The NLRB's Assault on Employer Workplace Rules and Policies

ABC of Western Washington

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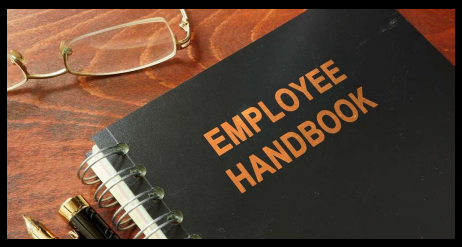

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We Will Review

- National Labor Relations Act (NLRA) rules governing employer workplace rules and policies
- The evolution of National Labor Relations Board (NLRB) case law leading to new restrictions on employer rules and policies
- The work rules that need to be reviewed by employers immediately along with recommendations
- New NLRB case law on union organizing
- Other recent developments involving rules and policies

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National Labor Relations Act (NLRA)

- The National Labor Relations Act (NLRA): Federal law guaranteeing employees the right to organize and engage in other "concerted activity" for mutual aid or protection.
- The NLRA covers private sector employers
- The NLRA is enforced by the National Labor Relations Board (NLRB)

Section 7 of the NLRA

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities….

29 USC §157

NLRA Section 8(a)(1)

- Sec. 8.

  (a) It shall be an unfair labor practice for an employer--

  (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

NLRB Scrutiny of Employer Policies

- The NLRB began closely scrutinizing employer workplace policies and handbooks in the 1990s
- NLRB decisions have swung back and forth based on whether there is a Democrat or Republican NLRB majority
- The key issue is whether the mere maintenance of an overbroad policy violates Section 7

NLRB Cases on Employer Policies and Handbooks

Lafayette Park Hotel, 326 NLRB 824 (1998) (Clinton Board)

- Case involved employer rules on various types of employee conduct
- The NLRB identified "the appropriate inquiry" as "whether the rules *would* reasonably tend to chill employees in the exercise of their Section 7 rights"
- Where there is a likely chilling effect, the mere maintenance of the rule is an unfair labor practice even if there is no enforcement of the rule

NLRB Cases on Employer Policies and Handbooks

Lutheran Heritage Village – Livonia, 343 NLRB 646 (2004) (Bush Board)

- A violation "is dependent upon a showing of one of the following: (1) employees *would reasonably construe* the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7rights."

NLRB Cases on Employer Policies and Handbooks

William Beaumont Hospital, 363 NLRB 1543 (2016) (Obama Board)

- Hospital rule prohibiting conduct that "impedes harmonious interactions and relationships" declared unlawful
- Employees would reasonably understand that the rule could encompass interactions protected by Section 7
- No general consideration given to employer interests in policy

NLRB Cases on Employer Policies and Handbooks

William Beaumont Hospital, (cont'd)

- Rule prohibiting "negative or disparaging comments" also unlawful
- Employees would reasonably construe the rule to prohibit protected expressions of concern about the workplace
- No general consideration given to employer interests in policy

NLRB Cases on Employer Policies and Handbooks

Boeing Co., 365 NLRB No. 154 (2017) (Trump Board)

- The case involved Boeing's policy prohibiting cameras in the workplace policy
- Board analyzed the lawfulness of work rules through a balancing test that considered the potential impact on both the employees' Section 7 rights and the employer's legitimate justifications associated with the rule

NLRB Cases on Employer Policies and Handbooks

Boeing Co., (cont'd)

- *Boeing* overruled *Lutheran Heritage* and classified work rules into three categories: (1) policies that were always lawful, (2) policies that were subject to individualized scrutiny, and (3) policies that were always unlawful
- For facially neutral policies, the Board will balance (1) the nature and extent of the impact on Section 7 rights and (2) the legitimate employer justifications for the rule

NLRB Cases on Employer Policies and Handbooks

LA Specialty Produce Co., 368 NLRB No. 93 (2019) (Trump Board)

- A challenged rule may not be found unlawful merely because it *could* be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity.
- NLRB GC must "prove that a facially neutral rule *would* in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights."

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., 372 NLRB No. 113 (August 2, 2023)

At issue were the following employer policies:

Conduct rules prohibiting

- The "[u]se of profanity or inappropriate language while on Stericycle premises whether on duty or not."
- Engaging in behavior which is harmful to Stericycle's reputation

NLRB's New Rule on Employer Rules and Policies

Stericycle (cont'd)

Conduct rules prohibiting

- The refusal to follow the directions of a supervisor or otherwise being insubordinate
- Participation in an activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management

NLRB's New Rule on Employer Rules and Policies

Stericycle (cont'd)

Harassment investigation policy stating:

- All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., 372 NLRB No. 113 (August 2, 2023)

- Overrules *Boeing* and all cases relying on *Boeing*
- "The primary problem with the standard from [*Boeing*]…is that it permits employers to adopt overbroad work rules that chill employees' [Section 7] rights…."
- Boeing fails to account for the economic dependence of employees on their employers.

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., (cont'd)

- Employees "are typically anxious to avoid discipline and discharge, so they are reasonably inclined both to construe an ambiguous work rule to prohibit statutorily protected activities and to avoid the risk of violating the rule by engaging in such activity"

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., (cont'd)

According to the Board, *Boeing*:

- Gives too much weight to employer interests;
- Condones overbroad rules by not requiring the party drafting the rules—the employer—to narrowly tailor its rules to only promote the legitimate and substantial business interests while avoiding burdening employee rights; and

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., (cont'd)

Boeing (cont'd):

- Does not interpret work rules from the perspective of the economically dependent employee who contemplates engaging in Section 7 activity

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., (cont'd)

New Rule:

- The Board will assess whether a work rule has a "reasonable tendency" to chill employees from exercising Section 7 rights
- Will interpret rule from the perspective of the reasonable employee who is economically dependent on the employer and who is inclined to interpret an ambiguous rule to prohibit protected activity

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., (cont'd)

New Rule (cont'd):

- If an employee *could reasonably interpret* a rule to restrict or prohibit Section 7 activity, the rule is presumptively unlawful, *even if* the rule could also be reasonably interpreted *not* to restrict Section 7 rights, and *even if* the employer did not intend for its rule to restrict protected rights.

Board remands case to ALJ

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., (cont'd)

Dissent:

- The Board's "reasonable employee" is an employee predisposed to read into their employer's rules references to Section 7 activity where none exists
- If a word or phrase *could* possibly be interpreted to prohibit protected activity, then the rule is presumptively unlawful, even though a truly reasonable employee would apply common sense and recognize the evident purpose of the rule has nothing to do with Section 7 rights

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., (cont'd)

Dissent:

- How will an employer prove that it is unable to advance its legitimate and substantial interest or interests with a more narrowly tailored rule?
- Would an employer have to show that it maintains the current rule because a prior narrower rule failed adequately to advance the relevant interest or interests?

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., (cont'd)

Dissent:

- Would it suffice for an employer to introduce evidence that it *considered* (but did not actually implement) a narrower rule and rejected it as unlikely to advance the relevant interest or interests?
- What if the Board finds a rule unlawful, the employer narrows it, and the narrowed rule fails adequately to advance the relevant interest or interests. Now that the original rule has been shown to be the narrowest possible rule, may the employer reinstate it, even though doing so would seemingly defy the Board's prior decision?

NLRB's New Rule on Employer Rules and Policies

Stericycle, Inc., (cont'd)

Dissent:

"Employers would be well advised to…try to avoid a finding of presumptive unlawfulness in the first place by retaining competent labor counsel to craft, for inclusion in their employee handbooks, language that would make it impossible— even for my colleagues' version of the reasonable employee— to interpret any rules contained therein to restrict Section 7 activity."

Other Recent Work Rule Cases

McLaren Macomb, 372 NLRB No. 58 (2023)

- Employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights. Such an agreement has a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances
- Severance agreement with broad nondisparagement and confidentiality provisions unlawful because "would restrict" employees' exercise of their NLRA rights
- According to the NLRB GC, any confidentiality provision in separation agreement must be narrowly tailored, targeted to proprietary or trade secret information, limited in scope and based on legitimate business justification.

Other Recent Work Rule Cases

McLaren Macomb (cont'd):

- Not waivable by employee or union
- NLRB GC may extend reasoning to noncompete, nonsolicitation and no-poaching agreements, and may also extend to supervisors, who are not normally protected by the NLRA
- Note: Pay attention to RCW 49.44.211 (nondisclosure agreements limiting disclosure of illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, sexual assault or anything deemed to be against public policy are void and unenforceable under Washington law)

Other Recent Work Rule Cases

Tesla, Inc., 371 NLRB No. 131 (2022)

- Employer attempts to impose any restrictions on the display of union insignia, including apparel, are presumptively unlawful absent special circumstances

NLRB Puts Its Thumb on the Scale of Union Organizing

Cemex Construction Materials Pacific, 372 NLRB No. 130 (August 25, 2023)

- Board reverses 50 years of case law on union recognition and elections
- Previously, employers could lawfully reject union demands for recognition and could require that unions file a petition for an election.

NLRB Puts Its Thumb on the Scale of Union Organizing

Cemex (cont'd)

New Rule Gives Employers Three Options for Responding to Union Request for Voluntary Recognition:

1. Grant Voluntary Recognition: An employer can recognize the union;
2. File an RM Petition for Election: An employer can seek an election by filing an "RM petition" with the NLRB "promptly" (i.e., within two weeks of the union's demand for recognition) to test the union's majority support and/or challenge the appropriateness of the petitioned-for bargaining unit. If the employer fails to file an RM petition, it will lose the ability to seek an election; **or**

NLRB Puts Its Thumb on the Scale of Union Organizing

Cemex (cont'd)

3. Do Nothing: An employer can do nothing in response to a union demand for recognition but will do so at its peril.
   - If an employer does nothing, a union can file an unfair labor practice ("ULP") charge claiming the employer unlawfully refused to bargain by rejecting its demand for recognition. If the employer fails to prove that the union lacks majority support or that the proposed bargaining unit is inappropriate in the ULP proceeding, the Board will consider the employer to have engaged in an unlawful refusal to bargain, and the Board will issue a bargaining order.
   - In addition, if the employer implements changes to mandatory subjects of bargaining unilaterally after the union's demand for recognition, that will constitute grounds for a separate failure to bargain ULP charge and a likely bargaining order as well.

NLRB Puts Its Thumb on the Scale of Union Organizing

Cemex (cont'd)

- "If the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order"

NLRB Puts Its Thumb on the Scale of Union Organizing

Cemex Impact

- Places burden on employer to request a union election
- Employer's failure to request election will likely result in automatic recognition of the union and an order to bargain
- The decision encourages—almost requires—unions to file unfair labor practice charges against employers while recognition is pending
- *Any* finding of an unfair labor practice while union recognition is pending will likely lead to automatic recognition and an order to bargain

Stericycle and *Cemex* One-Two Punch

Following *Cemex* and *Stericycle*, it is critical for employers to ensure their policies and work rules are lawful

- Employers can expect unions to file unfair labor practice charges alleging unlawful, overbroad employer rules and policies as part of a strategy to force automatic recognition of a union without an election
- *Cemex* gives no indication that an isolated unlawful policy *won't* cause automatic recognition
- Delays to elections will result from litigation over alleged unfair labor practices

Stericycle and *Cemex* One-Two Punch

Cemex likely to be reviewed by courts

- Decision appears contrary to the Supreme Court's decision in both *Lincoln Lumber Div. Summer & Co. v. NLRB*, 419 U.S. 301 (1974), which held that employers could lawfully reject union demands for recognition, and require the union to seek an NLRB election, and *NLRB v. Gissel Packing Inc.,* 395 U.S. 575 (1969), reserving bargaining orders for the exceptional case or cases in which there are extensive unfair labor practices committed by the employer that cannot be effectively addressed through the NLRB's traditional remedies.

Review Your Policies!

Following *Stericycle*, employers will need to review employee handbooks and policies, including policies related to:

- Disclosure of confidential information
- Use of employer technology and tools
- Social media and related activities
- Media and third-party engagement
- Solicitation and distribution rules
- Photography/recording policies
- Anti-harassment policies
- Employee disciplinary rules
- Appearance/dress code policies
- Open-door/internal complaint policies

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Review Your Policies!

Always include the following provision in policies that can be construed as limiting NLRA rights:

- *Nothing in this provision is intended to eliminate or limit Employee's rights under Section 7 the National Labor Relations Act.*

Be aware, however, that a generic disclaimer such as this will not automatically make an unlawful provision lawful. The policy must be "narrowly tailored" to meet a substantial business interest

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Lawful or Unlawful?

- "Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."

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UNLAWFUL

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"Confidential Information is: 'All information in which its unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members.'"

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- "Do not send "unwanted, offensive, or inappropriate" e-mails."

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Lawful or Unlawful?

- "[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions."

SEBRIS BUSTO JAMES

45

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- "No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any [Employer] employee or [Employer] operation.. .."
-

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UNLAWFUL

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Lawful or Unlawful?

- "Soliciting, collecting funds, distributing literature on Company premises without proper approvals or outside the guidelines established in the "No Solicitation/No Distribution" Policy."

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UNLAWFUL

50

Lawful or Unlawful?

- In order to preserve the integrity of its investigation of sexual or other harassment, the company will require those witnesses and parties involved to maintain the confidentiality of the investigation while it is ongoing.

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UNLAWFUL

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Lawful or Unlawful?

No Defamation. During employment and at all times after separating from employment for any reason, Employee shall not make or cause to be made any defamatory communications regarding Company, its Owners, its employees, its products, or its services. Defamatory statements constitute statements that are slanderous, libelous, and/or maliciously false. This provision in no way limits Employee's ability to make disclosures about factual or other information relating to potential discrimination, harassment, retaliation, wage and hour violations, or sexual assault occurring at Company (including at any work-related events coordinated by or through the Company, or involving Company employees), or other conduct Employee reasonably believes is unlawful under Washington's Silenced No More Act (RCW 49.44.211). Moreover, nothing in this provision is intended to eliminate or limit Employee's rights under Section 7 the National Labor Relations Act.

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LAWFUL (Probably)

Review Your Policies!

- Remember, the maintenance of unlawful policies during union organizing can lead to an NLRB order requiring you to recognize and bargain with the union without an employee election
- You must narrowly draft policies that could impact NLRA activity (not only union activity, but also any employee activity considered protected and concerted). Employers should insert disclaimers and/or illustrations for any provision that arguably could be read to restrict such activity.

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Review Your Policies!

Prepare written business justifications defining the need for your policies

Use evidence and incidents that justify the rule

Such evidence and incidents can be used during an NLRB investigation/litigation

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Other Interesting Developments

- "Caste" is now a protected class in Seattle. "Caste" is defined as rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion. Seattle employers will need to revise their EEO policies accordingly. Ordinance 126767, February 23, 2023.

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Other Interesting Developments

- Pre-Employment Drug Screening for Cannabis Use Prohibited effective January 1, 2024. RCW 49.44.240. There are exceptions for aerospace and airline employers, and for certain safety-sensitive positions identified by employers before an applicant's application for employment.

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Other Interesting Developments

- Search of Employee Vehicles. Employers may no longer search an employee's privately-owned vehicle parked on the employer's premises or on access roads leading to the employer's premises. RCW 49.44.230 (effective July 23, 2023).
- Certain exceptions for law enforcement purposes and if the employer has "probable cause" to search for employer property or controlled substances in the employee's vehicle.
- Employers should still maintain handbook or policy language stating employees have no expectation of privacy for vehicles or property on company premises.

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