

## Employers Take Note: New NLRB Guidance on Workplace Rules and Employee Handbooks

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The National Labor Relations Board (NLRB) recently issued new [guidance](#) on workplace rules, policies, and employee handbook provisions under the National Labor Relations Act (NLRA). The guidance addresses rules that appear neutral but could unlawfully interfere with an employee’s exercise of NLRA-protected rights. Under the NLRA, both union and non-union employees have the right to organize and form a union, as well as to engage in “concerted activity” for “mutual aid and protection”—these are known as “Section 7 rights.” The NLRB has previously held that many workplace rules regulating employee conduct violate an employee’s Section 7 rights when they prevent employees from discussing the conditions of their workplace with other employees. For example, a rule prohibiting employees from generally “disclosing confidential information without prior authorization” could be interpreted by employees to mean they cannot discuss their salaries or other terms and conditions of their employment with their colleagues.

The updated guidance promotes a different approach for evaluating an employer’s compliance with Section 7 of the NLRA based on the NLRB’s recent decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing*, a new three-member majority of the NLRB overturned a standard that had been much more protective of employees. Under that prior standard, even though a workplace rule did not explicitly restrict any Section 7 rights (i.e., it was “facially neutral”), the rule was nonetheless unlawful if an employee **could** interpret it that way. The new standard in *Boeing* makes these facially-neutral rules unlawful only if an employee **would** interpret it as covering Section 7 activity. In determining whether a facially-neutral rule would potentially interfere with an employee’s Section 7 rights, the NLRB will evaluate both (1) the nature and extent of the potential impact on employee rights; and (2) the employer’s legitimate justifications for implementing such a rule.

Going forward, the NLRB will classify workplace rules into the following three categories to help employees, employers, and unions determine whether the rules are likely to be viewed as lawful or unlawful:



1. **Category 1 rules** are presumptively lawful because the rule either: (a) when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights; or (b) the potential adverse impact on Section 7 rights is outweighed by the employer’s legitimate justification of the rule. Examples of Category 1 rules include rules:
  - Requiring employees to abide by basic standards of civility
  - Prohibiting cameras and recording video or audio in the workplace
  - Barring insubordination or non-cooperation
  - Barring disruptive behavior
  - Protecting confidential, proprietary, and customer information or documents
  - Prohibiting defamation or misrepresentation
  - Barring the use of employer logos or intellectual property
  - Requiring authorization to speak for the employer
2. **Category 2 rules** are those that are not clearly lawful or unlawful, and must be evaluated on a case-by-case basis to determine if they unreasonably interfere with the exercise of Section 7 rights. Examples of Category 2 rules include rules:
  - Broadly encompassing the confidentiality of the “employer business” or “employee information,” as opposed to “customer” or “proprietary information”
  - Prohibiting disparagement or criticism of the employer, as opposed to civility rules prohibiting disparagement of employees
  - Regulating use of the employer’s name, as opposed to its logo/trademark
  - Restricting employees from speaking to the media or third parties in general, as opposed to on the employer’s behalf
  - Banning off-duty conduct that might harm the employer, as opposed to insubordinate or disruptive conduct at work, or participation in outside organizations
  - Prohibiting false or inaccurate statements, as opposed to defamatory statements
3. **Category 3 rules** are presumptively unlawful because they would prohibit or limit NLRA-protected conduct, and the negative impact on Section 7 rights outweighs any employer justifications associated with the rule. Examples of Category 3 rules include rules:
  - Requiring confidentiality specifically regarding wages, benefits, or working conditions
  - Prohibiting membership in outside organizations
  - Banning voting on matters concerning the employer

The result is a more employer-friendly framework for evaluating workplace rules and employee policies, including social media policies. Note that the *Boeing* decision and the new NLRB guidance only apply to



employers maintaining facially-neutral rules. Rules that specifically ban protected concerted activity, or that are enacted in response to organizing or other protected concerted activity, remain illegal. Further, a neutral rule could still be unlawful if applied in a way that it violates an employee's Section 7 rights.

CAAs with questions about whether a workplace rule may violate the exercise of Section 7 rights are encouraged to contact CAPLAW for further consultation.

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