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Moment of Clarity? NLRB Upholds Info-Sharing and Media Contact Rules, Clarifies Boeing Standard Applicable to Employer Handbook Policies

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The NLRB continues to issue decisions on a variety of interesting issues. On October 10, the Board held, in *LA Specialty Produce Co.*, 368 NLRB No. 93 (Oct. 10, 2019), that an employer's strong confidentiality protections and limited media availability rules were lawful, and in so doing, clarified the analysis under the newly-issued *Boeing* standard, which we previously outlined here.

The Majority's Clarifications of *Boeing*

In *Boeing Company*, 365 NLRB No. 154 (2017), the Board set forth a new standard for evaluating whether facially lawful workplace rules, policies or employee handbook provisions unlawfully interfered with employees' Section 7 rights. The Board established a new balancing test, which considered the impact of the rule and the business justification. In so doing, the Board created a framework of three categories of rules (the first category is lawful, the second is dependent on the circumstances, and the third is unlawful). The Regions (with the instruction of the NLRB General Counsel) have been tasked with interpreting and applying *Boeing* using this framework, and which we have blogged about previously here.

The Board majority (Chairman Ring, Members Kaplan and Emanuel) in *LA Specialty Produce Co.*, clarified that the NLRB's General Counsel's initial burden under *Boeing* is to prove a facially neutral rule would potentially interfere with the exercise of Section 7 rights, as interpreted by a reasonable employee who is "aware of his legal rights" but "interprets work rules as they apply to the everydayness of his job"; if not, then the rule is lawful and the inquiry ends there. Only if the initial burden is met would the *Boeing* balancing inquiry be applied.

LA Specialty's Rules in Question

The employer, a wholesale distributor of produce and other foods, maintained an employee manual with two rules at issue:

- "Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists"; and
- "Employees approached for interview and/or comments by the news media, cannot provide them with any information", and the company president is "the only person authorized and designated to comment on Company policies or any event that may affect our organization."

The majority found both rules lawful because when "reasonably interpreted," the rules do not prohibit or interfere with the exercise of NLRA rights. The Board did not see how the confidential rule prohibited employees from appealing to customers during a labor dispute (which would have interfered with Section 7 rights), and when reading "client/vendor list" in the context of the other prohibited materials (*i.e.*, "accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operations"), the Majority found "client/vendor lists" fall under the type of material an employer may lawfully conceal. In so holding, the majority added that rules prohibiting disclosure of confidential and proprietary customer and vendor lists to *Boeing* Category 1 for future cases.

In upholding the employer's media contact rule, the Board held when the rule is read as a whole, it pertains to instances where the media contacts employees and the employees purport to speak on the company's behalf, even though the rule itself is not so limited to those circumstances. The majority reasoned because the NLRA does not confer a right for employees to speak to the media *on the employer's behalf*, a rule prohibiting an employee from doing so would be lawful.

The Majority and Dissent Spar Over *Boeing*

Member McFerran sharply disagreed with the majority, and would have found both rules unlawful because they were not narrowly tailored and would have a reasonable tendency to chill employees from exercising Section 7 rights. McFerran reiterated why she thought *Boeing* was wrongly decided, criticized the majority's "clarifications" to *Boeing,* asserting that the reconfigured balancing test is "far too strict to adequately protect Section 7 rights," and argued the majority impermissibly flipped the burden of proof on the General Counsel.

Takeaways

The Board's scrutiny of employer policies to find language that might interfere with employee rights developed into a true cottage industry, oftentimes without any discernible victim of the unfair labor practice. This decision could change in the coming years. In the meantime, employers should continue to refer to *Boeing* and its progeny for guidance as to whether their rules and handbook policies pass muster with the backdrop that the current Board seems more willing to view employers' rules as lawful.

Specifically, while similar rules may have been previously viewed as overly broad and unlawful, under *LA Specialty* an employer's rules that (i) prohibit the sharing of client or vendor lists with third parties; and (ii) prohibit employees from speaking to the media on the employer's behalf, likely would be found lawful. However, an employer likely will have gone too far if the rule or policy prohibits (i) employees from appealing to customers or vendors in support of a labor dispute, (ii) the disclosure of names and locations of customers or vendors derived from sources other than the employer's confidential records, or (iii) employees from speaking to the media in their personal capacity.

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