

NLRB Ruling in The Boeing Co. Establishes New Standards Governing Employee Handbook Rules and Policies

Article By:

Michael F. McGahan

One of the signatures of the Obama Board was an expansive application of the NLRA in the review and consideration of facially neutral workplace policies and procedures and a standard for review that gave little, or no, consideration to an employer's reasons for adopting the policy. In [*The Boeing Co.*](#), the NLRB overruled a decision by an earlier Board in *Lutheran Heritage Village*, 343 NLRB 646 (2004), and set aside that approach and articulated a new standard for determining whether facially neutral workplace rules, policies, and employee handbook provisions (collectively, "Work Rules") unlawfully interfere with employees' ability to exercise their rights under the NLRA.

The old standard provided that even if a Work Rule did not explicitly restrict Section 7 activities, it was still unlawful if employees could reasonably construe its language as prohibiting protected activity. Over the years of the Obama Board, the standard further evolved, and with the Board's announced policy of enforcing the NLRA, including application of this standard in non-union workplaces, many employers were surprised to find that their standard and common-sense Work Rules were subject to Board scrutiny and potentially violated the "reasonably construe" standard.^[1] With the prior Board's expanded interpretation of "reasonably construe"—and its findings that more and more facially neutral Work Rules violated the Act—employers repeatedly hastened to revise their Work Rules in an increasingly difficult attempt to meet the "reasonably construe" standard.

Under the Board's newly articulated test, announced in its *Boeing* decision issued in December 2017, when it considers a facially neutral Work Rule that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, it will continue its analysis and will *also* examine (i) the nature and extent of any potential impact on NLRA rights and (ii) the employer's legitimate justifications for the Work Rule. In particular, the Board will now differentiate between Work Rules that impact activities that are "central" to the Act, as opposed to those that are merely "peripheral." The Board will also now consider an employer's business justification for a challenged Work Rule (and, in so doing, will draw reasonable distinctions between different industries and work settings) and look at particular events that might shed light on the purpose(s) or impact of the challenged Work Rule.

In *Boeing*, the Board delineated three categories of Work Rules that, while not part of the test itself, will provide guidance to employers in future cases:

-
- **Category 1** will include Work Rules designated as *lawful* by the Board either because (i) when reasonably interpreted, the Work Rule does not interfere with statutory rights, or (ii) the Work Rule's potential adverse impact on protected rights is outweighed by the employer's justifications. For example, the "no-camera" rule at issue in the *Boeing* case is a Category 1 rule, because it had substantial justifications (i.e., it played an integral role in Boeing's security protocols and in allowing Boeing to comply with its duties as a federal contractor to prevent the disclosure of sensitive information), and any potential adverse impact on Section 7 rights would be slight. Similarly, the Board reaffirmed its holding in [Flagstaff Medical Center](#), 357 NLRB No. 65 (2011), which found a hospital's no-camera rule lawful because it was supported by "substantial patient confidentiality interests," as compared to only a "slight" potential impact on statutory rights. The Board announced that Work Rules requiring employees to abide by basic standards of civility are also considered Category 1 rules.
 - **Category 2** will include Work Rules that warrant *individualized scrutiny* to determine whether they would interfere with Section 7 rights and, if so, whether any potential adverse impact is outweighed by legitimate justifications.
 - **Category 3** will include Work Rules that are *unlawful* because they limit Section 7 activity and are not outweighed by any justification. A prohibition against employees discussing wages or benefits with one another is a Category 3 rule.

Going forward, the Board will decide on a case-by-case basis the types of Work Rules that fall into each category. Last month, before the issuance of *Boeing*, General Counsel Robb issued the [Mandatory Submissions Memo](#), which advises that the General Counsel's office will seek to "provide the Board with an alternative analysis" for cases involving Work Rules commonly found unlawful under the now-overruled *Lutheran Heritage Village* standard, including Work Rules requiring employees to maintain the confidentiality of workplace investigations or prohibiting the use of employer trademarks and logos. All employers should consult with their labor counsel to determine what changes to Work Rules may now be permissible.

Employers also should be aware of the following:

- New rules will be developed in future Board decisions. Therefore, employers should keep up to date on changes that will impact how they can now amend Work Rules.
- They should develop articulable and evidence-based business reasons to support their Work Rules.
- Because the Board will now make distinctions between different industries and work settings, it is possible that a Work Rule that is upheld in one setting may be struck down in another.
- The Board will still find that a facially neutral Work Rule adopted in spite of protected activity or applied discriminatorily against protected activity is a violation of the Act.

The *Boeing* decision did not alter the fact that Section 7 rights are enforceable in non-union workplaces.

[1] See *Boeing*, 365 NLRB No. 154, at 3 (noting that the "problems" with the *Lutheran Heritage Village* test have been "exacerbated by the zeal that has characterized the Board's application" of that test and, that "[o]ver the last decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain").

Source URL: <https://natlawreview.com/article/nlrb-ruling-boeing-co-establishes-new-standards-governing-employee-handbook-rules>