

The NLRB Reverses Itself – Good News for Employers and Their Employment Policies

By: Lizbeth (“Beth”) West, Esq.

In its December 14, 2017 decision entitled *Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001 (“Boeing”)*, the National Labor Relations Board (“NLRB”) reversed itself and adopted a new and much more realistic standard for evaluating whether employment policies and rules violate the National Labor Relations Act (“NLRA”).

The Employer and Employment Policy at Issue.

Boeing designs and manufactures military and commercial aircraft at various facilities throughout the United States. The work undertaken at Boeing’s facilities is highly sensitive; some of it is classified. Boeing’s facilities are targets for espionage by competitors, foreign governments, and supporters of international terrorism, and Boeing faces a realistic threat of terrorist attack.

As such, Boeing maintains a policy restricting the use by employees of camera-enabled devices such as cell phones on its property. It is referred to as the “no-camera rule.” Boeing’s no-camera rule does not explicitly restrict concerted activity protected by Section 7 of the NLRA. Further, it was not adopted in response to NLRA-protected activity and it has not been applied to restrict such activity. Nevertheless, the Union brought a claim before the NLRB alleging that the no-camera rule and a number of other policies in Boeing’s Employee Handbook violated Section 7.

The Old *Lutheran Heritage* Test.

The issue in the case was whether Boeing’s mere maintenance of a facially neutral no-camera rule was unlawful under the “reasonably construe” standard announced in the 2004 NLRB decision in *Lutheran Heritage Village-Livonia (“Lutheran Heritage”)*. In short, *Lutheran Heritage* held that if employees could “reasonably construe” a policy or rule as prohibiting them from exercising their rights under the NLRA, then the policy or rule violated the NLRA. In the *Boeing* decision, the NLRB quoted the standard from the *Lutheran Heritage* decision as follows:

[O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) *employees would reasonably construe the language to prohibit Section 7 activity*; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Flaws with the *Lutheran Heritage* Test.

The NLRB found a number of flaws with the *Lutheran Heritage* Test and outlined them as follows:

- The “reasonably construe” standard entails a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board’s own cases.
- The standard, especially as applied in recent years, reflects several false premises that are contrary to our statute, the most important of which is a 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. Employees are disadvantaged when they are denied general guidance regarding what standards of conduct are required and what type of treatment they can reasonably expect from coworkers. In this respect, *Lutheran Heritage* has required perfection that literally is the enemy of the good.
- In many cases, *Lutheran Heritage* has been applied to invalidate facially neutral work rules *solely* because they were ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of “just cause” provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself.
- The *Lutheran Heritage* “reasonably construe” test has improperly limited the Board’s own discretion. It has rendered unlawful every policy, rule and handbook provision an employee might “reasonably construe” to prohibit any type of Section 7 activity. It has not permitted the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur. Nor has *Lutheran Heritage* permitted the Board to afford greater protection to Section 7 activities that are central to the Act.
- *Lutheran Heritage* has not permitted the Board to differentiate, to a sufficient degree, between and among different industries and work settings, nor has it permitted the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.
- Finally, the Board’s *Lutheran Heritage* “reasonably construe” test has defied all reasonable efforts to make it yield predictable results. It has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

The New Standard Under Boeing.

In *Boeing*, the NLRB adopted a new standard when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights. Under the new standard, the Board will evaluate two things:

1. The nature and extent of the potential impact on NLRA rights; and
2. The legitimate justifications associated with the rule.

The NLRB emphasized that the Board will conduct this evaluation, consistent with the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1) of the NLRA. Once the NLRB concludes its evaluation and balancing of the above factors, it will then delineate three categories of employment policies, rules and handbook provisions ("rules"). The NLRB stressed that the three categories will represent a classification of results from the Board's application of the new test but they are not part of the test itself.

- **Category 1** - will include rules that the Board designates 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** - will include 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** - will include rules that the Board 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.

Applying the new standard to the instant case, the NLRB found that Boeing's justifications for restrictions on the use of camera-enabled devices on Boeing property outweighed the rule's more limited adverse effect on employees' exercise of Section 7 rights. The justifications for the no-camera rule included: i) enforcing security protocols to maintain Boeing's accreditation as a federal contractor; ii) ensuring that Boeing complies with its federally mandated duty to prevent the disclosure of export-controlled information; iii) helping to prevent the disclosure of Boeing's proprietary information; iv) limiting the risk that employees' personally identifiable information will be released; and v) limiting the risk of Boeing becoming a target of terrorist attack. Accordingly, the NLRB ultimately held that the no-camera rule did not violate the NLRA.

Takeaway: Under the new standard articulated in the *Boeing* decision, employers should fare better when defending their policies before the NLRB provided they have legitimate justifications for their employment policies, and those justifications outweigh any impact on employees' Section 7 rights.