

Insights: Alerts

NLRB Reverses Standard for Evaluating Workplace Rules

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The National Labor Relations Board (the “Board” or “NLRB”) has (again) changed federal labor law in favor of employees. The latest reversal concerns the Board's standard for evaluating the legality of neutral workplace rules under the National Labor Relations Act (“NLRA”). The Board's decision this week in *Stericycle, Inc.*, marks a significant deviation from the standard set just six years prior by appointees of former President Donald Trump. It applies retroactively and to both union and non-union workplaces.

Lutheran Heritage Standard

Prior to 2017, the NLRB evaluated whether workplace rules were lawful under the NLRA using a standard articulated in *Lutheran Heritage Village-Livonia*. In *Lutheran Heritage*, the Board held that workplace rules violate the NLRA if they (1) would be reasonably construed by employees to prohibit union and other protected concerted activity under Section 7 of the NLRA, (2) were issued in response to union activity, and (3) had been applied previously to restrict the exercise of rights under the NLRA. Decisions issued after *Lutheran Heritage* relied heavily on the “reasonably construed” criteria to invalidate even the most innocuous workplace civility rules. For example, the Board found that a policy requiring employees to behave in a “positive and professional manner” was unlawful in a 2014 decision.¹

Boeing Standard

In 2017, the Republican-led NLRB majority articulated a new standard for testing the validity of workplace rules in *The Boeing Company*. In *Boeing Co.*, the Board essentially replaced the “reasonably construed” criteria and adopted a balancing test, weighing the “nature and extent of the potential impact on NLRA rights” against an employer's justifications associated with the workplace rule. For the sake of clarify, the Board also created three categories of rules:

1. rules that are presumptively lawful because when interpreted reasonably they do not interfere with NLRA rights or any adverse impact is outweighed by the justifications for promulgating the rule;
2. rules that must be evaluated on a case-by-case basis to determine whether they prohibit or interfere with NLRA rights and, if so, whether any adverse impact is outweighed by legitimate business justifications; and

3. rules that are presumptively unlawful because they explicitly limit or prohibit protected activity without any overriding justification.

Stericycle Standard

In an expected turn-of-events, the Board ditched *Boeing's* objective balancing test in *Stericycle*. In its place, the Board announced a modified version of the *Lutheran Heritage* standard.

Under *Stericycle*, a policy is presumed to violate the NLRA if it has a “reasonable tendency” to discourage or chill employees from exercising Section 7 rights. The presumption may only be rebutted if the employer proves the rule advances “legitimate and substantial business interests” that cannot be advanced with a narrower rule.

The most important consideration when evaluating a rule or policy under the new standard is how an employee would understand it rather than how a neutral third-party or an employer might. Under this approach, “the employer’s intent in maintaining a rule is immaterial.” If an employee **could** interpret a rule to discourage the exercise of Section 7 rights, the rule will be presumed unlawful regardless of whether a contrary, non-coercive interpretation of the rule is reasonable.

Key Takeaways

Under *Stericycle*, very few workplace rules are categorically lawful. If an employee “could reasonably interpret” a rule or policy to chill or dissuade them from engaging in protected activity the rule is presumed unlawful. If the Board’s historical application of the *Lutheran Heritage* standard is a predictor for how it will apply *Stericycle*, employers should expect to see more scrutiny of their workplace policies. Rules and policies concerning workplace civility, restricting workplace recordings, to name a few, are likely to be unlawful under the new standard. As such, employers should review their existing policies to determine whether any updates should be made in light of the new standard.

If you have any questions about this Alert or the effect of the NLRB’s recent decision, please contact one of the authors or the attorney(s) in our firm with whom you are regularly in contact.

Footnotes

¹ *Hills and Dales General Hospital*, 360 NLRB 611, 612 (2014).

Related People



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