

NLRB Strikes Down Restrictive Standard for Evaluating the Legality of Employee Handbook Policies and Workplace Rules

On December 14, 2017, the National Labor Relations Board ("the Board") overruled its previous standard for determining whether facially neutral handbook policies or workplace rules interfere with the exercise of rights protected by the National Labor Relations Act ("NLRA"). The Board believes its new standard should put a halt to a decade of Board decisions that invalidated "a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain." For example, the Board presumably will no longer find that handbook policies or workplace rules that advise employees to "work harmoniously," or conduct themselves at work "in a professional and civil manner," violate the NLRA.

Under the previous standard articulated by the Board in *Lutheran Heritage Village-Livonia*, a workplace rule is unlawful not only if it explicitly restricts employees' rights to engage in union or protected concerted activity, but also if employees would "reasonably construe" the language to prohibit such activities. Over the past decade, the Board has relied on this "reasonably construe" standard to strike down a number of common-sense workplace rules, such as those requiring employees to abide by basic standards of civility.

In *Boeing Company*, the Board overruled the "reasonably construe" standard and articulated a new balancing test for evaluating workplace rules that may potentially interfere with the exercise of NLRA rights. The new balancing test requires the Board to evaluate both (i) the nature and extent of the rule's potential impact on NLRA rights; and (ii) the legitimate justification(s) for the rule advanced by the employer. Rather than apply a "one-size-fits-all" analysis and protect NLRA rights at all costs, the Board will now "strike the proper balance" between business justifications and the invasion of NLRA rights.

In an effort to provide greater clarity to employers, unions and employees, the Board delineated the following three categories of workplace rules:

1. Rules that are 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

POSTED:

Dec 22, 2017

RELATED PRACTICES:

[Corporate Law](#)

<https://www.reinhartlaw.com/practices/corporate-law>

[Labor and Employment](#)

<https://www.reinhartlaw.com/practices/labor-and-employment>

RELATED SERVICES:

[Labor Relations](#)

<https://www.reinhartlaw.com/services/labor-relations>

RELATED PEOPLE:

[Robert K. Sholl](#)

<https://www.reinhartlaw.com/people/robert-sholl>

[Christopher K. Schuele](#)

<https://www.reinhartlaw.com/people/christopher-schuele>

outweighed by justifications associated with the rule, such as rules requiring employees to abide by basic standards of civility;

2. 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; and
3. Rules that are 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, such as rules prohibiting employees from discussing wages or benefits.

In the underlying case, Boeing appealed an administrative ruling that invalidated its "no-camera rule," which restricted employees from using camera-enabled devices on company property. Applying its new balancing test, the Board ruled that the no-camera rule did not violate the NLRA because Boeing's business justifications for the rule (e.g., preventing the disclosure of Boeing's proprietary information and limiting the risk of Boeing becoming the target of a terrorist attack) outweighed the "comparatively slight" impact on NLRA-protected activity.

The new balancing test articulated in *Boeing Company* will likely result in a more predictable, consistent and employer-friendly application of the NLRA to handbook policies and workplace rules. The Board may now give meaningful consideration to the real-world complexities existing in the workplace, an employer's particular work setting, and the employer's legitimate reasons for adopting a handbook policy or workplace rule. However, employers should remain cautious when drafting such policies and rules, especially those that address privacy and confidentiality.

If you have any questions about whether your handbook policies or workplace rules comply with the NLRA, contact [Rob Sholl](#), [Christopher Schuele](#) or your Reinhart attorney.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.