

Management Alert



The Board's Return To Civility and Common Sense Regarding Workplace Rules

By John Toner

Seyfarth Synopsis: In a decision issued late last week, *The Boeing Company, 365 NLRB No. 154 (Boeing)*, the newly constituted "Trump" National Labor Relations Board ("Board") announced that employers could once again maintain common sense rules regarding employee conduct at the workplace.

Of all the decisions issued in recent years by the previous Board, none was more baffling than those regarding an employer's required standards of employee conduct contained in employee handbooks. These decisions were premised on a 13-year old decision in *Lutheran Heritage Village-Livonia (Lutheran Heritage)* which held that, in addition to an employer's policy being found unlawful if it explicitly restricted protected, concerted activities under Section 7 of the National Labor Relations Act, a policy would also be found unlawful if :

- (1) employees would reasonably construe the language to prohibit Section 7 activity,
- (2) the rule was promulgated in response to union activity, or
- (3) the rule has been applied to restrict the exercise of Section 7 rights

The Obama Board used the first test (how would employees "reasonably construe" the language of a policy) to invalidate numerous common sense policies, such as requiring employees not to engage in conduct that impedes "harmonious interactions or relationship" or prohibiting "abusive or threatening language to anyone on company premises." The Board found these and other policies to be illegal without taking into account an employer's legitimate justifications or the "real-world complexities" in a workplace.

To further complicate matters, the Obama Board sometimes found policies with the same objective (civility in the workplace) to be lawful. The byzantine nature of these decisions made it nearly impossible for an employer to maintain policies regarding employee conduct with any assurance that the Board would find the policies to be lawful.

In the *Boeing* decision, the Board majority (Chairman Miscimarra, and Members Emanuel and Kaplan), over a strong dissent (Members Pearce and McFerran), thankfully overruled the *Lutheran Heritage* "reasonably construe" standard and established a new test for evaluating whether a facially neutral policy, rule, or handbook provision, when reasonably interpreted, would interfere with employee Section 7 rights. Specifically, the Board in evaluating a policy will seek to strike a proper balance between (1) the nature and extent of the potential impact of the policy on employee Section 7 rights and (2) the employer's legitimate justifications associated with the rule.

To provide greater clarity to all parties, the Board's majority announced that, in the future, it will analyze the legality of workplace policies based on three categories:

- **Category 1** will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights, and thus no balancing of employee rights versus employer justification is warranted; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- **Category 2** will include 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** will include 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. The Board gave as an example under Category 3 a policy prohibiting employees from discussing wages or other working conditions.

The Board specifically highlighted as examples of policies that would be legal under Category 1, including policies requiring employees to foster "harmonious interactions and relationships" or "rules requiring employees to abide by basic standards of civility," and overruled previous cases that held to the contrary.

To be sure, there will be some confusion and issues to be addressed as the newly-announced categories are applied to employee handbook policies, but what **is** certain is that employers can once again lawfully require that employees maintain a reasonable level of civility in the workplace.

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