

NLRB Turning Up the Heat Over Employee Handbooks

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In the midst of one of the hottest summers on record, the National Labor Relations Board ('NLRB' or the 'Board') is putting the heat on employers.

In a recent decision issued on August 2, 2023, the NLRB has assumed the role of "Handbook Police." In its patrol of policies, the NLRB has now made it harder for employers to

lawfully implement and justify certain workplace rules.

The NLRB's latest decision regarding workplace rules affects both unionized and non-unionized workplaces. After issuing a notice and invitation for a briefing period, the NLRB vacated the 2017 *Boeing* Standard to adopt a new, employee-friendly standard. This new standard will assess whether any challenged workplace rule has a reasonable tendency to chill employees from exercising their National Labor Relations Act ("NLRA") Section 7 rights.

The 2017 Boeing Standard

In 2017, the NLRB announced a standard for when evaluating the lawfulness of a facially neutral workplace rule. This standard has become known as the *Boeing* Standard. The *Boeing* Standard evaluates the nature and extent of a rule's potential impact on NLRA rights and the employer's legitimate justifications in enacting the rule. The Board further created a categorical classification system when evaluating workplace rules which is as follows: (a) "Category 1" are rules that are always lawful; (b) "Category 2" are rules that are sometimes lawful (c) and "Category 3" are rules that are always unlawful. The *Boeing* Standard usually found workplace rules lawful—without taking into account the rule's wording or the specific workplace context in which it is maintained.

The New Standard

The NLRB's decision overturns the employer-friendly standard and its subsequent categories and, instead, opts for a more employee-friendly approach. Now, workplace rules will be examined under the standard of whether an employee would "reasonably construe" the workplace rule or policy as chilling protected conduct under Section 7 of the NLRA.

What is "reasonable" will be examined from the viewpoint of an "economically dependent" employee who is "inclined to interpret an ambiguous rule [as] prohibit[ing] protected activity." From this perspective, virtually

any facially neutral rule could have the "tendency to chill" employees from exercising their rights. Thus, making the workplace rule presumptively unlawful.

However, employers will have the opportunity to rebut the presumption of unlawfulness if the employer is able to demonstrate that the workplace rule advances a ***legitimate and substantial business interest*** that the employer is unable to advance with a more narrowly tailored rule.

In applying the new standard, the NLRB will assess workplace rules on a case-by-case basis—abandoning the categorical approach established in *Boeing*. Factors considered during a case-by-case analysis will include the specific language of the rule, the employer's interest, the specific industry or workplace in which the rule is maintained, and a myriad of other factors that may have arisen in the case.

Another important aspect of this decision that employers should take note of is that the standard will be applied *retroactively*. This means that the Board can determine that a workplace rule created under the *Boeing* Standard is now unlawful.

Still, a determination of a single provision's unlawfulness does not invalidate an entire handbook.

Handbook Safe Harbor?

As general workplace rules may be difficult to narrowly tailor in order to advance a legitimate business interest, many employers may opt to provide a disclaimer noting that their policies are not intended to interfere with an employee's Section 7 rights. However, this might be insufficient.

The NLRB declined to rule on the sufficiency of a "safe harbor" provision and instead noted that the Board would "evaluate any explanation or illustrations contained in the rule regarding how the rule does not apply to Sec[ti]on 7 rights."

What does this mean? Well, as the dissent pointed out, we have to wait until the Board addresses a "safe harbor" provision in the future. Until then, employers should consult legal counsel to either add or update their "safe harbor" provisions.

Handbooks at Risk

Based on the NLRB's decision, a plethora of workplace rules are now likely unlawful—or, at least, subject to additional scrutiny. These suspect policies *might* include:

1. Workplace Civility Policies (policies that require coworkers to engage harmoniously with one another);
2. No Camera/No Video Policies;
3. Loitering Rules;
4. Social Media Restriction Policies;
5. Confidentiality of Workplace Investigations Policies;
6. Confidentiality/Non-Disclosure Rule; and
7. Media Contact Rule.

Still, the unlucky seven may be lawful *if* an employer can articulate that the workplace rule advances a legitimate and substantial business interest that is unachievable with a more narrowly tailored rule.

Employers Should Be Proactive

The NLRB has demonstrated its aggressiveness in attempting to eradicate rules that chill employees from exercising their rights. All employers should consider reviewing their policies **now** in an effort to avoid the

disciplinary penalties associated with an unfair labor practice.

While the Handbook Police continue to patrol policies, employers will need to ensure their workplace rules are narrowly tailored to their business interests in an effort to avoid being deemed unlawful. For guidance and review of handbook policies, employers should consult legal counsel.

Ward and Smith's labor and employment attorneys can help employers create policies that adhere to federal and state labor laws while still protecting their substantial business interests. Our team of experienced attorneys can provide guidance on a wide range of topics and ensure your handbook rules are effective, enforceable, and compliant with the NLRA. Contact us today to discuss your needs.

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