

IT'S TIME TO REVISIT YOUR HANDBOOK RULES AS LABOR BOARD TAKES AIM AT WORKPLACE CIVILITY AND WORKPLACE CONDUCT

Insights
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The National Labor Relations Board is actively looking to modify the legal standards that for the past five years have provided a commonsense solution for evaluating the legality of commonplace workplace misconduct rules. And if recent events are any indication, both unionized and non-unionized employers alike should be prepared for a new day in which your handbook rules will once again be unreasonably scrutinized – meaning your policies may need to be rewritten to ensure compliance with the new standards. What is happening at the Labor Board and what should you do to prepare for this inevitable swinging of the pendulum?

The State of the Law Today

Under [its Boeing standard established in 2017](#), the Board examines facially neutral policies and handbook provisions based upon a pair of competing considerations: (1) the nature and extent that the rule would potentially impact NLRA rights; and (2) the legitimate justifications associated with the rule. Under this analysis, the agency attempts to classify rules into one of three categories:

- **Category 1:** Rules that are **lawful to maintain** because, when reasonably interpreted, they either do not prohibit or interfere with the exercise of NLRA rights or any adverse impact is outweighed by the articulated justifications for administering the rule. Civility rules requiring employees to maintain harmonious interactions and relationships are offered as a specific example.

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- **Category 2:** Rules that **must be evaluated on a case-by-case basis** to see whether they prohibit or interfere with NLRA rights and, if they do, whether any adverse impact is outweighed by legitimate business justifications. Investigative confidentiality rules that expand beyond open investigations are an example of a Category 2 rule.
- **Category 3:** Rules that are **unlawful** because they expressly limit or prohibit protected conduct without any overriding justification. Rules prohibiting workplace discussions of wages or benefits is offered as an example.

What Was the Prior Standard?

Prior to this standard, the Board applied a broader standard that asked only whether an employee could “reasonably construe” the rule at issue to prohibit the exercise of protected rights. Under this Lutheran Heritage standard, some workplace rules were deemed to be “inherently coercive” of those rights, while others were overturned if implemented in direct response to union activity.

This vague standard gave rise to the invalidation of hundreds of workplace civility rules – many of which might reasonably be viewed as the application of commonly accepted principles governing workplace conduct. After all, workplace civility rules generally require employees to treat their coworkers with dignity and respect. Taken to its logical extreme, virtually any such rule could (at least in the eyes of some) be “construed” to interfere with Section 7 rights under certain circumstances. But the obvious benefit to these rules is to ensure that employees treat their peers as they would presumably wish to be treated themselves.

What is Happening Now?

The Board recently requested advocacy groups and other interested parties weigh in by filing amicus briefs in a case called *Stericycle, Inc.* to address the following questions:

- Should it continue to apply the three-part *Boeing* standard for determining whether a facially neutral rule violates the act?
- Should the rule be modified to: account for the possibility that this standard “chills” employees in the exercise of Section 7 activity; properly allocates the burden of proof;

and properly balances employee rights with legitimate business interests?

- Should the Board continue to uphold workplace rules regulating investigative confidentiality, non-disparagement, and outside employment?

Although we are still awaiting a definitive answer to these questions, it seems only a matter of time before we can expect the NLRB to issue a decision responding with a resounding “No,” “Yes,” and “No,” respectively. We expect the Board to replace the *Boeing* test with a variation of its prior *Lutheran Heritage* standard. Any such decision would likely adopt a similar “reasonably construe” analysis that separately examines every workplace rule to determine whether it could potentially chill Section 7 rights.

Among other things, this means that employers should prepare for the following potential changes:

1. The Board will likely invalidate previously valid workplace rules imposing **confidentiality restrictions against the backdrop of workplace investigations**.
2. The Board will probably strike down **non-disparagement rules** on the basis that they can be reasonably construed to interfere with employee rights to seek outside support concerning their employment terms and conditions.
3. The Board will likely find that **rules prohibiting moonlighting or outside employment** are unreasonable given that they could restrict the ability of paid union “salts” to enter your workforce and begin an organizing drive.

How Should You Prepare for the Change?

No one knows exactly what the new standard will be at this point. The new standard may ultimately mirror the old one, but that is not guaranteed. It is entirely possible that a Board majority will choose instead to craft an entirely new standard.

Nevertheless, you should carefully monitor the *Stericycle* case so you are standing on “go” to adapt change your civility and other handbook rules governing workplace misconduct to satisfy the new standard. When that day comes, we can certainly expect that a multitude of policies

that have been deemed lawful for the past five years will suddenly be deemed impermissible by the NLRB.

Conclusion

We will continue to monitor this situation as it unfolds. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information direct to your inbox. Should you have any questions on the implications of these developments and how they 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.