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Trials & TRIBULATIONS

NLRB's new standard for legality of employer handbook policies

On Dec. 14, 2017, the National Labor Relations Board (“NLRB” or “Board”) created a new test for evaluating whether an employer’s facially neutral policy, rule or handbook would interfere with an employee’s rights pursuant to the National Labor Relations Act (NLRA). In *The Boeing Company*, 365 NLRB No. 154, slip op. (rel. Dec. 14, 2017), (“Boeing”) the Board effectively reversed the 13-year-old standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (“Lutheran Heritage”). The Lutheran Heritage standard stated that it was unlawful for an employer to explicitly restrict activities protected by Section 7 of the NLRA. Section 7 protects employees’ right to “form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” or to refrain from any such activities. 29 U.S.C. §157. In addition to explicitly restricted activities, an employer could run afoul of Lutheran Heritage if employees: (1) would reasonably construe the language in the policy to prohibit Section 7 activity, (2) the rule or policy was promulgated in response to union formation or activity, or (3) the rule or policy was applied to restrict the exercise of employees’ Section 7 rights. 343 NLRB No.646, 646-647. The “reasonably construe” standard was under review in the majority of the case law since the Luther-



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Administrative Law Judge determined that Boeing’s no-camera policy constituted an unlawful interference with the exercise of protected rights in violation of the NLRA because employees would “reasonably construe” the policy to prohibit Section 7 activity. In reversing the Judge’s decision, the Board noted that Boeing designs and manufactures military aircraft, which involves sensitive and classified information, making it a target for espionage by competitors, foreign governments and terrorists. In the Board’s 3-2 decision, it explicitly overruled the “reasonably construe” standard in the Lutheran Heritage test citing six defects it had identified with applying that test. These defects included that the test: (1) had a single-minded consideration of NLRA-protected rights without taking into account legitimate employer justifications associated with the policies, (2) reflects the Lutheran Heritage stan-

ard’s misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks, (3) Lutheran Heritage was applied to invalidate facially neutral rules and policies solely because they were in some respect ambiguous, (4) the “reasonably construe” test has improperly limited the Board’s own discretion, (5) the Lutheran Heritage standard does not permit the Board to differentiate between different industries and work settings, and (6) the “reasonably construe” test has defied all reasonable efforts to yield predictable results for employers.

At issue in Boeing was Boeing’s policy which prohibited its employees from using camera-enabled devices, including cellphones, on the Boeing premises. When reviewing the case prior to the Board’s review, the

Administrative Law Judge determined that Boeing’s no-camera policy constituted an unlawful interference with the exercise of protected rights in violation of the NLRA because employees would “reasonably construe” the policy to prohibit Section 7 activity. In reversing the Judge’s decision, the Board noted that Boeing designs and manufactures military aircraft, which involves sensitive and classified information, making it a target for espionage by competitors, foreign governments and terrorists. In the Board’s 3-2 decision, it explicitly overruled the “reasonably construe” standard in the Lutheran Heritage test citing six defects it had identified with applying that test. These defects included that the test: (1) had a single-minded consideration of NLRA-protected rights without taking into account legitimate employer justifications associated with the policies, (2) reflects the Lutheran Heritage stan-

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Based upon the defects identified above, the Board established a new test for evaluating whether a facially neutral policy, rule or handbook would interfere with an employee’s NLRA rights. The Board’s new test requires that the Board evaluate the policy or rule based on (1) the nature and extent of its potential impact on the employees’ NLRA rights, and (2) the employer’s legitimate justifications associated with the rule. The Board’s majority decision further identified three categories of rules, to provide greater clarity to employees, employers and unions.

This first category, Category 1 rules or policies, include those that the Board designates as lawful to maintain, either because the rule does not pro-

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hibit or interfere with the exercise of NLRA rights, or the potential adverse impact on protected rights is outweighed by the employer's justifications. The Board noted an example of a Category 1 rule or policy is the no-camera rule at issue in Boeing.

Category 2 rules include rules and policies that warrant individual scrutiny on a case-by-case basis to determine whether the rule would prohibit or interfere with NLRA rights, and if so, whether the adverse impact on the NLRA-protected conduct is outweighed by an employer's legitimate justifications.

Finally, Category 3 includes rules that are unlawful on their face because they prohibit or limit NLRA-protected conduct, and the adverse impact of the rule

or policy is not outweighed by the employer's justifications for the rule. The Board noted that an example of a Category 3 rule or policy is a rule that prohibits employees from discussing their wages or benefits with one another.

The Board analyzed Boeing's no-camera rule under the new standard and ultimately determined that it was a Category 1 rule because the adverse impact that could occur as a result of restricting an employee's Section 7 activities was outweighed by Boeing's substantial justification for the rule which was protecting national security.

The two dissenting Board members criticized the new standard as being overly protective of employers and underprotective of employees. They further argued that the new standard lacked a rational basis and was inconsistent with

the NLRA. The dissents also criticized that the new test would be impossible to apply.

The Board acknowledged that the new standard will require the categorization of specific rules going forward and for certain types of rules may require the Board to re-designate particular types of rules from one category to another. There is no question that the new standard creates some uncertainty for employers and will need to be carefully reviewed by employers for the purpose of maintaining and changing any employer policies and rules going forward to ensure compliance.

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