

CLIENT ALERT: NLRB Clarifies and Retracts Handbook Language Limits - By Keith H. McCown

On June 6, 2018, the National Labor Relations Board's General Counsel issued new guidance effectively ending the Obama-era NLRB's prolonged and imaginative attack on the wording of facially neutral handbook provisions, work rules, and policies. The guidance is contained in a General Counsel Memorandum to the Regional offices, [GC-18-04](#). Much of this change was forecast in *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017). The June 6th General Counsel Memorandum provides more substance and useful discussion of the *Boeing* framework.

The NLRB will now apply a more concrete, predictable and sensible approach to the issue of whether the mere existence of certain kinds of workplace rules or policies, without more, can become a violation of the National Labor Relations Act. No longer will rules be unlawful merely because the language "*could* be interpreted" to interfere with employees' Section 7 activities (the right to engage in protected, concerted activity, including the right to form, join or assist unions). The NLRB's Regional Offices will now target only handbooks, rules and policies that "*would*" be interpreted as interfering with, suppressing or chilling Section 7 activity.

The difference is meaningful. In a string of well-publicized cases, the Obama Board had found that many types of rules, despite obviously valid purposes, nonetheless were unfair labor practices because they *might* be construed to bad effect. Perceived ambiguities in often-routine workplace rules were construed against the employer, even if there were no actual bad activity or misuse of the rule. The General Counsel has now instructed Regional Offices that ambiguities in workplace rules should no longer automatically be construed against the employer, and that "generalized provisions should no longer be interpreted as banning all [protected] activity that could conceivably be included" in the theoretical sweep of a rule's prohibitions.

The General Counsel advised the Regions that rules and policy language should be evaluated to fit into three categories:

Category 1 Cases - Rules That Are Generally Lawful to Maintain

These types of formerly suspect rules will now be considered presumptively *lawful*:

- civility rules;
- rules banning photography and workplace recordings;
- rules against insubordination, non-cooperation, or on-the-job misconduct;
- rules prohibiting disruptive behavior;
- rules protecting confidential, proprietary and customer information or documents;
- rules against defamation or misrepresentation;
- rules against using employer logos or intellectual property;
- rules requiring authorization before speaking for the employer; and
- rules banning disloyalty, nepotism, or self-enrichment.

Category 2 Cases - Rules Warranting Individualized Scrutiny

Certain types of rules will warrant further scrutiny because they *might* cross the line and interfere with protected employee rights. The General Counsel instructed that "often, the legality of such Category 2 rules will depend on context." These include:

- broad conflict of interest rules that seem to reach beyond prohibiting fraud and self-enrichment;
- broad confidentiality rules encompassing all "employer business" or "employee information;"
- rules prohibiting any disparagement of the employer, as opposed to civility rules about behavior

- toward co-workers or customers;
- rules prohibiting the use of the employer's name, as opposed to the use of a logo or trademark;
- rules prohibiting media contact generally, as opposed to speaking on the employer's behalf;
- rules banning off-duty conduct that might harm the employer, as opposed to rules prohibiting on-duty disruptive or insubordinate conduct;
- rules against any type of false or inaccurate statements, as opposed to defamatory statements.

Category 3 Cases - Rules That Are Unlawful to Maintain

Some rules are still simply unlawful to maintain, including:

- rules imposing confidentiality or demanding silence about wages, benefits, or working conditions;
- rules against joining outside organizations or prohibiting voting on matters concerning the employer.

The General Counsel instructed that this policy guidance applies primarily to the issue of whether the mere maintenance of a rule violates the National Labor Relations Act. Undisturbed are Board precedents about lawful and unlawful "no solicitation" rules; apparel rules; rules that overtly ban or interfere with protected, concerted activity; or rules promulgated directly in response to and aimed at limiting organizing or other protected, concerted activity. "A neutral handbook rule does not render protected activity unprotected."

The labor law community has come to recognize – and often to suffer through – an ever-increasing politicization of NLRB regulation. For the last few decades, each Presidential administration has tried to stamp a strong partisan imprint on the administration of the National Labor Relations Act and the work of the NLRB. It is arguable whether the Obama Board continued the trend with even more vigor than its predecessors.

One of the Obama Board's most visibly political ventures was this strange and persistent exercise in sheer imagination, finding hidden threats lurking in common handbook language, workplace rules, and policies. During the Obama administration the Board struck down rules that asked employees to be civil to each other, rules that required employees to check with a supervisor before leaving a building, and rules that prohibited secret tape recording (even in states like Massachusetts, where secret tape recording is a crime).

The effort to find hidden evil behind common rules and policies led to confusing Board decisions, with different Board members and Administrative Law Judges seeing different demons, while others saw no demons at all. While investigating charges, Regional NLRB agents were prompted to scour handbooks and work rules that had no relation to real issues in the charge. Worst of all, the Board's unpredictable obsession caused a huge waste of public and private sector time and money, as the Board's Regional staff and employers nationwide tried in good faith to evaluate handbooks and policies, often just guessing whether there might be an inchoate unfair labor practice residing in the wording of some policy or rule. The reach of the Board's campaign against hidden meanings and potential effects was limited only by imagination.

And for what? So far as it appears, the proverbial witch hunt did little or nothing to advance the statutory goal of protecting the right of employees to engage in protected, concerted activities, or to refrain therefrom. The now-abandoned policy initiative amounted to two Presidential terms of a useless and outright wasteful intellectual exercise. Now, in the tradition of every new NLRB administration since at least the 1980's, the Trump Board has re-examined and reversed an initiative launched by its predecessors. And so the pendulum swings back. But in this case, the swing is toward sensible and predictable jurisprudence.

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