NLRB General Counsel Adopts Less Restrictive Policy on Employee Handbook Rules

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On June 6, 2018, the National Labor Relations Board's (NLRB) General Counsel issued a guidance on the agency's new position on employee handbook rules. Reflecting recent changes in Board law, the guidance issued by NLRB General Counsel Peter Robb indicates that his office has abandoned the broad prohibition on certain workplace rules adopted by his predecessor during the Obama administration and, more broadly, signals that the new General Counsel will take a more employer-friendly approach in interpreting federal labor law.

Under the Obama-era Board, a facially neutral workplace rule was presumed unlawful if an employee could reasonably construe the rule to restrict protected concerted activity. This was true for both union and non-union workplaces. Accordingly, the NRLB General Counsel issued a guidance during the Obama administration providing that many common workplace rules – such as rules requiring employees to "be respectful of others and the company" and "avoid the use of offensive, derogatory and prejudicial comments" – were presumptively invalid, because employees *could* view the rules as prohibiting their right to engage in Section 7 activity.

However, in its December 2017 ruling in *The Boeing Company*, 365 NLRB No. 154, the newly comprised, Republican-majority Board overruled that standard, holding that, in assessing a facially neutral rule, it would balance: (1) the rule's potential impact on protected concerted activity and (2) the employer's legitimate business justifications for maintaining the rule. According to the new Board, if the justifications outweigh the potential impact, then the rule would be deemed lawful.

Expanding on this ruling, the General Counsel's guidance provides that ambiguous rules (i.e., rules not explicitly restricting protected conduct) will no longer be presumptively unlawful. By contrast, rules that explicitly prohibit concerted activity remain unlawful. The guidance also provides examples of common workplace rules that the General Counsel would consider to be lawful and unlawful:

- Facially neutral civility rules, no-photography rules, rules against insubordination or improper conduct, rules protecting confidential information or use of employer logos, and rules against disruption, defamation and disloyalty will be presumed to be lawful. For example, a rule prohibiting "behavior that is rude, condescending or otherwise socially unacceptable," is now presumably valid, because the likelihood of this rule limiting concerted activity is slight compared to an employer's legitimate interest in promoting civility and avoiding a toxic work environment.
- The guidance recognizes that certain rules may clearly prohibit certain protected concerted activity, but, because of the particular workplace, there may still be an overriding justification for allowing such rule. These rules include rules potentially restricting employees' rights to disclose information about wages, or terms and conditions of employment (e.g., confidentiality rules broadly encompassing "employee information"). In this circumstance, the guidance indicates that further advice from the General Counsel's office would be needed to assess the lawfulness of such rules. (As a reminder, restrictions on employee discussion of wages are unlawful under Massachusetts' new pay equity law, which has been described here.)
- Rules that explicitly limit or prohibit protected concerted activity, such as rules prohibiting employees from discussing information pertaining to their wages or blanket prohibitions against employees talking to the media about their working conditions, will continue to be deemed unlawful.

Overall, this guidance demonstrates a continuing shift by the current NLRB to reverse the policy objectives of the prior Board. With regard to workplace rules, the agency will now consider the context of the rule at issue and its overall purpose, rather than looking only at the rule's possible impact on potential concerted activity. However, because this guidance is new and untested, employers should proceed cautiously in revisiting the rules in their employee handbooks.

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