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NLRB General Counsel Memo Provides New Guidance for Employee Handbooks

By former Associate Jeffrey Hord

In June, the General Counsel of the National Labor Relations Board ("NLRB" or the "Board") released the agency's latest memorandum providing guidance on permissible rules and language in employee handbooks. The memo—entitled "Guidance on Handbook Rules Post-*Boeing*"—is intended to give employers a clearer picture of the types of workplace policies that the NLRB believes unlawfully interfere with workers' rights under the National Labor Relations Act ("NLRA" or the "Act"). The need for such guidance became clear as employers struggled to understand and apply the principles set forth in the Board's decision & order in the *Boeing case* last December (as we previously reported).

As all employers should know, the NLRB is the government agency tasked with enforcing U.S. labor laws in relation to collective bargaining and unfair labor practices under the NLRA. Established by FDR as part of the New Deal, the Board historically focused on unionized workforces and union organizing activities, such that non-union private employers rarely felt the NLRB's impact in the first 75 years of its existence even though the NLRA applies to non-unionized as well as unionized work places. However, as the percentage of private sector employees that are unionized has continued to drop into the low single-digits, the last 10 years have seen the Board delve increasingly into the affairs of non-unionized employers. These efforts have largely centered on the Act's provisions which protect "concerted activities" for employees' "mutual aid or protection."

In December 2017, the NLRB decided a case involving the legality of The Boeing Company's ("Boeing") policy that restricted the use of camera-enabled devices—including cell phones—on company property. To determine whether a particular handbook policy might potentially interfere with the exercise of an employee's NLRA rights, the Board established a new balancing test comparing the legitimate interests of the employer to the relative burden on NLRA-protected rights. Under *Boeing*, facially neutral policies are divided into three categories: rules that would always be lawful to maintain, rules which require case-by-case analysis, and rules that would always be unlawful.

The General Counsel's recent memorandum discusses the *Boeing* decision and offers "general guidance [. . .] regarding the placement of various types of rules in the three categories set out in *Boeing*[.]" First, the memo lists several examples of the type of rule that would fall into **Category 1 ("Rules that are Generally Lawful to Maintain")**, including:

- Civility rules
- No-photography and no-recording rules
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations
- Disruptive behavior rules
- 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
- Rules banning disloyalty, nepotism, or self-enrichment

In most cases, according to the General Counsel, charges which allege that rules in this category are facially unlawful should be dismissed.

For **Category 2**, the memo gives several "possible examples" of the kind of rule that is "**not obviously lawful or unlawful, and [which] must be evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA**":

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

- Confidentiality rules broadly encompassing “employer business” or “employee information”
- Rules regarding disparagement or criticism of the employer
- Rules regulating use of the employer’s name
- Rules generally restricting speaking to the media or third parties
- Rules banning off-duty conduct that might harm the employer
- Rules against making false or inaccurate statements

The legality of rules falling into this category will often depend on context; the General Counsel says that such rules “should be viewed as they would by employees who interpret work rules as they apply to the everydayness of their job.”

Finally, as to **Category 3 (“Rules that are Unlawful to Maintain”)**, the memo identifies rules that are almost always deemed unlawful because they would prohibit or limit conduct protected by the NLRA, and the adverse impact on those guaranteed rights “outweighs any justifications associated with the rule.” Examples of such rules include:

- Confidentiality rules specifically regarding wages, benefits, or working conditions
- Rules against joining outside organizations or voting on matters concerning the employer

Like the *Boeing* ruling to which it relates, the General Counsel’s latest memorandum is good news for employers. Not only does it eliminate some of that decision’s ambiguity, it expressly lists certain policies (such as those governing civility and insubordination) as “generally lawful to maintain” even though previous incarnations of the Board had viewed them as inherently unlawful. The memo also makes clear that rules should be viewed in the context of everyday work, not through the lens of extreme hypotheticals. These developments should prompt all employers to review and update their own handbooks so as to achieve maximum effectiveness and ensure compliance with the law.

