

# Dust off Those Handbooks: NLRB Restores Sanity to Employment Policies

## Labor & Employment Law Update

on December 27, 2017

Thirteen years ago the National Labor Relations Board issued its decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, which held that facially neutral work rules violated the National Labor Relations Act if employees would “reasonably construe” the rule to restrict the employees’ rights to engage in protected concerted activity under Section 7 of the Act. Following that decision, the Board used the “reasonably construe” standard to invalidate even the most well intentioned work rules. See e.g., *T-Mobile USA Inc.*, April 29, 2016 (finding that employer’s policy requiring employees to maintain a positive work environment violated the NLRA).

On December 14, in *The Boeing Company*, 365 NLRB 154, the Board overturned *Lutheran Heritage* and articulated a new test for evaluating the validity of facially neutral work rules. In place of the unworkable “reasonably construe” standard, the Board introduced a balancing test for analyzing facially neutral work rules. Under the new standard, the Board will “evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” (emphasis in original).

Utilizing this standard, the Board reversed the administrative law judge’s decision that Boeing’s no-camera rule violated the NLRA. Instead, it found that the employer’s legitimate business reasons for the policy — protecting proprietary information and national security interests — outweighed any potential Section 7 violation. The Board also articulated three broad categories of work rules that would result from the new balancing test:

- “Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.”
- “Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.”
- “Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and

the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.”

*Boeing* is a big win for employers and represents a clear change in the Board’s attitude towards work rules. While only time — and additional Board decisions — will tell, the new standard should provide “far greater clarity and certainty” to employers in drafting workplace policies. Additionally, employers may want to consider taking a second look at policies previously removed and/or revised in the wake of *Lutheran Heritage* and its progeny. Finally, as we head into 2018, employers should evaluate all workplace policies in light of the Board’s new balancing test and be prepared with strong justifications for any policies that have the potential to infringe on an employee’s rights under the Act.

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