

NLRB Handbook Rules Change Like the Wind Post-*Boeing*

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On June 6, 2018, the Office of the General Counsel of the National Labor Relations Board (the “NLRB” or the “Board”) published its most recent memo concerning employer handbook policies. The memo’s guidance reflects a stark shift by the NLRB away from its largely employee-friendly stance on employer policies.

Why the Change?

In March 2015, the Office of the General Counsel issued guidance on the types of handbook employment policies the General Counsel would continue to consider an unlawful infringement on employee rights protected by the National Labor Relations Act (“NLRA”). During the Obama administration, various Board decisions found that many facially neutral employee handbook rules were unlawful because they could be “reasonably construed” by employees to infringe on their rights to engage in protected concerted activity. The General Counsel quietly withdrew guidance issued by his predecessor on December 1, 2017. On December 14, 2017, the NLRB laid out a new approach to these cases in *The Boeing Company*, 365 NLRB No. 154.

In *Boeing*, the Board analyzed previous decisions regarding the legality of employer handbook rules and held that its previously articulated “reasonably construe” standard created “rampant confusion” and prevented the Board from giving “meaningful consideration to the real-world complexities associated with employment policies.” Emphasizing the need for “common sense,” the Board held that going forward, employer rules would be assessed as falling into one of three categories: first, generally lawful rules that, if reasonably interpreted, do not interfere with the exercise of NLRA rights; second, rules that warrant “individualized scrutiny” as to whether any adverse impact on employee rights is outweighed by legitimate justifications; and third, rules that are generally unlawful because they limit conduct protected by the NLRA.

What Has Changed?

The June 6, 2018 memo lays out the General Counsel’s interpretation of *Boeing*. The memo is not binding as a case decision would be, but it provides insight into how the new General Counsel will exercise his authority when making decisions to prosecute and dismiss charges on handbook policies without a hearing. Until the NLRB decides more cases, the memo is the most detailed guidance available on where the NLRB’s new direction will take that law.

The memo sets forth the following:

- rules in the first category that generally are lawful include those requiring civility and authorization to speak on behalf of the employer and preclude the disclosure of confidential customer information;
- rules in the second category that warrant “individualized scrutiny” include, for example, those regulating off-duty conduct, confidentiality and conflicts of interest; and
- rules in the third category that remain unlawful are those against joining outside organizations or that require employees to keep the terms and conditions of their work confidential.

What Should Employers Do?

Employers are encouraged to review their handbook policies to see where they might be able to articulate stronger expectations regarding, in particular, rules which may fall into category one, and where they may need to revise their policies regarding confidential and/or proprietary information (which could fall into any of the articulated three categories). In doing so, employers will need to consider the specifics of the memo's guidance, new decisions on this topic coming from the Board almost every month, as well as the myriad of other recent developments impacting employer policies, including the General Data Protection Regulation (GDPR), publicity surrounding the #MeToo movement and new state laws legalizing the off-duty use of marijuana.

If you have any questions concerning the NLRB memo and its impact on your company's policies, please contact **Elizabeth N. Hall** at +1 (312) 609-7795, **Kenneth F. Sparks** at +1 (312) 609-7877, **Caralyn M. Olie** at +1 (312) 609-7796 or the Vedder Price attorney with whom you have previously worked.

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