

Employers Should Prioritize Reviewing Their Handbooks in Light of New NLRB Decision

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On August 2, 2023, in *Stericycle Inc.*, the National Labor Relations Board abandoned the framework it had been using since 2017 to evaluate the legality of workplace rules, like those in employee handbooks. In its place, the NLRB largely reverted to the framework it had been using before 2017. The renewed standard establishes a presumption that workplace rules are unlawful if they have a reasonable tendency to chill employees from exercising their right to engage in concerted activity. However, an employer can rebut this presumption if it can show that the rule is narrowly tailored to advance legitimate and substantial business interests. The NLRB's new legal framework for work rules has a significant impact on all employers, not just those that employ unionized workforces, because Section 7 of the NLRA protects an employee's right to engage in concerted activity regardless of union membership. This decision will require employers to scrutinize all workplace rules and handbook policies to ensure compliance. **Background** During the previous administration, in its 2017 *Boeing Co.* decision, the NLRB formulated a framework for evaluating workplace policies. Under *Boeing* and subsequent cases, the lawfulness of employer policies depended on a balancing of the impact of employee rights and the employer's business interest. It outlined several categories of rules that were considered lawful, unlawful, or required individualized scrutiny, regardless of their language and context. Several years ago, unionized workers at Stericycle Inc., one of the largest medical waste disposal companies in the United States, filed a complaint alleging that their employer maintained employment policies and rules that interfered with their Section 7 rights. These policies included rules that addressed "personal conduct," "conflicts of interest," and "confidentiality of harassment complaints." On September 4, 2020, an NLRB administrative law judge applied the standard set forth in *Boeing Co.* and found that Stericycle's policies violated the National Labor Relations Act. **NLRB Establishes New Standard for Determining Legality of Employer Policies** The case then was heard by the NLRB, which overruled *Boeing* and subsequent cases, including the categorical holding that certain types of work rules are always lawful. Instead, the NLRB announced that it will now examine, on a case-by-case basis, whether a challenged work rule has a reasonable tendency to chill employees from exercising their Section 7 rights. The NLRB stated that, in

determining whether a challenged work rule has a reasonable tendency to chill employees from exercising their rights, it will interpret rules “from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity.” It further explained that a reasonable employee interprets the rule as a layperson, not as a lawyer. Thus, if the rule in question could reasonably be interpreted to restrict or prohibit Section 7 activity, then it has been demonstrated that the rule is presumptively unlawful. This is true even if the rule could also be reasonably interpreted as not restricting or prohibiting Section 7 rights. The intent of the employer not to affect such rights has no bearing on the analysis. The employer also has the opportunity to rebut the presumption. An employer must come forth with a legitimate and substantial business interest and show that it is unable to advance that interest with a more narrowly tailored rule. In making that determination, the NLRB will evaluate any explanations or illustrations that the employer sets forth. The NLRB declined to provide any more guidance as to how employers can narrowly tailor their policies. **Implications for Employers** As a result of this new standard, employers can no longer assume that categories of workplace rules will always be considered lawful. Instead, employers will have to carefully reexamine all of their employment policies and workplace rules, and through the lens of an economically dependent employee who contemplates exercising Section 7 rights. To that end, employers should work with their human resources departments and legal teams to identify what interests each of their workplace rules are aimed at protecting and draft policies that are narrowly tailored to advance those interests. This includes avoiding rules that may have ambiguous language or are overly technical, which will be construed against the employer. Rather, rules should be drafted in a commonsense way that can be readily understood by an ordinary person.

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