

NLRB Reaffirms Its Commonsense Approach to the Validity of Employee Rules

LA Specialty Produce is a distributor of produce and other fine and specialty foods. LA Specialty's employee manual contains, among other rules, a confidentiality rule and a media contact rule. The confidentiality rule states, "Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [LA Specialty] including but not limited to client/vendor lists." The media contact rule states: "Employees approached for interview and/or comments by the news media cannot provide them with any information. Our President [of LA Specialty] is the only person authorized and designated to comment on Company policies or any event that may affect our organization."

In a recent 3-1 decision a majority of the National Labor Relations Board reversed an Administrative Law Judge's decision that found the above rules unlawful (*LA Specialty Produce, Inc.*). In finding the rules lawful, the Board majority applied its 2017 decision in *Boeing Company* that overruled its earlier precedent in *Lutheran Heritage*. Under *Lutheran Heritage*, an employee rule would be unlawful if a reasonable employee would read the rule to apply to activity protected by the National Labor Relations Act (NLRA). In describing how that standard was applied by the previous Board, the majority concluded that the previous Board "had lost its way" because "In case after case, it invalidated commonsense rules and requirements that most people would reasonably expect every employer to maintain." *Boeing*, in the majority's view, repudiated the quest for "linguistic precision" that prevailed for years under *Lutheran Heritage*. The majority stated "*Boeing* requires the Board to determine whether a facially neutral rule, reasonably interpreted, would potentially interfere with the exercise of NLRA rights. Accordingly, a challenged rule may not be found unlawful merely because it **could** be interpreted, ... as limiting some [NLRA] activity, or because the employer failed to eliminate all ambiguities from the rule."

The majority, applying the *Boeing* standard, found the confidentiality rule as interpreted by an objectively reasonable employee does not prohibit or interfere with NLRA rights. The majority reasoned that the rule does not prohibit employees from disclosing the names of LA Specialty's clients or vendors to other parties such as a union. The rule only prohibits disclosure of client or vendor lists. The majority then concluded that in context of the other information that was not to be disclosed under the rule, the rule only applied to LA Specialty's own non-public proprietary records. Finally, and more significantly, the Board held "we now generally categorize rules that prohibit the disclosure of confidential and proprietary customer and vendor lists as lawful rules." These rules do not target employee salary or wage information, which would be unlawful.

In similarly deciding that the media contact rule was lawful, the majority initially described the NLRA right of employees to speak to the media about their terms and conditions of employment. The majority concluded that LA Specialty's rule did not prevent employees from talking to the media about such issues. When reasonably interpreted, the subject media rule only applied when employees were approached by the media for comment and in those circumstances they could not speak on LA Specialty's behalf. The majority recognized that "the rule might have been better written if the order of the two sentences were reversed" but concluded that *Boeing* rejected "linguistic perfection" as a standard as to whether an employee rule interfered with NLRA rights. Further, as with the confidentiality rule, the Board found that rules that prohibit employees from speaking to the media on behalf of their employer are generally lawful.

As the majority's treatment of the above rules indicates, the Board will no longer view handbooks and the validity of employee rules solely through a NLRA prism, and will conduct a commonsense analysis of what kind of employee conduct the rule is attempting to regulate.



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