NLRB Delivers Holiday Gift to Employers in the Form of New Standard for Workplace Civility Rules

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As explained in this companion article, the National Labor Relations Board (NLRB) gave employers an early holiday gift with its reversal of the Obama-era joint employer test. But the Board had even more holiday cheer to spread to employers. On December 14, it overruled its 2003 decision in Lutheran Heritage Village - Livonia.

Lutheran Village, a case decided by the so-called Obama Board, held that any workplace rule that could be “reasonably construed” by an employee to restrict the exercise of rights protected by the NLRA was invalid. The Obama Board used this broad standard to strike down a whole series of employer rules governing workplace civility (read: “no profanity”) and policies prohibiting employees from making workplace recordings and photos. By the end of 2016, many in the employer community believed the NLRB would find that nearly any workplace policy could be read to have a potentially chilling effect on employees’ rights under the NLRA.

Today, however, there is a new Board in town, which is dominated by two recent appointees of President Trump, as well as the Republican holdover from the Obama Board, Philip Miscimarra. In the just-issued Boeing decision, the Board overruled an Administrative Law Judge’s (ALJ) finding that Boeing’s policy restricting the use of camera-enabled devices such as cell phones on its property violated employees’ NLRA rights. The ALJ found that the no-camera rule did not explicitly restrict activity protected by the NLRA, nor was it promulgated as a response to any NLRA-protected activity or applied to restrict any NLRA-protected activity. Despite these facts, by applying the standard under Lutheran Heritage, the ALJ found the no-camera policy was unlawful because employees “would reasonably construe” this policy to infringe on their Section 7 rights under the NLRA. In overruling the ALJ, the Board found the employer’s justification for the no-camera rule outweighed any potential negative effect on employees’ Section 7 rights.

In overruling Lutheran Heritage, the Board adopted a new standard. In the future, when evaluating workplace rules which on their face do not appear to restrict employees’ NLRA rights, the Board will use a balancing test. That test will weigh two factors:

(i) the nature and extent of the potential impact on NLRA rights; and

(ii) legitimate justifications associated with the rule.

This balancing test will consider such things as the type of protected activity potentially being harmed, different industries and work settings, and the circumstances that gave rise to a particular rule. In short, a defense contractor like Boeing ought to be able to have a no-camera rule as an important part of its security efforts, especially where there is no actual evidence of any harm to employees’ NLRA rights.

Going forward, employers have been given some breathing room to implement policies that have a legitimate business purpose. Employers will still have to be prepared, however, for the accusation that a particular rule inhibits NLRA rights. Employers must stand ready to meet the new balancing test by showing that business reasons outweigh any potential negatives.