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# NLRB General Counsel Issues Much Needed Guidance on Employee Handbooks

By Meghan N. Cox June 2018

On June 6, 2018, the General Counsel of the National Labor Relations Board issued a memorandum providing guidance on how employer rules should be interpreted following the Board's December 2017 holding in *Boeing*, which set forth a new standard for determining the legality of employer rules under the National Labor Relations Act. Following the issuance of the memorandum, employers can expect their work rules and handbooks to be subjected to less scrutiny than under the previous administration.

Prior to the *Boeing* decision, the Board applied a standard set forth in the *Lutheran Heritage* decision that prohibited any employer rule that could be construed as covering a protected activity under the NLRA. In *Boeing*, the Board set forth a balancing test that balances the nature and extent of the rule's potential impact on NLRA rights against the employer's legitimate justifications for the rule. The memorandum explains that, moving forward, under the new *Boeing* standard, there will be three categories of work rules: (1) rules that are generally *lawful* to maintain; (2) rules warranting *individualized scrutiny*; and (3) rules that are *unlawful* to maintain.

The General Counsel's memorandum also makes clear that "ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included." However, rules that specifically ban activities protected under the NLRA or that are promulgated in direct response to employees engaging in protected activities are still unlawful. Likewise, a facially neutral rule is unlawful if it is applied against employees engaged in a protected activity.

The memorandum sets forth several examples of "Category 1" rules that are generally lawful to maintain. These rules are considered generally lawful because, when reasonably interpreted, they either (1) do not prohibit or interfere with the exercise of rights guaranteed by the NLRA or (2) the business justification for the rule outweighs any potential adverse impact on protected rights. Category 1 rules include:

- Civility rules;
- No-photography and no-recording rules;
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- Disruptive behavior rules;
- Rules protecting confidentially, proprietary, and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak for the company; and
- Rules banning disloyalty, nepotism, or self-enrichment

While there are legitimate justifications for rules protecting the confidentiality of employee information, the General Counsel was careful to note that if such a rule specifically mentions employee or wage information, the rule falls within Category 2 and requires individualized scrutiny.

The General Counsel was also careful to distinguish rules that protect documents or records with employee information, as opposed to employee information itself. While there are legitimate justifications for protecting documents and records with employee information, rules that prohibit the disclosure of employee information (as opposed to documents or records containing employee information) can be interpreted to prohibit protected activity. In the memorandum, the General Counsel explained, "employees do not have a right under the Act to disclose employee information obtained from unauthorized access/use of confidential records, or to remove records from the employer's premises." For this reason, "where the [employer] rule is specifically about accessing or disclosing confidential employee records or documents (as opposed to disclosing employee information), the rule will . . . not affect Section 7 rights."

Category 2 rules, like confidentiality rules that encompass "employee information," require individualized scrutiny to determine whether the rule interferes with protected rights, and if so, whether the adverse impact on those rights is outweighed by a legitimate justification. The memorandum explains that the legality of rules in Category 2 will often depend on the context. The General Counsel was careful to note that when interpreting the appropriate context, "such rules should be viewed as they would be by employees who interpret work rules as they apply to the everydayness of their job." Other factors that will be considered include examples provided within the rule, the placement of the rule among other rules, and whether the rule has actually caused employees to refrain from engaging in protected activity.

Many of the examples listed as Category 2 rules by the General Counsel are broader versions of Category 1 rules. For example, a rule prohibiting disparagement or criticism of the *employer* falls within Category 2, whereas civility rules prohibiting the disparagement of *employees* or rules prohibiting defamation of the employer fall within Category 1. Likewise, a rule that generally restricts speaking to the media or third parties falls within Category 2, while a rule that requires authorization to speak on the company's behalf falls within Category 1.

Finally, Category 3 (rules that are unlawful to maintain) are those that have a serious adverse impact on the protected rights of employees and which have little to no legitimate business justification. Many of the rules that fall within Category 3 are rules that employers already understand to be unlawful, including confidentiality rules specifically prohibiting the discussion of employee wages, benefits, or working conditions or rules prohibiting employees from joining outside organizations.

While the General Counsel's memorandum provides helpful guidance for employers and indicates that this administration will subject employer rules to less scrutiny, employers must remember that this memorandum, along with the *Boeing* decision, only applies to the maintenance of facially neutral rules. Rules that specifically prohibit a protected activity or that are facially neutral but specifically applied against employees engaged in protected activity remain unlawful.

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