December 12, 2019

NLRB Clarifies Standard for Determining Legality of Employer Rules and Approves Confidentiality and Media Rules

In its recent *LA Specialty Produce Company* decision, the National Labor Relations Board (NLRB/the Board) clarified its previous *Boeing Co.* standard for determining the legality of workplace rules and specifically found that an employer's confidentiality and media contact rules, when "reasonably interpreted," do not interfere with employees' exercise of Section 7 rights under the National Labor Relations Act (NLRA).

Clarification of *Boeing Co.*

In its 2017 *Boeing Co.* decision, the current Board overturned the Obama-Board enforcement position for determining the legality of employer work rules under the NLRA and instituted a more employer-friendly standard. More recently, the Board went into greater detail as to how that standard would be applied to provide employers with "certainty and predictability" regarding how the Board would interpret their rules.

The Board reiterated that it will use three categories:

> *Category 1* rules are lawful to maintain because (a) "the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights;" or (b) "the potential adverse impact on protected rights is outweighed by justifications associated with the rule."
>
> *Category 2* rules are those that "warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights."
>
> *Category 3* rules are those that are unlawful "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."

The Board explained that *Boeing* requires it to determine whether a facially neutral rule, interpreted by a reasonable employee, would potentially interfere with the exercise of Section 7 rights. It must do so by viewing the rule through the lens of "an objectively reasonable employee who is 'aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job.'" Importantly, the Board noted that "[t]he reasonable employee does not view every employer policy through the prism of the NLRA.'"

Confidentiality/Non-Disclosure Rule

The Board reviewed the following rule, contained in the employer's employee handbook:

> **Every employee is responsible for protecting any and all information that is used, acquired, or added to regarding matters that are confidential and proprietary of [the employer] including but not limited to client/vendor lists**, client/vendor information, accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operations, to name a few. Confidential information will also include information provided by a third party and governed by a non-disclosure agreement between [the employer] and the third party. Access to confidential information should be disclosed on a "need to know" basis and must be authorized by management. Any breach of this policy will not be tolerated and will be subject to disciplinary and legal action.

The bolded language above was specifically what an Administrative Law Judge found to have violated the NLRA. The Board found that an objectively reasonable employee would not interpret this rule to interfere with his or her exercise of Section 7 rights. Therefore, no consideration of business justification was necessary to find the rule lawful under *Boeing.* The Board noted that the employer's client and vendor lists contain sensitive information about pricing and discounts and the ALJ acknowledged that the employer had a substantial justification in preventing the information from being disclosed to its competitors, and that it "generally categorizes rules that prohibit the disclosure of confidential and proprietary customer and vendor lists as Category 1(a) rules." The Board said such rules do not target information "central to the exercise of Section 7 rights, such as employee salary or wage information" and did not "prohibit employees from appealing to customers or vendors for support in a labor dispute, or from disclosing the names and locations of customers or vendors derived from sources other than the employer's own confidential records." The Board specifically stated that the NLRA does not protect employees who divulge information that their employer may lawfully conceal.

Media Contact Rule

The Board reviewed the following rule, which was also contained in the employer's employee handbook:

> Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President [name] is the only person authorized and designated to comment on Company policies or any event that may affect our organization.

In upholding this rule under Category 1(a), the Board held that, when reasonably interpreted, the above rule governed only when employees are approached by the news media for comment on the employer's behalf. The Board noted that when the two sentences of the rule are read together "and from the perspective of a reasonable employee, the rule provides that because only [the president] is authorized and designated to comment on company matters, employees approached for comment by the news media cannot speak on the [employer's] behalf." The Board also noted that it designates rules that prohibit employees from speaking to the media on behalf of their employer as Category 1(a) rules.

Ultimately, to determine the legality of their rules, employers should educate themselves with the types of rules the Board has determined to be lawful, to be unlawful, and to require greater analysis. Although the Board has made it clear that it will interpret workplace rules in a manner more beneficial to employers than it had in the past, employers should nonetheless have legitimate justifications for their rules and should confer with labor counsel to ensure their compliance with applicable law.

Would you like to receive our *Employment and Labor Quarterly Update?* Sign up here.

Authors



Francine Esposito

Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com