CLIENT ALERTS & INSIGHTS

NLRB Advice Memoranda Provides Guidance on Employer Work Rules and Social Media

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Authors: W. Eric Baisden, Adam Primm

The National Labor Relations Board released a series of advice memoranda this week, two of which applied the new *Boeing* test to determine if a company rule or policy unlawfully restricts employees' Section 7 right to engage in protected concerted conduct. The *Boeing* test overturned the NLRB's 2004 decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). For a discussion of the *Boeing* decision, see our December 15, 2017 bulletin.

The *Boeing* standard states: "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, two factors will be considered: (i) the nature and extent of the potential impact on NLRA rights *and* (ii) legitimate justifications associated with the rule." Applying this analysis, the NLRB divided company rules into three categories:

- Category 1: a rule is lawful because it does not interfere with Section 7 rights or is lawful because any interference is outweighed by justifications associated with the rule;
- Category 2: the Board determines that maintenance of a rule is unlawful by conducting individualized scrutiny into adverse impact upon Section 7 rights that outweighs any justifications; and
- Category 3: a rule is unlawful because it predictably has an adverse impact on Section 7 rights that outweighs any justifications.

In two Advice Memoranda, the NLRB applied this standard. The first, dated July 31, 2018, but released this week, examined four workplace rules at ADT, LLC and found three to be lawful. First, an employer rule preventing workers from wearing items of apparel "with inappropriate commercial advertising or insignia" did not violate workers' Section 7 right because workers would not interpret it to prohibit wearing items with a union logo, which generally violates the NLRA. The rule focused on appropriate and professional attire, which could include clothing with a union insignia; it would only restrict inappropriate or unprofessional attire.

Two more work rules were upheld as lawful restrictions on sharing information. One instructed workers to "exercise a high degree of caution" when handling sensitive information. The categories of information included proprietary information, personally identifiable customer or employee information, and HIPAA-related information. The rule was directed at employees who may have access to this sensitive information. The Memorandum opined that workers would not read the rule to limit organizing rights. The other rule directed that only designated spokespeople of ADT should

speak to the media, financial analysts, or investors about the company to avoid sharing information that could be misinterpreted as a company position. The Memorandum stated that the rule is clearly applicable to when workers are (or are not) authorized to speak on the company's behalf. Workers would not read this rule to block discussion of workplace grievances with the media.

The ADT Advice Memorandum did strike one rule regarding a restriction on the use of personal cellphones during non-work time because the NLRB has long protected workers right to communicate through non-employer methods during lunch or break periods.

The second Memorandum, dated November 14, 2018, examined four work rules of Nuance Transcription Services, Inc. The Memorandum found one rule lawful - a rule requiring workers to cooperate with investigations. The Memorandum determined that workers would read the rule to mandate cooperation with investigations of workplace misconduct, which is lawful, as opposed to probes into claims of NLRA violations, which NLRB precedent blocks.

The Nuance Memorandum stated that the remaining rules violated Section 7. A foreword in the handbook requiring confidentiality over the contents of the handbook and a separate handbook policy restricting communication of payroll information to the public both run afoul of the NLRB's long-standing precedent permitting discussion of terms and conditions of employment, including compensation. Thus, those rules violate the test in *Boeing*. The Memorandum stated that the rules likely fell into Category 3 of the *Boeing* test, but even if they were in Category 2, the company failed to present justifications outweighing any restriction on Section 7 rights.

The final rule in the Nuance Memorandum banned non-business use of its email system. The rule banned personal email, even on non-work time, and also permitted some incidental personal use. First, the rule cannot ban such use on personal time under *Purple Communications*. Second, the permitted incidental use is too vague to cure the violation because it requires employees to decide at their own peril which of the conflicting policies to follow.

Social Media Memorandum

In addition to the analysis of workplace rules, another Advice Memorandum addressed protection of an employee's posts on Facebook. An employee - a lineman - responded to a message on an online community for linemen on Facebook called "Linejunk" addressing questions of workplace safety and how to fix them. The post was made within a section of the forum directed at linemen safety and included other posts related to safety awareness, standards, and accidents. The employee was terminated for airing his "harsh feelings" about the company on Facebook. The company acknowledged that the employee had raised the concerns in the post with management previously and that a number of coworkers followed the Linejunk page. The Memorandum determined that the posts were protected by Section 7 because they were aimed at mutual aid or protection in that they addressed the lineman's and his coworkers' concerns about workplace safety, and the posts were concerted as he was engaged in a group discussion with other statutory employees, addressed at least in part, to his coworkers. Also, discussions of health and safety are considered "inherently concerted" and protected by Section 7.

For more information, please contact a member of Benesch's Labor & Employment Practice Group:

W. Eric Baisden at 216.363.4676 or ebaisden@beneschlaw.com;

Adam Primm at 216.363.4451 or aprimm@beneschlaw.com.