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With New General Counsel, NLRB Will No Longer "Robb" Employers from Implementing Sensible Work Rules

By: Mark M. Trapp

On December 14, 2017, two days before the term of then-NLRB Chairman Philip A. Miscimarra expired, the existing Republican majority-Board issued its decision in *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017). As readers of this blog learned not long after, the *Boeing* case illustrated "the profound difference in the way the Board under new General Counsel Peter B. Robb intends to evaluate employer rules and workplace policies versus the perhaps overzealous and less employer-friendly approach of the Obama-era Board."

This statement has been borne out in Robb's recent issuance of Memorandum GC 18-04, Guidance on Handbook Rules Post-*Boeing*. As Robb notes in the new memorandum, "not only did the Board in *Boeing* add a balancing test, but it also significantly altered its jurisprudence on the reasonable interpretation of handbook rules." Specifically, according to Robb, the Board reversed and "severely criticized" prior caselaw "prohibiting any rule that *could* be interpreted as covering Section 7 activity, as opposed to only prohibiting rules that *would* be so interpreted."

The memorandum, created to provide specific guidance and direction to the 26 regional offices of the NLRB in making prosecution decisions, includes this important statement:

Regions should now note that ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included.

Beyond this, the memorandum provides useful guidance to employers as they draft work rules and revise handbooks and other policies. It accomplishes this by placing various common workplace rules into one of three categories identified in the Boeing decision: (1) rules that are generally lawful to maintain, (2) rules warranting individualized scrutiny, and (3) rules that are unlawful to maintain. A look at some of the work rules and their placement makes clear the significant difference between the current NLRB and its predecessor.

Category 1 – Rules That Are Generally Lawful to Maintain

The Memorandum states that rules in this category "are generally lawful, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the [NLRA], or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule." Accordingly, the memorandum instructs that allegations in this category "are facially unlawful [and] should be dismissed, absent withdrawal."

These rules include:

- **Civility Rules** – prohibiting rude, discourteous, condescending or otherwise socially unacceptable behavior, disparagement of company employees, or offensive language.
- **No Photography/No Recording Rules** – prohibiting use of cameras or recording devices. Note, however, that a ban on mere possession of cell phones at work may be unlawful where the employees' main method of communication during the work day is by cell.
- **Insubordination Rules** – prohibiting insubordination, uncooperative behavior, refusal to comply with orders, or other on-the-job conduct that adversely affects the employer's operation.
- **Disruptive Behavior Rules** – prohibiting boisterous, disruptive or disorderly conduct.
- **Confidentiality Rules** – prohibiting discussion of confidential, proprietary or customer information that makes no mention of employee or wage information.
- **Defamation or Misrepresentation Rules** – prohibiting misrepresentation of company products or services, defamatory messages and the like.
- **Employer Logos or Intellectual Property Rules** – prohibiting use of company logos or trademarks.
- **Company Authorization Rules** – requiring authorization to speak on behalf of the company or to respond to media requests.
- **Conflict of Interest Rules** – prohibiting disloyalty, nepotism, or self-enrichment.

Category 2 – Rules Warranting Individualized Scrutiny

Rules in this category "are not obviously lawful or unlawful, and must be evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications." Accordingly, the memorandum instructs regions to submit these rules to the Board's Division of Advice, unless the Board has already issued a decision applying the Boeing standard to the rule at issue.

The memorandum lists the following "possible examples" of rules in Category 2:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union
- Confidentiality rules broadly encompassing "employer business" or "employee information" (as opposed to confidentiality rules regarding customer or proprietary information, or confidentiality rules more specifically directed at employee wages, terms of employment, or working conditions)
- Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of other employees)
- Rules regulating use of the employer's name (as opposed to rules regulating use of the employer's logo/trademark)
- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to

the media *on the employer's behalf*)
- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work, or rules specifically banning participation in outside organizations)
- Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements)

Category 3 – Rules That Are Unlawful to Maintain

Rules in this category "are generally unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on the rights guaranteed by the NLRA outweighs any justifications associated with the rule." Accordingly, the memorandum instructs regions to issue complaints related to these rules, absent settlement.

The memorandum identifies two types of rules in category 3:

- **Confidentiality Rules Specifically Regarding Wages, Benefits or Working Conditions** – prohibiting disclosure of wages, salaries or employment contracts, or prohibiting discussion of working conditions or other terms of employment.
- **Rules Against Joining Outside Organizations or Voting on Matters Concerning the Employer** – prohibiting membership in outside organizations, particularly unions.

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The *Boeing* decision, and now Memorandum GC-04, provide helpful clarity to employers in preparing lawful and compliant policies, procedures, and handbooks. Combined with the clear statement by General Counsel Robb that ambiguities will not be interpreted against the drafter, employers should feel much more comfortable and confident in issuing reasonable and business-justified common-sense policies to govern their workplace.