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Employment Law Note

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NLRB Targeting Employer Workplace Policies -- Again

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The National Labor Relations Board ("NLRB") is currently reconsidering its legal framework for assessing whether workplace rules violate federal labor laws. If revised, the new standard adopted by the NLRB could have a significant impact on how you may need to draft and revise your existing and future workplace policies to avoid violations, so let's discuss it.

Background

First, let's review how employer rules can be found to violate the National Labor Relations Act ("NLRA"). Section 7 of the NLRA protects union and non-union employees who engage in "concerted activity" for mutual aid or protection on matters related to wages, benefits and working conditions. Section 7 also gives employees the right to form, join or assist a union, or to refrain from doing so. Employer work rules that restrict these rights are unlawful under the NLRA. Employer policies and rules that violate the Act fall into two primary categories: (1) rules which explicitly prohibit or restrict Section 7 activity, and (2) rules that don't explicitly prohibit or restrict Section 7 activity, but still result in a violation because of how they are applied.

For example, if your handbook directly stated that employees don't have the right to self-organize, to form, join, or assist a labor organization, or to bargain collectively through representatives of their own choosing, this would fall under category (1) as an explicit prohibition.

However, even if your policies don't include an explicit restriction or prohibition, they could still be found to violate prong (2) as an implicit violation.

Prior to 2017, the standard adopted by the NLRB to assess whether workplace rules violated federal labor laws was articulated in a case called *Lutheran Heritage*.[1]

The *Lutheran Heritage* test allowed employees to prove that their rights under Section 7 were being restricted or prohibited implicitly if they could show one of the following:

> (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.

Most cases in which employees have challenged workplace rules have fallen under the first element. As such, in practice, this test has been more favorable to employees than employers because it allows employees to more easily challenge rules that don't contain explicit prohibitions as long as they can show that employees would "reasonably construe the language to prohibit section 7 activity." This is a low bar and has resulted in various decisions in favor of employees rather than employers.

The *Boeing Company* Decision

In 2017 the *Lutheran Heritage* standard was overturned and replaced with an entirely new standard in the NLRB's *Boeing* case.[2] In this decision the NLRB found that the standard in *Lutheran Heritage* didn't appropriately balance the legitimate needs of employers to impose certain workplace restrictions with the employee rights under Section 7.

In *Boeing*, the company's "no-camera rule" was being challenged under element (1) of the *Lutheran Heritage* standard. This policy restricted the use of camera-enabled devices such as cellphones on Boeing property.

[1] 343 NLRB 646 (2004).

[2] *The Boeing Company,* 365 NLRB No. 154 (2017).

Employees argued that while the no-camera rule did not explicitly restrict protected Section 7 activity, employees could still "reasonably construe" the rule to prohibit such activity.

The NLRB found that using the *Lutheran Heritage* standard gave no consideration to the legitimate security needs that caused Boeing to adopt its policy in the first place. The Board explained that Boeing's facilities contain highly sensitive and sometimes classified information, and are targets for espionage by competitors, foreign governments, and even supporters of international terrorism. The NLRB overruled *Lutheran Heritage* and replaced it with a new test that would balance legitimate employer interests with employee interests.

The *Boeing* standard focused on (1) the nature and extent of the potential impact on NLRA rights, and (2) the legitimate justifications associated with the rule. The NLRB divided policies into three categories based on the likelihood of a Section 7 violation resulting from the phrasing and context of policies. The goal of this newly promulgated rule was to "strike the proper balance" between legitimate business justifications and employee rights.

What's Happening Now?

It is likely that the *Boeing* standard will be overturned to revert back to the former standard used in *Lutheran Heritage* (or one similar to it). The NLRB is set to reconsider the rule in a new case involving a medical waste disposal company's workplace confidentiality rule.[3] The Board will consider whether the policy infringes on the NLRA protections that allow employees to collectively speak up about working conditions, including concerns surrounding pay and safety.

What Does this Mean?

If the *Boeing* standard is overturned, we could see a major shift in how existing and future employee handbook policies will need to be drafted and revised. In practice, the *Boeing* standard has been more favorable to employers than the previous *Lutheran Heritage* standard. For example, in a case applying the *Boeing* standard last year, the Board ruled in favor of a California ambulance company's social media policy that forbade its workers from criticizing their business, disclosing proprietary information, and posting pictures of co-workers. Under the *Lutheran Heritage* standard, this decision may have turned out differently.

Key Takeaways

The Board likely won't rule in this matter for several months, which leaves many companies in "limbo," trying to assess whether the process for revising policies should begin preemptively, or whether it is more prudent to wait until a final ruling.

Although many suspect that the Board will tighten its current standard, we believe it is premature to revise policies before a ruling has been issued. However, it is certainly not too early to begin reviewing employee handbooks to note potential areas that may require revisions or alterations in the future if a new standard is imposed.

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[3] *Stericycle, Inc.*, 371 NLRB No. 48 (2021).