10-23-2021

Rules in the Workplace: Does the NLRA Protect Employees' Ability to Record Working Conditions?

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Can employees record videos or take photographs at work to demonstrate unsatisfactory working conditions? The National Labor Relations Board recently upheld Boeing's workplace policy which restricts the use of camera-enabled devices such as cell phones on its property, known as the "no-camera rule."[1] The Board described in detail the sensitivity of Boeing's classified work before enacting a new standard of review for evaluating workplace rules under the National Labor Relations Act.[2] With two recent Biden nominations taking their seats on the Board, securing a three to two majority,[3] the Board might apply the new *Boeing* test liberally or even overturn the new standard and return to the previous standard.[4] In the wake of the COVID-19 pandemic and its effects on the job market, will the pro-labor Board push back on "no-camera" rules?

The National Labor Relations Act explicitly provides employees with various labor rights, including the right to self-organize, to form, join, or assist labor organizations, to bargain with their employer collectively through representatives of their own choosing, as well as the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[5] Employer and union activities are limited by various rules, duties, and restrictions detailed in the NLRA. For example, employers can express their views and opinions,

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[1] *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017).

[2] *Id.* at *1.

[3] Mark Gruenberg, *Senate OKs Biden NLRB picks, giving board pro-worker majority*, PEOPLE'S WORLD (July 29, 2021), https://www.peoplesworld.org/article/senate-oks-biden-nlrb-picks-giving-board-pro-worker-majority/.

[4] *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004).

[5] 29 U.S.C. § 157.

make arguments, and otherwise disseminate information without committing an unfair labor practice as long as such expression contains no threat or reprisal or force or promise of benefit.[6] Thus, employers are generally allowed to give anti-union speeches to their employees without committing an unfair labor practice.[7]

Not all conduct falls squarely into those explicit categories – some holes are left open for employers to regulate within their workplace unless the Board or the courts say otherwise. Generally, employers can create and enforce workplace rules. Of course, if the rule governs terms and conditions of employment and the employees have elected a union as their bargaining representative, the employer must bargain with the union about the proposed rule to comply with the employer's duty to bargain in good faith.[8] Where an employer enacts a rule about conduct in the workplace that appears facially neutral but nonetheless restricts employees' protected rights under the NLRA, the Board applies a special test to determine if that rule is unlawfully restrictive of protected labor rights despite the rule's apparent neutrality.[9]

The Board previously applied a two-step standard of review first introduced in *Lutheran Heritage Village* to evaluate such workplace policies.[10] If the employer rule *explicitly* restricted employee rights explicitly protected under Section 7 of the NLRA, such as the right to self-organize, bargain collectively, etc., then the rule constituted an unfair labor practice under Section 8(a)(1) by interfering with, restraining, or coercing employees in the exercise of their explicit rights.[11] However, facially neutral rules which passed this first inquiry would still be found violative of Section 8(a)(1) if employees could *reasonably construe* the

[6] 29 U.S.C. § 158(c).
[7] *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941).
[8] 29 U.S.C. § 158(a)(5), (d).
[9] *Supra* note 1; *supra* note 4.
[10] *Supra* note 4.
[11] *Id.* at 646.

language of the rule to prohibit Section 7 protected activity.[12] If the workplace rule failed this second step of the test, however, the rule still could be upheld if the rule was shown to advance legitimate business interests of the employer.[13] Applying this standard, the Board found that a confidentiality rule which prohibited employees from exchanging personal information unlawfully restricted employees from exercising their protected rights despite the rule's neutrality on its face.[14] Under this second step of the test, the Board also found rules prohibiting employees from criticizing their employer on social media sites to constitute unfair labor practices under Section 8(a)(1).[15]

Finding that the second prong of the *Lutheran Heritage* test restricted employer policies too greatly by failing to adequately take into account any legitimate employer justifications, the Trump Labor Board changed the applicable standard for evaluating facially neutral employer work rules in their decision in *The Boeing Co., Inc*.[16] There, the Board instituted a balancing test that considers the nature and extent of the potential impact on employees' rights under the NLRA and the employer's legitimate business justifications for the rule.[17] Whereas legitimate business justifications constituted an exception to the rule under the second prong of *Lutheran Heritage*,[18] here, the Board simply seeks to strike a balance between the effect on employees' rights and the employer's legitimate needs. The Board noted the difficulty and unpredictability of applying the old standard, as well as the lack of flexibility it provided the Board to afford less or greater protection to more peripheral or more fundamental rights under Section 7.[19]

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[12] Under *Lutheran Heritage Village*, a facially neutral rule or policy also could constitute a violation if the rule was promulgated in response to union activity or if the rule had been applied to restrict the exercise of Section 7 rights. *Id.* at 647.

[13] E.g., *Clearwater Paper Corp.*, No. 19-CA-64418.

[14] *MCPc, Inc.*, 360 N.L.R.B. 216 (2014).

[15] E.g. *Dish Network*, 359 N.L.R.B. No 108 (2012).

[16] *Supra* note 1, at *2.

[17] *Id.* at *4.

[18] *Supra* note 13.

[19] *Supra* note 1, at *2, *3.

In *Boeing*, the Board also identified three categories of results regarding these work rule challenges in order to provide clarity.[20] Category One envisages rules that the board designates as completely lawful, though the unlawful application of such rules could still violate the NLRA.[21] Category Two includes rules that warrant individualized scrutiny through the Board's balancing test.[22] Finally, rules that the Board designates as unquestionably unlawful because they directly violate an explicit right guaranteed under the NLRA fall into Category Three.[23]

As the first application of the new test, the Board upheld Boeing's policy which prohibits employees from using devices to take photos or videos on job sites without permission.[24] The Board reasoned that Boeing's justifications for the rule outweighed the rule's "more limited adverse effect on the exercise of Section 7 rights."[25] Following that decision, the NLRB has allowed an employer to ban employees from using the company's name, trademarks, or logos in association with any personal advertisement, online profile, or personal use without written permission even though some employees might read the rule to prohibit them from using the company's image on picket signs, leaflets or apparel while engaging in protected activity.[26]

The new NLRB General Counsel, Jennifer Abruzzo, indicated in her first memorandum on August 12, 2021, that she intends to present the Board

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[20] *Supra* note 1, at *4.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Supra* note 1, at *6.

[25] *Id.*

[26] Most workers would understand this rule to only ban using the employer's intellectual property for commercial and other non-protected uses. Moreover, even if a few workers interpreted these rules to apply to protected activities, it is unlikely that this construction would actually cause them to refrain from such activities. *Denton Cty. Elec. Coop., Inc. d/b/a Coserv Elec. & Int'l Bhd. of Elec. Workers Loc. 220, Affiliated with Int'l Bhd. of Elec. Workers*, No. 16-CA-149330, 2020 WL 553494 (Feb. 4, 2020).

with the opportunity to reverse recent Trump Board precedents.[27] The first case mentioned in the memorandum is *Boeing*,[28] so the future of "no-camera" rules in the workplace may still be up in the air.

Edited by Alex Beezley

[27] Steven M. Swirsky & Donald S. Krueger, *NLRB General Counsel Jennifer A. Abruzzo Issues "Mandatory Submissions to Advice" and "Utilization of Section 10(j) Proceedings" Memos, Outlining Her Priorities and Enforcement Agenda*, THE NATIONAL LAW REVIEW (Aug. 23, 2021), https://www.natlawreview.com/article/nlrb-general-counsel-jennifer-abruzzo-issues-mandatory-submissions-to-advice-and.

[28] Jennifer A. Abruzzo, *Memorandum GC 21-04*, NLRB Gen. Couns. Memorandum (Aug. 12, 2021), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos (scroll down to the applicable memorandum and click the link embedded in "Mandatory Submissions to Advice").