

NLRB Adopts New Test for Evaluating Workplace Policies

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On the eve of former Chairman Philip Miscimarra's departure from the National Labor Relations Board (NLRB), the Board Thursday created a new test for determining the lawfulness of workplace policies, overturning the test articulated in its 2004 *Lutheran Heritage-Livonia* decision. In *The Boeing Company and Society of Professional Engineering Employees in Aerospace (Boeing)*, the Board rejected the more-than-decade-old "reasonably construe" test in favor of an assessment seeking to balance employer and employee interests.

In *Boeing*, the Board upheld an employer policy prohibiting cameras and the use of devices with cameras in the workplace without first demonstrating a business need and obtaining a permit. In reaffirming the policy, the Board found that the employer's justifications—including national security concerns—outweighed the potential impact on protected activity. This decision overturned *Lutheran Heritage*, which held that it was unlawful to maintain workplace rules that could be reasonably construed to chill employee exercise of rights protected by Section 7 of the National Labor Relations Act (NLRA). Under *Lutheran Heritage*, workplace policies having nothing to do with prohibiting or limiting protected conduct could still be found unlawful if a reasonable employee might construe the rules as discouraging protected activity.

The Board's decision in *Boeing* was foreshadowed by a partial dissent of then-member Miscimarra in the 2016 *William Beaumont Hospital* case, which advocated abandonment of the "reasonably construe" test in favor of one that included

consideration of employer justifications. *Boeing* largely tracks Miscimarra's dissent in *Beaumont*, finding the *Lutheran Heritage* test problematic because it invalidated neutral workplace rules and limited the Board's ability to apply its discretion in considering whether the mere existence of policies with substantial justifications outweighed what would be minimal, if any, impact on perhaps only peripherally protected activity.

Boeing establishes a new test for workplace policies, which requires evaluation of two factors: the nature and extent of the potential impact on Section 7 rights, and legitimate justifications associated with the rule. The *Boeing* test will aim to "strike the proper balance between asserted business justifications and the invasion of employee rights ... focusing on the perspective of the employee."

Boeing "provide[s] greater clarity and certainty to employees, employers, and unions" by classifying the work rules and policies into three categories. The first category includes rules designated as lawful because, as reasonably interpreted, they do not interfere with the exercise of Section 7 rights *or* because any potential adverse impact is outweighed by employer justifications. The second category includes rules warranting individualized scrutiny in order to conduct the balancing test where the rules are found to interfere with protected rights. The third category includes rules designated as unlawful because they prohibit or limit protected rights *and* the adverse impact is not outweighed by the rule's justifications.

Notably, *Boeing* maintains one aspect of *Lutheran Heritage*: although mere maintenance of a rule may not be unlawful, a challenge can still be made as to an employer's application of the rule. Where an employer applies a lawful rule to discipline employees who have engaged in protected activity, the application of it could violate the NLRA even when the rule on its face does not.

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