

Employee Handbook Revisions Likely Needed for NLRA Compliance

August 8, 2023

In a strong swing back in favor of employees, the National Labor Relations Board adopted a new legal standard for analyzing employer work rules in *Stericycle, Inc.* The August 2, 2023, decision will significantly impact certain policies in employee handbooks as well as employers' disciplinary decisions. Section 7 of the National Labor Relations Act grants rights to employees in both unionized and non-unionized workforces, so the decision will apply to most U.S. employers.

Background

In February 2015, the employer in *Stericycle, Inc.* distributed a revised employee handbook, which, among other policies, included rules restricting the use of personal electronic devices to break times only; prohibiting personal “[in]appropriate” conduct and behavior that maliciously or intentionally harms the company’s reputation; requiring employees to maintain confidentiality of harassment complaints; and prohibiting employees within the context of a conflict of interest policy to engage in an activity that adversely reflects upon the integrity of the company or its management. The union filed unfair labor practice charges, and the General Counsel issued a complaint under the theory that the rules unlawfully infringed on employees’ Section 7 rights. The Administrative Law Judge held that the employer’s desire to ensure employees did not use their cell phones in hazardous work areas outweighed any impact on Section 7 activity and found other policies did not violate the NLRA. The General Counsel appealed the ALJ’s decision to the Board.

Decision

The Board agreed with its General Counsel. *Stericycle* overruled the 2017 decision in *Boeing Co.*, refined in 2019 by *LA Specialty Produce Co.*, and builds on the 2004 *Lutheran Heritage Village-Livonia* standard. The Board found the *Boeing/LA Specialty Produce* standard improperly “permit[ted] employers to adopt overbroad work rules that chill[ed] employees’ exercise of their rights under Section 7.” The Board also rejected the prior employer-friendly categorical approach to certain work rules.

Under the new standard announced in *Stericycle*, when evaluating a facially neutral work rule, the NLRB will assess whether the rule has a “reasonable tendency to chill employees from exercising their Section 7 rights.” The Board will interpret the rule from the perspective of the employee who is economically dependent on the employer and who contemplates engaging in protected concerted activity. Contrary to prior Board decisions, “the employer’s intent in maintaining a rule is immaterial.” If an employee “could reasonably interpret the rule to have a coercive meaning,” then the work rule presumptively violates the NLRA – “even if a contrary, noncoercive interpretation of the rule is also reasonable.”

The employer may rebut the presumption only “by proving that the rule advances a legitimate and substantial

business interest and that the employer is unable to advance the interest with a more narrowly tailored rule.” In line with this framework, the Board rejected the categorical approach of *Boeing* in favor of case-specific consideration of work rules.

This new standard highly favors employees. The current Board majority is “requiring employers to narrowly tailor their rules [as] a critical part of working out the proper adjustment between employee rights and employer interests in the work-rules context.” Where a rule is ambiguous, the Board will interpret it against the drafter, *i.e.* the employer.

Work Rules at Issue

The Board remanded *Stericycle, Inc.* to the administrative law judge to assess the challenged work rules under the new standard, so we do not yet have a definitive answer on what language might comply. The decision also explained that certain work rules are no longer presumptively lawful. For example, Boeing had a blanket ban on photographing and recording in the workplace. When challenged, the NLRB in 2017 found the policy did not violate the NLRA because Boeing is a key, military defense contractor, and the ban fostered a substantial interest in protecting national security. The *Stericycle* decision said *Boeing* went too far, though, by holding all employers’ blanket bans on recording in the workplace are acceptable work rules under the NLRA. Applying the new standard, employers must narrowly tailor work rules to minimize the “chilling effect” on employees’ NLRA rights. We recommend employers review the following policies at a minimum, which typically contain broad language that an employee could believe would subject them to discipline if they engaged in protected concerted activity:

- Personal conduct (particularly policies requiring workplace cooperation)
- Non-disparagement
- Conflicts of interest
- Confidentiality of harassment complaints
- Mandatory confidentiality during investigations
- No outside employment
- Audio and video recordings at work
- Blanket restrictions on speaking to the media
- Social media

The *Stericycle* standard will likely not permit employers to merely rely on the typical “we will not apply this policy in a manner that interferes with Section 7 rights” proviso. When disciplined or terminated for violating work rules, an NLRA-savvy employee may file an unfair labor practice charge with the local NLRB region or subregion to challenge the employer’s decision. Based on current typical handbook language, such a challenge probably would be successful under *Stericycle*, and the Board could require the company to reinstate the employee and make them whole with back pay, front pay, and consequential damages.

Importantly, the decision did not address employers’ work rules regarding conduct in violation of discrimination or harassment policies, violence in the workplace, or that could be considered bullying. Employers should continue to enforce those strong policies.

Impact

Employers should eliminate or rewrite policies to minimize the risk of running afoul of the NLRA, particularly the above-listed work rules. The policies should advance legitimate and substantial business interests that the company cannot achieve with more narrowly tailored rules. Human resource and management personnel will need to be trained on applying the new work rules to ensure discipline decisions to not violate the NLRA.

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