



Employers May Face More Liability for Unlawful Work Rules Under NLRB General Counsel's New Memo: Key Points and What You Can Do to Prepare

Insights

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Employers should review their handbooks and workplace conduct policies in light of a new development that could greatly expand the penalties for unfair labor practice charges. The NLRB's General Counsel just issued a memo on April 8 directing the Board's Regional Offices to seek full remedies for all employees harmed by an unlawful work rule or contract term – even if those employees are not identified during an unfair labor practice investigation. As we predicted last year in the aftermath of a Labor Board decision that dramatically changed the law on employee handbooks, employers will need to kick their compliance efforts into high gear. We'll explain the key points and give you four steps you should consider taking next.

Federal Labor Law and the *Stericycle* Standard

In its *Stericycle, Inc.* decision last year, the NLRB adopted a new legal standard for evaluating whether an employer's work rule violates the National Labor Relations Act even if it does not expressly restrict employees' right to engage in protected concerted activity under Section 7 of the act. The new standard examines whether a workplace rule or policy "has a reasonable tendency to interfere with, restrain, or coerce employees who contemplate engaging in protected activity."

In the aftermath of that decision, common employer policies, such as those on confidentiality, moonlighting, at-will employment, dress code, and many others, have been struck down by administrative law judges (ALJ). For example, in *United Electrical Contractors, Inc.*, an ALJ concluded that a prohibition on "disrespect toward supervision" and rules against dishonesty or falsification of company records (such as employment applications and time entries) were presumptively unlawful. And in *General Motors Components Holdings, LLC*, an ALJ struck down employer prohibitions on:

- distracting the attention of others;
- "wasting time" or loitering;
- unauthorized soliciting or collecting contributions for any purpose whatsoever during working hours;

- misusing or removing certain items from employer premises (such as employee lists, blueprints, company records, or confidential information) without proper authorization;
- making or publishing of malicious statements concerning any employee, the company, or its products.

What the Recent Memo Means for Employers

Some recent post-*Stericycle* ALJ orders have arguably already expanded employee remedies for unlawful work rules. For example, in addition to cease-and-desist orders, remedies included:

- reversal of the discipline, including reinstatement of the discharged employee (*ExxonMobil Global Services Company*);
- removal of all references to the unlawful disciplinary actions from company files;
- a “make whole” remedy for loss of earnings and other benefits, with interest compounded daily;
- compensation for any other direct or foreseeable financial harms, including job-search and interim employment expenses, with interest; and
- compensation for any adverse tax consequences of receiving a lump-sum backpay award.

As is typical, the employers were also ordered to post notices in obvious places for 60 days regarding the violations and ALJ order and distribute the notice electronically if the company regularly communicates to its employees in that manner.

But the General Counsel’s new memorandum appears to target another class of cases – which do not necessarily involve specifically identified affected employees. These types of cases previously have had less comprehensive remedies – but the memorandum suggests that those remedies fail to make impacted employees whole. So, the General Counsel is instructing Regional Directors to:

- identify employees who were impacted by the unlawful work rules and order the employer to remove discipline from their record and provide backpay as part of the remedy;
- obtain this information from the employer “during settlement efforts,” which could greatly expand the liability of any given case and make settlement more costly for employers; and
- request legal fees and costs, if any, as part of the remedy for those eligible employees impacted by an unlawful contract term.

Because any work rule deemed unlawful could impact an employer’s entire workforce, the potential liability employers may face under such expanded remedies could be dramatic and ultimately detrimental to their business.

What Employers Should Do Next

Now more than ever, you should consider taking the following four steps:

Now, more than ever, you should consider taking the following four steps:

1. **Review your work rules** for potential Section 7 violations, especially all too common rules on confidential information and disobedience.
2. **Seek legal counsel** for questionable work rules and ensure they're narrowly tailored or properly phrased in compliance with the law.
3. **Train managers and human resources staff** to avoid chilling employees' Section 7 rights.
4. **Review all other policies** to ensure they are compliant with the NLRA and close the gap on potential liabilities.

Conclusion

We will continue to monitor developments as they unfold. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. Should you have any questions on the implications of the GC Memorandum and how it may impact your current workplace rules and policies, please do not hesitate to contact your Fisher Phillips attorney, the authors of this Insight, or [any member of our Labor Relations Group](#) for additional guidance.

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