NLRB Guides Employers on Handbook Rules Post-Boeing

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The National Labor Relations Board (NLRB) General Counsel's office has issued guidance in the aftermath of the NLRB's groundbreaking decision in *The Boeing Company*, 365 NLRB 154 (Dec. 14, 2017). *Boeing* established a new standard for workplace policies that balances employee rights to engage in protected concerted activity—such as to organize, bargain collectively or engage in other activities for mutual aid and protection—and a business's right to maintain discipline and productivity, and protect its property.

Boeing divided rules into three categories: (1) those that are generally lawful to maintain; (2) those warranting individualized scrutiny; and (3) those that are unlawful to maintain. (*Boeing* applies only to the maintenance of facially neutral rules. Rules that expressly ban protected activity—or are directly in response to organizing—remain unlawful.)

The guidance, Memorandum 18-04, which was issued June 6 by NLRB General Counsel Peter Robb, provides examples in each category.

Category 1: Rules That Are Generally Lawful to Maintain

These are rules that do not tend to infringe on employee rights—or only do so peripherally—and are outweighed by legitimate business justifications, such as

avoiding an unsafe and hostile working environment, and protecting company reputation and assets. Included are:

- Rules prohibiting uncivil behavior, such as name-calling, gossip, offensive language or rudeness;

- Rules banning photography and recordings at work, or requiring prior approval;

- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;

- Rules prohibiting disruptive behavior;

- Rules protecting confidential, proprietary, and customer information or documents;

- Rules against defamation or misrepresentation;

- Rules against using employer logos or intellectual property;

- Rules requiring authorization to speak for the company; and

- Rules banning disloyalty, nepotism, or self-enrichment.

Category 2: Rules Warranting Individualized Scrutiny

These rules must be evaluated on a case-by-case basis to determine whether they would interfere with protected rights, and, if so, whether that interference is outweighed by legitimate business justifications. Examples include:

- Broad conflict of interest rules that do not specifically target fraud and self-enrichment;

- Confidentiality rules that reference "employer business" or "employee information" broadly, rather than customer or proprietary information;

- Rules prohibiting disparagement or criticism of the employer;

- Rules regulating the use of the employer's name, rather than its logo or trademark;

- Rules generally restricting speaking to media or third parties;

- Rules banning off-duty conduct that might harm the employer, rather than insubordination or disruptive conduct at work; and

- Rules against making false and inaccurate statements generally, rather than making defamatory statements.

Category 3: Rules That Are Unlawful to Maintain

Rules in Category 3 are generally unlawful because they would prohibit or limit protected conduct and the impact on these rights would outweigh any business justifications. This category includes:

- Confidentiality rules on wages, benefits, or working conditions; and

- Rules against joining outside organizations or voting on matters concerning the employer, which would generally be interpreted as prohibiting union participation.

Employers should reevaluate their workplace rules and policies to ensure compliance with this memorandum, and keep these categories in mind as they draft these documents going forward.

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