Cleared for Take-Off: NLRB Establishes New Balancing Standard for Evaluating Handbooks and Workplace Policies

Thursday, December 21, 2017

Recently, we reported that the “new” National Labor Relations Board (“NLRB” or the “Board”) has commenced the anticipated roll back of decisions and procedures rendered by the Obama Administration’s NLRB. On Friday, December 15, 2017, the NLRB issued another important decision with far-reaching implications for all employers.

In Boeing Company, 365 NLRB No. 154 (2017), the NLRB established a new standard for evaluating whether workplace rules, policies, or employee handbook provisions unlawfully interfere with employees’ exercise of rights under Section 7 of the National Labor Relations Act (“NLRA”). Under the new standard established in Boeing, the NLRB will balance the impact an employer’s proffered rule may have upon an employee’s Section 7 rights to engage in protected concerted activity against the employer’s business justification for the rule.

The NLRB indicated it would categorize the results of future decisions in three ways:

- **Category 1** will include rules the NLRB designates as lawful because (i) the rule, when “reasonably interpreted,” does not prohibit or interfere with the exercise of Section 7 rights; or (ii) the potential adverse impact on protected rights is outweighed by the employer’s business justification(s) for the rule.

- **Category 2** will include rules warranting individual scrutiny on a case-by-case basis as to whether the rule would prohibit or interfere with Section 7 rights, and if so, whether any adverse impact on employees’ protected conduct is outweighed by legitimate justifications.

- **Category 3** will include rules that the NLRB will designate as unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on employees’ Section 7 rights is not outweighed by legitimate business justifications. The Board specifically identified employer policies that would prohibit employees from discussing wages or benefits with each other as an example for this third category.

The three categories identified by the NLRB represent a classification of results from the NLRB’s application of the new test and are not part of the test itself. The NLRB will determine in future cases the types of additional rules that fall into each category.

The new balancing test established in Boeing Company overrules the “reasonably construe” standard in place since 2004. Under the “reasonably construe” standard, the NLRB could conclude that a proffered work rule violated the NLRA so long as an employee could “reasonably construe” the rule to interfere with their Section 7 rights. The Board’s new balancing test seeks to provide employees, employers and unions with greater clarity and certainty.

While it will take time to determine the full impact of the Boeing decision, the fact that the new balancing standard requires the NLRB to consider the business purpose of a rule is a remarkable shift in the Board’s evaluation of
workplace rules, policies and employee handbook provisions. In light of the new balancing test, employers should consider clearly articulating the business justification(s) for workplace rules, policies, and procedures, particularly those that could conceivably implicate rights arising under Section 7 of the NLRA.

© Polsinelli PC, Polsinelli LLP in California

Source URL: https://www.natlawreview.com/article/cleared-take-nlrb-establishes-new-balancing-standard-evaluating-handbooks-and