

NLRB Loosens Standard of Review for Employee Handbook Policies

By former Associate Jack Blum

Over the last several years, employers have had to alter or remove policies from employee handbooks in response to numerous decisions from the National Labor Relations Board (NLRB) finding that those policies could potentially interfere with employee rights to organize and engage in concerted activities. Through these decisions, the NLRB regulated basic aspects of the employment relationship for even non-union employers, restricting the scope of rules that employers can enact to maintain order in their workplaces. Policies governing matters as varied as social media, civility, insubordination, confidentiality, recording, and investigations have been targeted even when those policies were enacted and enforced for completely proper purposes. In a groundbreaking decision, however, the NLRB has rescinded a key case in its handbook drive and signaled a possible retreat from its move to increasingly regulate non-union employers.

The NLRB's move into handbook regulation was powered by its 2004 *Lutheran Heritage* decision, which provided that workplace rules violate the National Labor Relations Act (NLRA) if they (1) were promulgated in response to union activity, (2) have been applied in the past to restrict the exercise of NLRA rights, or (3) *would be reasonably construed by employees to prohibit NLRA-protected activity*. Under the NLRA, employees have not only the right to unionize, but also the right to take group action to improve their terms and conditions of employment outside of the union context. On December 14, 2017, the NLRB released a major decision in *The Boeing Company* case curtailing the "reasonably construed" test of the *Lutheran Heritage* standard that had previously been a potent tool in the NLRB's expansion into regulation of the non-unionized workforce. This test allowed the NLRB to invalidate handbook provisions that were neither motivated by, explicitly applicable to, or enforced against union or other protected activity.

Under the "reasonably construed" part of the *Lutheran Heritage* standard, the NLRB regularly found that employers committed unfair labor practices under the NLRA for merely maintaining policies that could conceivably, in a hypothetical scenario, be applied to restrict employees' NLRA rights. For example, workplace civility or conduct codes were frequently invalidated because they could conceivably be used to punish employees for raising employment-related disputes in a manner that is not considered to be civil. Other types of policies invalidated under *Lutheran Heritage's* "reasonably construed" standard include insubordination policies, photography and recording rules, mandatory incident reporting, and confidentiality rules. Under *Lutheran Heritage*, it mattered not whether the rule had ever actually been enforced to limit the exercise of NLRA rights (or, indeed, ever enforced at all) or what business interests the employer sought to advance by creating the rule because the NLRB limited its analysis solely to the text of the rule. Merely having an offending rule in effect was an unfair labor practice.

In *The Boeing Company*, the NLRB took a major step towards rolling back this standard. The rule in question was a "no-camera rule" that prohibited employees from using cell phones or other devices to photograph or take video on the company's premises. Under an application of *Lutheran Heritage*, this type of rule would be invalid because it could be enforced to prevent employees from documenting and publicizing union organizing or protest efforts or other activities in support of workplace disputes. Rather than engaging in this type of analysis, however, the NLRB instead reframed the *Lutheran Heritage* standard. The NLRB explained that the *Lutheran Heritage* analysis would now consider (1) the nature and extent of the rule's potential impact on employees' NLRA rights, and (2) the employer's legitimate justifications for the rule.

The NLRB explained that its decisions on workplace rules must now recognize that in many cases the risk of an actual intrusion on employees' NLRA rights is minimal. In addition, the NLRB broadened its focus beyond the mere text of the rule to include evidence about the rule's impact on employee rights and the employer's business justifications, distinctions among different types of industries and workplaces, and particular events that shed light on the rule's purpose or impact. Applying this new standard, the NLRB found that the no-camera rule's impact on NLRA rights was minimal. While it was possible that a group of Boeing employees could conduct an employment-related protest and be prohibited from photographing their activity, the rule would not actually prevent the employees from engaging in the protected protest in the first place, and thus had only an indirect effect. On the other hand, the NLRB credited Boeing's

justifications for the rule as necessary for the security of its facilities and protection of confidential and proprietary information.

The NLRB also provided some guidance for future cases, noting that some classes of rules would always be lawful to maintain, some would require case-by-case analysis, and some would always be unlawful. As lawful policies, the NLRB identified the no-camera rule as well as “other rules requiring employees to abide by basic standards of civility.” This is a stark reversal, because workplace conduct and civility policies had previously been among the NLRB’s most common targets under *Lutheran Heritage*. On the other hand, the NLRB explained that rules prohibiting employees from discussing wages and benefits would always be unlawful because the rule is a direct prohibition on NLRA-protected conduct and typically unaccompanied by a substantial business justification.

As a final note, it is important to point out some limits of the NLRB’s ruling. First, it only curtails the “reasonably construed” test under *Lutheran Heritage*; rules that are enacted in response to union activity or have been applied in the past to restrict NLRA rights are still unlawful. Second, the NLRB’s reference to rules prohibiting discussion of wages and benefits indicates that the NLRB will not permit rules that directly and explicitly impact NLRA rights, as opposed to rules that merely could be interpreted to affect NLRA rights or only do so indirectly. Finally, the NLRB made clear that although in many cases the mere maintenance of such facially-neutral rules will not be prohibited, instances where an employee is actually disciplined for engaging in NLRA activity under such a rule will still be subject to scrutiny.

A major takeaway for employers is the importance of considering the business justifications for any workplace rules so that those justifications can be explained in a convincing manner if the rule is later challenged. Merely cursory or non-specific justifications may not pass muster even under the more relaxed standard. Finally, from a broader perspective, *The Boeing Company* may signal that the NLRB is prepared to step back from many of its expansive policies under the previous administration that fueled the agency’s expansion into non-union sector enforcement.