Applying the Boeing Standard, NLRB Upholds Employer’s Policies Restricting Cell Phone Use, Non-Work Email Use and Disclosure of Confidential Information

Article By
Mark Theodore
Joshua S. Fox
Proskauer Rose LLP
Labor Relations Update

- Labor & Employment
- Administrative & Regulatory
- Litigation / Trial Practice
- All Federal

Saturday, February 22, 2020

Applying the facially neutral work rule test laid out in Boeing (see here), the Board recently reversed an Administrative Law Judge decision, concluding that the employer maintained lawful workplace rules restricting employee use of (i) cell phones in commercial vehicles, (ii) the company email server for purposes not related to work, and (iii) the disclosure of confidential business information. See Argos USA LLC d/b/a Argos Ready Mix, LLC, 369 NLRB No. 26 (Feb. 5, 2020).

Factual Background

The employer operates 300 ready-mix concrete facilities across the United States. Employees, including the truck drivers at issue in the case at the employer’s Naples, Florida facility, are subject to several employment policies.

First, employees are bound by the company’s “Cell Phone Policy,” which places certain restrictions on employees’ ability to use cell phones while working in
recognition of the “danger associated with using cell phones while driving.” Specifically, the policy provides that cell phones are not permitted in the cab of a commercial and/or heavy equipment vehicle.

Second, employees are required to abide by the employer’s “Electronic Communications Policy,” which mandates that the company’s email system is to be used for business purposes only and not personal purposes.

Finally, employees are required to sign an “Employee Confidential Information Agreement,” which prohibits employees from disclosing “confidential Company information” to which employees have access during their employment. “Confidential information” is defined broadly in the agreement to include, among many other things, earnings and employee information.

In 2017, the employer suspended and subsequently discharged an employee for suspected possession of a cell phone in his concrete truck in violation of the Cell Phone Policy. His termination occurred after an unsuccessful attempt by the employer and the union representing the Naples truck drivers to resolve the issue.

The employee then challenged the implementation of the Cell Phone Policy, as well as the other policies identified above.

**NLRB Reverses ALJ and Upholds Workplace Rules and Suspension/Termination of Employee**

Both the Board and ALJ applied the same standard for determining whether a facially neutral work rule, reasonably interpreted, would unlawfully interfere with, restrain or coerce employees in the exercise of their Section 7 rights. See *The Boeing Company*, 365 NLRB No. 154 (2017). Since the Boeing decision, the Board now evaluates the potential impact of the rule on Section 7 rights and the employer’s proffered justification; in so doing, the Board has delineated three categories of rules that represent classification of results from the Board’s application of the new test: category one (always lawful) because (a) the rule does not interfere with Section 7 rights or (b) the potential adverse impact on protected rights is outweighed by justifications associated with the rule); two (individualized scrutiny warranted); and three (always unlawful).

We summarize the Board’s findings below, and identify which category of rule the Board placed each of the policies at issue.

**Employer’s Cell Phone Policy Restricting Use While Driving Was Lawful**

Because the employer’s cell phone policy focuses on safe driving practices by prohibiting the presence of cell phones in the cabs of commercial vehicles and/or heavy equipment vehicles (weighing 10,000 pounds or more), the Board reversed the ALJ and found the policy lawful. The Board concluded that employees would not reasonably interpret the rule as interfering with their Section 7 rights, as the cell phone restriction does not prohibit employees from communicating during non-work hours. Moreover, the policy ensures the safety of drivers and the general public by
drawing awareness to the dangers of distracted driving and prohibiting the device that enables such behavior.

In finding that the policy was lawful (in Category 1(a)), the Board emphasized that “employees are not guaranteed the right to use every method of communication available to them to discuss their terms and conditions of employment.” Because the cell phone policy was lawful, the employer was justified in suspending and discharging the employee who violated the policy. (As an aside, the ALJ found virtually nothing in the employee’s testimony to be credible and so the judge’s decision rested exclusively on the lawfulness of the policy). The Board reversed the ALJ and upheld the suspension and discharge.

**Employer’s Electronic Communications Policy Limiting Use of Company Email Was Valid**

The Board again reversed the ALJ, but largely due to the change in NLRB precedent between the ALJ ruling and the instant Board decision. The ALJ applied *Purple Communications*, 361 NLRB 1050 (2014), and found that the employer unlawfully banned employee use of the company email system for personal use during non-work time. Since the ALJ decision, the Board reversed *Purple Communications*, in *Caesars Entertainment Corp.*, 368 NLRB No. 143 (2019), which reinstated the principle that employees have no statutory right to use employer email systems for Section 7 purposes in a typical workplace. Because *Caesars Entertainment Corp.* applies retroactively to all pending cases, the Board reversed the ALJ, holding that the employer’s facially-neutral policy that restricts employees’ personal use of company email systems is lawful.

**Confidentiality Agreement is Lawful under the Boeing Analysis**

The Board concluded that the employees would not reasonably interpret the confidentiality agreement to potentially interfere with the exercise of Section 7 rights, even though the agreement prohibits the disclosure of company information, including but not limited to, earnings and employee information. The Board reiterated that the analysis considers the perspective of an “objectively reasonable employee,” and the policy must be read as a whole. Given this backdrop, the Board concluded that because the policy focuses on the disclosure of the company’s proprietary business information, and does not specifically prohibit disclosure of employees’ wages, contact information or other terms and conditions of employment that would be generally known or accessible from other sources, the policy fit within Boeing Category 1(a).

**Board Hints That It Is Taking Aim At Recent Cases Requiring Bargaining Before Discipline**

The case contained an allegation that the employer violated its duty to bargain in good faith by not giving notice of its intent to discipline and discharge the employee for violating the use of cell phones. This rule, which did not so much overrule prior precedent as much as it created a new obligation, requires bargaining over discipline and discharge in first time contract situations. We have reported on this
issue [here](#) and [here](#). The Board in this case severed the allegation which is a sure sign that the new obligation will be eliminated in the near future.

**Takeaways**

The decision of the Board in this case demonstrates how even under the relaxed scrutiny of handbook provisions, reasonable minds can differ as to lawfulness of a policy. The ALJ and Board both applied *Boeing* to the policies at issue but came to opposite conclusions. Here the employee was completely discredited and so the case rested on the interpretation of a policy, which there is no suggestion was applied in a discriminatory fashion. This may suggest there is more work to be done in creating a legal standard to address common workplace policies.

Still, this decision is consistent with a recent line of cases applying *Boeing*’s work rule test to uphold routine common sense policies that an objectively reasonable employee would find do not interfere with his or her Section 7 rights to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. Most unions have actively avoided going to the NLRB over such policies in recent months hoping to avoid decisions such as this one.

This decision also provides several illustrative examples of the types of rules that will be upheld, particularly rules designed to limit distracted driving and enhance workplace safety. It bears watching whether another case with similar work rules in different workplace scenarios reaches the Board this term, so stay tuned!

© 2020 Proskauer Rose LLP.