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NLRB's Division of Advice Gives "Advice" As to the Application of Boeing — When a Work Rule/Employment Agreement is Facially Valid Under the NLRA in Union and Union Free Workplaces

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In The Boeing Company, 365 NLRB No. 154 (2017), the National Labor Relations Board (NLRB) reassessed the standard it would apply when determining the facial validity of otherwise neutral work rules based upon a balancing between a given rule's negative impact on employee's ability to exercise their statutory rights and the rule's connection to an employer's right to maintain discipline and productivity in the workplace. For the purpose of applying this new balancing standard, the *Boeing* Board trifurcated all work rules into one of three distinct categories. First, a Category 1 rule is a work rule that does not prohibit or interfere with the exercise of statutory rights or one whose potential impact on statutory rights is relatively slight or outweighed by the business justification associated with the rule. According to *Boeing*, the maintenance of such rules is to be considered lawful. Next are Category 2 rules, which are neither "obviously" lawful nor unlawful and which may adversely impact NLRA-guaranteed rights. Under *Boeing*, their lawfulness is to be determined on a case-by-case basis and depends upon whether the rule's adverse impact on statutory rights is outweighed by the employer's interest in maintaining the rule. Finally, Category 3 rules are those that on their face prohibit or limit statutory rights and whose impact on statutory rights outweigh the business justifications associated with the rule. Category 3 rules are facially invalid, rendering their mere maintenance unlawful.

Even though, to date, the Board has remained silent on *Boeing*'s meaning and application, the Agency's General Counsel, Peter Robb, has not. On June 6, 2018, he issued GC Memo 18-04 to all of the Agency's Regional Directors, Officers-in-Charge and Resident Officers for the purpose of giving them "Guidance on Handbook Rule's Post-Boeing." In this memo, GC Robb assigned various stereotypical work rules into one of the three categories with instructions to submit questionable cases or novel "rule" issues to the GC's Division of Advice before making regional case determinations. While regions are encouraged to abide by this "Guidance," unfair labor practice investigations are matters of considerable discretion and whether and how this "Guidance" is read and actually followed varies greatly from one region and one investigator to the next. Thus, while certainly helpful authority in responding to a regional investigation of work rules, GC Memo 18-04 is nothing more than guidance and certainly not precedent that a region must follow.

This past week, the Agency's Division of Advice also spoke to *Boeing*'s application with the public release of two late 2018 "advice" memos by the Division's head, Associate General Counsel, Jayme Sophir While not binding on the Board and not official Board precedent, these memos address and render "advice" with respect to questions raised by the Agency's regional office during the processing of cases and, thus, operate to shape how regional offices will process similar cases in the future.

ADT

In ADT, LLC, dated July 31, 2018 and publicly released on March 14, 2019, the following rules were found to be facially valid and lawfully maintained:

1. **A dress code calling for the maintenance of a professional business-like appearance and**

prohibiting the wearing of any items of apparel with inappropriate commercial advertising or insignia — Found lawful because when viewed in context, employees would not reasonably understand the rule to apply to union insignia and the rule only reached those commercial logos and insignia that were inconsistent with a professional business-like appearance.

2. **A confidential information and information security rule calling on employees to "exercise a high degree of caution" in the handling of confidential information which was defined as proprietary information owned by or otherwise in the Employer's possession or control including "business plans, internal correspondence and customer lists, personally identifiable customer and employee information and HIPAA-related information and prohibiting those in positions supporting managers or performing HR or timekeeping functions and who may have access to personal information concerning employees confidential information about the Employer or its customers from discussing or divulging said information** — Found lawful because employees would not reasonably interpret that rule to restrict Section 7 communications or as precluding them from sharing employee names and addresses obtained without resort to an Employer's files and because the Employer had a legitimate business interest and, in some instances, a legal duty, to maintain the confidentiality of certain employee information

3. **A media relations rule focusing on how critical it is that the Employer communicate information about its activities consistently, accurately and in a timely fashion and requiring that all information provided to media, financial analysts, investors or any other person outside the Employer be provided only by the Employer's designated spokesperson or officer** — Found lawful because, given its context, employees would reasonably construe the rule as only limiting who may speak on the Employer's behalf, because the Employer had a significant interest in ensuring that only authorized employees speak for it and because the rule merely regulates who may speak on behalf of the Employer and does not restrict employee media appeals protected by the Act.

Found unlawful in *ADT* was a rule stating that **personal cell phones could be used on premises for "work-related or [only] critical, quality of life activities (defined as "communicating with service or health professionals who cannot be reached during a break or after business hours)" and prohibiting "[o]ther cellular functions such as text messaging and digital photography . . . during working hours"** — Found unlawful because the rule prohibited the use of personal phones at all times except for work -related or critical quality of life activities and because employees have a statutory right to communicate with each other through non-Employer monitored channels during lunch and break periods.

Nuance Transcription Services

Also released for publication on March 14, 2019, is an advice memo in Nuance Transcription Services, Inc., Case No. 28-CA-216065, dated November 14, 2018, in which Division of Advice found a **management directive requiring a complaining employee to participate in the investigation of wrong-doing unrelated to an unfair labor practice and stating that their future failure to do so would be considered insubordination for which they could be terminated to be facially valid** — Found to be lawful because, absent some language or context referencing an unfair practice investigation (which employees have a right not to participate in), the employee would not reasonably read the rule as applying to ULP investigations; instead they would interpret the rule to apply to employer investigations of workplace misconduct, and more specifically the complaint previously made by the employee.

However, other *Nuance* work rules were found unlawful. They include the following:

1. A handbook rule strictly **prohibiting the "solicitation for any non-Company business or activity using Company resources", stating that all of the Employer's electronic communications systems including email "are for business purposes only" but also permitting the Company's email system to be used for "incidental personal use" that did not include transmission of junk mail, chain letters, personal for-profit businesses or counterproductive messages that tie up system resources and are not considered in support of the Employer's objectives** — Found unlawful because under extant law[1], an employer who provides its employees with access to its email system as part of their work, must allow those same employers to make personal use of the email system during non-working time, i.e. meal or break periods and before and after work and because the carve out of messages that "are not considered in support of the [Employer] objective" could be read as a reference to union or protected concerted activity.

2. A work rule stating that **the Employer's handbook and its contents were confidential information and prohibiting the disclosure of any portion of it to others except for the Employer's employees and others affiliated with the Employer whose knowledge of the**

information was required in the normal course of business — Found unlawful as a Category 2 and/or 3 rule because it effectively precluded employees from discussing handbook policies regarding working conditions with unions and other third parties and because the rules adverse impact on statutory rights outweighed the employer's justification for the rule.

3. A handbook rule **restricting communications of payroll information and any other information not available to the public** — Found unlawful as a Category 3 rule because it could be read as prohibiting employees from discussing wages and benefits with each other or with third parties or in the alternative, as an unlawful Category 2 rule because of the Employer's failure to present a business justification for the rule that outweighed its adverse impact on statutory rights.

Employers should assess their work rules and employment agreements in light of the new *Boeing* test and recently issued Advice Memos to ensure that their rules either fall into Category 1 or are defensible under Category 2.

[1] The "extant" case law referred to in the advice memo is Purple Communications, Inc., 361 NLRB 1050, a case decided by the Obama Board in 2016. Prior to *Purple Communications*, the Board decision governing this area of the law was *Register Guard*, 351 NLRB 1110 (2007) which held that an employer could lawfully prohibit its employees from making personal use of the Employer's email system, provided that prohibition was non-discriminatory and not aimed at union or protected concerted activity. The extant law may be about to change and to return to *Register Guard*. Indeed, in a pending case now before the Board, *Caesars Entertainment Corporation*, Case No. 28–CA—060841 and speaking through a brief authored by this same Division of Advice, General Counsel Robb argued for the overturning of *Purple Communications* and a return to the earlier law that existed under *Register Guard*. If that should happen and provided the text pertaining to messages that are not considered to support the Employer's objective is removed from the text, then the handbook rule rejected in the recent advice memo might pass legal muster under *Boeing*.

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