

NLRB Sharpens Review of Employee Handbooks

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On August 2, 2023, the National Labor Relations Board (“NLRB”) adopted a new standard to determine whether an employer’s workplace rules or policies violate employees’ rights under the National Labor Relations Act (the “Act”). As a result, many employers will need to review and revamp their employee handbooks and manuals to avoid a potential lawsuit.

What Rights are Protected Under the Act?

Section 7 of the Act guarantees employees, among other rights, the right to engage in concerted activities for the purpose of collective bargaining or for other mutual aid or protection, as well as the right “to refrain from any or all such activities.” For example, concerted activities include talking with one or more co-workers about wages and benefits or other working conditions, petitioning for better hours, participating in a concerted refusal to work in unsafe conditions, or joining with co-workers to talk about problems in the workplace. Section 8 of the Act prohibits an employer from interfering with, restraining, or coercing employees in the exercise of these rights.

The Old Employer-Friendly Test

The previous test stems from *The Boeing Company*, a Trump-era decision outlining an employer-friendly test that weighed a rule’s potential impact on employee rights against the employer’s legitimate justification for enacting the rule. The *Boeing* decision also provided employers with bright-line categories of rules that are (1) always lawful, (2) sometimes lawful, and (3) always unlawful.

Returning to an Employee-Friendly Test

The NLRB’s most recent decision ditches the *Boeing* analysis and replaces it with a standard that has the potential to cause disruptions for employers moving forward. In *Stericycle, Inc.*, the NLRB explained that a workplace rule is presumptively unlawful if an employee, subject to the rule, could reasonably interpret it as dissuading the employee from engaging in Section 7 activities. The NLRB also scrapped the categorical approach outlined in *Boeing* and instead opted for a standard that evaluates each rule on a case-by-case basis. Once a rule is found to be unlawful, the employer can rebut this presumption by showing that the rule advances a legitimate and substantial business interest and that the employer cannot advance such interest with a more narrowly tailored rule.

Employers Should Review their Rules and Policies Immediately

Another important aspect of the *Stericycle* decision is that it applies retroactively. In other words, the NLRB can find a workplace rule or policy unlawful even if it was created under the *Boeing* standard. Accordingly, employers will need to thoroughly review their employee handbooks, rules, and policies and revise them to comport with the standard described above.

Examples of policies that likely need to be reviewed and revised include rules:

- Restricting social media use;

- Restricting the use of cameras in the workplace;
- Prohibiting insubordination;
- Prohibiting employees from speaking with the media;
- Prohibiting employees from openly talking about pay, benefits, or problems in the workplace;
- Promoting civility among employees; and
- Requiring confidentiality of investigations and complaints.

Employers should also consider adding carefully drafted disclaimers to their employee handbooks explaining that the policies and rules included therein are not intended to restrict Section 7 activity; however, it remains unclear what – if any – legal effect such a disclaimer would have on an employee's claim.

The Seigfreid Bingham team will continue to monitor the latest developments and legal requirements in this area of law. If you have any questions about the NLRB's latest decision, how it affects your business, or disclaimers to include in your employee handbooks, please do not hesitate to contact the firm's Employment Law attorneys for further information.

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