Where is Boeing Going?

All Employers Should Pay Close Attention To Potential Changes In The Standards For Employer Policies Or Practices That May Limit Concerted Activity

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Many employers tend to think only of traditional labor and unionized workforces at the mention of the National Labor Relations Act. However, the NLRA's protection, at Section 7, of the right to engage in "other concerted activities for the purpose of . . . mutual aid or protection"[1] extends to nearly all employees, regardless of whether such activity is undertaken in the context of traditional organizing or collective bargaining. Accordingly, nearly all employers may be impacted by shifts in the standard for determining when a policy or practice unlawfully restricts activity protected by Section 7. This standard has been expanding and contracting for decades, and expansion is on the horizon again as President Biden's Democrat-controlled board recently invited party briefs and *amici* in the *Stericycle, Inc.* matter, soliciting input on whether the standard established by the National Labor Relations Board in 2017 in the matter of *Boeing Co.*[2] sufficiently protects employees.[3]

Turbulence From Martin Luther to AT&T Mobility

In 2004, in the matter of *Martin Luther Memorial Home, Inc.*, the Board held that an employer policy that does not set forth an express restriction of Section 7 activity may be unlawful nonetheless if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[4] In that case, the Board upheld rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" as complying with the NLRA, but found that rules prohibiting solicitation, loitering, and unlawful strikes, work stoppages, or other interference were unlawful.[5]

In 2017, however, in deciding the *Boeing Co.* case, the Trump administration's Board lamented the way in which the Obama-era Board applied the *Martin Luther* "reasonably construe" standard, stating that the Board "subsequently lost its way . . . it invalidated commonsense rules and requirements that most people would reasonably expect every employer to maintain[,]" and "viewed challenged rules not from the standpoint of reasonable employees, but from that of traditional labor lawyers who have devoted their professional lives to interpreting and applying the NLRA" thereby outlawing policies and rules that a reasonable employee would expect a reasonable employer to have.[6]

In *Boeing Co.*, the NLRB evaluated whether a policy restricting the use of camera-enabled devices such as cell phones on company property unlawfully restricted Section 7 rights. The Administrative Law Judge had found that the policy violated the NLRA because a reasonable employee could construe the policy to violate Section 7 rights, but the NLRB reversed the ALJ, adopting a new test setting forth that if a policy is not explicitly unlawful, the Board will evaluate "(1) the rule's potential impact on protected concerted activity; and (2) the employer's legitimate business justifications for maintaining the rule." Tribunals applying the *Boeing* rule essentially would engage in a balancing test to evaluate whether and to what extent a rule's potential unlawful impact outweighed its justifications, and also would consider whether the employer had applied the rule to restrict Section 7 rights, leaving intact the "applied to restrict" factor of the *Martin Luther* test.

Then, in 2021, after President Biden's inauguration, but before control of the Board flipped to the Democrats, the Board revisited its own precedent to further narrow the rule, divesting the "applied to restrict test" from the inquiry as to lawfulness of a rule itself, and thereby overruling what remained of *Martin Luther*. In *AT&T Mobility*, an employer had applied a no-recording rule similar to one upheld in *Boeing Co.* to prohibit an employee from recording what clearly was protected Section 7 activity. Instead of striking down the rule for failing the "applied to restrict" test, the Board held that whether a rule had been applied to restrict Section 7 rights no longer was part of the test, and instead was a violation to be evaluated and addressed separately. As it stands, the test for whether an employer rule or policy unlawfully restricts Section 7 rights is "(1) the rule's potential impact on protected concerted activity; and (2) the employer's legitimate business justifications for maintaining the rule" as set forth in *Boeing Co.*, and even a rule or policy that is applied to restrict Section 7 rights may be lawful, as the unlawful application no longer is relevant to the inquiry into the propriety of the rule itself.

Where will the NLRB Land?

In the recent *Stericycle, Inc*. matter, the Board invited party briefs and *amici* on four questions: (1) Should the Board continue to adhere to *Boeing Co.* standard?; (2) How, if at all, should the Board modify existing law on maintaining employer work rules "to better ensure that: (a) the Board interprets work rules in a way that accounts for the economic dependence of employees on their employers and the related potential for a work rule to chill the exercise of Section 7 rights by employees; (b) the Board properly allocates the burden of proof in cases challenging an employer's maintenance of a work rule under Section 8(a)(1); and (c) the Board appropriately balances employees' rights under Section 7 and employers' legitimate business interests?"; and (3) Should the Board continue to hold always lawful certain categories of work rules including investigative confidentiality rules, rules prohibiting outside employment, and non-disparagement rules.[7] Briefs were due March 7, 2022 and responsive briefs were due March 22, 2022.

While it is expected that the NLRB will give due consideration to briefs filed, it is also safe to assume, given the composition of the current Board, that any modifications to the *Boeing Co*. standard will be employee-friendly. A return of the "reasonably construe" test may be in order, and, if the pendulum swings far enough, forthcoming decisions may even require employers to do more affirmatively to enable employees to engage in Section 7 activity, as opposed to simply refraining from restricting it. An example of this approach by the Board under President Obama is set forth in the since-overruled matter of *Purple Communications, Inc.*, where the Board found a presumption "that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time," rebuttable only by a showing of "special circumstances necessary to maintain production or discipline justify restricting its employees' rights."[8] It remains possible that President Biden's Board will act similarly, and that the presently austere *Boeing Co*. test either will undergo a liberal makeover, or will be eschewed entirely in favor of a more indulgent standard for workers.

Unpacking Employer Obligations and Recommendations in the Interim

Until the Board rules, it will not be possible to know for sure which employer policies will remain lawful and which will need to be amended to comply with a new standard. For the time being, employers may wish to review existing policies to evaluate whether such policies might discourage a reasonable employee from discussing the terms and conditions of employment or the work environment with colleagues. If so, a proactive modification might be in order, even if the policy is justified by a legitimate business consideration. In any event, employers should pay close attention to updates from the NLRB in the coming weeks and months. Employers seeking to review existing employee policies or implement new ones should contact legal counsel for guidance.

[1] 29 U.S.C. § 157.

[2] *Boeing Co.*, 365 N.L.R.B. No. 154 (2017).

[3] *Stericycle, Inc.*, 371 N.L.R.B. No. 48 (January 6, 2022).

[4] *Martin Luther Memorial Home, Inc.*, 343 N.L.R.B. No. 75 (November 19, 2004).

[5] Id.

[6] *L.A. Specialty Produce Company*, 368 N.L.R.B. No. 93 (October 10, 2019).

[7] *Stericycle, Inc.*, 371 N.L.R.B. No. 48 (January 6, 2022).

[8] *Purple Communications, Inc.*, 361 N.L.R.B. 1050, 1063 (December 11, 2014).