

Insights, News & Events

## NEW SHERIFF(S) IN TOWN: THE NLRB ISSUES NEW TEST FOR WORKPLACE RULES

Boeing Co. Signals The End Of Lutheran Heritage And Its Progeny

Insights  
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The National Labor Relations Board just relieved employers of a great deal of uncertainty surrounding seemingly innocuous workplace rules and handbooks. The newly constituted NLRB issued its first round of significant decisions this week, taking square-aim at controversial doctrines developed during the past eight years. One target in its sights: the Board's interpretation of *Lutheran Heritage*, the seminal 2004 decision involving workplace civility rules.

In its December 14 decision, the NLRB overruled *Lutheran Heritage* and issued a new test for facially neutral policies that potentially interfere with employees exercising their rights under the National Labor Relations Act (NLRA). Using a phrase that will be music to every employer's ears, the NLRB will now seek to "ensure a meaningful balancing of employee rights and employer interests" when analyzing attacks on handbook rules and policies.

### BACKGROUND: NLRB'S ATTACK ON REASONABLE WORK RULES

In *Lutheran Heritage*, the NLRB held that a seemingly neutral work rule that does not explicitly restrict employees' rights to engage in union or protected concerted activity was nevertheless unlawful if employees would "reasonably construe" the rule to prevent them from exercising their rights. Although *Lutheran Heritage* involved a workplace civility rule, the NLRB dramatically expanded its reach over the last eight years.

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The NLRB issued so many decisions attacking employer rules that, in 2015, the Board's General Counsel felt it appropriate to publish a memorandum summarizing them all. The memorandum discussed rules regarding, among other things, confidentiality, employee interactions with third parties, employee use of logos and trademarks, and recording and photography in the workplace. The new General Counsel, Peter Robb, has since rescinded the memorandum, which set the stage for the current NLRB to overrule *Lutheran Heritage*.

## **BOEING'S WORKPLACE RULES INITIALLY FOUND TO VIOLATE LABOR LAW**

Boeing, an aerospace company that designs and manufactures military and commercial aircraft, has for decades maintained rules restricting the use of cameras on its property. Boeing's current policy, most recently updated November 2011, forbade the use of Personal Digital Assistants, cell phones, laptops or personal computers with web cameras, or barcode scanners capable of capturing images without a valid business need and an approved Camera Permit. The company maintains this no-camera rule for both security and business reasons, as it performs classified work as a federal contractor.

A union filed an unfair labor practice charge against Boeing, alleging, among other things, that its no-camera rule interfered with, restrained, or otherwise coerced employees in the exercise of their rights under the NLRA. In May 2014, an administrative law judge applied the *Lutheran Heritage* test and found that Boeing's maintenance of the rule did, indeed, violate the NLRA. Boeing sought the NLRB's review of the judge's decision.

## **NEW BOARD, NEW TEST: MEET "THE *BOEING* STANDARD"**

In yesterday's 3-2 decision, the NLRB overruled the judge's finding and, with it, the *Lutheran Heritage* test. In its place, the majority established the following two-prong test:

**When evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the**

**exercise of NLRA rights, the NLRB will evaluate: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.**

As we predicted in our September 2017 newsletter article, "[A New Era for Labor Relations? Fisher Phillips Lawyers Predict Fate Of Top 10 Key Issues](#)," the NLRB took this opportunity to adopt a balancing test which considered the employers' legitimate justification for the rule or policy in question. By its own admission, the NLRB will now strike the "proper balance" between asserted business justifications and the inference with employee rights.

In light of this new balancing of interests, and for the clarity of employers, employees, and unions, the NLRB created three categories of policies and rules:

- **Category 1:** Rules that the Board designates as lawful to maintain, either because (i) when reasonably interpreted, the rule does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. This category includes camera rules like Boeing's, as well as workplace civility rules.
- **Category 2:** Rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- **Category 3:** Rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. This category would include a rule that prohibits employees from discussing their wages.

In its analysis, the NLRB distinguishes between the *maintenance* and the *application* of rules or policies. It cautions that a rule's *application* with respect to employees

who have engaged in NLRA-protected activity may be unlawful even if its *maintenance* is lawful.

Applying its new test, the Board ruled Boeing lawfully maintained a no-camera rule. It found that the rule fell under Category 1, as the Company's important justifications – including national security concerns – outweighed its potential impact on NLRA rights.

## WHAT DOES THIS MEAN FOR EMPLOYERS?

Without question, this is a good sign for facially neutral handbook policies and rules going forward. Employers can now expect the NLRB to consider and weigh the business justification of such rules, in addition to the potential impact on the NLRA. This alone will be a significant shift in the balance towards more equitable consideration of employers' rights by the NLRB.

Does this mean neutral rules/policies with some business justification are automatically lawful? Not quite. The new test necessarily creates additional uncertainty on how the NLRB will address workplace rules going forward. This is only the first case involving the application of the new *Boeing* test and its three categories; surely many more will follow.

Although the new test tracks now-Chairman Miscimarra's dissents that he authored in previous decisions while a minority member of the Democratic-controlled NLRB, his term ends on Saturday, December 16. With the recent appointment of the two Republican Board members, and the upcoming reality of a four-member Board (two Republicans, two Democrats), it remains to be seen how this test shall play out in practice and how far the Board will be willing to go. It could take several months before a fifth Board member can be properly seated to provide a 3-2 majority once again, so employers may need to wait for the playing field to be further evened out.

If you have questions about whether your current handbook or specific policies complies with the current NLRB standards, ask your regular Fisher Phillips attorney or any member of our [Labor Relations Practice Group](#).

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*This Legal Alert provides an overview of a specific NLRB decision. It is not intended to be, and should not be*

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