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The NLRB Says It's Time to Update Your Employee Handbook (Again)

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Over the past 10 years, the National Labor Relations Board (NLRB) has flip-flopped its way through interpreting company work rules and handbooks. Largely dependent upon who is occupying the White House, the NLRB has changed its mind on a number of occasions regarding how company handbooks are interpreted and whether those handbooks infringe upon employee rights under the National Labor Relations Act (NLRA). In August 2023, the NLRB issued a decision in *Stericycle, Inc.* that takes an extremely restrictive approach to an employer's right to maintain specific policies in the face of alleged employee Section 7 rights. As a result, employers must once again review and revise their employee handbooks or risk a finding of an unfair labor practice.

Section 7 of the NLRA protects employees' 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..." commonly referred to as "protected concerted activity." In *Stericycle*, the NLRB held a work rule is presumptively unlawful if it "has a reasonable tendency to chill employees from exercising their Section 7 rights. In doing so, the Board will interpret the rule from the perspective of the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in." Therefore, the NLRB believes that company handbooks must be interpreted in the manner that employees interpret them, "even if the employer did not intend for its rule to restrict Section 7 rights." Unfortunately, given this decision, there are no bright line rules or safe harbors to insulate employers from unfair labor practices and employers will be forced to defend more of these charges. The NLRB also ruled that the *Stericycle* decision is to be applied retroactively, meaning that a company's current policy that could be interpreted by an employee to chill employees' Section 7 rights is illegal and the employer has already, unknowingly, committed an unfair labor practice.

Employers should pay particular attention to the following policies because the NLRB has previously determined that if they are overly broad, they may restrict Section 7 rights: requiring confidentiality of investigations, non-disparagement, outside employment/moonlighting, civility rules, prohibiting media communication, social media, solicitation, uniform/clothing policies, policies prohibiting recording/videotaping, and complaint procedures. These policies should be carefully reviewed to determine whether they could infringe on an employee's right to engage in protected concerted activities. The *Stericycle* dissent suggested that one strategy an employer could utilize to avoid overly broad interpretations is to include a disclaimer; however, the majority opinion declined to approve the use of disclaimers and instead held that policies and disclaimers need to be reviewed on a case-by-case basis. The *Stericycle* majority opinion suggested that the use of examples may be better to explain a certain policy, rather than a disclaimer. If an employer carefully crafts and narrowly tailors a policy but is still concerned about the possibility of infringing on Section 7 rights, the following sample disclaimer may be an option to limit the potential of an unfair labor practice finding: "This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities." Employers should also keep in mind that Section 7 rights apply to all employees, not just those that are in a union. Therefore, employers should review and revise current employee handbooks to make sure that they do not infringe on employees' right to engage in protected concerted activity.

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