Labor Board Issues a Blow to Workplace Conduct Policies: Here's How Your Employee Handbook May Need to Change Today

Insights
8.03.23

The National Labor Relations Board (NLRB) just changed the law again on employee handbooks by modifying the legal standards that for the past six years have provided a commonsense solution for evaluating workplace misconduct rules. Yesterday's decision will dramatically impact employers across the country, leading many to once again modify their handbooks to ensure compliance with the latest NLRB mandates. While some employers already review their handbooks on a yearly basis, it may be important to do so more frequently in light of this ruling – and the additional decisions and guidance memos that are expected in the months and years to come. Here's what you need to know about the August 2 decision in *Stericycle, Inc.* and how your policies may need to be updated.

What Changed?

The NLRB issued its long-awaited decision in *Stericycle, Inc.* yesterday, overturning its more employer-friendly *Boeing* decision, which had governed agency doctrine on workplace conduct policies for the past six years. (We wrote about the *Boeing* standard and our predictions here.)

Under the new standard, the Board analyzes whether an employee "would reasonably construe" the applicable rule or policy as chilling protected conduct under Section 7 of the National Labor Relations Act. To avoid a violation, employers must now show that workplace conduct rules are narrowly tailored to special circumstances justifying any infringement on employee rights. With the *Stericycle* decision, the NLRB now returns to a test similar to its *Lutheran Heritage* standard, which was in effect before *Boeing*.

The decision does away with three categories of policies that were introduced in *Boeing*:

1. rules that are presumptively lawful;
2. those that must be evaluated on a case-by-case basis to see whether they prohibit or interfere with NLRA rights and whether any adverse impact is outweighed by legitimate business justifications; and
3. rules that are presumptively unlawful.

In their place, the new standard subjectively examines **whether a workplace rule or policy has a reasonable tendency to interfere with employees' exercise of Section 7 rights**. In other words, if an employee could reasonably interpret the rule to be coercive (even if a noncoercive interpretation is also reasonable), then the burden shifts to the employer to justify it.

Employers may rebut this presumption only by proving that the handbook rule advances a **legitimate and substantial business interest**, and that they are unable to advance that interest with a more tailored iteration. A handbook rule remains overbroad when "it could be narrowed to lessen the infringement of employees' statutory rights while still advancing the employer's interest…" and any ambiguous rules will be construed against the employer.

Here are three additional points to note about what has changed under the new standard:

- **The NLRB will take a case-by-case approach.** Unlike the prior *Boeing* standard, the new test will assess workplace rules on a case-by-case approach, so employers should expect to see new cases in the coming months to clarify how this standard will be applied in practice.
- **The new standard applies retroactively.** Which means all employers should consider reviewing their policies now to ensure that they comply. While the new standard does not necessarily invalidate an entire handbook, it does mean that certain provisions could now be deemed unlawful. That could lead to any application of those policies for disciplinary or related purposes to subject employers to unfair labor practice charges on a retroactive bases, along with the potential for back pay and other damages.
- **Disclaimers should be reviewed.** Many employers will add a disclaimer to their handbook to note that the policies are not intended to interfere with employees' Section 7 rights, but this alone may not be sufficient to avoid violating the new standard – particularly with respect to policies that are otherwise deemed to be coercive or overly broad. Employers should therefore act now before they are subject to an unfair labor practice claim for the application of policies that may have passed muster under the *Boeing*

What Does This Mean in Practice?

The following four policies are now likely to be deemed unlawful, since they typically were under *Lutheran Heritage*:

1. *Workplace civility rules*

So called "workplace civility rules" requiring employees to positively engage with co-workers are likely to be deemed unlawful under the *Stericycle* standard. If the past is any indication, then such examples may include the following policies:

- "False, vicious, profane or malicious statements toward or concerning the … employer or any of its employees" are prohibited.

- Expecting "employees to behave in a professional manner that promotes efficiency, productivity, and cooperation … to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management."
- "To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information, employees are prohibited from recording people or confidential information using cameras."
- "If you feel you have not been paid all wages or pay owed to you, believe that an improper deduction was made from your salary, or feel you have been required to miss meal or rest periods, you are required to contact a manager, an HR business partner, or the integrity line."

Under the now resurrected Lu*theran Heritage* standard, the NLRB had found that employees could reasonably construe each of these rules to coercively interfere with the exercise of Section 7 rights in violation of the NLRA.

2. *Loitering rules*

A policy stating that, "at no time are you to loiter around the premises off duty" was previously deemed unlawful under the *Lutheran Heritage* standard. The NLRB specifically held that, "an employer's rule denying access to all off-duty employees to all areas of its premises violates the Act unless there are legitimate business concerns to justify the rule or policy."

Consequently, employers maintaining such rules will need to evaluate whether they can continue to be enforced given the circumstances and particular working conditions.

3. *Rules prohibiting unlawful strikes, work stoppages, and slowdowns*

Rules prohibiting employees from "engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any [Company Name] facility or official business meeting" have also been found to be unlawful under the Act. As organizing activity increases throughout the country, employers must be careful to determine whether and to what extent these prohibitions can be maintained.

4. *Restrictions on video and/or cell phone recording*

This was one of the main policies at issue in *Boeing*, which permitted the **possession** of camera enabled devices. The policy added: "However, **use** of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security." The rule was in place to comply with the federal contracting requirements.

You should expect that such policies may no longer be lawful and should therefore evaluate similar restrictions to determine whether revisions need to be made.

How Should You Respond to this New Ruling?

This decision may be only the beginning of the Board's efforts to turn back the clock to similar rulings regarding social media, confidentiality policies, employee communications, and workplace conduct that were issued by the Obama Board. Unfortunately, these doctrinal pendulum swings have become commonplace on the heels of political changes in Washington, D.C.

These changes can have a profound impact on unionized and non-union businesses alike, as we have already seen with respect to a recent decision regulating language in employee severance agreements and a subsequent General Counsel memorandum purporting to restrict use of non-compete agreements.

Employers are therefore encouraged to continue working with their internal HR teams and legal counsel to stay up to speed on the latest developments in this rapidly evolving regulatory environment.

It remains to be seen whether this decision will be appealed and – if so – whether it will survive the scrutiny of the reviewing court. In the meantime, however, we can expect every regional office within the agency to apply the new standard as written. You should therefore consider working with your Fisher Phillips attorney to audit your employment policies for compliance with the new standard and ensure you are up to speed on its real-world impact on existing workplace conduct rules.

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 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.

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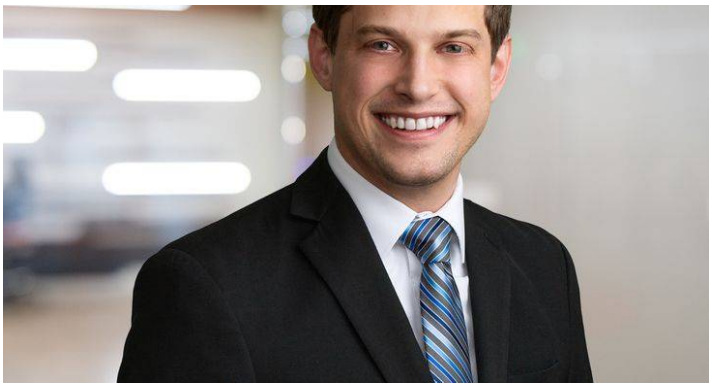

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