

# NLRB Solidifies Boeing and Provides Guidance on Employer Workplace Rules

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Article By

[Brock Olson](#)

[Adam C. Abrahms](#)

[Epstein Becker & Green, P.C.](#)  
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As discussed in previous [blog posts](#) and [articles](#), the National Labor Relations Board (NLRB), in [Boeing Co.](#), overruled past precedent that had resulted in the invalidation of “commonsense [workplace] rules and requirements that most people would reasonably expect every employer to maintain.” *Boeing* sought to return the analysis to a more balanced approach in which workplace rules would no longer be struck down simply because such rules could *have* been more narrowly tailored or just because a hypothetical employee theoretically might construe them to conflict with the exercise of Section 7 rights.

On October 10, 2019, for the first time since *Boeing* was published, the Board had the opportunity to clarify and apply the analysis now required for facially neutral work rules in [LA Specialty Product Company](#). At issue in *LA Specialty Produce Company* was two workplace rules included in the employee manual for employer LA Specialty Produce Company.

## **The Importance of *LA Specialty Produce Company***

The true significance behind this decision is the Board's clarification and application of the *Boeing* two-part balancing test. The Board strongly reiterated and confirmed that under this test, the initial burden is on the General Counsel to prove that a facially neutral rule *would* in context be interpreted by a reasonable employee to potentially interfere with the exercise of his or her Section 7 rights. This is an important change from pre-*Boeing* decisions where a workplace rule would be struck down if it "could" be interpreted to violate an employee's Section 7 rights and where in application the Board seemingly placed the burden on the employer. As the Board pointed out, this resulted in the Board viewing challenged rules not from the perspective of a reasonable employee, but rather from that of traditional labor lawyers who have devoted their careers toward interpreting and applying the NLRA.

This change is noteworthy because a workplace rule will no longer be found unlawful simply "because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity, or because the employer failed to eliminate all ambiguities from the rule, an all-but-impossible task." Accordingly, employers now can establish reasonable work rules without fear of them being overturned because of some outlandish hypothetical.

Additionally, even if it is determined that a facially neutral rule would (not just could) potentially interfere with the exercise of NLRA rights, the Board will then balance the nature and extent of the potential impact on the NLRA rights and the employer's justification for the workplace rule. The rule will only be considered to violate the Act if the employer's justification for the rule is outweighed by the adverse impact on the rights protected by the Act. Thus, there is yet another check against an employer's workplace rule being deemed unlawful.

Lastly, but separate from the aforementioned analysis, *Boeing* provides a system for the Board to sort employer rules into three distinct categories in order to provide certainty and predictability regarding workplace rules. Therefore, over time, *Boeing* will allow for greater clarity in this area of NLRB law. In *LA Specialty Produce Company* the Board began that process.

## **Application of *Boeing* in *LA Specialty Produce Company***

The first rule at issue in *LA Specialty Produce Company* was a Confidentiality Rule which stated that: "Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [employer] including but not limited to client/vendor lists . . . ."

The Board began by acknowledging that employees have a right to appeal to third parties, including customers of their employer, for support in labor disputes. Nonetheless, the Board stated that it could not see how the Confidentiality rule here would interfere with this right as the rule only applied to the Respondent's own nonpublic, proprietary records. Moreover, the Board found that an objectively reasonable employee would not interpret this Confidentiality rule to prohibit or interfere with the exercise of their Section 7 Rights. Accordingly, the rule was

deemed lawful.

Importantly, the Board categorized rules that prohibit the disclosure of confidential and proprietary customer and vendor lists as Category 1(a) rules, which, in layman's terms, means the Board has deemed such rules lawful, as, when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights.

The second rule at issue was a Media Contact rule that stated: "Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization."

Once again, the Board began by acknowledging the employees' rights, which under the Act, generally protects employees when they speak with the media regarding working conditions, labor disputes, or other terms and conditions of employment. Reading the Media Contact rule as a whole, the Board held that a reasonable employee would understand that under this Media Contact rule, he or she would only be precluded from speaking *on behalf of* the Respondent when approached by media for a comment. Since employees do not have a right under the National Labor Relations Act to speak on behalf of their employers, the Board held that the rule did not potentially interfere with the exercise of employees' rights. Accordingly, the Board found the Media Contact rule lawful.

Again, as with the Confidentiality rule, the Board designated rules that prohibit employees from speaking to the media on behalf of their employees as *Boeing* Category 1(a) rules, and thus such rules are considered lawful.

## **Moving Forward**

While the Board warned that it has not given all client/vendor confidentiality rules or all media contacts rules a categorical stamp of approval, the significance of this decision is not the rules themselves but the Board's reinforcement and application of *Boeing*. This decision highlights that the Board will no longer allow commonsense rules to be struck down simply because they could have been more narrowly tailored or because of some far-fetched hypothetical in which a reasonable employee *could* interpret a rule as violating their rights under the Act. Rather, workplace rules will only be found in violation of the NLRA if they fail both parts of the two-part test established in *Boeing* and clarified in *LA Specialty Produce Company*.

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