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NEW STANDARD APPLIES TO ASSESSING THE VALIDITY OF WORK POLICIES UNDER THE NATIONAL LABOR RELATIONS ACT

For well over a decade, the National Labor Relations Board has freely invalidated seemingly neutral, common-sense workplace rules simply because employees might understand them to limit their rights under federal labor law. Rules were held unlawful even if they were neither intended to limit employee rights nor ever applied in a way that actually interfered with those rights. However, a recent decision by a newly constituted, Republican-majority Board adopts a new analysis for determining if workplace rules are lawful. The new test will be applied to future cases as well as all pending cases. Practically speaking, this is one of the most significant and employer-friendly legal decisions of 2017 in the labor and employment law arena.

All employees, unionized or not, have the right to engage in concerted employment-related activities under the National Labor Relations Act (NLRA). Since 2004, the Board has held that workplace rules violate the NLRA if employees might “reasonably construe” them to interfere with their rights. Instructing employees to be civil in the workplace could very well be unlawful, for example, because that requirement might be interpreted to prohibit protests of working conditions. Furthermore, any ambiguity in a rule was construed against the employer.

Workplace rules have fallen left and right under that test, and most employee handbooks probably contain provisions that would not pass muster under the test. For example, in a single case last year, the Board struck down all the following:

- a rule prohibiting employees from allowing unauthorized individuals to access information without prior written approval;
- a Code of Business Conduct provision that prohibited arguing with co-workers, subordinates or supervisors; failing to treat others with respect; or failing to demonstrate appropriate teamwork;
- a rule requiring employees “to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships”; and
- a rule prohibiting employees from making recordings in the workplace.

more ...

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Despite compelling criticism that the 2004 test led to federal micromanagement of the workplace, that test has survived—until now. The new Board decision involved a Boeing policy that prohibited employees from taking photos or videos at Boeing worksites without a valid business need and approval. The policy further provided that an authorizing manager would decide if there is a business need for camera use (e.g., as necessary to meet contractual commitments, for training, or for other purposes that provide a positive benefit to the company). An administrative law judge struck down the policy because Boeing had adequate protections for its secured military and commercial information, and the policy amounted to an impermissible infringement on NLRA rights because it could chill employees from exercising those rights. The Board reversed that ruling.

The new framework established in the *Boeing* case requires balancing the nature and extent of a workplace rule's potential limitation on NLRA rights against the employer's business justifications for the rule. (Of course, a rule is lawful, and no balancing is required, if it has no tendency in the first place to interfere with employee rights.) In addition, that balancing process is to consider five factors (see box below). If the justifications for the rule outweigh its adverse impact on NLRA rights, then the rule is lawful; conversely, if the impact outweighs the justifications, it is unlawful. As examples, the *Boeing* decision indicates that a rule requiring employees to abide by basic standards of civility and to maintain harmonious relationships is lawful, while a rule prohibiting employees from discussing wages or benefits with each other is unlawful.

The Board held that Boeing's policy limiting camera use was lawful. The Board reasoned that, while the rule may, in some circumstances, affect the exercise of NLRA rights, the adverse impact is comparatively slight. The Board further concluded that the policy's potential adverse impact is outweighed by the substantial and important justifications, such as Boeing's need to maintain heightened security protocols to maintain its accreditation as a federal contractor.

With the Board Chairman's departure earlier this month at the end of his term, the Board is now split two and two along party lines. Further application of the new Boeing test by the Board will likely be delayed until a new Board member is nominated and confirmed, which is likely several months away.

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Summary of the new *Boeing* test for workplace rules:

Workplace rules are lawful if, when reasonably interpreted, they have no tendency to interfere with employee rights. They are also lawful if, under a balancing test, they do interference with such rights, but that interference is outweighed by the justifications for the rule.

Five aspects of the Board's duties are to be considered in the analysis. These are the duties to: (1) provide parties certainty and clarity; (2) distinguish among types of NLRA protected activities and compare to different types of business justifications; (3) refrain from further analysis of a facially neutral rule that, when reasonably interpreted, does not violate NLRA rights; (4) focus on an employee's perspective when evaluating a rule's impact on employees; and (5) find that a rule can be maintained even if the rule cannot be applied against employees engaging in NLRA protected conduct.