

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 5, 2018

TO: David Cohen, Regional Director
Region 12

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Ally Financial, Inc. 512-5012-0100
Case 12-CA-211123 512-5012-0125
512-5012-0133
512-5012-3322
512-5036-3300

The Region submitted this Section 8(a)(1) case for advice, as to whether (1) in light of the Board's decision in *The Boeing Co.*,¹ the Employer maintained rules that restrict employees in the exercise of their Section 7 rights; and (2) the Employer violated Section 8(a)(1) by issuing a disciplinary coaching notice based in part on an unlawfully overbroad rule. We conclude that certain of the Employer's rules at issue are unlawful under the Board's *Boeing* decision. However, we conclude that the Employer did not act unlawfully when it issued the coaching notice based on the overbroad rule.

The Employer is a national financial services company. It operates a call center in Jacksonville, Florida where the Charging Party worked as (b) (6), (b) (7)(C) (b) (6), (b) (7)(C). During the relevant period, the Employer maintained a "Workplace Behavior" policy and a separate solicitation rule. On (b) (6), (b) (7)(C), the Employer issued the Charging Party a "Coaching on Attendance" notice due to (b) (6), (b) (7) poor attendance record. (b) (6), (b) (7) was later terminated because of (b) (6), (b) (7) attendance. (b) (6), (b) (7) filed charges in Cases 12-CA-206085 and 12-CA-208921 alleging, respectively, that the coaching notice and the termination were unlawful because (b) (6), (b) (7) was engaged in protected concerted activity. The Region dismissed those charges due to insufficient evidence that (b) (6), (b) (7) engaged in any protected activity that led to either action. On (b) (6), (b) (7)(C), 2017, the Charging Party filed charges in the instant case alleging that the Employer maintains rules that restrict employees in the exercise of their rights under the Act and that the Employer enforced an overbroad rule prohibiting conduct against the best interest of the Employer when it issued (b) (6), (b) (7) coaching notice, all in violation of Section 8(a)(1).

¹ *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017).

I. The Lawfulness of the Alleged Restrictive Rules Under *Boeing*

In cases where a facially neutral employer work rule, if reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights, and (ii) legitimate business justifications associated with the requirement(s).² The Board will conduct this evaluation “consistent with the Board’s ‘duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,’ focusing on the perspective of employees.”³ In so doing, “the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral),” and make “reasonable distinctions between or among different industries and work settings.”⁴ The Board will also account for particular events that might shed light on the purpose served by the rule or the impact of its maintenance on Section 7 rights.⁵

The Board also indicated that its balancing test will ultimately result in its ability to classify the various types of employer rules into three categories, thereby eliminating the need to conduct case-specific balancing as to certain types of rules so as to provide employers, employees, and unions with greater certainty in the future. The Board described the following categories:

- *Category 1* will include rules that the Board designates as *lawful* to maintain, either because: (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights and thus no balancing of rights and justifications is required; or (ii) even though the rule has a reasonable tendency to interfere with Section 7 rights, the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule. The Board included in this category rules requiring “harmonious relationships” in the workplace, rules requiring employees to uphold

² *Boeing Co.*, 365 NLRB No. 154, slip op. at 2–3.

³ *Id.*, slip op. at 3, quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967).

⁴ *Boeing Co.*, 365 NLRB No. 154, slip op. at 15.

⁵ *Id.*, slip op. at 16.

basic standards of “civility,” and rules prohibiting cameras in the workplace.

- *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 Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate business justifications.
- *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit Section 7 conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. The Board included as an example of a Category 3 rule one that prohibits employees from discussing wages and benefits with each other.⁶

The Region submitted to the Division of Advice the legality of rules contained in the Employer’s “Workplace Behavior” policy that prohibit the following conduct:

1. *Insubordination, neglect of duties or other disrespectful conduct including, but not limited to, refusal to perform work or comply with other instructions given by a supervisor. If the employee reasonably believes the instructions are illegal, immoral or dangerous, it should be reported through the appropriate Company channels per the Open Door Policy (i.e. next level Leader or HRBP), or Ethics Hotline (intended to address issues of fraud, theft, illegal or unethical activity).*

The General Counsel has determined that such rules should be in *Boeing* Category 1. Almost every employer with a rulebook has a rule forbidding insubordination, unlawful or improper conduct, uncooperative behavior, refusal to comply with orders or perform work, or other on-the-job conduct that adversely affects the employer’s operation. The vast majority of activity covered by these rules is unprotected, and employees would not usually understand such rules as covering protected concerted activity.⁷ Furthermore, employers have a legitimate and substantial interest in preventing insubordination or non-cooperation at work, and an employer has every right to expect employees to perform their work and follow

⁶ *Id.*, slip op. at 3–4, 15.

⁷ See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–89 (1999).

directives during working time. Therefore, the Region should not allege that this rule is unlawful.

2. *Solicitation or distribution of literature within the department without the approval of Human Resources and the department manager.*

The *Boeing* decision did not alter the well-established standards regarding no-solicitation/distribution rules, where the Board has already struck a balance between employee rights and employer business interests.⁸ Thus, under extant Board law it is well settled that employees presumptively have the right to solicit on their employer's premises during non-work time and to distribute literature on their employer's premises during non-work time and in non-work areas.⁹ An employer that seeks to restrict such activity bears the heavy burden of showing that special circumstances exist that make the restrictions necessary to maintain production or discipline.

Here, the Employer's policy prohibiting solicitation or distribution of literature within the department without the approval of Human Resources and the department manager, without distinguishing between non-work time and work time, constitutes a flat ban on these Section 7 protected activities. And, the Employer has not articulated any special circumstances that might justify such restrictions. Accordingly, the Region should allege that the rule is unlawfully overbroad and that maintaining the rule violates Section 8(a)(1).

3. *Any conduct or activity which is not in the best interest of the Company*

Although certain narrowly-tailored conflict of interest rules will be considered lawful Category 1 rules, broad conflict of interest rules require a case-by-case analysis and therefore belong in Category 2 of *Boeing*. And, when a conflict of interest rule bans *all* activity that could harm the employer's reputation or that is adverse to the employer's interests, it raises substantial Section 7 issues that are not outweighed by any legitimate employer interests. Thus, while this rule certainly encompasses conduct that is unrelated to Section 7 activity, its broad language also sweeps in protected concerted or union activity where employees pit their own collective interests against the Employer's, such as employee protest activity connected to a labor dispute that could harm the employer's reputation. This would include core

⁸ See *Boeing Co.*, 365 NLRB No. 154, slip op. at 8 (relying on doctrine regarding those types of rules as support in overturning *Lutheran Heritage*).

⁹ *Republic Aviation v. NLRB*, 324 U.S. 793 (1945); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962).

NLRA-protected activity such as strikes, protests, boycotts, honoring picket lines, or indeed, any public expressions of workplace dissatisfaction.¹⁰ Further, the legitimate business interests that the Employer seeks to advance by promulgating this kind of rule can be achieved with a rule that does not ban *all* activity that is not in the Company's best interest, but rather prohibits specific types of business-related conflicts of interest. Given that the impact on core Section 7 rights are significant, and that the Employer's legitimate interests can be served by a more clearly defined rule, the Region should allege that this rule is unlawfully overbroad and that maintaining the rule violates Section 8(a)(1).

4. *Employees may not use Company supplies or equipment for solicitation or distribution. This includes telephone, computers and email, voicemail, copy machines, fax machines, interoffice mail or regular mail paid for by the Company.*

This stand-alone rule that prohibits the use of the Employer's equipment and electronic systems to engage in solicitation is unlawful to the extent it restricts employees' right to use the Employer's email system, when on non-working time, to engage in Section 7-related solicitation. Under *Purple Communications*, the Board adopted the 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 non-working time."¹¹ To justify a total ban on employees' non-work use of email, an employer must demonstrate that "special circumstances make the ban necessary to maintain production or discipline."¹² The Board has suggested that it will be the "rare case" where special circumstances justify a total ban, and it has emphasized that in demonstrating special circumstances, an employer's "mere assertion of an interest that could theoretically support a restriction" is insufficient.¹³ Here, the employees use the email system in the course of their work and the Employer has raised no special circumstances warranting a prohibition.

¹⁰ *Cf. First Transit, Inc.*, 360 NLRB 619, 619 n.5, 629–30 (2014) (finding such a rule unlawful under *Lutheran Heritage* for these reasons).

¹¹ *Purple Communications*, 361 NLRB 1050, 1063 (2014).

¹² *Id.* at 1050.

¹³ *Id.* at 1063.

Accordingly, the Region should allege that under extant Board law the rule is facially unlawful and maintaining the rule violates Section 8(a)(1).¹⁴ Since the Board has not expanded the holding of *Purple Communications* beyond employer email systems, the remainder of the Employer's rule is lawful.

II. Issuing the coaching notice based in part on the Employer's unlawfully overboard rule prohibiting conduct against the best interest of the Employer

Under *Continental Group, Inc.*, an employer violates Section 8(a)(1) by imposing discipline pursuant to an unlawfully overbroad rule in two scenarios: (1) if the employee was engaged in protected conduct; or (2) if the employee was engaged in conduct that otherwise implicates the concerns underlying Section 7.¹⁵ However, an employer does not violate the Act by disciplining an employee for conduct "wholly distinct" from the concerns underlying Section 7, even if the discipline is imposed pursuant to an unlawfully overbroad rule.¹⁶ For example, in *Continental Group*, the Board held that an employer did not violate the Act by disciplining an employee pursuant to an unlawfully overbroad "no access" policy because the conduct for which he was disciplined, sleeping on the employer's premises, was conduct "wholly distinct" from Section 7 concerns. An employer may also defend against an alleged violation by showing that the employee's conduct interfered with the employee's work, the work of other employees, or the employer's operations.¹⁷

Here, the Region has already determined that the Charging Party was not engaged in any protected activity, and that the Charging Party was disciplined and terminated for (b) (5), (b) (7) poor attendance record. Therefore, the first scenario under *Continental Group, Inc.* is not applicable. As to the second scenario, even if it is determined that the Charging Party engaged in conduct that implicated the concerns underlying Section 7, the Region has already determined that the Employer discharged (b) (5), (b) (7) because of (b) (5), (b) (7) attendance issues rather than (b) (5), (b) (7) allegedly Section 7-

¹⁴ (b) (5)

¹⁵ *Continental Group, Inc.*, 357 NLRB 409, 412 (2011). The General Counsel does not necessarily agree with the holding of *Continental Group* and may seek to revisit it in an appropriate case.

¹⁶ *Id.* at 413.

¹⁷ *Id.* at 412.

related conduct. Thus, the Region should not allege that the Employer acted unlawfully by issuing the coaching notice based in part on the unlawfully overbroad “conduct not in the best interests of the Company” rule.

Accordingly, the Region should issue complaint, absent settlement, regarding the overbroad rules, and should dismiss, absent withdrawal, the allegation that the Employer acted unlawfully by issuing the coaching notice based in part on one of its unlawfully overbroad rules.

/s/
J.L.S.

ADV.12-CA-211123.Response.Ally Financial. (b) (6), (b) (7)