

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

DATE: August 30, 2018

TO: David Cohen, Regional Director
Region 12

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

SUBJECT: Coastal Industries, Inc. d/b/a Coastal Shower Doors Case 12-CA-194162
512-5012-0000
512-5012-0125
512-5012-0133
512-5012-1725
512-5012-1737
512-5012-6722
512-5012-3322

The Region submitted this Section 8(a)(1) case for advice as to whether various Employer rules and policies are lawful under *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017) (“*Boeing*”).

We conclude that one of the Employer’s confidentiality rules, parts of its social media policy, and its cell phone rule are unlawful Category 2 rules, but that the rest of the rules are lawful.

Coastal Industries, Inc. d/b/a Coastal Shower Doors (the “Employer”) is a shower door manufacturer based in Jacksonville, Florida. On June 1, 2014, the Employer promulgated, and still currently maintains, an employee handbook with several rules that the Charging Party alleges are unlawfully overbroad.¹ Specifically, the Employer maintains rules regulating Conduct and Behavior that require employees to refrain from certain inappropriate behavior, including “un-businesslike conduct,” “creating discord,” “obtaining unauthorized confidential information,” and soliciting not “in good taste.” In addition, the Employer maintains a confidentiality policy that states that all information “retained or generated” by the Employer is confidential, and an electronic assets policy that forbids “disparaging” language. The Employer also maintains a social media policy that bans connecting to social media on the Employer’s electronics, bans posting “derogatory information,” and bans handing out

¹ The Employer is also alleged to have discharged an employee in retaliation for protected concerted activity, and told another employee not to discuss Board charges. Those allegations were not submitted to Advice.

the Employer's telephone number. Finally, the Employer maintains a cell phone policy that bans all use of cell phones during "working hours."

We conclude that the conduct, solicitation, electronic assets, and email policies are lawful Category 1 rules. We further conclude that the Employer's confidentiality and cell phone policies are unlawful Category 2 rules. Finally, we conclude that the Employer's social media policy is partially lawful and unlawful.

I. The *Boeing* Standard for Determining Whether a Work Rule is Facially Lawful

In cases where a facially neutral 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,

² *Boeing*, 365 NLRB No. 154, slip op. at 2–3 (Dec. 14, 2017) (expressly overruling the "reasonably construe" standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)).

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

⁴ *Boeing*, slip op. at 15.

⁵ *Id.*, slip op. at 16.

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 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 Board specified that these categories represent the results of the new balancing test, but are not part of the test itself.⁷

II. The Lawfulness of Various Provisions of the Employer’s Employee Handbook Under the *Boeing* Standard

The Employer’s handbook includes various rules in the category of “Conduct and Behavior.” The introduction to this category states that “The Company views the following as inappropriate behavior:”

⁶ *Id.*, slip op. at 3–4, 15.

⁷ *Id.*, slip op. at 4.

A. “*Obtaining unauthorized confidential information pertaining to clients or employees.*”

We conclude that this is a lawful rule. Rules prohibiting disclosure of customer information should be considered Category 1 rules.⁸ Thus, the first part of this rule raises no issues. As for the ban on obtaining information regarding “employees,” confidentiality rules that encompass employee information should be considered Category 2 rules,⁹ and such rules should be found unlawful where the impact on Section 7 rights outweighs the employer’s legitimate business justification for the rule. However, context is important in determining where a rule would reasonably be read as prohibiting protected activities. We conclude that the general prohibition in this rule regarding “obtaining unauthorized confidential information pertaining to . . . employees” is lawful.

Employees would not reasonably read this confidentiality rule as prohibiting them from disclosing information about their wages and working conditions to their co-workers or a union. The rule does not define “unauthorized confidential information” in a way that would suggest the inclusion of terms and conditions of employment, and employees are unlikely to interpret “obtaining unauthorized confidential information” as asking coworkers about their wages. In context, a more reasonable understanding of the rule is as a ban on unauthorized *access* of confidential information held by the *Employer*, that is, of records and files. Employees do not have a right under the Act to disclose employee information obtained from unauthorized access or use of confidential records, or to remove records from the employer’s premises.¹⁰ Accordingly, where a rule, as here, is about accessing or obtaining confidential employee records, the rule will not affect Section 7 rights.

⁸ Memorandum GC 18-04, “Guidance on Handbook Rules Post-*Boeing*,” at 13 (June 6, 2018).

⁹ Memorandum GC 18-04 at 17.

¹⁰ See *Macy’s Inc.*, 365 NLRB No. 116, slip op. at 3 (Aug. 14, 2017); *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 8–9 & n.28 (Feb. 23, 2017) (Miscimarra, dissenting in part and concurring in part).

B. “Rude, discourteous or unbusinesslike behavior; creating a disturbance on Company premises or creating discord with clients or fellow employees.”

We conclude that the first part of this rule is a lawful civility policy, and that the second part of this rule is a lawful disruptive behavior policy, both of which should fall under Category 1. As for the first part of the rule, the Board made clear in *Boeing* that employers may maintain rules requiring “harmonious relationships” in the workplace and requiring employees to uphold basic standards of “civility.”¹¹ In so holding, the Board noted that any adverse effect on Section 7 rights would be comparatively slight since a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility.¹² The Board incorporated by reference the civility rules at issue in *William Beaumont Hospital* and Member Miscimarra’s dissent arguing for their legality, in which he reasoned that the vast majority of conduct covered by such rules does not implicate Section 7 at all.¹³ While protected concerted activity may involve criticism of fellow employees or supervisors, the requirement that such criticism remain civil does not unduly burden the core right to criticize. Instead, it burdens the peripheral Section 7 right of criticizing other employees in a demeaning or inappropriate manner.

In contrast to the minimal impact that these types of civility rules have on Section 7 rights, employers have significant business interests in maintaining such rules. These interests include an employer’s legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity.¹⁴ Thus the civility portion of the rule is a lawful Category 1 rule.

As for the second part of the rule, as explained in GC Memorandum 18-04, disruptive behavior rules are usually lawful.¹⁵ The majority of conduct covered by this

¹¹ 365 NLRB No. 154, slip op. at 4 n.15.

¹² *Id.*

¹³ See *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 21–23 (Apr. 13, 2016) (Miscimarra dissenting) (incorporated by reference in *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15)); Memorandum GC 18-04 at 3–5.

¹⁴ *Boeing*, 365 NLRB No. 154, slip op. at 4 n.15.

¹⁵ Memorandum GC 18-04 at 8–9.

rule is unprotected roughhousing, fighting, dangerous activities, or other bad behavior, and employees would correctly interpret the rule as covering such issues. Thus, employees will usually not interpret such rules as applying to Section 7 activity, and the rule should fall under Category 1.¹⁶ To the extent that employees might view this rule as applying to protected concerted activity, any chill created would be marginal at best; the kinds of “disruptive” protected activities that an employee might conceivably believe are covered by the rule are activities that employees know are counter to the Employer’s interests and are willing to do anyway, e.g., protests and strikes. Moreover, any marginal chill created by a no disruption rule is outweighed by the Employer’s substantial interest in safety and productivity. Thus, the rule is lawful.

C. “Soliciting, collecting money, or distributing bills or pamphlets on Company property by employees during non-working time, including rest and meal periods, is not restricted so long as such activity is in good taste.”

We conclude that this is a lawful solicitation/distribution policy. The policy’s limitation of solicitation and distribution to non-working time is clearly lawful. However, as the Region notes, “good taste” is an undefined content-based restriction on employee solicitation and distribution that might chill protected concerted solicitation and distribution, given that only the Employer knows what is in “good taste.”

We find that *Boeing* is the appropriate standard to assess this potentially chilling rule, even though the rule is encompassed within a solicitation/distribution policy. Traditional solicitation/distribution cases usually deal with rules that restrict the place, timing, means, and method of solicitation and distribution.¹⁷ Such rules are

¹⁶ See, e.g., *First Transit, Inc.*, 360 NLRB 619, 629 (2014) (finding under *Lutheran Heritage* that, in context, rule banning “fighting . . . and other disruptive behavior” would not be read as applying to Section 7 activity); *Tradesmen International*, 338 NLRB 460, 460–61 (2002) (finding lawful rule that prohibited “disloyal, disruptive, competitive, or damaging conduct”). See also *Component Bar Products*, 364 NLRB No. 140, slip op. at 6 (Nov. 8, 2016) (Miscimarra, dissenting, arguing that rule against “boisterous and other disruptive conduct” was lawful under his *William Beaumont* dissent).

¹⁷ See *Republic Aviation v. NLRB*, 324 U.S. 793 (1945); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962).

treated as explicit restrictions on Section 7 activity,¹⁸ where ambiguity in the rule is construed against the drafter.¹⁹ The *Boeing* decision did not alter the balance between employee rights and employer business interests in determining the extent an employer may explicitly restrict solicitation and distribution.²⁰ Rather, the Board in *Boeing* instated a new standard for assessing when facially neutral rules are unlawful, that is, rules that do not explicitly address Section 7 activity. Ambiguity in such rules is not construed against the drafter, but rather is examined to determine whether employees reasonably would interpret the rule as forbidding protected conduct, regardless of whether there is a second, less-reasonable meaning.²¹

While prior to *Lutheran Heritage* the Board treated ambiguous content-based restrictions on solicitation/distribution similarly to place and time restrictions,²² after *Lutheran Heritage* issued, the Board applied that standard to potentially chilling rules, even if those rules related to a solicitation/distribution policy. In *Target Corp.*, e.g., the Board applied *Lutheran Heritage* to find that a policy that banned solicitation and distribution for “personal profit” or “commercial purposes” was unlawfully

¹⁸ *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 & n.5 (2004) (citing *Our Way*, 268 NLRB 394 (1983)).

¹⁹ See, e.g., *Pueblo Supermarkets, Inc.*, 156 NLRB 654, 656 (1966) (finding solicitation/distribution rule unlawfully overbroad because the rule could be interpreted as banning all solicitation on employer’s property) (quoting *NLRB v. Harold Miller*, 341 F.2d 870, 871 (2d Cir., 1965)). See also *Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005) (Schaumber, dissenting, arguing that not all rules, but only rules that explicitly address Section 7 activity, like solicitation, should be construed against drafter).

²⁰ 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*). See also *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 1 & n.4 (July 19, 2018) (not applying *Boeing* to a distribution/solicitation policy).

²¹ *Boeing Co.*, 365 NLRB No. 154, slip op. at 9 n.43.

²² See, e.g., *Great Lakes Steel, Division of National Steel v. NLRB*, 625 F.2d 131, 132–33 (6th Cir. 1980) (holding unlawful a distribution policy that banned “libelous, defamatory, scurrilous, abusive or insulting” literature); *NCR Corp.*, 313 NLRB 574, 577 (1993) (finding distribution rule that banned “offensive language” unlawful, since what constitutes offensive language “is a matter of subjective interpretation,” that “could be interpreted by the Company or employees as applying to union literature”).

overbroad.²³ In *Conagra Foods, Inc.*, the Board applied *Lutheran Heritage* to a notice that “discussions about unions” were governed by the employer’s solicitation policy, which lawfully banned solicitation during working time. The Board held the notice was unlawfully overbroad, since employees could reasonably understand the notice as banning *discussions* about unions during working time, not just solicitation.²⁴ Essentially, the Board treated such provisions as facially neutral aspects of rules that explicitly dealt with Section 7 activity.

We conclude that the Board in *Boeing* similarly intended the new standard to apply to all cases where the lawfulness of a no-solicitation rule depends on its “chilling” impact rather than on the extent of its place/time/method restrictions. Indeed, it would be inconsistent to apply *Boeing* to a rule requiring emails or behavior be in “good taste” but apply a different standard simply because such a good taste requirement is included in a solicitation/distribution rule.

We next conclude that requiring that solicitation and distribution be in “good taste” is not unlawful under *Boeing*. Merriam-Webster defines “good taste” as “proper and acceptable.”²⁵ The Collins English Dictionary states that “if you say that something is in good taste, you mean that it is not offensive and that it is appropriate for the situation.”²⁶ The Oxford English Dictionary defines “good taste” as having “[g]ood or discerning judgment, especially with regard to what is aesthetically pleasing, fashionable, polite, or socially appropriate.”²⁷ This rule is thus similar to the civility rules considered in *William Beaumont Hospital* that were incorporated by reference in *Boeing*.²⁸ Those rules banned “inappropriate” or “socially unacceptable”

²³ 359 NLRB 953, 953–54 (2013). This decision was issued by a panel that, under *Noel Canning*, 134 S. Ct. 2550 (2014), was not properly constituted.

²⁴ 361 NLRB 944, 946 (2014), *enforced in relevant part*, 813 F.3d 1079 (8th Cir. 2016).

²⁵ Merriam-Webster, <https://www.merriam-webster.com/dictionary/in%20good%20taste> (last visited July 24, 2018).

²⁶ Collins English Dictionary, <https://www.collinsdictionary.com/us/dictionary/english/in-bad-good-etc-taste> (last visited July 24, 2018).

²⁷ Oxford Dictionary, https://en.oxforddictionaries.com/definition/good_taste (last visited July 24, 2018).

²⁸ See *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 21–23; Memorandum GC 18-04 at 3–5.

behavior, and there is little reason to distinguish those rules from one demanding good taste. Much like civility rules, the “good taste” requirement here only burdens the peripheral Section 7 right to solicit or distribute in bad taste. Given that an employer’s duty to prevent harassment or a toxic work environment applies to all employee conduct at work, including at-work solicitation and distribution, the Employer’s legitimate business interest outweighs the peripheral Section 7 rights affected. Accordingly, we conclude that the “good taste” requirement in the Employer’s solicitation/distribution policy is lawful.

D. “Un-business-like conduct, on or off Company premises, which adversely affects the Company services, property, reputation or goodwill in the community, or interferes with work.”

We conclude that this rule is lawful. The policy comprises two different rules, an on-duty conduct policy and an off-duty (off-premises) conduct policy. The General Counsel has concluded that on-duty conduct policies generally fall in Category 1. The vast majority of activity covered by such a rule is unprotected, and employees would not reasonably interpret the rule to cover protected concerted activity. Thus, the rule would have little, if any, impact on Section 7 rights.²⁹ And, even if there were some ambiguity about what on-duty conduct might fall within the meaning of “adversely affects” in this policy, on balance, the Employer’s interests in maintaining discipline and production outweigh any chilling effect of this part of the provision. Employers have a significant interest in maintaining productivity and ensuring that an employee’s conduct does not affect his or her job performance or others’ job performance.³⁰

However, the General Counsel has placed rules regarding off-duty conduct that may adversely affect the employer in Category 2.³¹ That is because such rules, depending on how they are phrased and their surrounding context, can be read either as forbidding unlawful or immoral off-duty behavior or as forbidding protected concerted activity, such as a protest or strike, that is contrary to the employer’s interests. Parsing the difference depends on what kinds of conduct are forbidden by

²⁹ See Memorandum GC 18-04 at 6–7.

³⁰ *Boeing Co.*, 365 NLRB No. 154, slip op. at 7 n.30 (discussing how rules may restrict employees’ exercise of Section 7 rights during work because “[w]orking time is for work”).

³¹ See Memorandum GC 18-04 at 17.

the rule. If *all* conduct that may be detrimental to the employer is forbidden, such a rule might reasonably be read as including much core protected concerted activity.³² Conversely, even prior to *Boeing*, the Board generally found off-duty conduct rules lawful where they specified they were directed not at all conduct adverse to the employer, but only at unlawful behavior or “misconduct.”³³

Here, the rule would not reasonably be interpreted as covering Section 7 activity, and even if it did, the balance of interests weighs in the rule’s favor. The Employer’s rule specifies that only “un-business-like” off-duty conduct is encompassed by the policy. Merriam-Webster defines “unbusinesslike” as “lacking the qualities (such as polite seriousness and professionalism) considered appropriate for business or a businessperson.”³⁴ The Oxford English Dictionary says it means not “carrying out tasks efficiently without wasting time or being distracted by personal or other concerns; [not] systematic and practical.”³⁵ While “un-business-like conduct” is arguably less serious than “misconduct,” they are on the same spectrum of behavior, along with “inappropriate” or “offensive” conduct.³⁶ Accordingly, the General Counsel placed civility rules that ban “unbusinesslike behavior” into Category 1.³⁷ There is no reason to believe that employees are any more likely to interpret “un-business-like” as encompassing Section 7 activity in an off-duty conduct rule than they would in an on-duty conduct rule. Most activity covered by the term is unprotected, and most employees would understand the purpose of the rule as to prevent off-duty bad

³² Cf. *First Transit, Inc.*, 360 NLRB 619, 619 n.5, 630 (2014) (finding unlawful under *Lutheran Heritage* rule banning “conducting oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company”).

³³ See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–89 (1999) (finding lawful rule prohibiting “off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel”).

³⁴ Merriam-Webster, <https://www.merriam-webster.com/dictionary/unbusinesslike> (last visited July 25, 2018).

³⁵ Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/us/businesslike> (last visited July 25, 2018).

³⁶ See Memorandum GC 18-04 at 3–4.

³⁷ *Id.* at 4.

behavior from affecting the employer's business reputation or workplace. They are especially likely to do so here, where elsewhere in the Code of Conduct the Employer's policy groups "unbusinesslike" behavior with "rude" and "discourteous" behavior.³⁸ And while an employer's legitimate business interest in regulating its employees' off-duty conduct is less significant than its interest in regulating on-duty conduct, employers do have a significant interest in ensuring that off-duty employee conduct neither harms the company's reputation nor creates problems that continue once employees are back on duty. Firms are often judged by the conduct of their employees, and when an employee engages in unlawful or inappropriate activity off duty, it can cause damage to a company's reputation and brand. Employers also have an interest in ensuring that off-duty social dynamics and off-duty recreation do not cause trouble in the workplace or render employees unfit to work. Thus, we conclude that the off-duty conduct rule here is a lawful Category 2 rule.

E. “. . . all information gathered by, retained or generated by the Company is confidential. There shall be no disclosure of any confidential information to anyone outside the Company without the appropriate authorization. . . . nothing in this policy is intended to infringe upon employee rights under Section Seven (7) of the National Labor Relations Act (NLRA).”

We conclude that this rule is unlawfully overbroad under *Boeing*. While the rule does not explicitly target wages and working conditions, the rule's definition of confidential information is so broad as to easily be interpreted to include such information.³⁹ Employee wage rates, employment policies, handbook rules, and virtually all other terms and conditions of employment are information that is "generated" and "retained" by the Employer. Moreover, a confidentiality rule encompassing such information strikes at core Section 7 rights. Discussions and coordination among employees, or between employees and unions, regarding terms and conditions of employment and employment-related disputes is a central aspect of protected concerted activity under the NLRA. This includes discussing the names and

³⁸ See Section B, *supra*.

³⁹ Cf. *Cintas Corp.*, 344 NLRB 943, 943 (2005) (finding unlawful under *Lutheran Heritage* rule classifying "any information concerning the company" as confidential), *enforced*, 482 F.3d 463 (D.C. Cir. 2007); *Fremont Manufacturing Co.*, 224 NLRB 597, 603–04 (1976) (finding unlawful provision in confidentiality rule that prohibited employees from making any "disclosure regarding company affairs"), *enforced*, 558 F.2d 889 (8th Cir. 1977).

contact information of other employees with coworkers or union representatives.⁴⁰ As Chairman Miscimarra noted about a slightly different rule in *Schwan's Home Service*, it is hard to fathom how any Section 7 activity could be conducted without employees disclosing or discussing “company business” in some manner.⁴¹

While the rule includes a “savings clause,” it is not sufficient to render the rule lawful. Although the Board has stated that an express notice to employees advising them of their NLRA rights “may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule,”⁴² the savings clause included here does not in any way indicate that employees have the right to discuss wages or working conditions. Employees do not necessarily know what their rights are under the NLRA, and the only contextual clue provided by this rule is that their NLRA rights may have something to do with confidential information. Thus, the Employer’s confidentiality rule is an unlawful Category 2 rule.

F. “Disparaging, abusive, profane, or offensive language (materials that would adversely or negatively reflect upon the Company or be contrary to the Company best interests) and any illegal activities—including piracy, cracking, extortion, blackmail, copyright infringement, and unauthorized access to any computers on the Internet or email—are forbidden.”

We conclude that this rule is a combination of civility policies and on-duty misconduct policies, and is thus a lawful Category 1 rule, as discussed *supra*.

⁴⁰ See *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.5 (June 14, 2016) (Chairman Miscimarra, concurring, applying his test from *William Beaumont Hospital* to find unlawful rule that prohibited disclosure or “personal use” of employee addresses and phone numbers), *enforced* 870 F.3d 82 (2d Cir. 2017).

⁴¹ 364 NLRB No. 20, slip op. at 15 (Miscimarra, concurring rule was unlawful, even though majority relied on *Lutheran Heritage*, with which Miscimarra disagreed).

⁴² *First Transit, Inc.*, 360 NLRB 619, 621 (2014).

The following rules are encompassed by the Employer's Social Media policy. The policy also includes a disclaimer that "[N]othing in this policy is intended to infringe upon employee rights under Section Seven (7) of the National Labor Relations Act." The rules are:

G. "Company electronic assets may not be used to access these [social media] accounts."

We conclude that this rule is not unlawful under *Purple Communications*.⁴³ In that case, the Board held only that employees who have rightful access to their employer's *email system* in the course of their work have a right to use that system to engage in Section 7-protected communications during nonworking time. *Purple Communications* did not deal with social media accounts. The General Counsel does not agree with extending the Board's holding in *Purple Communications* regarding email to other electronic communications systems. Accordingly, the Region should not allege this rule as unlawful.

H. "Employees should refrain from posting derogatory information about the Company on any such sites and proceed with any grievances or complaints through the normal channels."

We conclude that this rule is unlawfully overbroad under *Boeing*. A rule prohibiting disparagement of the employer has a significant impact on NLRA rights. Concerted criticism of an employer's employment and compensation practices is central to rights guaranteed by the NLRA.⁴⁴ A general rule against disparaging the company on social media, absent limiting context or language, would cause employees to refrain from publicly criticizing employment problems on social media.⁴⁵ Such criticism is often the seed that becomes protected concerted activity for improving working conditions, the core of Section 7.

⁴³ 361 NLRB 1050 (2014).

⁴⁴ *Richboro Community Mental Health Council*, 242 NLRB 1267, 1267–68 (1979). *Cf. Quicken Loans, Inc.*, 359 NLRB 1201, 1201 n.3, 1205 (2013) (finding unlawful under *Lutheran Heritage* rule that employees may not "publicly criticize, ridicule, disparage or defame the Company"), *incorporated by reference in* 361 NLRB 904 (2014).

⁴⁵ *See Teletech Holdings, Inc.*, 342 NLRB 924, 931–32 (2004) (finding unlawful rule that employees were not to speak negatively about their job) (citing *Lexington Chair Co.*, 150 NLRB 1328 (1965) (holding unlawful rule prohibiting employees from criticizing company rules and policies), *enforced*, 361 F.2d 283, 287 (4th Cir. 1966)).

Although an employer may be understandably wary of reputational damage that can occur when criticized by its own employees, such an interest does not outweigh the core NLRA rights undermined by a broad ban on criticism or disparagement of the employer.⁴⁶ And, rules against disparaging the employer do not implicate the same civility and anti-harassment interests involved in rules against disparaging coworkers.⁴⁷

Since this rule is an absolute ban on employees making any comments on social media disparaging the Employer, and is not limited to prohibiting disparagement of the Employer's products or services, the provision would have a significant impact on online protected concerted activity that is not outweighed by any legitimate interests of the Employer.⁴⁸ Therefore, this rule should be treated as an unlawful Category 2 rule.⁴⁹

⁴⁶ See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311–13 (2014) (discussing an employer's interest in preventing disparagement of its products or services and protecting its reputation as balanced against Section 7 rights).

⁴⁷ Compare *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 11–12 (Feb. 23, 2017) (Acting Chairman Miscimarra, dissenting in part) (although the Board had found prohibiting “[d]isparaging . . . the company's . . . employees” unlawful under *Lutheran Heritage*, Acting Chairman Miscimarra in dissent concluded that the rule was lawful under his *William Beaumont* test), with *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (June 10, 2016) (Member Miscimarra, concurring in part) (recognizing that “public statements by employees about the workplace are central to the exercise of employee rights under the Act” and concurring that rule requiring permission to use employer's name was unlawful, applying his *William Beaumont* test rather than *Lutheran Heritage*).

⁴⁸ See *Triple Play Sports Bar & Grille*, 361 NLRB at 311–12 (discussing the standard for disparaging comments from *Jefferson Standard*, 346 U.S. 464, 475–78 (1953), and noting that the Facebook comments at issue did not lose the Act's protection where, among other things, they did not mention the employer's products or services); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) (explaining that the Board distinguishes between “disparagement of an employer's product and the airing of what may be highly sensitive [employment] issues” and looks at whether the employee had a “malicious motive”), *enforced mem. sub nom. Nevada Serv. Emps. Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009).

⁴⁹ See Memorandum GC 18-04 at 17.

In addition, the requirement that employees take their grievances to the Employer is an independent violation of the Act. The Board has found that requiring employees to first take work-related complaints to management “tends to inhibit employees from banding together Faced with such a requirement, some employees may never invoke the right to act in concert with other employees or to seek the assistance of a union, because they are unwilling first to run the risk of confronting the [employer] on an individual basis.”⁵⁰ There is no legitimate business interest in preventing employees from discussing grievances among themselves, or with a union or other third parties, before going to management.

Moreover, the Social Media Policy’s NLRA disclaimer does not save this rule. There is little ambiguity in the requirements to not disparage the Employer and to bring any grievances to the Employer, and the disclaimer does nothing to change either of their meanings. Accordingly, the Region should issue complaint, absent settlement, alleging this provision is unlawful.

I. “Employees may not post any statements, photographs, video, or audio that reasonably could be viewed as disparaging to employees.”

We conclude that this rule is a lawful Category 1 civility rule. As discussed *supra*, the Board made clear that an employer may maintain rules demanding civility from its employees.⁵¹ This includes not disparaging fellow employees.⁵² There is thus a distinction between rules restricting what employees can say about their coworkers (i.e., disparaging other employees), which has little impact on Section 7 activity, and rules restricting what employees can say about their employer (i.e. disparaging the owners).⁵³ Accordingly, the Region should not include this allegation in its complaint.

⁵⁰ *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–72 (1990).

⁵¹ *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15.

⁵² *See Cellco Partnership*, 365 NLRB No. 38, slip op. at 11–12 (Chairman Miscimarra, dissenting, arguing that rule against “[d]isparaging . . . the company’s . . . employees” was lawful).

⁵³ *See Memorandum GC 18-04* at 4–5, 17.

J. “Employees may not post to any on-line forums . . . providing any Company telephone number or extension. Do not create a link from any personal blog, website or other social networking site to a Company website without identifying oneself as an employee of the Company.”

There are two aspects of this rule, one lawful and one unlawful. We conclude that the ban on providing the Employer’s telephone number is unlawful. Employees have a right under Section 7 to concerted communication of their workplace complaints to the public, customers, and others.⁵⁴ By forbidding employees from using the Employer’s telephone number, the Employer is effectively banning employees from soliciting customers and/or the public to call the Employer to express support for the Employer’s Section 7 activities. Moreover, given that the Employer’s telephone number is publicly available on its website, the Employer has failed to provide a legitimate business interest supported by such a rule. Accordingly, we conclude that this portion of the rule is unlawful.

However, we conclude that the self-identification requirement is lawful. Employers have a significant interest in requiring that only authorized individuals speak for the company.⁵⁵ Therefore, employers may have rules ensuring that employees do not, intentionally or unintentionally, make statements that can be interpreted as coming from the company. The rule here appears to be in support of a similar goal – it is aimed at employees linking to the company website in a way that would make people think the employee was a disinterested third party. The Employer is not requiring that employees use specific words for the disclaimer, only that they make it clear when linking to the Employer’s website that they work for the Employer. Therefore, any burden that the disclaimer requirement may have on Section 7 activity is minimal and is outweighed by the Employer’s business interests.

⁵⁴ *Kinder-Care Learning Centers*, 299 NLRB at 1171–72.

⁵⁵ See *UPMC*, 362 NLRB No. 191, slip op. at 14 n.17 (Aug. 27, 2015) (Member Johnson, concurring in part) (recognizing that the employer has a “legitimate interest in prohibiting non-authorized employees from acting as representatives or spokespeople” for the employer). See also Guideline Memorandum GC 18-04 at 14.

Finally, the Employer's handbook includes the following Personal Cell Phones or Other Mobile Devices policy:

K. “The use of personal cell phones or other mobile devices is prohibited during working hours for personal use, including phone calls, texting and downloading of web content.”

We conclude that this is an unlawful Category 2 rule. The Board in *Boeing* held that cell phone bans belong in Category 1 (although the Board there was focused on the camera aspect of cell phones and not the communication aspect). However, this rule does not completely ban cell phones, as in *Boeing*, but only bans cell phone use during “working hours.” Also, the rule appears to be directed at *only* the communication aspect of cell phones; it prohibits “phone calls, texting and downloading of web content” and says nothing about use of the phone for photography or recording. In these circumstances, we conclude that this is a Category 2 rule. We also conclude that this rule should be found unlawful. Employees have a right to engage in Section 7 communications during non-work times, e.g., break times and lunch, and they would reasonably read this rule to prohibit cell phone use during those times.⁵⁶ Therefore, absent an employer business justification that outweighs the interference with Section 7 rights, the rule should be found unlawful. The Employer has not provided any business justification for this rule.

Based on the foregoing, the Region should proceed as directed.

/s/
J.L.S.

ADV.12-CA-194162.Response.CoastalIndus (b) (6)

⁵⁶ Cf. *Ichikoh Mfg.*, 312 NLRB 1022, 1022 (1993), *enforced*, 41 F.3d 1507 (4th Cir. 1994). See also *BJ's Wholesale Club, Inc.*, 297 NLRB 611, 612 (1990) (“ . . . a rule prohibiting solicitation during ‘working hours’ is prima facie susceptible of the interpretation that solicitation is prohibited during all business hours and, thus, invalid . . . ”).