Legal Update

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NLRB Shifts to Employer-friendly View of Workplace Rules

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National Labor Relations Board (NLRB) General Counsel Peter Robb recently issued a new Guidance Memorandum detailing how NLRB Regional Offices receiving claims of improper employment policies are to interpret employer workplace rules. The Memo is good news for employers because it establishes a new, and much more employer-friendly standard for lawfulness of employee work rules. The Memo essentially reverses the standard established in *Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), in which the mere maintenance of certain work rules was deemed to violate Section 8(a)(1) of the National Labor Relations Act (NLRA).

The new Memo directs NLRB Regional Offices to no longer interpret ambiguous rules against the drafter, or generalized provisions as banning all activity that could conceivably be included within the rule. Instead, they will now look to whether a rule *would* be interpreted as prohibiting NLRA Section 7 rights, as opposed to whether it *could* conceivably be so interpreted.

The test now focuses on the balance between the rule's negative impact on employees' abilities to exercise their NLRA Section 7 rights, and the rule's connection to an employer's right to maintain discipline and productivity in the workplace. Now, work rules are to be classified into three categories: (1) rules that are generally ***lawful*** to maintain; (2) rules warranting ***individualized scrutiny***; and (3) rules that are plainly ***unlawful*** to maintain.

Category 1 Rules are generally lawful either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the NLRA, or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule. The examples provided in the Memo of the types of rules that fall into this category include:

- Civility rules (such as "disparaging, or offensive language is prohibited");
- No-photography rules and no-recording rules;
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- Disruptive behavior rules (such as "creating a disturbance on company premises or creating discord with clients or fellow employees is prohibited");
- Rules protecting confidential, proprietary, and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;

- Rules requiring authorization to speak for the company; and
- Rules banning disloyalty, nepotism or self-enrichment.

Category 2 Rules are not obviously lawful or unlawful and must be evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications. General Counsel Robb identified the following examples of types of Category 2 Rules:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union;
- Confidentiality rules broadly encompassing "employer business" or "employee information" (as opposed to confidentiality rules regarding customer or proprietary information, or confidentiality rules more specifically directed at employee wages, terms of employment, or working conditions);
- Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of employees);
- Rules regulating use of the employer's name (as opposed to rules regulating use of the employer's logo/trademark);
- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media *on the employer's behalf*);
- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work, or rules specifically banning participation in outside organizations); and
- Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements).

Further, the General Counsel's Memo instructs the Regions to submit all Category 2 rules to the General Counsel's Division of Advice. The Region must include the rule at issue and related rules, the employer's asserted justification, evidence that the rule had a chilling effect and pertinent past enforcement, facts raised by either party, and the Region's proposed balancing of the factors and recommended conclusion.

Category 3 Rules are generally unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on the rights guaranteed by the NLRA outweighs any justifications associated with the rule. The examples provided in the Memo of the types of rules that fall into this category include:

- Confidentiality rules specifically regarding wages, benefits, or working conditions; and
- Rules against joining outside organizations or voting on matters concerning the employer.

The Memorandum is particularly enlightening to employers as it foreshadows the manner in which a NLRB Regional Office would prosecute a potential unfair labor practice charge brought by an employee or union.

If you have any questions about this Legal Update, or require assistance in reviewing your employment policies, please contact Susan M. Love at slove@buelowvetter.com or 262-364-0255, Brian J. Waterman at bwaterman@buelowvetter.com or 262-364-0257, or your Buelow Vetter attorney.

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