



The Boeing Company, 365 NLRB No. 154(December 14, 2017)

Employer Work Rules, Policies and Employee
Handbooks

The Boeing Company

- The Board revisited the legality of employer work rules, policies and employee handbook provisions using the test set forth in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) (“Lutheran Heritage”).

BACKGROUND

- The Boeing Company designs and manufactures military and commercial aircraft at various facilities throughout the United States. The work is sensitive and sometimes classified.
- Maintaining security at its facilities and the information located at these facilities is critical to Boeing’s business.

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- Boeing maintains a policy restricting the use of camera-enabled devices such as cell phones on its property—the “no camera” rule. The rule does not explicitly restrict rights protected by Section 7 of the Act, nor was it adopted in response to activity protected by Section 7.
- Based upon charges filed by the Union, the General Counsel issued a complaint in which he alleged that Boeing promulgated and maintained the no camera rule to discourage its employees from engaging in activities protected by Section 7.
- An ALJ found that under test set forth in Lutheran-Heritage, Boeing’s no camera rule violated Section 8(a)(1) of the Act as it reasonably tends to chill employees in the exercise of Section 7 rights and that employees would “reasonable construe “ the language to prohibit Section 7 activity.

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The No Camera Rule

- Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements.
- However, the use of these devices to capture images or videos is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by security.
- The rule then list the devices it covers.

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- In Lutheran Heritage, the Board stated that its inquiry into whether a challenged rule is unlawful began with whether the rule explicitly restricts Section 7 activities. If the rule explicitly restricts Section 7 activities then it is unlawful.
- Where a rule does not explicitly restrict activities protected by Section 7, the violation depends 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 activity.

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THE BOARD'S DECISION

The Board majority overruled the Lutheran Heritage “reasonable construed” standard. The Board will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry which made legality turn on whether an employee would reasonable construe a rule to prohibit some type of potential Section 7 activity that may or may not occur in the future.

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- The Board adopted a new standard for evaluating facially neutral policies, rules or handbook provisions.
- In cases in which facially neutral policies, rules or handbook provisions, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, the Board will evaluate two things:
 1. the nature and extent of the potential impact on NLRA rights and
 2. legitimate justifications associated with the rule.

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- The Board will conduct this evaluation consistent with its duty to strike the proper balance between asserted business justifications and the invasion of employee rights in light of the Act and its policies, focusing on the perspective of employees, which is consistent with Section 8(a)(1).
- The majority delineated three categories of employment policies, rules and handbook provisions based upon this balancing test.

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Category I Rules

- Includes rules that the Board designates as lawful to maintain either because the rule, when reasonably interpreted, does not prohibit or interfere with NLRA rights or the potential adverse impact on protected rights is outweighed by the justification for the rule.
- The Board gave examples of these Category I Rules—no camera rules, harmonious interaction and relationship rules and other rules that require employees to abide by basic standards of civility.

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Category II Rules

- 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 the NLRA protected conduct is outweighed by legitimate justifications.

Category III Rules

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—such as rules that prohibit employees from discussing wages and benefits with one another.

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- The three categories are not a part of the new test but are the results of the Board's application of the new test.
- The majority believes that the application of the new test will ultimately provide greater clarity and certainty to employees, employers and unions.
- The Board may find that an employer may lawfully maintain a particular rule notwithstanding its possible impact on Section 7 activity even though the rule cannot be lawfully applied against employees who engage in NLRA protected conduct—for example an employer can maintain a courtesy and respect rule but if the employer invokes the rule and disciplines employees who engage in a work related dispute that is protected by Section 7, the Board may find that the discipline violates Section 8(a)(1).

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- The Board determined that it would retroactively apply its new standard.
- In applying the standard to this case, it found that the no camera rule, in some circumstances, may potentially impact Section 7 rights, but this adverse impact is slight.
- The Board also found that the adverse impact was outweighed by substantial and important business justifications associated with Boeing's maintenance of the rule.
- The rule falls under Category I
- The rule did not violate Section 8(a)(1) of the Act.