

Transcripts are generated automatically using AI and may contain errors or omissions.

Rich Meneghello

Welcome to The FP5: Five Things for Your 9-to-5. We help employers make sense of the fast moving world of workplace law and compliance by breaking topics down into five parts. I'm Rich Meneghello, Chief Content Officer here at Fisher Phillips.

So, a new memo just dropped from the general counsel at NLRB and a lot of employers are having some questions about it. And their biggest question is, does this change the law when it comes to employer handbooks and policies? And the answer as always when we're talking about employment law is: it's complicated. Joining me to help break it down is Rick Grimaldi. Rick, how are you?

Rick Grimaldi

I'm doing really well, Rich. Thank you.

Rich Meneghello

Rick is one of the better folks we can have talking about this because you have a really neat intersection: you're not only one of the key members of our firm's Labor Relations group, but you also happen to be co-chair of our Government Relations Practice Group. So you really sort of have a good understanding about when DC activity hits labor relations.

Rick Grimaldi

Yeah, I think that's right. We see it from both the policy side and then, of course, ultimately the legal impact on clients.

Rich Meneghello

Well, let's talk about the five things that employers need to know about this new NLRB guidance. So, the first thing is there is this general counsel guidance on workplace rules, but it is not a change in the law. Rick, tell us about what this guidance is.

Rick Grimaldi

Sure. And just by way of quick background, that's right. The General Counsel of the National Labor Relations Board has the authority to issue memoranda, guidances, what we call GC memos. And you're right. It is not a change in the law that would require a National Labor Relations Board decision. But it does have some power. And the General Counsel has used them in any administration somewhat as almost like a velvet hammer.

Right? They will direct the regions--the NLRB is broken into regions--and what they'll do is they'll instruct the regional officers or the regional directors to do something or not do something. In this case, what we're talking about is a memo that was issued by the relatively new general counsel, Crystal Carey. And she issued a memo toward the end of February, around the 27th, instructing her regional directors and the regional offices to be more selective.

And that's one of the things that these memos do, to be more selective. And this one, it was directed toward work rules and specifically handbook policies and various work policies. And people need to remember the National Labor Relations Act applies in both union and non-union environments. And so it becomes rather critical.

Rich Meneghello

Right, I feel like that's one of the things that I hear most often from folks. They hear 'NLRB' and they think, they tune out if they don't have a union, thinking, "I don't have to worry about it." But that's obviously not the case.

Rick Grimaldi

That is absolutely not the case and everybody needs to pay attention. Particularly when you're talking about something like this that has an impact on every workplace. Almost every workplace has a handbook, has certain policies in place. And as you pointed out rightly, a GC memo though is merely an enforcement guidance, right? It tells the agencies, prosecutors, what you should prioritize or not prioritize as the case may be. It does not change the law.

Rich Meneghello

Okay. So that leads us to the second thing you need to know about this memo. The standard that the NLRB laid down for workplace rules under the Biden administration is still in place. So help us understand what that standard says, Rick.

Rick Grimaldi

I will. So there was a case that came down and as did many cases come down during the Biden years that were not very employer-friendly, shall we say. And this was probably in--there were two cases, I think, that impacted employers the most. This one, I think, more generally impacted both union and non-union environments, primarily non-union. And it involved handbooks. And the case was called *Stericycle*.

It came down in 2023. And essentially, what it did was it took what could have been on their face historically perfectly reasonable policies or handbook provisions and essentially turned them on their ear. It more or less blew them up. And it made employers that weren't vulnerable, now suddenly vulnerable to unfair labor practice charges.

And it's difficult because it was a really rapid change and it required employers to go back and really take a good hard look at their handbooks, which we always had advised. Prior to that decision, the board used something called the *Boeing* standard and it was much more predictable. And it was sort of broken into different categories in terms of work rules that were fine, maybe not so fine and bad, right? And employer could have a pretty good sense of how that would play with their employee population. And under *Stericycle*, however, it changed so significantly that now a rule in a handbook would be considered presumptively unlawful by the board. If an employee could reasonably interpret it as discouraging any kind of protected activity, which we would call under Section 7, which is the section of the National Labor Relations Act, that applies most to employee rights.

Rich Meneghello

Okay, and let's make sure our listeners completely understand what we're talking about here. Give me an example of the kinds of policies that employers may have had in place, may currently have in place, thinking they're completely fine because they seem reasonable, yet under this *Stericycle* standard that we're still living with, could be in violation of the National Labor Relations Act.

Rick Grimaldi

Sure, and the one example that I have dealt with a lot--and it caught probably most employers most by surprise when I mentioned it, they look at me like, you got to be kidding--is the civility rules. Most places, and we preach this. I mean I used to do training and it was entitled, "Respectful Workplace." We want our workplaces to be respectful and civil. And under *Stericycle* now, a civility clause, for example, in a handbook that employees need to act civil toward each other and their supervisors could be considered unlawful. And then the burden will switch. It's presumptively unlawful, frankly, if it's in there. And now the employer has to prove, has the burden to prove that, no, no, no, it's reasonable and it's lawful. And that's a difficult standard. And so now, and I just dealt with this just literally this week.

In fact, I'll probably be talking to the client again shortly because they had a terminated employee and they want to, they wanted--and this was before they talked to us--but they, it was because the employee acted offensively--quote offensively--toward a supervisor. that's just not going to necessarily fly under *Stericycle*.

Rich Meneghello

So I can curse you out, Rick, and my boss can't get me in trouble anymore is what you're saying. That'll be for ...

Rick Grimaldi

Right. I mean, I'm personally used to getting cursed out, but not everybody is.

Rich Meneghello

That'll be the R-rated version of this podcast available for extra subscription cost.

Well, let's talk about the third thing that we want to talk about related to this general counsel memo guidance. And that is that it means that the NLRB is less likely to come after employers for these policies that may be borderline, but it, less likely doesn't mean that they won't come after you. So talk about that, Rick.

Rick Grimaldi

Yeah, I think that's a fair point. So the enforcement, there are a couple of things. The enforcement memo is directed to the various regions. Some regions are a little less employer friendly than others. And so could they potentially ignore the directive? Yes, it's possible. And even though they may not focus on this, if a union or employee files an unfair labor practice charge, the agency and the regions still have an obligation to investigate and determine whether or not there is merit. And they still have to follow the law. And as we talk today, the law is still *Stericycle*. Yeah, it's still, I guess it lowers the risk, but the risk isn't zero by any stretch.

Rich Meneghello

Okay, so if an employee files a charge today, what will actually happen with that case now that a regional office is being told by the GC to stand down, but yet the law says this might be in violation? Where's the rubber meet the road there?

Rick Grimaldi

Well, I think that's sort of what I was talking about. Maybe it depends on the region. I mean, a region can, frankly, they could deep-six these things and sit on them, but technically they're going to look at it. And if there's an unfair labor practice charge, they have an obligation to investigate. They still have to follow the standard. So they can't necessarily turn away from what the standard is. Now, would they be more likely to work with an employer to correct it now? Maybe, which they wouldn't have pre this memorandum from the GC. So it is a bit of a catch. They have to evaluate it, right? They still have to, under *Stericycle* and look at that analysis. And so that's, and that's one

of the things that I know we're telling employers is look, you can't, don't abandon looking at your handbook and suddenly think you're in the clear.

Because you're not necessarily in the clear at this point still. What ends up happening, and I think this is where the enforcement piece will come into play. The NLRB, the regions, oftentimes it could be an unrelated unfair labor practice charge and they ask for a handbook or they ask for a policy. And then what happens, that opens the door for them to rattle around in all of your policies.

And that's where I think you may see a change. They may be less likely to do that in where looking at a handbook might be attendant to an unfair labor practice charge, but for some other reason.

Rich Meneghello

Gotcha. OK, that makes sense. This is the FP5. Once again, I'm Rich Meneghello and our guest today is Rick Grimaldi. Let's talk about the fourth thing then, Rick. We've been sort of leading up to it, talking about the law hasn't yet changed. But the fourth thing is, I think everyone here in Fisher Phillips Labor Relations group has told me that they expect the board to revisit that *Stericycle* standard in the next year or so, and the law on workplace rules is going to shift once again. What do you think about that?

Rick Grimaldi

Oh I wholeheartedly agree, it will, it's just a matter of when and even though we now have a quorum at the Board meaning we have enough members of the Board that they can issue decisions, there's still a lot of time that has to pass. A case has to come up first of all, and so it has to be there has to have been an unfair labor practice charge that that there was merit found in a region and a complaint issued and litigation etc. and make its way to the board before they can find that case and flip the law. We just recently acquired the quorum. And what's interesting is it's still a three-member Board, two Republicans, one Democrat. And two things I think are important here. The Democrat rolls off in September. So potentially, if we don't get another Republican member between now and then, a Republican majority, we're back down to having no quorum.

And there'll be no decisions issued. Right. So that's important to keep in mind. Also, there's this sort of rule that the Board won't reverse major decisions without a full majority and a full Board. So a three-member Republican majority in this case would be required. So I think we're going to see some time here before this happens. And that's pretty important, right? And they cannot do any sort of administrative rulemaking where they are, right?

So it has to be done by deciding a case and reversing *Stericycle*. And I think we're a little ways off. Is it going to happen? Yes. That as well as I believe that many of the other Biden administration board decisions will get reversed.

Rich Meneghello

Okay. The Rick Grimaldi guarantee. You just heard it. Rick for those, for those ...

Rick Grimaldi

I make no guarantees, but it is my strong opinion.

Rich Meneghello

For the betting folks listening to this podcast, give us the date by which you think *Stericycle* will be overturned.

Rick Grimaldi
I will not predict, I cannot predict it.

Rich Meneghello
Unbelievable.

Rick Grimaldi
Can't do it. I know the betting markets are going to go crazy.

Rich Meneghello
They are. I'm gonna give you a date and you tell me if you think it'll happen before or after that date. Okay?

Rick Grimaldi
All right.

Rich Meneghello
January 1, 2027.

Rick Grimaldi
January 1, 2027. I'm going to go with yes. I'm going to go with the before.

Rich Meneghello
Oh, before, okay. You just answered the question differently than I asked it. Love it. What a good lawyer you make, Rick.

All right, well, let's talk about the fifth thing that employers need to know about this new general counsel guidance, and that is employers should use this opportunity to review their handbooks while the heat is a little bit lower and then decide what to do next. So Rick, one of your clients calls you today, they've heard about this general counsel guidance and they want to know what they can and what they should do related to their handbook. What are you telling them?

Rick Grimaldi
Some of what we just talked about, which is it's simply a guidance, the law still remains. The notion that, you know, look, do I believe the momentum is trending the right way? Absolutely. Am I hopeful? Absolutely. But the law is still the law. And this combined with some of the other decisions that came down during the administration, the Biden administration that have not been reversed, could get you in a whole heap of hot water if you don't continue to follow the law.

My advice is continue to follow the law, update your handbooks because when it changes, you'll have an opportunity to revise those handbooks again. But until then, it's always follow the law. The last thing obviously we want to say is, you know, don't follow the law, don't worry about it.

And that's my biggest fear is that clients, and I do have clients that are like, well, now we don't have to do anything because we know that this is where it's headed and we're just going to wait it out.

Look, you can be a big risk taker, sure, but I don't think in this environment that is necessarily a risk you want to take. It's much easier to revise your handbook and ride that out if you haven't already revised it, right? Or now don't revise it back to the *Boeing* standard yet because we're still operating under *Stericycle*.

Rich Meneghello

Right. Maybe that more irreverent podcast that we do, Rick, where we can curse each other out will also tell people how not to follow the law. But this podcast will tell people definitively, employers, hey, follow the law.

Rick Grimaldi

This is correct. This is a Fisher Phillips podcast. I think we have to be very careful to make sure that we don't tell them not to follow the law.

Rich Meneghello

Absolutely. I hope all of those Fisher Phillips folks listening in are appreciative of the fact that we're instructing employers to follow the law. Thanks, Rick.

All right, Rick, and this is something we do each week. We like to have our listeners get to know our guests a little bit better. So I'm gonna hit you with five rapid fire bonus questions so we get to know you a little bit better. Are you ready?

Rick Grimaldi

I am ready.

Rich Meneghello

Okay, morning workout or evening workout?

Rick Grimaldi

Morning.

Rich Meneghello

When you drive: music, talk radio, podcast or silence?

Rick Grimaldi

All three plus audiobooks.

Rich Meneghello

Oh, okay. Wow. You tick all the boxes. Who's your favorite band or musical artist?

Rick Grimaldi

Grateful Dead. Might be a surprise to some.

Rich Meneghello

Yeah, I think so. People are getting to know you. Favorite childhood TV show?

Rick Grimaldi
Oh. *The Green Hornet*.

Rich Meneghello
Wow, okay, great.

Rick Grimaldi
Top of mind.

Rich Meneghello
And final fifth question, what's one hidden talent that people don't know about?

Rick Grimaldi
Well, I would hope they would know this, but I've written a couple of books about the workplace.

Rich Meneghello
This is your chance to plug them, Rick. Go for it.

Rick Grimaldi
I'm happy to do a shameless self-promotion anytime. I wrote two books. The first one, a couple of years ago, I actually finished up right after COVID, called *Flex*. And that was functionally about managing transformative change in the workplace.

And then the second one, somewhat similar, but a little bit different in the sense that there are generations in the workforce, right? There's technically five generations in the workforce now, if you count the silent generation, of which there are still some. But the book's titled *Age Appropriate, How to Leverage a Multi-generational Workforce and Win the Market*. In order to, you have to be able to get along. And when you have that many generations in the workplace, the get along part can be challenging.

Rich Meneghello
Excellent. And both of those books, both *Flex* and *Age Appropriate* by Rick Grimaldi are available on Amazon. Well, thanks Rick. Glad to get to know you a little bit better.

Rick Grimaldi
Scary as that may sound.

Rich Meneghello
Well, this has been a delight as always. Our guest this week, once again, was Rick Grimaldi. Rick is the co-chair of our government relations practice group and a key member of our labor relations group. I would say that Rick is based in Philadelphia, but honestly, Rick, you travel the country all the time anyway. You're a man, a nomadic attorney, I think.

Rick Grimaldi
It is part of what we do.

Rich Meneghello

You're in the wind all the time. But Rick, thank you very much for joining us. This has been a real good conversation, I appreciate it.

Rick Grimaldi

Thank you. I really appreciated the opportunity to talk about it. It's great to be able to sort of hopefully reach a wide audience and talk about these things that are so near and dear to all of us that practice labor law for sure.

Rich Meneghello

There's a link to an article talking about this subject in our podcast show notes. Go ahead and check it out if you want to dive deeper into this topic. If you enjoyed our show, please rate us on your favorite podcast app. We'll see you next week.

Just as a reminder, folks, we aren't providing legal advice on this podcast and it doesn't create an attorney client relationship with our listeners. For more information, visit fisherphillips.com/legal-notices.