

# New NLRB guidance memorandum on workplace policies and handbooks

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[Introduction](#)  
[Overview](#)  
[Comment](#)

## Introduction

On 6 June 2018 National Labour Relations Board (NLRB) General Counsel Peter Robb issued a new guidance memorandum (GC 18-04) clarifying the standard that it will apply when interpreting employer workplace policies and handbooks following its recent decision in *The Boeing Co* (365 NLRB 154 (2017)).

In *Boeing*, the NLRB rejected a prior standard that it had applied for judging workplace rules, which generally prohibited an employer from maintaining any rule that an employee "could reasonably construe" as prohibiting the exercise of the employee's rights under Section 7 of the National Labour Relations Act, in favour of a test that balances:

- the nature and extent of the potential impact of a rule or policy on the employee's National Labour Relations Act rights; and
- the employer's "legitimate justifications associated with the rule".

## Overview

In connection with this balancing test, the NLRB delineated three categories of employment practice, rule and handbook provision. The new memorandum provides additional guidance to NLRB regional directors and officers on how to categorise and evaluate such policies moving forward:

- Category 1 – policies that are "generally lawful" because, "when reasonably interpreted", they do not "prohibit or interfere with the exercise of rights guaranteed by the [National Labour Relations Act], or because the potential adverse impact on protected rights is outweighed by the employer's business justifications associated with the rule". Examples of Category 1 policies include:
  - policies that govern employee civility, insubordination, disruptive behaviour and defamation;
  - policies that protect the employer's confidential, proprietary or customer information that do not make mention of employee or wage information;
  - rules governing the use of the employer's logos or intellectual property and authorisation to speak on behalf of the employer; and
  - policies that prohibit photography and recordings in the workplace.
- Category 2 – policies that are "not obviously lawful or unlawful, and must be evaluated on a case-by-case basis" and whose legality often depends on context. Examples of these policies include:
  - policies that broadly govern conflicts of interest and do not specifically target fraud or self-enrichment;
  - confidentiality policies that broadly encompass the employer's business or information (and thus could inadvertently incorporate employee wages, terms of employment or

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- working conditions); and
- rules regarding:
  - disparagement or criticism of the employer;
  - the use of the employer's name;
  - the employees' general ability to speak to the media or third parties;
  - off-duty conduct that might harm the employer; and
  - false or inaccurate statements that do not rise to the level of defamation.
- Category 3 – rules that are "generally unlawful" because they plainly interfere with the exercise of protected rights and the adverse impact on protected rights outweighs any business justification. Examples of this category include:
  - confidentiality rules that prohibit discussion of salaries, wages, commissions, benefits or working conditions, either internally or with third parties; and
  - rules against joining outside organisations or voting on matters concerning the employer.

## **Comment**

The NLRB's guidance memorandum clarifies that post-*Boeing*, many employment policies and procedures that may have been deemed unlawful under the previous NLRB General Counsel memoranda will now be upheld. The new memorandum, which specifically discusses a number of routine workplace policies and explains why such policies will generally be found lawful or unlawful under the National Labour Relations Act, provides employers with a greater degree of predictability with respect to the legality of many of their policies. However, the general counsel makes clear that employers may not directly limit protected activity (eg, discussions on wages) and that lawfulness of a policy can turn on the specific language and scope of the policy used. Employers should thus keep the new guidance in mind when drafting and revising workplace policies and should regularly review their workplace rules and policies to ensure compliance with the constantly evolving legal landscape in this area.

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