

Employment Law Update: NLRB Attack #3 – Employee Handbooks

09/14/23

On August 2, the National Labor Relations Board (NLRB), issued its decision in the [Stericycle case](#). The decision created a new standard regarding the lawfulness of workplace rules and policies.

The new standard is as follows:

If an employee could reasonably interpret the work rule/policy to have a reasonable tendency to chill employees from exercising their rights under the National Labor Relations Act ([NLRA Rights](#)), the rule/policy is unlawful. The employer's intent in maintaining a work rule is immaterial. The NLRB clarified that it will interpret the rule from the perspective of an employee who is subject to the policy, economically dependent on the employer, and contemplates engaging in protected concerted activity (Section 7 rights under the NLRA).^[1] If the rule can reasonably be interpreted to chill Section 7 rights, the rule is presumptively unlawful.

However, the employer may counter the presumption by proving that the rule/policy advances a legitimate and substantial business interest **and** that the employer cannot advance that interest with a more narrowly tailored rule/policy. If the employer proves the aforementioned, the work rule/policy will be found lawful.

Each challenged rule/policy will be reviewed on a case-by-case basis.

The decision may be appealed. The appeal can take many months or even years. In the meantime, the NLRB will be enforcing this new standard. The risk is, if employees are terminated for violating the unlawful rule, the employer could owe back pay and other penalties.

Takeaway: Employers should review their handbooks/work rules/policies, including but not limited to, rules/provisions regarding:

- Employees' use of social media.
- Restricting criticism, negative comments, and disparagement of the company's management, products, or services.
- Insubordination.
- Confidentiality of investigations and complaints.
- Using cameras or recording devices in the workplace.
- The making of safety complaints.
- The use of company electronic devices.
- Comments to the media, government agencies or other third parties.
- Any other policies that appear to limit an employee's NLRA Section 7 rights.

Employers with questions can contact [Tracy Armstrong](#) or another member of the Wilentz [Employment Law](#) Team.

^[1] Concerted activity includes but is not limited to talking with one or more co-workers about wages and benefits or other working conditions, circulating a petition asking for better hours, participating in a concerted refusal to work in unsafe conditions, and/or talking with other employees to third parties regarding problems/issues in the workplace.

Practice

- Employment Law