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Labor and Employment Alert: NLRB's Creation of New Standard for Employee Handbooks is a Present for Employers

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Earlier this month, the National Labor Relations Board (NLRB) articulated a new standard for evaluating when a facially neutral workplace policy or rule would potentially interfere with rights protected by the National Labor Relations Act (NLRA). In doing so, the NLRB overruled its 2004 *Lutheran Heritage Village-Livonia* decision, which had held that employers violated the NLRA if their workplace rules could be “reasonably construed” by employees as prohibiting their exercise of protected rights.

In *The Boeing Company*, the NLRB (in a 3-2 decision under the new Republican majority) jettisoned the “reasonably construe” standard in favor of a new test. “When evaluating a facially neutral workplace policy, rule, or handbook provision, that when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” The NLRB emphasized that, in conducting this evaluation, it will strike “the proper balance” between employees’ rights and business justifications.

To that end, the NLRB delineated three categories of employment policies, rules, and handbook provisions. These categories represent a classification of results from that new test:

- **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.” The NLRB held that rules requiring that employees abide by basic standards of civility are lawful, as are rules like Boeing’s which prohibited the use of cameras without a valid business need and permit.
- **Category 2:** “Will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of 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.” An example of such a rule would be one prohibiting employees from discussing wages or benefits with one another.

The NLRB emphasized that even if the maintenance of a particular rule is lawful, the application of that rule to employees engaged in NLRA-protected conduct may still be unlawful. This is determined on a case-by-case basis.

Boeing represents a significant departure from the prior rule that had been in place for 13 years. The NLRB believes that the new standard in *Boeing* will provide “far greater clarity and certainty to employees, employers and unions.” Of course, it may be some time before *Boeing’s* full impact is realized. Contact your Vorys lawyer if you have questions about NLRA-protected rights in your workplace and evaluating your workplace policies, rules, and handbook provisions in light of *Boeing*.