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Back to the Future: Employers Must Buckle Up for a Return to the NLRB's New (Old) Standard for Workplace Rules

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Employers, whether they have unionized employees or not, must navigate the aftermath of another change in the ever-evolving landscape of labor law. A recent National Labor Relations Board (NLRB or Board) decision has sent ripples through the realm of employer workplace rules. The decision has prompted all employers, both unionized and union-free, to revisit and revamp how to craft effective and lawful workplace rules. The NLRB's revised standard will assess whether any challenged workplace rule has a reasonable tendency to chill employees from exercising their Section 7 rights guaranteed to them under the National Labor Relations Act (NLRA). In other words, almost any facially neutral workplace rule could have a tendency to chill employees from exercising their rights under the new standard.

How Did We Get Here?

The *Stericycle, Inc.* decision breathes new life into and amends the Board's standard established in the 2004 *Lutheran Heritage* decision. In *Lutheran Heritage*, the NLRB signaled that it would find innocuous employer rules violated the NLRA if employees would merely "reasonably construe the language" to prohibit "Section 7" activities.

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Thirteen years later, the NLRB's 2017 *Boeing Co.* decision, which overturned *Lutheran Heritage*, saw the NLRB turn to an employer-friendly two-factor balancing test that acknowledged employers' legitimate business interests in maintaining workplace rules.

Now, the NLRB has scrapped the *Boeing Co.* test and determined in *Stericycle* that workplace rules will be evaluated by determining whether an employee would "reasonably construe" the workplace rule as chilling protected conduct under Section 7. The NLRB "will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer." If an employee could *reasonably interpret* a rule to restrict or prohibit protected activity, the NLRB has met this burden.

If this burden is met, under *Stericycle*, the NLRB will find that the rule is presumptively unlawful. The employer does have the opportunity to rebut this presumption. The employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. When the decision was announced, NLRB Chairman Lauren McFerran stated that "under the new standard, the Board will carefully consider both the potential impact of work rules on employees and the interests that employers articulate in support of their rules. By requiring employers to narrowly tailor their rules to serve those interests, the Board will better support the policies of the National Labor Relations Act." Although this certainly makes it sound like employers will get a fair chance to rebut the presumption that a rule is unlawful by showing its legitimate and substantial business interest cannot be advanced with a more narrowly tailored rule, we anticipate rebutting the presumption will be a formidable challenge under *Stericycle.*

What Does This Mean for Employers?

A lot of things, but before we dive in, it is important to reinforce that Section 7 applies to both unionized and non-unionized workplaces. Because of this, almost all private employers are going to be impacted by the *Stericycle* decision.

In short, the *Stericycle* decision means that the NRLB is going *Back to the Future*. Flashing back to times post-*Lutheran Heritage*, and pre-*Boeing Co.,* provides some insight into how the Board may enforce its shiny new toy (the standard articulated in *Stericycle*). Following *Lutheran Heritage*, the Board prosecuted dozens of unfair labor practice charges over benign workplace rules asking employees to "work harmoniously," "to conduct themselves in a positive and professional manner," "to keep customer and employee information secure," and to "refrain from inappropriate discussions about the company." The Board's Obama-era General Counsel had even issued a detailed memorandum cataloging scores of decisions finding various workplace rules unlawful, even if they had never been applied to restrict employees' rights under the NLRA and were not issued in response to union activity. We anticipate the Board will get back to this level of nitpicking and overall unpredictable outcomes.

So, what rules should employers review? While we recommend reviewing and scrutinizing all policies carefully in light of this decision, there are certain policies that stand out more than others that should be reviewed and possibly rewritten to comply with the new standard articulated in *Stericycle*. Those rules include but are not limited to:

- Social Media Restriction Policies;
- Workplace Civility/Conduct Policies;
- Confidentiality of Workplace Investigations (Including Sexual Harassment Investigations) Policies;
- Conflict of Interest and Outside Employment Policies;

- Media Contact Policies;
- Confidentiality/Non-Disclosure Policies;
- Non-Disparagement Policies;
- Electronic Communications and Computer Usage Policies;
- Dress Codes;
- No Camera and No Video Policies;
- Loitering Policies; and
- Open Door Policies

Employers need to quickly understand that the success of their policies moving forward is ultimately built on the little things. There are two essential questions that employers need to ask themselves: (1) what is the legitimate interest that this rule advances for the company; and (2) is this rule narrowly tailored to protect that legitimate interest? The first question is generally easier to answer, but the second question is where things can get tricky. For example, if an employer wants to protect its confidential information, the safest way to do so and avoid the NLRB's inquiry is to specifically identify what confidential information the employer is trying to protect. Vague and overbroad references to things such as "confidential information" will not cut it under the *Stericycle* decision. The devil truly is going to be in the details of handbook policies to make sure they are narrowly tailored.

Importantly, employers should keep in mind that even if a policy or rule is lawful, if it is inconsistently applied it may be found to interfere with employee rights. Employers must train their management team on all updated policies to ensure they are being applied consistently with the updated policies.

Can NLRA Disclaimers Save Employers' Rules?

Maybe. Conventional wisdom would say that if an employer adds disclaimer language to a handbook or policy, such as "nothing in this rule is intended to, nor should be construed to limit the employee's

rights as set forth under all applicable provisions of the NLRA," the disclaimer language should clearly demonstrate the employer is not intruding on NLRA rights. However, based on recent history, it seems unlikely an NLRA disclaimer is a guaranteed way to avoid the NLRB's scrutiny. The Board has not yet considered the sufficiency of disclaimers under this new standard, but it seems likely that unless the disclaimer contains specific language that explains all rights an employee has under the NLRA, a general disclaimer may not be enough to save employers.

In a scenario reminiscent of *Back to the Future*, employers find themselves at the crossroads of legal evolution. The *Stericycle* decision reminds us that we are witnessing both familiar echoes of the past and the potential of uncharted legal territories. Just as Marty McFly navigated the past with a watchful eye on the future, employers must carefully navigate the changes articulated in *Stericycle*, striving to maintain the delicate balance between current precedent and what is to come in the future. Now is the time for employers to take the opportunity to review their rules and policies to avoid being the test cases of the *Stericycle* standard. As always, Akerman attorneys will continue to monitor changes in NLRB guidance and policies. For any labor or workforce concerns, contact your Akerman labor attorney for further information and guidance.
