

# Handbook Civility Rules Aimed at Preventing Toxic Work Environments Found Lawful by NLRB's Division of Advice

**Labor Relations Update Blog** on **December 1, 2020**

The NLRB's Division of Advice recently released a long-awaited Advice Memorandum (originally issued in February 2019, *Chipotle Mexican Grill*, Case 28-CA-229134 (Feb. 22, 2019)) concerning the validity of two workplace rules under the *Boeing* standard: (1) a rule encouraging employees to "[b]e...objective" in their communications; and (2) a rule requiring employees to notify the employer of inquiries or requests for information from governmental entities.

Advice concluded the rule concerning employee communications was a lawful workplace civility rule under *Boeing*, but the government investigations directive violated the Act because it could be applied to investigations by the NLRB or other agency investigations/proceedings.

## **Policy on "Ethical Communications" is a Lawful Civility Rule under *Boeing***

Advice reviewed a rule maintained in the employee handbook under the heading, "Ethical Communications", which primarily served as an anti-discrimination and harassment policy, but also encouraged employees to "[b]e clear and objective" in their communications. Advice evaluated whether the policy could reasonably be interpreted as interfering with protected concerted activity.

Upon inspection, Advice determined that the policy, read as a whole, was lawful and unlikely to be understood by employees as prohibiting protected activity. Although the requirement to “be...objective” could theoretically be read as restricting some forms of protected, subjective speech, Advice concluded that “the entire rule read in context is best understood as the sort of civility rule the Board has found lawful under *Boeing*”. The provision of the rule requiring employees to “be...objective” appears alongside other requirements that employee communications be “fair and courteous,” “thoughtful and ethical,” and do not “constitute harassment or bullying.” While the rule included some restrictions on the content of employee communication, such as disparaging speech, Advice found it was clear that this provision of the policy restricts disparagement of customers and other employees, which has little to no impact on Section 7 activity.

Under the second prong of the *Boeing* analysis, Advice considered the employer’s legitimate business justifications for maintaining the proper employee communication policy and determined that the employer’s legitimate interests outweighed any potential impact the rule *might* have on protected activity. Advice explained that employers have an interest in maintaining civility rules like the kind at issue in this case, including the “employer’s legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity and other legitimate business goals.” The purpose of the policy was not to prevent employees from publicly criticizing the terms and conditions of their employment, but rather to ensure employees remained civil in their communications in the workplace, which is lawful.

**Employer’s “Government Inquiries/Investigations” Rule Facially Unlawful under *Boeing***

Advice reviewed another rule in the employee handbook, entitled “Government Inquiries/Investigations”, which stated that “[a]ny inquiry, request for information, or subpoena from a government agency or authority should be forwarded immediately to the Compliance Department, the Safety, Security and Risk Department or Chipotle’s General Counsel or, in the case of tax audits, to the Chief Financial Officer.”

Advice concluded this policy was unlawful because, on its face, it restricts employees from participating or cooperating in investigations conducted by the NLRB and other government agencies. Advice explained that employees have a right under Section 7 of the NLRA to “cooperate in Board investigations or to concertedly participate in investigations by other regulatory or law enforcement agencies.” Employees would reasonably understand the rule as prohibiting them from providing requested evidence or otherwise participating in a government investigation without first communicating with the employer.

Although the employer argued that the rule only applies to government inquiries addressed to the employer and not to individual employees, and that it has a legitimate interest in ensuring it is aware of governmental inquiries and communications addressed to it, Advice found this explanation insufficient where the text of the rule failed to draw a distinction between government inquiries addressed to the employer and those addressed to individual employees.

### **Takeaways**

The Advice Memorandum solidifies (for now, anyway) the NLRB’s approach to workplace civility rules, as originally expressed in *Boeing*, where the Board held that civility rules requiring harmonious workplace relations and professional and appropriate conduct are generally lawful and fall within Category 1 under *Boeing*. Here, Advice indicated that a policy regulating employee communications with customers and other employees in the workplace falls squarely within the realm of lawful civility rules under NLRB jurisprudence. Employers should thus keep in mind that, while certainly not limitless, preventing a toxic work environment is a legitimate business justification for a policy that *could potentially* interfere with employees’ rights to engage in protected concerted activity.

The second rule evaluated by Advice regarding disclosure of government investigations and inquiries to the employer before responding is a helpful reminder to employers of the importance of careful and thoughtful drafting when it comes to handbook policies. While the employer in the case intended only to ensure that communications from government agencies and regulatory bodies made their way to the employer, the policy did not sufficiently make the limited scope of the policy apparent. Employers should thus ensure that any policies concerning government investigations are narrowly tailored, making clear that employees are free to cooperate with government requests for information and other inquiries without restriction or interference.

This is an appropriate time to note that the standards enunciated in *Boeing* could change in the coming months as the Executive Branch will change parties on January 20, 2021. The change in administration will ultimately cause a change to the make-up of the NLRB. It was only a few short years ago that all rules at issue in this case likely would have been found to be unlawful by the Board. We will, as always, keep you posted of important developments in this area.

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