NLRB Counsel Returns Common Sense To Workplace Rules

Insights
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The National Labor Relations Board General Counsel, Peter Robb, recently outlined the agency's plan of action for evaluating workplace rules in his latest memorandum to regional offices—and the message is welcome news for employers. The 20-page memo is a reaction to the Board's December 2017 decision in *Boeing Co.* that upended the controversial *Lutheran Heritage* standard and helped start to restore balance to workplace rules. This memo takes the next step in that process.

In an effort to take back a certain modicum of control and privacy, the June 6 memo, titled "Memorandum GC 18-04: Guidance on Handbook Rules Post-*Boeing*," provides a roadmap for employers to defend their commonplace rules, which faced severe attacks under the Obama-era Board. During that period, the Board often presumed that otherwise standard workplace rules were ambiguous in meaning and thus susceptible to attack under Section 7 of the National Labor Relations Act (which prevents employers from restricting employees' rights to engage in union or protected concerted activity). This memo highlights the shift now taken by the current Board, where workplace rules are to be interpreted in favor of the businesses that drafted them, and thus less likely to be struck down as illegal.

Instead of prohibiting any rule that *could* be interpreted to influence Section 7 activities, the memo instructs that only rules that "*would be so interpreted*" to influence Section 7 activity are prohibited. While the *Boeing* case focused on no-photography rules, Robb's memo outlines nine other types of standard rules that, when evaluated under the new *Boeing* standard, should be allowed back into employee handbooks.

How Did We Get To This Point? A Brief History

Prior to 2004, employers did not have much to worry about when their handbooks contained facially neutral rules governing behavior at their place of business. Things abruptly changed for employers after the Board's notorious 2004 *Lutheran Heritage* decision. That case, and its progeny, prohibited any rules the employees would "reasonably construe" to prevent them from exercising their Section 7 rights.

The Obama-era Board's assault on workplace rules was so prolific that, in 2015, the General Counsel published a memo—commonly referred to as the *Wendy's* Memo—to summarize all of the relevant cases employers needed to know about. These cases found many commonplace rules to be unlawful, such as those governing civility or banning disruptive behavior in the workplace. Robb's

first memo as General Counsel, released in early December 2017, rescinded the *Wendy's* Memo, clearing the path for the Republican Board to decide *Boeing*.

What Did *Boeing* Do?

As we explained in our December 2017 alert examining the *Boeing* decision, the Board overruled *Lutheran Heritage* and established a two-prong test for evaluating facially neutral rules. The NLRB now will evaluate: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The Board 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.
- **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.

As we previously noted, this new test left a bit of uncertainty on how the Board would address workplace rules going forward. With this memo, the General Counsel has taken steps to resolve that uncertainty.

Memo Provides Practical Examples For Employers

The memo provides examples of specific workplace rules, many of which are commonplace and are probably somewhere in your own employee handbooks, and assesses which of the three above categories they could fall into if scrutinized by Board personnel.

Category 1: Lawful To Maintain

The memo first lists nine types of rules that typically will fit into Category 1. It not only identifies types of rules that fit into Category 1, but also describes their impact on NLRA rights while describing legitimate business justifications behind each type of rule.

The memo indicates that no-recording rules should follow the same logic as no-photography rules that were decided to be lawful in *Boeing*. An example of the language found in this type of rule is: "Employees may not record conversations, phone calls, images or company meetings with any recording device without prior approval." Robb states that although this rule had been deemed unlawful under the *Lutheran Heritage* standard, employers can now argue to the Board that a rule like this is legal because, in addition to legitimate security concerns, no-recording rules also "encourage open communication among employees." Other examples provided in this category include:

- "Insubordination to a manager or lack of cooperation with fellow employees or guests is prohibited";
- "Misrepresenting the company's products or services or its employees is prohibited"; and
- "Do not use any Company logo, trademark, or graphic without prior written approval."

The memo also analyzes how the following rules could fall within Category 1 and be considered lawful for employers to maintain: civility rules (such as "Behavior that is rude, condescending or otherwise socially unacceptable is prohibited"); rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations ("Being uncooperative with supervisors . . . or otherwise engaging in conduct that does not support the [Employer's] goals and objectives" is prohibited"); disruptive behavior rules ("Creating a disturbance on Company premises or creating discord with clients or fellow employees is prohibited"); rules protecting confidential, proprietary, and customer information or documents ("Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendor, or customers"); rules against defamation or misrepresentation; rules prohibiting the use of company logos or intellectual property; rules requiring authorization to speak on behalf of the company; and rules banning disloyalty, nepotism, or self-enrichment.

Category 2: Warrant Individualized Scrutiny

While the majority of the memo focuses on Category 1 rules, Robb gives seven examples of Category 2 rules, which hinge on the reasoning behind a rule to determine if it can lawfully remain in a handbook. If rules with legitimate justifications outweigh their impacts on Section 7 rights, they will be considered lawful. When evaluating these rules, the Board will look to evidence that the particular rule has "actually caused employees to refrain from Section 7 activity" to help interpret if the rule is unlawful. Examples of rules provided in this category include:

- Confidentiality rules broadly encompassing "employer business" or "employee information";
- Rules regarding disparagement or criticism of the *employer*; and
- Rules banning off-duty conduct that might harm the employer.

Category 3: Unlawful To Maintain

The memo lists only two examples of rules that are unlawful to maintain: (1) confidentiality rules specifically regarding wages, benefits, or working conditions; and (2) rules against joining outside organizations or voting on matters concerning an employee's employer. If an employer includes one of these rules in its handbook, Regions are instructed to issue a complaint. Robb notes that justifications for these types of rules are simply too weak to overcome their influence on Section 7 rights.

What Does This Mean For Employers?

Now that this memo has been released, you should be able to publish and enforce common sense workplace rules as outlined in Category 1 with greater confidence and a clearer standard to follow

in creating those rules. Be careful to note that while facially neutral rules are now considered lawful, there is still the possibility to run afoul of the NLRA through the "application of a facially neutral rule against employees engaged in protected concerted activity."

This memo returns the evaluation of workplace rules to a balanced approach, providing clarity on the *Boeing* standard, and aims to inform Regions on how to process workplace rule charges that were so popular under the activist Obama-era board. Several of the rules outlined in the memo as being presumptively legal have not yet been formally re-evaluated by the Board under the *Boeing* standard. Thus, you should remain cautious about forging ahead with these rules.

While it is likely that the current Board will ultimately follow Robb's opinion, there remains a question to the legality of certain rules until a specific decision is issued. But, until then, you should be relieved by this newfound clarity to ultimately promulgate common sense rules once again. You can always reach out to your Fisher Phillips attorney to help draft or redraft rules to follow these standards.

For more information, contact any member of the Fisher Phillips Labor Relations Practice Group or your Fisher Phillips attorney.

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