

NLRB ESTABLISHES NEW TEST FOR WORKPLACE RULES

In a 3-2 decision issued on December 14, 2017, the National Labor Relations Board (“NLRB”) overruled the standard previously applied to determine whether workplace rules, policies, and employee handbook provisions that do not facially interfere with employees’ rights under the National Labor Relations Act (“NLRA”) are nonetheless unlawful under the Act. Under the Board’s previous standard, an employer violated the NLRA by maintaining workplace rules that did not explicitly prohibit employee activities that are protected by the Act – referred to as protected concerted activities – if those rules could nonetheless be “reasonably construed” by an employee to prohibit protected activities, such as discussing working conditions with coworkers.

In the NLRB’s decision, which related to a no-camera workplace rule maintained by The Boeing Company, the Board established a new standard: when looking at a rule or policy that is facially neutral but could potentially interfere with the exercise of employees’ rights under the NLRA, the Board will consider (1) the nature and extent of the potential impact the rule could have on employees’ rights, and (2) any legitimate justifications for maintaining the rule. The Board also established three general categories that workplace rules may fall under:

- **Category 1:** Rules that are lawful to maintain because either (a) the rule does not prohibit or interfere with any protected rights when reasonably interpreted; or (b) the potential negative impact on employees’ rights is outweighed by the employer’s justifications for the rule.
- **Category 2:** Rules that must be individually scrutinized to determine whether the rule would prohibit or interfere with employees’ rights, and if so, whether the potential negative impact is outweighed by legitimate justifications.
- **Category 3:** Rules that are unlawful to maintain because they would prohibit or limit conduct protected by the NLRA, and the negative impact is not outweighed by its justifications. This category includes broad rules that prohibit employees from discussing their wages or benefits with co-workers.

The Board also noted that although a particular rule may be generally lawful under this new test, an employer could still violate the NLRA by applying the rule to an employee in retaliation for the employee’s protected concerted activity, depending on the facts of the case.

Applying this new standard, the Board held that Boeing did not violate the NLRA by maintaining a no-camera rule that prohibited employees from using any camera-enabled devices to take photos or videos in the workplace without a valid business need and an approved camera permit. The Board placed this rule into Category 1 and explained that although it could potentially affect the exercise of employees’ protected rights, the impact was slight and was outweighed by important justifications, including national security concerns.

The NLRB’s decision was joined by Board Chairman Philip A. Miscimarra and Members Marvin E. Kaplan and William J. Emanuel, both Trump appointees. Members Mark Gaston Pearce and Lauren McFerran, both Obama appointees, dissented from the majority’s opinion. This decision indicates that the newly-appointed Board members will continue to roll back employee protections that had been expanded under the Obama Board.

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