

# NLRB Establishes New Standard Governing Workplace Policies

December 15, 2017

The National Labor Relations Board (NLRB) recently set forth a new standard governing whether facially neutral workplace rules, policies and employee handbook provisions unlawfully interfere with the exercise of rights protected by the National Labor Relations Act (NLRA).

The NLRA provides employees with the right to engage in concerted activity regarding terms and conditions of employment. This right exists for union and non-union employees, and in recent years, the National Labor Relations Board (NLRB) has focused enforcement on employer policies and rules that it views as restricting those employee rights.

The NLRB in *Boeing Company and Society of Professional Engineering Employees in Aerospace*, IFPTE Local 2001 overruled *Lutheran Heritage Village – Livonia*. In *Boeing*, the NLRB established a new test to replace the “reasonably construe” standard. When evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the NLRB will evaluate two things: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule.

Applying the new standard, the NLRB allowed Boeing’s no-camera rule, which prohibited employees from using camera enabled devices to capture images or video without a valid business need and an approved camera permit. The NLRB found that the rule potentially impacted the exercise of NLRA rights, but the impact was comparatively slight and outweighed by important justifications, including national security concerns.

The NLRB also announced that going forward three categories of rules will be delineated to provide greater clarity and certainty to employees, employers, and unions. Category 1 rules will be lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

Category 2 rules will require individualized scrutiny in each case to determine whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications. If a rule falls under Category 3, it will be unlawful, because the NLRB will have determined it would prohibit or limit NLRA-protected conduct which is not outweighed by legitimate justifications.

NLRB ESTABLISHES NEW STANDARD GOVERNING WORKPLACE POLICIES Cont.

While this is good news for employers, it is always wise to consult an employment law attorney before drafting work rules, policies and procedures.