guidance Memorandum, expanding on the *Boeing* standard and providing specific examples of workplace rules and policies that will now pass muster under the NLRA. The Guidance Memorandum identifies three different categories of workplace rules, providing examples for each category, which we detail below.

Category 1 Rules, according to the Guidance Memorandum, are workplace rules that are generally lawful, as their legitimate purpose outweighs any possibility that they may be interpreted to prohibit employees from exercising their Section 7 rights. This Category 1 includes:

- Neutral civility rules, barring rude, offensive, or disparaging language or behavior;
- Rules banning photography and recording, or devices for photography and recording, from the workplace;
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- Rules banning disruptive behavior, disorderly conduct, or creating disturbances or discord on premises;
- Rules protecting confidential, proprietary, and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against using the employer's logo or intellectual property without authorization;
- Rules requiring authorization to speak on behalf of the company; and
- Rules banning disloyalty, nepotism, or self-enrichment.

Category 3 Rules are those rules and policies that would be generally unlawful, due to the fact that their adverse impact on employees' Section 7 rights would outweigh any justification by the employer. This Category 3 includes:

- Confidentiality rules specifically prohibiting discussions of wages, benefits, or working conditions; and
- Rules prohibiting joining outside organizations or voting on matters concerning the employer.

According to the Guidance Memorandum, **Category 2 Rules** are less clear-cut. Rather, for this broad list of rules and policies, the General Counsel requires individualized assessment under the new *Boeing* standard. This Category 2 includes:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment (which would fall under **Category 1**), and do not restrict membership in, or voting for, a union (which would fall under **Category 3**);
- Confidentiality rules broadly encompassing “employer business” or “employee information,” rather than those relating to customer or proprietary information (which would fall under **Category 1**) or those that ban sharing wages, terms of employment, or working conditions (which would fall under **Category 3**);
- Rules regarding disparagement of an *employer*, rather than an *employee* (which would fall under **Category 1**);
- Rules regulating use of the employer’s name, rather than its logo or trademark (which would fall under **Category 1**);
- Rules restricting speaking to media or third parties, rather than rules restricting speaking *on behalf of employer* (which would fall under **Category 1**);
- Rules banning off-duty conduct that may be harmful to an employer, as opposed to rules banning insubordination or disruptive workplace conduct (which would fall under **Category 1**); and
- Rules against false or inaccurate statements, rather than defamatory statements (which fall under **Category 1**).

Highlighting the fact that the General Counsel’s new standard employs a balancing of interests test, the Guidance Memorandum explicitly recognizes that some of these rules “clearly would be read to preclude some Section 7 activity.” The Guidance Memorandum concludes that the ultimate question is “whether the employer’s particular business interest in having the rule outweighs the impact on Section 7 rights.” To that end, the General Counsel invites the NLRB’s Regions to submit any disputed rule, along with the parties’ positions regarding the rule’s chilling effects and legitimate justifications, to the Board’s Division of Advice, in the absence of any previous application of the *Boeing* standard to a **Category 2 rule**.

Employer Tips

The NLRB’s General Counsel’s new Guidance Memorandum should prompt employers to review their current human resource policies and employee handbooks. The Guidance

Memorandum provides to employers an opportunity to refine their rules governing workplace civility and behavior to comply with the new Guidance. Employers should remain vigilant with regard to two issues: (1) ensuring that any **Category 2 rule** is well-grounded in legitimate business considerations, and (2) ensuring that new standards only apply to the “maintenance of facially neutral rules,” rather than to enforcing rules in such a way that would ban protected concerted activity.

Employers seeking to modify or complement their current employee handbooks and workplace policies should review such revisions with legal counsel, to ensure that the new or modified workplace rules are consistent with the new Guidance and that the employer applies such new rules in a lawful manner. The following attorneys in our Employment and Labor Law Practice can assist you with such reviews.

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