Standing on the Precipice of Major Policy Change NLRB Quarterly Update: Q1 2022

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TODAY'S SPEAKERS

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Agenda

- Latest Developments
- General Counsel Initiatives
- Issues to Watch



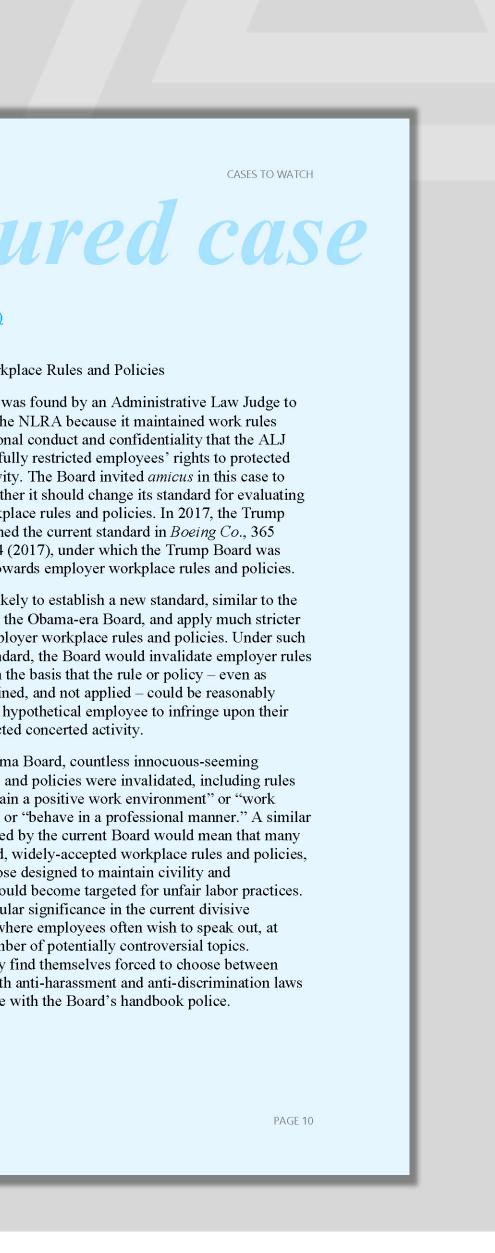
Standing on the Precipice of Major **Policy Change**

NLRB Update First Quarter, 2022



https://www.hrpolicy.org/HRPoli cy/media/HRWorkforce/2022/03 /NLRB Q1 2022 Report.pdf

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2022)

over Workplace Rules and Policies

Employer was found by an Administrative Law Judge to olated the NLRA because it maintained work rules to personal conduct and confidentiality that the ALJ ed unlawfully restricted employees' rights to protected rted activity. The Board invited amicus in this case to nine whether it should change its standard for evaluating oyer workplace rules and policies. In 2017, the Trump established the current standard in Boeing Co., 365 3 No. 154 (2017), under which the Trump Board was lenient towards employer workplace rules and policies.

Board is likely to establish a new standard, similar to the rd under the Obama-era Board, and apply much stricter y to employer workplace rules and policies. Under such ntial standard, the Board would invalidate employer rules olicies on the basis that the rule or policy – even as maintained, and not applied – could be reasonably rued by a hypothetical employee to infringe upon their to protected concerted activity.

the Obama Board, countless innocuous-seeming ver rules and policies were invalidated, including rules "maintain a positive work environment" or "work niously" or "behave in a professional manner." A similar ard adopted by the current Board would mean that many ntforward, widely-accepted workplace rules and policies, ularly those designed to maintain civility and ctivity, could become targeted for unfair labor practices. as particular significance in the current divisive nment, where employees often wish to speak out, at , on a number of potentially controversial topics. overs may find themselves forced to choose between liance with anti-harassment and anti-discrimination laws ompliance with the Board's handbook police.



Latest Developments – Significant Decisions Coming Soon

- Issues where the Board has already signaled incoming changes:
 - Consequential damages employers will be on the hook for more than just back pay
 - Bargaining unit sizes increase in micro units and fractured workplaces
 - Smaller units means more union election wins
 - Independent contractor status more employees, less independent contractors
 - Workplace rules and policies heavy scrutiny of employee handbooks
 - Arbitration agreements unlawful under the NLRA?







Employer Workplace Rules Under the Microscope • Rules/policies found unlawful by Obama-era Board:

- - "Behave in a professional manner"
 - "Maintain a positive work environment"
 - "Work harmoniously in a positive and professional manner"
 - "Do not make false, vicious, or malicious statements concerning the company"
 - "Do not engage in fighting, violence, threats, or harassment"







General Counsel Driving Unprecedented Policy Change

- GC Abruzzo's ambitious policy agenda includes:
 - Injunctive relief initiative employers increasingly dragged into federal court for alleged unfair labor practices
 - Interagency collaboration and enforcement use of all government agency resources to target employers
 - Union card check authorization/Joy Silk forced recognition of and duty to bargain with a union based solely on showing of majority of employee support







Looking Ahead...

- Issues where the Board has not yet acted, but is expected to:
 - Worker Misclassification misclassification of an employee as a per se unfair labor practice
 - **Expansion of employee voice** social, political protests as protected concerted activity 0
 - Increased union access to employer property physical property and technology (use of 0 employer computers, emails, etc. for organizing purposes)
 - **Employer speech restrictions** "captive audience" meetings, other types of employer speech 0 during union election campaigns could be prohibited
 - Joint employer liability increased liability for violations of subsidiaries, franchisees, contractors 0
 - Mail ballot elections/electronic voting moving away from traditional, physical onsite secret 0 ballot election
 - ...and many, many, many more! 0





