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

DATE: July 31, 2018

TO: William B. Cowen, Regional Director
Region 21

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

SUBJECT: ADT, LLC
Case 21-CA-209339

512-5012-0100-0000
512-5012-0125-0000
512-5012-0133-0000
530-6001-5025-0000
530-6067-4033-2500
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This case was submitted for advice as to: (1) whether the Employer violated Section 8(a)(5) when it failed to give unit employees an annual discretionary wage increase; and (2) whether four of the Employer's handbook rules (a dress-code rule, a personal-cell-phone rule, a confidential-information rule, and a media-relations rule) are unlawful under the Board's *Boeing*[1] analysis. As to the first issue, we conclude that the charge allegation should be dismissed, absent withdrawal, because the Union failed to timely act in response to the Employer's announcement that it needed to bargain over the discretionary aspect of the unit employees' merit wage increase. As to the second issue, we conclude that: (a) the dress-code rule is lawful; (b) the personal-cell-phone rule is unlawful; (c) the confidential-information rule is lawful; and (d) the media-relations rule is lawful.[2]

FACTS

For at least the past 13 years, Protection 1 Alarm Monitoring ("P1"), the predecessor employer, provided employees with a discretionary, merit-based annual wage increase in late August or early September, following employees' annual evaluations. On April 28, 2016, the Communications Workers of America, Local 9510,

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

[2] The rules are presented and analyzed only in the Action section of this memo.

AFL-CIO ("the Union") was certified as the collective-bargaining representative for all full-time and part-time monitoring representatives at P1's Cypress, California facility. P1 is owned by Apollo Global Management ("Apollo"). In August of 2016, unit employees received their annual evaluation and merit-based wage increase per usual. P1 did not consult the Union before implementing the wage increase, and the Union did not object. On April 1, 2017,[3] Apollo merged P1 and ADT (a company it had purchased in 2016), which resulted in P1 being dissolved and ADT ("the Employer") remaining as the surviving entity.

When the Employer took over operations in April, it recognized the Union and began bargaining for a first contract. On August 15, a Union representative sent the Employer an email stating that [redacted] would be the Union's new negotiator and requesting dates for bargaining. The Employer did not respond, and the Union sent a follow-up email on August 22 reiterating its general request to bargain. On August 23, the Employer responded by email, stating that it was "booked through September," and provided available bargaining dates in early October. The same day, the Employer sent another email to the Union stating that, as a "heads up," non-Union employees would receive their annual discretionary wage increase but Union-represented employees would not because the Employer wanted to leave Union-represented employees' bonuses subject to bargaining given their discretionary nature. The Union did not immediately respond nor did it mention the issue of wage increases when it confirmed the parties' October bargaining date.

The parties met for general bargaining in early October and discussed only the parties' collective-bargaining agreement; the Union did not seek to specifically discuss the annual wage increase. Also in early October, a unit employee began circulating a decertification petition. In late October, the Employer withdrew recognition based on the employee petition and provided unit employees with a merit wage increase retroactive to August.

ACTION

We conclude that the Employer did not unlawfully fail to give unit employees an annual merit wage increase, because the Union did not timely act in response to the Employer's invitation to bargain over the discretionary aspect of the wage increase. As to the handbook rules, we conclude that: (a) the dress-code rule is lawful; (b) the personal-cell-phone rule is unlawful; (c) the confidential-information rule is lawful; and (d) the media-relations rule is lawful.

[3] All dates hereinafter are in 2017 unless otherwise stated.

A. The Wage Increase

An employer bargaining for a first contract must maintain the pre-election status quo, which includes affirmatively continuing past practices.[4] In particular, when an employer has a past practice of granting merit wage increases that are fixed as to time but discretionary as to amount, it maintains the lawful status quo by continuing to grant the increases at the same time but first bargaining with the union over the amount.[5] To satisfy its bargaining obligation over the discretionary amount of the increase, the employer must give the union notice and an opportunity to bargain.[6] Where a union has been given notice and an opportunity to bargain, it is incumbent on the union to timely exercise that right.[7] Unions must act with due diligence in requesting bargaining.[8] Thus, a union's failure to demand bargaining privileges the employer's unilateral conduct on that issue.[9]

Here, the Employer maintained the fixed timing of the annual merit wage increase and sought bargaining only with respect to the discretionary amounts of the

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[4] *See Hyatt Regency Memphis*, 296 NLRB 259, 286 (1989) (employer bargaining for first contract must maintain dynamic status quo that includes continuing scheduled merit pay benefits), *enforced in relevant part*, 939 F.2d 361 (6th Cir. 1991).

[5] *Windsor Redding Care Center, LLC*, 366 NLRB No. 127, slip op. at 5 (July 17, 2018) (employer with past practice of merit wage increase must maintain fixed-timing element of practice); *Mission Foods*, 350 NLRB 336, 337–38 (2007) (employer is required to maintain fixed elements of wage increase, including timing, and negotiate with the union over discretionary elements).

[6] *Mission Foods*, 350 NLRB at 338 (employer unlawfully failed to give union notice and an opportunity to bargain over the amount of the annual wage increase).

[7] *Emhart Industries*, 297 NLRB 215, 216 (1989) (employer's method of reinstatement not unlawful because notice to union was sufficient and union failed to request bargaining), *enforcement denied on other grounds*, 907 F.2d 372 (2d Cir. 1990).

[8] *AT&T Corp.*, 337 NLRB 689, 692 (2002) ("the union must act with due diligence in requesting bargaining in order to enforce the employer's bargaining obligation").

[9] *See Alltel Kentucky, Inc.*, 326 NLRB 1350, 1356 (1998) (no violation for employer's unilateral discontinuance of COLA where employer gave sufficient notice to union of change and union's failure to request bargaining privileged employer to make change).

wage increases.[10] Following the Employer's August 23 email informing the Union that the Employer wanted to bargain over the amount of the employees' merit wage increase, the Union never requested bargaining on the matter. Although the Employer claimed, in response to the Union's general request to bargain, that it could not meet with the Union until October, nothing prevented the Union from requesting earlier dates as to the discrete issue of the annual wage increase.[11] Indeed, when the Union agreed to meet with the Employer in October, it made no mention of specifically bargaining over the annual wage increase. Further, when the parties met in person in early October and the Employer stated its preference to discuss economics last, the Union failed to object or insist that employees receive their wage increase. Thus, the Employer maintained the lawful status quo; the Union's failure to timely request bargaining over the wage-increase matter privileged the Employer to not implement a wage increase. Accordingly, the Employer did not unlawfully change the past practice or unlawfully fail to bargain over the discretionary portion of the practice.

B. Rules

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)

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[10] We note that the Employer is subject to P1's bargaining obligations, including any obligation concerning its past practice of granting an annual wage increase, because Apollo, P1's parent company, purchased ADT's stock and then merged ADT and P1, leaving ADT as the surviving entity. There was no hiatus in operations, and unit employees' day-to-day activities remained the same. *See Hartford Hospital*, 318 NLRB 183, 189–90 (1995) (hospitals merged and daily operations for unit employees remained the same, making merger akin to stock transfer with no hiatus in operations; employer required to recognize and bargain with union and maintain terms and conditions), *enforced per curiam*, 101 F.3d 108 (2d Cir. 1996); *Children's Hospital*, 312 NLRB 920, 927 (1993) (employer's merger that kept corporate structure of one hospital and merged into another was akin to stock transfer where only name changed and operations, as imposed on unit employees, remained the same), *enforced sub nom. Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304 (9th Cir. 1996).

[11] *See Emhart Industries*, 297 NLRB at 216 (although employer suggested meeting date that was after the scheduled implementation date, nothing precluded union from suggesting earlier date to meet and discuss the specific issue).

legitimate business justifications associated with the requirement(s).[12] 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."[13] 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."[14] 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.[15]

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 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,

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

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

[14] *Id.*, slip op. at 15.

[15] *Id.,* slip op. at 16.

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.[16]

Here, we conclude that the rules fall in Category 2 and: (a) the dress-code rule is lawful; (b) the personal-cell-phone rule is unlawful; (c) the confidential-information rule is lawful; and (d) the media-relations rule is lawful.

1. Dress Code

The handbook contains an approximately two-page section titled "Personal Appearance," with an opening sentence that states, "[m]aintaining a professional, business-like appearance is very important to the success of [the Employer] . . . . We should always seek to project an image of a professional, productive, and reliable provider of security services." The section also contains a list of approximately 22 bullet points that includes apparel that the Employer considers inappropriate and not permitted in the workplace or when attending company business. The list includes items such as dirty, see-through, or otherwise revealing clothing, as well as athletic apparel and beachwear. One bullet point, which is the subject of the instant charge, prohibits the wearing of "**[a]ny items of apparel with inappropriate commercial advertising or insignia**" (emphasis added).

We conclude that the rule is lawful because employees would not reasonably understand the rule, when viewed in context, to apply to union insignia. The portion of the rule in question is one bullet-point line of a two-page rule that has the theme of "maintaining a professional, business-like appearance[.]" Further, although it is one of approximately 22 bullet points addressing inappropriate clothing, it is the only bullet point that specifically includes the word "inappropriate." Thus, employees would not read the rule to restrict *all* commercial logos or insignia—which might cover union insignia too—only those that are not appropriate because they are inconsistent with a professional, business-like appearance or with the Employer's

[16] *Id.,* slip op. at 3–4, 15.

other legitimate policies.[17] For example, insignia that has objectionable language or imagery that may violate the Employer's anti-harassment policy would be "inappropriate." The impact on Section 7 rights of prohibiting such insignia would be relatively slight, and the Employer has a legitimate business interest in maintaining a work environment free of such inappropriate language or imagery.[18]

2. Personal Cell Phones

This rule states that, because cell phones can present a "distraction in the workplace," resulting in "lost time and productivity," personal cell phones may be used for "work-related or critical, quality of life activities only." It defines "quality of life activities" as including "communicating with service or health professionals who cannot be reached during a break or after business hours." The rule further states that "[o]ther cellular functions, such as text messaging and digital photography, are not to be used during working hours."

This rule is unlawful because employees have a Section 7 right to communicate with each other through non-Employer monitored channels during lunch or break periods. Because the rule prohibits use of personal phones at all times, except for work-related or critical quality of life activities, it prohibits their use on those non-working times. The phrase regarding text messaging and digital photography is more limited, but still refers to "working hours," which the Board, in other contexts, has held includes non-work time during breaks.[19] Although the employer has a legitimate interest in preventing distractions, lost time, and lost productivity, that interest is only relevant when employees are on work time. It therefore does not outweigh the

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[17] *Cf. Long Beach Memorial Medical Center*, 366 NLRB No. 66, slip op. at 2–3 (Apr. 20, 2018) (employer's blanket prohibition that employee badges can *only* be branded with employer's logo was unlawful because it effectively banned employees from wearing badge reels with union's insignia).

[18] *See Medco Health Solution of Las Vegas*, 364 NLRB No. 115, slip op. at 16 (Aug. 27, 2016) (Miscimarra, dissenting) (arguing that dress code rule was lawful because it only prohibited inappropriate clothing, employer had legitimate business reason for rule, and any impact on Section 7 rights was relatively slight).

[19] *See Our Way, Inc.*, 268 NLRB 394, 394 (1983) (rules prohibiting solicitation during "working hours" are presumptively invalid because that term connotes periods from the beginning to the end of a work shift, which include employees' own time such as lunch and break periods).

employees' Section 7 interest in communicating privately via their cell phones, during non-work time, about their terms and conditions of employment.[20]

We reject the argument that the rule's exception for "critical, quality of life activities," which is defined as including "communicating with service or health professionals who cannot be reached *during a break or after business hours*" (emphasis added), clarifies that the rule in fact permits general personal cell phone use during breaks and on other non-work time. Because the exception is limited to "critical, quality of life" matters, employees would not reasonably infer from the definition of that phrase that cell phones may be used for other kinds of communications, including Section 7 communications, during breaks and other non-work time; rather, employees will reasonably read the rule in its entirety to prohibit Section 7 communications by cell phone even during non-work time.

3. Confidential Information and Information Security

The rule states that employees should "exercise a high degree of caution" in handling Confidential Information. It defines "Confidential Information" in three categories: proprietary information owned by or otherwise in the Employer's possession or control, such as "business plans, internal correspondence, [and] customer lists . . ."; "[p]ersonally identifiable customer and employee information, including name, address, social security, credit card and bank account numbers, and similarly personally identifiable information"; and HIPAA-related information. The rule further explains that certain employees, particularly those in positions supporting managers or performing HR and timekeeping functions, may have access to personal information concerning employees or confidential information about the Employer or its customers, which is maintained by the Employer, and those employees should not discuss or divulge the information.

Employees would not reasonably interpret this rule to restrict Section 7 communications. The Employer has a legitimate business interest and, in some instances, a legal duty, to maintain the confidentiality of certain information it has obtained and stored about its employees. Although the rule instructs all personnel to "exercise caution" in handling confidential information, it only specifically restricts employees who have access to the information as part of their jobs from discussing or

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[20] *See Argos Ready Mix, LLC*, Case 12-CA-196002, Advice Memorandum dated Jan. 2, 2018, at 4–5 (employer's blanket ban on cell phones, including during non-work time, unlawful; employer's legitimate safety concerns did not outweigh adverse effects on employees' Section 7 rights).

divulging it.[21] Thus, employees will not understand the rule as prohibiting the sharing of employee names and addresses obtained on their own, without resort to the Employer's files. Although employees have a strong interest in disseminating employee contact information for Section 7 purposes, the rule's potential impact on that activity is slight, and the Employer's business interest therefore outweighs the Section 7 impact.

4. Media Relations

The rule opens with the statement that "[i]t is critical that the [Employer] communicate information about its activities consistently, accurately and in a timely manner." It then states that reporters, financial analysts, and investors sometimes contact the Employer with questions for articles or research about the Employer, and that "information provided by an employee could be incorrectly interpreted as an official [Employer] position and published as such." To that end, the rule states that "**all information provided to media, financial analysts, investors or any other person outside the [Employer] may be provided only by [Employer] designated spokespersons or [Employer] officers**" (emphasis in original).

We conclude that the rule is lawful because employees would reasonably construe it as only limiting who may speak on the Employer's behalf. The Employer has a significant interest in ensuring that only authorized employees speak for it, and this interest is communicated to employees in the rule's opening sentence. Although the rule contains broad language regarding "all information" provided to outside parties, it is clearly limited by the surrounding language. Thus, the prior two sentences make clear that the rule was intended to ensure that news reporters, investors, and financial analysts seeking the Employer's position on certain matters do not mistake an employee's communication for "an official Company position." Because the rule, when viewed in context, merely regulates who may speak on behalf of the Employer and does not restrict employee media appeals regarding workplace matters, it would have no real impact on Section 7 rights.[22]

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[21] *See Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 8 (Feb. 24, 2017) (Miscimarra, dissenting) (arguing that employer's confidentiality rule was lawful because it restricted only employee disclosure of information acquired and retained by the employer).

[22] Although the General Counsel has determined that rules requiring authorization to speak for the company fall in Category 1, *see* Memorandum GC 18-04, "Guidance on Handbook Rules Post-*Boeing*," at 14 (June 6, 2018), we view the Employer's media-relations rule as a lawful Category 2 rule because a contextual analysis was required to determine that it merely regulated who may speak on the Employer's behalf.

Accordingly, for the foregoing reasons, the Region should dismiss, absent withdrawal, the allegation that the Employer unlawfully unilaterally changed its annual discretionary merit wage increase practice, as well as the allegations regarding the dress-code, confidentiality, and media-relations rules. The Region should issue complaint, absent settlement, alleging that the Employer's cell-phone rule unlawfully infringes on employees' Section 7 rights in violation of Section 8(a)(1).

/s/
J.L.S.

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