

Client Alert **Employment & Labor**

NLRB Ruling Provides More Deference to Employers with Workplace Policies

The National Labor Relations Board (NLRB) recently issued a decision that affords employers more flexibility for their handbook policies. The decision overturned NLRB precedent that facially neutral handbook policies or workplace rules were unlawful if employees could “reasonably construe” them to interfere with their right to engage in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). Under the prior standard, the NLRB deemed many policies, including confidentiality, civility and social media policies, that were not intended to limit employees’ rights under Section 7, unlawful even if an employer had a legitimate justification for the rule.

The Balancing Test

Going forward, the NLRB will apply a balancing test when evaluating the lawfulness of a facially neutral rule. It will weigh the nature and extent of the potential impact of the rule on the employee’s Section 7 rights **and** the employer’s legitimate justifications associated with the rule. The NLRB has stated that this new standard will obviate previous decisions that invalidated “a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain.” For instance, the NLRB now will most likely find workplace policies where employers advise employees to “work harmoniously” or conduct themselves in a “positive and professional manner” lawful, where they previously were considered a violation of the NLRA.

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The Recent NLRB Decision

The NLRB applied the new balancing test in its December 14, 2017 decision in *The Boeing Company*, when it considered whether Boeing lawfully maintained a no-camera rule prohibiting employees from using in the workplace camera-enabled devices, such as cell phones, without a valid business need and an approved camera permit. The policy did not explicitly restrict employees from discussing the terms and conditions of their employment, nor was the policy adopted in response to NLRA-protected activities or applied to restrict such activities.

Applying the new standard, the Board held that Boeing's no-camera policy was lawful because Boeing's business justifications for its restrictions on the use of camera-enabled devices on company property, including national security concerns, outweighed the rule's more limited adverse effect on an employee's exercise of Section 7 rights. Some of Boeing's justifications included the need for security protocols to maintain its accreditation as a federal contractor; the need to limit the risks that employees' personally-identifiable information would be released (like an employee badge that another person could recreate); and the need to limit the risk of Boeing becoming a target of a terrorist attack, inasmuch as pictures and video of its property could disclose any property vulnerabilities.

Under the new balancing test, most workplace rules will fall into three categories:

- Category 1 covers all lawful rules because they either (i) do not interfere with the exercise of NLRA rights or (ii) the employer's justifications for the rule outweigh any possibly adverse impact on protected rights.
- Category 2 includes rules that are lawful in some cases and, therefore, will warrant individualized scrutiny on a case-by-case basis as to whether the rules would interfere with NLRA rights, and if so, whether there is a legitimate justification for the rules.
- Category 3 consists of rules that are always unlawful as they prohibit or limit NLRA-protected conduct and the employer's justifications associated with the rules do not outweigh any adverse impact on workers' rights.

Employer Tips

The NLRB ruling applies to most employers in unionized and union-free workplaces, as it addresses Section 7 rights that all employees have regardless of whether the workplace

is unionized. In light of the ruling, employers that had previously removed or modified facially neutral policies on confidentiality, social media use, privacy and civility under the NLRB's prior standard may want to consider revising them if they believe they have a legitimate business justification for those policies.

The following attorneys in our Employment and Labor Law Practice Group can assist employers in drafting policies and answering questions in light of the NLRB's recent ruling.

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