

PUBLICATION

No Chill: The Future of Employee Handbook Standards at the NLRB

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In one of his first official actions, President Biden relieved former General Counsel (GC) of the National Labor Relations Board (NLRB) Peter Robb of his position. As Mr. Robb's replacement, President Biden selected Peter Sung Ohr, Regional Director of the NLRB's Chicago Regional Office, to serve as Acting GC.

Mr. Ohr promptly revoked multiple NLRB administrative guidance memoranda issued by his predecessor. One of the revoked memoranda was Memorandum GC 18-04, which provided guidance on employee handbook rules in the wake of the NLRB's landmark decision, *The Boeing Co.*, 365 NLRB No. 154 (2017). Both unionized and non-unionized employers are likely familiar with the NLRB's decision in *Boeing*. That decision constituted a welcome relief from the pre-existing NLRB precedent regarding employee handbooks.

Background

Prior to *Boeing*, the NLRB's decision in *Lutheran Heritage Village-Livonia*, established the controlling standard for analyzing whether employee handbook rules violated the protections afforded employees by the National Labor Relations Act (NLRA). Under that standard, a workplace rule violated the NLRA if it would "reasonably tend to chill" an employee from engaging in protected activity. Even if a rule did not violate the NLRA, on its face, it was unlawful if an employee could "reasonably construe" the policy as restricting his or her NLRA rights. This placed many standard employee handbook provisions on the chopping block without any consideration of justification or reasoning behind the rule.

The NLRB's 2017 *Boeing* decision created a new framework for evaluating workplace rules. This new, employer-friendly standard balances "the nature and extent of the potential impact on NLRA rights" caused by the employer's policy with the "legitimate justifications associated with the rule." When the employer's legitimate justifications for the rule outweigh its potential impact on employees' rights, the rule may be considered lawful.

Moreover, in an effort to provide employers with some predictability regarding future application of the new standard, the NLRB's *Boeing* decision created and defined "three categories of employment policies, rules, and handbook provisions," which were applied as follows:

- rules that fit within Category 1 are lawful,
- Category 2 rules require individualized scrutiny under the facts of each case, and
- Category 3 rules are unlawful.

For more details on the *Boeing* decision and its impact, see ["NLRB Establishes New Standard for Analyzing Employers' Policies"](#) and ["New Administration, New NLRB."](#)

On June 6, 2018, then-NLRB GC Robb issued Memorandum GC 18-04, which aimed to provide guidance on employee handbook rules in light of *Boeing* and detailed the manner in which NLRB Regional Offices should

interpret workplace rules. Memorandum GC 18-04 provides examples of lawful employer policies and instructs the NLRB Regional Offices to cease interpreting ambiguous employer rules against the drafter. It goes on to instruct against interpreting broad provisions as necessarily prohibiting all activity that could possibly be included within the employer rule. For more details regarding Memorandum GC 18-04, see: ["Post Boeing NLRB Guidance on Employee Handbook Rules Bring Common Sense and Flexibility to Employer Work Rules."](#)

Takeaways

Employers knew to expect significant changes from the NLRB in light of the results of the most recent presidential election. However, employers may have anticipated a gradual transition marked by President Biden's appointees changing the composition of the NLRB, followed by a decision turning away from the standard announced in *Boeing*. Given its revocation, employers can throw the guidance provided in Memorandum GC 18-04 out the window. Instead, employers should look directly to established NLRB precedent for guidance on what employer rules are permissible. Employers should, of course, be mindful that a departure from *Boeing* itself is likely on the horizon.

A Look Ahead

On February 17, 2021, President Biden nominated Jennifer Abruzzo to be GC of the NLRB and she was confirmed by the Senate on July 21, 2021. The NLRB is expected to have an aggressive enforcement agenda under her direction. Ms. Abruzzo named Mr. Ohr as Deputy General Counsel. Prior to her nomination, Ms. Abruzzo served as Special Counsel for Strategic Initiatives for the Communications Workers of America. Before that, Ms. Abruzzo worked for the NLRB and was the Acting GC prior to the appointment of Mr. Robb.

On May 26, 2021, President Biden nominated union-side attorney Gwynne Wilcox to fill a vacant seat on the NLRB. On June 22, 2021, President Biden nominated another union-side attorney, David Prouty, to fill William Emanuel's seat on the NLRB. Ms. Wilcox and Mr. Prouty were confirmed by the Senate on July 28, 2021, now giving the NLRB a pro-union Democratic majority.

Employers should stay tuned for further developments and should feel free to contact one of the authors or their Baker Donelson attorney with questions.