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Striking A New Balance – The NLRB Abandons the Lutheran Heritage Test and Devises a New Standard for Assessing the Facial Validity of Neutral Work Rules

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In 2004, the National Labor Relations Board (NLRB) issued *Lutheran Heritage Village-Livonia*, 343 NLRB 646 ("*Lutheran Heritage*"), and held that the mere maintenance of a neutral work rule violated Section 8(a)(1) of the National Labor Relations Act (NLRA) if employees would reasonably construe the rule to prohibit union and other protected concerted activity (Section 7 conduct). For the purposes of this analysis, a neutral work rule is one that does not explicitly reference or restrict Section 7 conduct. In the ensuing years, primarily during the Obama administration, the Board relied on *Lutheran Heritage's* "reasonably construe" standard to invalidate countless neutral work rules to the point that practically every employer in America was placed at risk of being found to be in violation of the NLRA by virtue of the wording found in their employment agreements, employee handbooks and work rules.

On Thursday, in a decision called *The Boeing Company*, 365 NLRB No. 154 ("*Boeing*"), the new Republican NLRB majority articulated a new method for testing the facial validity of work rules, overturning *Lutheran Heritage*. In the *Boeing* Board's view, *Lutheran Heritage* needed to be replaced because its single minded focus on NLRA rights and its overly simplistic approach rendered it too difficult to apply, led to anomalous and inconsistent results and prevented the Board from giving meaningful consideration to the real world complexities associated with many employment policies, work rules and handbook provisions.

In *Lutheran Heritage's* stead, the *Boeing* Board announced a new standard that it will follow when the Board evaluates a facially neutral work rule that, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights. Under this new standard, the Board emphasized the Agency's duty to strike the proper balance between asserted business justifications and the invasion of employee rights, and stated that it will now evaluate two things when testing the facial validity of work rule language: (1) the nature and extent of the rule's potential impact on NLRA rules and (2) an employer's legitimate justification associated with the rule. In some instances, the impact of the work rule may be self-evident, or the justifications associated with particular rules may be apparent from the rule itself or the Board's experience with particular types of workplace issues. Parties may also introduce evidence regarding a particular rule's impact on protected rights or the work-related justifications for the rule and the Board may draw reasonable distinctions between or among different industries and work settings. The Board may also take into consideration particular events that may

shed light on the purpose(s) served by a challenged rule or on the impact of its maintenance on Section 7 conduct.

The *Boeing* Board identified three categories of work rules that would likely result from the new balancing test:

- **Category 1** will include rules that the Board designates to be facially lawful 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 1 rules are the no-camera in the workplace rule at issue in *Boeing* as well as rules calling for "harmonious interactions and relationships" and other rules calling for employees to abide by basic standards of civility.
- **Category 2** will include 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 3** will include those rules that the Board will designate as unlawful 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. As an example of such an unlawful rule, the *Boeing* Board cited a rule that prohibited employees from discussing wages or benefits with one another.

Boeing is welcome news for employers. It appears that gone are the days when the mere utterance of words found to be offensive by the Board are twisted into automatic, *per se* violations of the law. Instead, a more balanced and even-handed assessment will be applied. However, even with the reversal of *Lutheran Heritage* and the use of this new balanced approach, the mere maintenance of neutral work rules can still be found to interfere, restrain and coerce employees in the exercise of their Section 7 rights. Employers should assess their work rules in light of the new *Boeing* test to ensure that their rules either fall into Category 1 or are defensible under Category 2.

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