

## NLRB Sets New Standard for Employee Handbooks

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The National Labor Relations Board set a new standard regarding employer rules, policies and handbook provisions in a decision that should give employers greater freedom.

Last week's decision reverses a previous one in which the NLRB would consider a rule, policy, or handbook provision unlawful if an employee would reasonably construe the language to prohibit protected union activity. The board found this standard was exceptionally difficult to apply and caused conflicting decisions and unpredictability. Last week's decision stated that the board's "past decisions have disregarded entirely the overwhelming number of employees and others whose interests are *protected* by rules that the Board has invalidated." It further stated that the test "required perfection that literally is the enemy of the good."

The NLRB set forth a new standard that it promises will strike the proper balance between business justification and invasion of employee rights. "The (b)oard will evaluate two things: (i) the nature and extent of the potential impact on NLRA (National Labor Relations Act) rights, *and* (ii) legitimate justifications associated with the rule," the board stated in its decision last week. The board will delineate three categories of employment policies, rules and handbook provisions, according to its decision:

- Category 1 - "Will include rules that the (b)oard designates as *lawful* to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule." The (b)oard then held that rules requiring employees to abide by basic standards of civility are lawful.
- Category 2 - "Will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."
- Category 3 - "Will include rules that the (b)oard will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule." An example of a Category 3 rule would be one that prohibits employees from discussing wages or benefits with one another.

The decision applies only to cases pending at the time of the decision and future cases.

This decision also comes on the heels of a recent memorandum by the general counsel of the NLRB. General counsel indicated that it would provide an "alternative analysis" to prior board decisions on handbook rules, especially rules prohibiting disrespectful conduct, rules prohibiting use of employer trademarks and logos, no camera/recording rules, and rules requiring employees to maintain the confidentiality of workplace investigations.

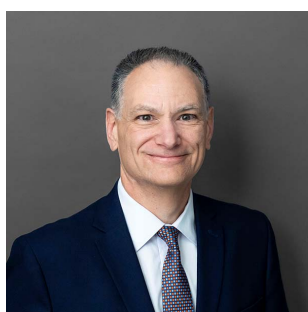
Last week's decision will provide employers with greater clarity and freedom in drafting employee handbooks and

other work rules, policies and procedures. Employers have been frustrated over the past decade with seemingly unreasonable pro-union decisions from the NLRB and others regarding handbook provisions. The latest decision now will strike a proper balance between employees' rights and employers' business justifications for the rule.

If any employers have questions on how this latest ruling affects their business, please [reach out to me](#) or to any other members of Barley Snyder's [Labor Law Practice Group](#).

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