

## Employer Handbooks: New NLRB Guidance Balances Employee Rights and Business Interests

In a June 6<sup>th</sup> memo, NLRB General Counsel Peter Robb provided a road map for employers on the lawfulness of workplace rules, explaining how regional directors should apply the more employer-friendly handbook standard established by the board in last year’s *Boeing* decision. This approach gives employers more flexibility to communicate workplace rules without triggering unfair labor practice charges. Employers that have not reviewed their workplace rules, policies, and handbook provisions post-*Boeing* should re-examine and update them in light of this guidance.

### Background

In its 2004 *Lutheran Heritage Village-Livonia* decision, the National Labor Relations Board (NLRB) [held](#) that employers may violate the National Labor Relations Act (Act) just by maintaining facially neutral workplace rules, policies, and employee handbook provisions (“work rules” or “policies”) that employees might “reasonably construe” to restrict their ability to engage in activity protected by the Act. The Obama board applied this standard broadly to strike down work rules and policies as unlawful if they *could* — rather than *would* — be interpreted to interfere with the exercise of NLRA rights.

In December 2017, the NLRB re-evaluated the circumstances under which simply maintaining a facially neutral work rule violates the Act. Overruling the *Lutheran Heritage* “reasonably construe” standard, the board’s [decision](#) in *The Boeing Company* [established](#) a new standard governing workplace policies that balances the interests of the employer against the relative burden on the employee’s NLRA rights, along with a two-factor balancing test for interpreting handbook rules. Under that test, the board weighs “(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule,” taking into account such factors as the arguably protected activity implicated, industry norms, different work settings, and particular circumstances the rule addresses.



In *Boeing*, the board also established the following three categories of employment policies, work rules, and handbook provisions based on its balancing of employer and employee interests:

- Category 1: Rules that are lawful to maintain either because (i) the rule does not prohibit or interfere with employees' exercise of NLRA rights when reasonably interpreted, or (ii) the business justification for the rule outweighs the potential adverse impact on those rights
- Category 2: Rules that warrant individualized scrutiny of whether they prohibit or interfere with employees' NLRA rights and, if so, whether legitimate justifications outweigh any adverse impact on protected conduct
- Category 3: Rules that are unlawful because they prohibit or limit protected conduct, and the justification does not outweigh the adverse impact on NLRA rights

## The General Counsel Memo

On June 6, NLRB General Counsel Peter Robb issued [Memorandum GC 18-04](#), providing guidance to NLRB regional directors on interpreting and enforcing handbook rules in light of *Boeing*. The guidance provides a road map for navigating the board's new approach to evaluating the lawfulness of workplace rules, policies, and handbook provisions. This approach will give employers more flexibility to communicate important rules without triggering unfair labor practice charges.

The memo addresses common handbook provisions that were problematic under the more employee-friendly *Lutheran Heritage* test, and advises that ambiguous handbook rules are no longer construed against the employer and generalized provisions should not be interpreted as banning all activity that might fall under them. Going forward, regions that receive claims of unlawful employment policies are instructed to consider whether the rules *would* — rather than *could* conceivably — be interpreted to interfere with the exercise of NLRA rights.

The guidance summarizes, as a matter of enforcement policy, the placement of common workplace policies into *Boeing's* three categories of employment policies, work rules, and handbook provisions as follows:

### Category 1: Rules that are generally lawful to maintain

Absent special circumstances or unlawful application, regions generally should consider the following types of rules to be lawful under *Boeing's* Category 1 framework.

- Civility rules, including rules prohibiting disparagement of employees
- No-photography and no-recording rules
- Rules against insubordination, noncooperation, refusal to perform work, and other on-the-job conduct that adversely affects operations
- Disruptive behavior rules
- Rules protecting confidential, proprietary, and customer information (provided they do not ban discussion of employee or wage information)
- Rules against defamation or misrepresentation
- Rules against employee use of employer's logos or intellectual property

- Rules requiring authorization to speak for the company
- Rules prohibiting disloyalty, nepotism, or self-enrichment

### **Category 2: Rules that warrant individualized scrutiny**

The memo identified the following as “possible examples” of rules that are neither obviously lawful nor unlawful and will require individualized scrutiny and evaluation on a case-by-case basis under *Boeing’s* Category 2 framework:

- Broad conflict-of-interest rules
- Confidentiality rules that encompass “employer business” or “employee information”
- Rules prohibiting disparagement or criticism of the *employer* (as opposed to employees)
- Rules regulating use of the employer’s name (as opposed to the employer’s logo/trademark)
- Rules restricting employees from speaking to the media or third parties generally (as opposed to on the employer’s behalf)
- Rules banning *off-duty* conduct that might harm the employer (as opposed to insubordinate or disruptive conduct at work, or rules banning participation in outside organizations)
- Rules against making false or inaccurate statements (as opposed to defamatory statements)

### **Category 3: Rules that are unlawful to maintain**

Finally, the general counsel advised that the following types of rules normally would be considered unlawful under *Boeing’s* Category 3, and could trigger unfair labor practice charges, because of their adverse impact on NLRA rights or their interference with protected activity:

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

### **Other Rules and Considerations**

The board in *Boeing* noted that the decision applied only to the maintenance of facially neutral rules — not to their application. Rules that ban protected concerted activity, are put in place in response to organizing or other protected activity, or are applied against employees engaged in protected concerted activity remain unlawful.

As the memo notes, *Boeing* did not change established standards frameworks for assessing the lawfulness of other types of rules (such as no-solicitation/distribution or premises no-access rules) where the board has “already struck a balance between employee rights and employer business interests.” How the *Boeing* framework will, for example, apply to rules requiring confidentiality of discipline or arbitration, or rules limiting an employee’s access to board processes is not yet clear. Regional offices are instructed to submit cases involving those issues to the board’s Division of Advice for further analysis.

### **In Closing**

The memo provides a road map for employers on how the NLRB can be expected to interpret, evaluate, and enforce employee handbook provisions and workplace rules in light of the board’s new employee handbook standard. Employers that have not reviewed their workplace rules, policies, and handbook provisions post-*Boeing* should re-examine and update them considering the NLRB’s new guidance.

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