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The Rules Have Changed: A New Standard for Assessing Lawfulness of Workplace Policies

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The bottom line: private employers should anticipate new challenges to work rules that may seem neutral, and should review their existing employment policies and employee handbooks to ensure that they are narrowly tailored and serve a legitimate and substantial business interest.

Background

On August 2, 2023, the National Labor Relations Board (NLRB) adopted a new standard in *Stericycle* for how it will evaluate workplace policies (commonly found in employee handbooks) to determine whether such policies interfere with or infringe upon employees' rights to engage in protected activities.

Specifically, the *Stericycle* decision focused on when an employer (through creation and enforcement of policies) may commit an unlawful labor practice by interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively, and to engage in other concerted activities for the purpose of collective bargaining (i.e., Section 7 rights). **This new standard will impact most private sector employers.**

Previous Standard

The previous standard was established by the NLRB's *Boeing* decision in 2017. In *Boeing* the Trump-era NLRB adopted a categorical approach which classified work rules into three categories:

1. Policies that are always lawful,
2. Policies that are subject to individualized scrutiny, and
3. Policies that are always unlawful.

The *Boeing* approach treated certain work rules as always lawful if the employer's justification for the rule outweighed the potential impacts on employees' Section 7 rights. In its newest decision, the NLRB ruled that the *Boeing* approach permitted employers to adopt overbroad work rules that chilled employees' exercise of their Section 7 rights, thus establishing a new standard in *Stericycle*.

New Standard

Through *Stericycle*, the NLRB (a majority of its members nominated by President Biden) ruled that it would return to a case-specific approach rather than a categorical one. The NLRB will now examine the specific wording of the work rule, the specific industry and workplace context in which it is enforced, the specific employer interests it may advance, and the specific rights it may infringe upon.

With this new standard, if an employee can reasonably interpret a work rule to have a meaning that prohibits or discourages employees from engaging in protected activities, the work rule will be deemed unlawful. This

presumption will still apply even if a contrary interpretation of the work rule is also reasonable.

Simply put, the NLRB is now more likely to find that the enforcement of any rule will be unlawful whenever it can theoretically be read to restrict any type of hypothetical future National Labor Relations Act protected conduct. When determining whether a rule is presumptively unlawful, the NLRB will interpret the rule from the perspective of an employee who is subject to the rule and is economically dependent on the employer. However, the employer may rebut the presumption by proving that the work rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.

Effect on Employers

With this new and more employee-friendly standard in place, private employers should anticipate new challenges to work rules that may seem neutral on their face as they implicate employees' Section 7 rights.

This may include social media policies, workplace conduct rules, restriction on the disclosure of confidential information, solicitation and distribution rules, and dress code policies. Employers should review their existing employment policies and employee handbooks to ensure that they are narrowly tailored and serve a legitimate and substantial business interest.

If you have questions or concerns about the NLRB's new standard for assessing the lawfulness of work rules, please contact your Knox Law attorney, our Labor & Employment group, or call us at 814-459-2800.

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