

# Employers Take Note: Labor Board Poised to Reverse Additional Obama-Era Work Rule Interpretations

By Robert H. Morsilli &

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## Meet the Authors



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The National Labor Relations Board has taken another giant step toward repudiating the Obama-era Board's highly restrictive interpretations of work rules, set forth in *Lutheran Heritage-Livonia*, 343 NLRB 646 (2004).

In *Grill Concepts Services, Inc. v. NLRB*, Nos. 16-1238, 1287, at the Board's request, the U.S. Court of Appeals for the District of Columbia Circuit remanded to the Board for consideration of the legality of several work rules the Board had determined violated the National Labor Relations Act (NLRA). *Grill Concepts Services, Inc.*, 364 NLRB No. 36 (2016). The remand for reconsideration was based on the Board's December 2017 decision in *The Boeing Co.*, 365 NLRB No. 154.

Under *The Boeing Co.*, the NLRB announced it had rescinded its test for determining the legality of facially neutral work rules (asking whether those rules can be "reasonably construed" by an employee to prohibit the exercise of concerted, protected activity). Instead, the Board will consider whether facially neutral rules, when reasonably interpreted, potentially would interfere with NLRA Section 7 rights to engage in "concerted activities." The Board will analyze (i) the nature and extent of the potential impact on employees' NLRA rights, and (ii) the employer's legitimate justifications for maintaining the rules.

The remand bears close watching because the rules the NLRB will be reconsidering under *The Boeing Co.* test are similar to those that many employers maintain now or modified or eliminated because of the Obama Board's crackdown pursuant to the "reasonably construed" standard articulated in *Lutheran Heritage-Livonia*.

### Legality of Rules

The Board will review the legality of the following rules (or portions thereof), various versions of which the Obama Board often found unlawful. (The specific language to be reviewed is shown in italics):

#### Team Member Relations/Positive Culture

[The Employer] believes that the working conditions, wages, and benefits offered to Team Members are competitive with those offered by other employers in this area and in this industry. If Team Members have concerns about working conditions, wages or benefits, they are encourage[d] to voice these concerns *openly, respectfully and directly* to their General Managers or if necessary, the Regional/Area Director or with the People Department.

Please DO NOT *loiter on restaurant property* when not working. While off the clock and waiting to punch in, Team Members should not be in the restaurant earlier than 15 minutes prior to their scheduled starting time nor should they remain more than 15 minutes after they clock out.

#### Team Member Conduct While Representing the Restaurant

Team Members must refrain from *any negative behaviors* (as listed in this manual) off the property while representing the Restaurant. The Restaurant reserves the right to counsel any Team Member who jeopardizes the welfare and/or reputations of the Restaurant up to and including termination of employment.

#### Online Communications

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2. Accurate Information.... Team Members and other company representatives may not knowingly communicate information that is *untrue or deceptive*.

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4. Protection of Confidential and Proprietary Information.... Team members and other company representatives must maintain the confidentiality of information [Employer] considered confidential, including the company data, Guest data, partner and/or supplier data, *personal Team Member data*, and any information not generally available to the public.

#### Progressive Discipline: Gross Misconduct

A Team Member may be terminated for cause without prior warning for committing any conduct issues as listed as Gross Misconduct. Gross Misconduct issues include ... *failure to participate in or intentional falsification of a statement during a formal company investigation; ... unauthorized disclosure of confidential or privileged information concerning company or Team Members.*

The Court of Appeals also remanded the Board's finding that a provision in the employer's Dispute Resolution Arbitration Agreement subjecting "employment-related disputes" to arbitration violated Section 8(a)(1) because it could be reasonably construed to require arbitration of unfair labor practice charges.

#### Legitimate Employer Interests

In many instances, the Obama-era Board appeared to disregard legitimate employer interests in maintaining work rules similar to those above. Therefore, many employers weakened their work rules to an extent that their continuing usefulness was questionable. *The Boeing Co.* decision and the Board's remand request in *Grill Concepts Services* signals that employers once again may maintain work rules that will serve their legitimate interests.

While we expect the Board to pursue a balanced approach when considering the validity of work rules, this remains a complicated, highly fact-intensive area of the law. Employers

should seek appropriate legal review of any work rule that may implicate employee rights under Section 7 of the Act.

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