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National Labor Relations Board Balances Analysis of Employer Policies and Work Rules

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On December 14, 2017, the National Labor Relations Board ("NLRB") returned to a balanced approach when analyzing facially neutral workplace rules and whether those rules violate the National Labor Relations Act ("NLRA"). The decision scraps a previous decision in *Lutheran Heritage Village-Livonia*, which created a subjective standard under which the Board has been finding as unlawful employer policies that "employees would reasonably construe . . . to prohibit Section 7 activity." The Board's recent decision, *The Boeing Company*, subjects the Board to a new standard, which requires the Board to balance an employer's justification for the rule with the likelihood that an employee would reasonably construe the language to prohibit Section 7 activity.

Prior to *The Boeing Company*, the Board found facially neutral work rules unlawful if employees might construe them to violate their ability to engage in protected concerted activity.

In doing so, the Board created a subjective standard to consider how an employee "might feel" and failed to consider an employer's rationale for implementing the rule. Examples of facially neutral policies that have previously been found by the Board to be unlawful include: policies prohibiting profanity or abusive behavior toward co-workers, policies encouraging employees to work harmoniously, policies requiring employees to behave in a positive or professional manner, and policies prohibiting photography and surreptitious audio or video recording in the workplace.

In *The Boeing Company*, the Board reviewed a policy set forth by Boeing, a federal contractor responsible for designing and manufacturing military and commercial aircraft, to protect Company information from dissemination. Boeing's work involves highly sensitive, even classified information. Specifically, Boeing instituted a blanket ban against camera-enabled devices on its premises to protect the information, but also to protect personally identifiable information, proprietary information, and to avoid security and safety risks. Boeing's policy read:

Possession of the following camera-enabled devices is permitted on all company property and locations except as restricted by government regulation, contract requirements or by increased local security requirements. However, the use of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security: [list of devices omitted].

The Administrative Law Judge initially found that the policy would reasonably tend to chill employees' exercise of Section 7 rights and that an employee would reasonably construe the language to prohibit Section 7 activity. The Board majority, however, disagreed and put an end to the standard established in *Lutheran Heritage*.

The Board overturned the Administrative Law Judge's decision finding that the "no-camera" rule is lawful. In doing so, the Board expressly overruled *Lutheran Heritage*. The Board found that prior NLRB decisions employing the *Lutheran Heritage* standard ignored employers' interests in maintaining certain workplace rules - a consideration expressly provided for in the NLRA and reinforced in Supreme Court precedent. The Board further stated that *Lutheran Heritage* required too much perfection in workplace rule and policy language, failing to take into consideration real life industrial facts and circumstances that may demand restrictive workplace rules.



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Accordingly, the Board announced a new standard:

In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

The Board further articulated three categories it intends to categorize facially neutral policy decisions into in the future: (1) rules which are lawful to maintain because they are not reasonably read to interfere with Section 7 rights, or have a potential impact that is so slight as to be outweighed; (2) rules which require individualized scrutiny to determine if they would interfere, or whether such interference might be outweighed by the justification for the rule; and (3) rules which are unlawful because the interference is not outweighed by business justifications.

The Board's new standard is beneficial for employers seeking to enforce facially neutral policies without running afoul of the NLRA. Further, the standard appears to resurrect the right of employers to establish work rules and discipline employees for disruptive/disrespectful behavior during work meetings. *The Boeing Company* decision reinstates a balance between an employer's interest in instituting policy and employees' interpretation of such policies chilling their Section 7 rights. While the Board will analyze an employer's intentions behind workplace policies moving forward, employers should continue to include disclaimers in their policies that the rules are in no way meant to interfere with employees' Section 7 rights. Likewise, employers must be prepared to reasonably justify work rules and policies with supporting documentation if necessary. Further, consideration of employee concerns and comments should not be discouraged.

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