

## EMPLOYMENT LAWSCENE ALERT: NLRB'S GENERAL COUNSEL ISSUES GUIDANCE ON HANDBOOK RULES POST-BOEING

On June 6, 2018, the NLRB's General Counsel issued a memorandum (GC 18-04) to all NLRB Regional Directors providing regional offices general guidance on the new standard regarding the lawfulness of handbook rules under Section 7 as established by the NLRB in *The Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing*, the NLRB overturned the onerous "reasonably construe" standard that was previously established by the NLRB in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In *Lutheran Heritage*, the NLRB held that employers can't maintain workplace policies that workers could "reasonably construe" as barring them from exercising their Section 7 rights. Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities..."

The *Lutheran Heritage* standard was criticized as rendering unlawful every policy, rule and handbook provision—such as rules governing workplace civility, open door policies, fraternization, use of recording devices, use of cameras, confidentiality, use of social media, interactions with media, and use of logos and trademarks—that an employee might "reasonably construe" to prohibit any type of Section 7 activity. Simply, the *Lutheran Heritage* standard was unworkable for employers in drafting legitimate and effective workplace policies.

Under the new *Boeing* standard, however, the NLRB will apply a balancing test (balancing employees' Section 7 rights with employer's legitimate business interests) in evaluating whether an employer's facially neutral policy interferes with employees' Section 7 rights by considering two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

In applying this new balancing test, the NLRB will delineate three categories of facially neutral employment policies, rules and handbook provisions:

- Category 1 includes rules that the NLRB will designate as 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 includes rules that warrant individualized scrutiny in each case as to 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.
- Category 3 includes rules that the NLRB will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

The above three categories will represent a classification of results from application of the new *Boeing* balancing test. The categories are not part of the test itself.

The NLRB's June 6th memorandum will assist NLRB regional offices in assessing on how to handle or process unfair labor charges alleging that a particular employer's policy or handbook rule violates employees' Section 7 rights. In addition, the NLRB's General Counsel's memorandum will guide regional offices regarding the placement of various types of rules into the three categories set out in *Boeing* providing the regional offices a balanced common sense approach in evaluating and processing such unfair labor practice charges against the new standard set forth in *Boeing*.