

NATIONAL LABOR RELATIONS BOARD TARGETS WORKPLACE POLICIES IN RECENT DECISION

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On August 2, the National Labor Relations Board (NLRB) issued an opinion that could invalidate many workplace rules of private employers. In *Stericycle, Inc. and Teamsters Local 628*, the NLRB set a new standard for determining whether employer work rules violate the provisions of the National Labor Relations Act (the Act) that give workers the right to engage in “concerted activities,” which include the right to organize and to engage in collective bargaining and other activities for mutual aid and protection. The “concerted activities” provisions of the Act apply to all employees, not just union employees.

What are “Concerted Activities,” and Why Does the NLRB Care About Them?

The term “concerted activities” has always been broadly interpreted by the NLRA. It can include discussion of and complaints about pay, hours and numerous working conditions, including health, safety, workplace harassment, treatment of employees by management, investigations of employee complaints, the ability of employees to meet with each other to discuss working conditions and other matters of concern. The NLRB’s focus since the Act came into existence in 1935 has been protection of employee rights to participate in concerted activities. In the NLRB’s estimation, work rules that chill the rights of workers to engage in concerted activities violate the Act. However, balanced against these rights of employees is the equally important right of a business to maintain discipline in the workplace.

The NLRB’s Criticism of Certain Workplace Rules in the Stericycle Decision

Until the *Stericycle* decision, the NLRB utilized a balancing test to determine whether work rules had a chilling effect upon employees’ rights to engage in concerted activities. The test took into account the rights of the employees and the rights of employers to maintain discipline in the workplace. Key to the balancing test was the question of how an employee would interpret the employer’s work rules – that is

how employees reasonably view work rules in the context of the everyday performance of their jobs and not through a union's perspective.

In *Stericycle*, the NLRB held that the work rule, which is to be applied retroactively, must be viewed from the perspective of an employee who is subject to the work rule, economically dependent upon the employer and contemplates engaging in protected activity—in other words how a union organizer would interpret the rule. And if such an employee could (not would) view the rule as having a chilling effect upon his right to engage in concerted activity, the NLRB will presume the rule violates the Act. The employer can only overcome the presumption by demonstrating that it has a legitimate and substantial business interest to protect with the rule and that it cannot protect the interest with a narrower rule.

Under the prior test, a work rule that subjects employees to discipline for the "inability or unwillingness to work harmoniously with other employees" would be understood by a reasonable employee to reflect the expectation that employees conduct themselves with general notions of civility and decorum in the workplace and found to be an enforceable workplace rule. Not so for the "reasonable" union organizer because the concerted activity of organizing might occasion disharmony among employees.

Workplace Rules Targeted by the NLRB

The work rules contested in *Stericycle* included conflicts of interest, activities that adversely reflected upon the integrity of the company and the confidentiality of harassment complaints, all of which are legitimate concerns for employers. However, the NLRB held that these policies could be construed by some to impinge upon their rights to engage in concerted activities and remanded the case to the judge for consideration under the new rule it promulgated.

What Happens Next

This decision will cause numerous workplace rules to be challenged and quite possibly invalidated. Moreover, even if a rule is validated for one work site of a business, it may not be for another. For example, a rule against the use of personal cell phones may be valid in one location while not in another depending on the activities conducted in each—such as manufacturing versus office work.

The *Stericycle* case will probably be challenged in a federal court of appeals; but even if it is reversed, relief will be slow to come to employers because the NLRB has traditionally abided by adverse federal appellate decisions only in the appellate circuit that made the ruling and not in other circuits. So, it could take multiple federal appellate court opinions or a U.S. Supreme Court decision to give employers relief from this decision.

What This Means for Employers

The takeaway for employers is that they need to examine all the work rules and policies contained in their employee handbooks or elsewhere to make sure they are precise and unambiguous as to the conduct forbidden or required and that there are valid, documented justifications for those rules. Employers should begin this process immediately.



If you have any questions about this decision and its implications for your business, please do not hesitate to contact our labor and employment team.

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