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News & Types: Employment, Labor & Benefits Update

New Rules for Drafting Employee Handbooks

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Practices: Employment, Labor & Benefits

As one of its first rulings sweeping aside decisions by President Obama's National Labor Relations Board ("Labor Board"), President Trump's Republican appointees entirely changed the focus of analysis when drafting and implementing rules in employee handbooks. In general, the Obama Labor Board focused on the employee's perspective and found numerous policies unlawful, because an employee could reasonably construe a rule to restrain, coerce and interfere with the rights of employees to organize into a union and to discuss their wages, hours and working conditions. However, the Trump Labor Board will now focus on the employer, balance the interests of the employees and employer, and determine whether the employer had a business justification for the policy.

In *The Boeing Company*, 365 NLRB No. 154, the Labor Board reversed the long-standing rule in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 646. The Republican-appointed majority addressed the difficulty of applying the *Lutheran Heritage* rule uniformly. In determining whether a facially neutral policy, rule, or handbook provision interferes with employees' rights, the Labor Board will now balance the nature and extent of the potential impact of the rule on employees' rights and the employer's legitimate justifications.

The Labor Board will place policies into one of three categories, as follows:

> **Category 1**: Rules that the Labor Board designates as lawful to maintain, either because (a) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of employees' rights or (b) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
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> **Category 2**: Rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of employees' rights, and if so, whether any adverse impact on employee-protected conduct is outweighed by legitimate justifications.
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> **Category 3**: Rules that the Labor Board designates as unlawful to maintain because they would prohibit or limit employee-protected conduct, and the adverse impact on employees' rights is not outweighed by justifications associated with the rule.

The majority overruled the decision in *Lutheran Heritage*. The majority stated that the previous Labor Board and the dissenters in *Boeing* focus on a challenged rule's potential effect on the exercise of employees' rights to the exclusion of everything else. Applying the new analysis, the Labor Board will focus on the employee's perspective, but the Labor Board will balance the interests of the employees and employer and consider whether the employer has a business justification. In addition, the Labor Board may differentiate between

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different types of employee-protected conduct, and the Labor Board will identify instances where the risk of intruding on those rights is "comparatively slight."

In the *Boeing* case, the Labor Board applied its new analysis to Boeing's policy on the use of cameras by its employees. The policy stated that "use of [camera-enabled] devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security." The rule defined a business need as "a determination made by the authorizing manager that images or video are needed for a contractual requirement, training, technical manuals, advertising, technical analysis or other purpose that provides a positive benefit to the company." Boeing's witnesses testified that the no-camera ruled is necessary to maintain its accreditation as a federal contractor and prevents the disclosure of export-controlled information and proprietary information.

To Boeing, videotaping workplace safety issues would not "provide a positive benefit." To the administrative law judge, the rule violated federal law because it interfered with employees' rights to discuss working conditions. The Labor Board disagreed and found the rule lawful. First, the Labor Board cited the business needs about which Boeing's witnesses testified. Then, the Labor Board found that the adverse impact of the no-camera rule on employee-protected conduct "is comparatively slight." For example, the Labor Board stated that posting a photograph on social media "falls outside the Act's protection."

As a result of the *Boeing* decision, the new rule flips the burden of proof from the employer to the employee. There must be a showing that the risk of any adverse impact on employees' rights is not comparatively slight and is not outweighed by substantial and important justifications associated with the rule's maintenance. The Labor Board hopes that this new rule will provide certainty for employers as they draft and review their employment policies.

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