NEWS

Companies Should Nail Down Precise Business Reasons for Workplace Policies

August 11, 2023 | Leah Shepherd

Employers will need to think carefully about how to defend some of their corporate policies, such as ones about cameras at a worksite, social media use and appropriate workplace conduct, in light of a recent decision by the National Labor Relations Board (NLRB).

Legitimate business interests will need to justify any such policies under the new standard outlined in the NLRB's *Stericycle* decision, Cary Reid Burke, an attorney with Seyfarth in Atlanta, said during a SHRM Government Affairs webcast on Aug. 10.

It will depend on the type of worksite, but "just saying '[the rule is needed for] safety' on its own is not going to be a panacea. There's going to have to be more specificity undergirding that," Burke said.

Background

With the *Stericycle* decision, the NLRB **overturned the standard** it established more than five years ago in *Boeing*. The **new standard** holds that if an employee could reasonably interpret a workplace rule to restrict or prohibit their Section 7 rights under the National Labor Relations Act (NLRA), that rule will be presumed unlawful, and the employer will have a higher burden to rebut that presumption.

Section 7 gives workers the right to form, join or assist labor unions, to bargain collectively, to discuss their pay and benefits, and to engage in other concerted activities for mutual aid or protection—or to refrain from those activities.

In this case, Stericycle, a waste management service in Baltimore, had implemented several new employee policies, including:

- Limiting the use of personal electronic devices to break times only.
- Requiring personal phone and email usage to be infrequent, brief and limited to urgent communication with family members.
- Banning employees from taking pictures, video or audio recordings at the worksite without a supervisor's permission.
- Prohibiting employee conduct that maliciously harms or intends to harm the business reputation of the company.
- Prohibiting activity that constitutes a conflict of interest or adversely reflects upon the integrity of the company or its management.
- Prohibiting employees from disclosing retaliation complaints and the terms of their resolution.

An employer can rebut an NLRB charge of unfair labor practice by showing a legitimate business interest in having the challenged policy, but now "it's a harder test to pass than the *Boeing* test," which allowed for a category of policies that were always presumed lawful, Burke said.

The employer's intent in maintaining a work rule is immaterial, the NLRB wrote. Instead, the board clarified it will interpret the employer's rule from the perspective of an employee who is subject to the policy, is economically dependent on the employer and is contemplating engaging in protected concerted activity.

"A code of conduct or a communication policy will certainly be impacted by this decision. Other impacted policies would be nondisclosure agreements, confidentiality agreements, any policies requiring respectful conduct or policies regulating social media use," John Kuenstler, an attorney with Barnes & Thornburg in Los Angeles, said in an email. "Depending on how they are written, drug and alcohol, anti-harassment, anti-discrimination, and leave of absence policies should not be impacted by the ruling."

Also, while rules for nonmanagerial workers are covered under the *Stericycle* decision, "rules covering managers/supervisors, agricultural, domestic workers or independent contractors fall outside the reach of the NLRA and this ruling," Pamela Krivda, an attorney with Taft Law in Columbus, Ohio, said in an email.

Many employers are surprised to find the NLRA applies to both nonunionized and unionized worksites, Burke said. The NLRA does not apply to federal or state governmental units, railroads, or airlines.

Give Examples and Disclaimers

Employers should take a hard look at their policies and consider what they are trying to protect and what the goal of a rule is, Burke said. "Really ask yourself, 'Is a rule necessary, and is it appropriate? Can it be drafted more narrowly?' " he said.

Employers should also "immediately review their policies and handbooks to determine if any of their existing policies could reasonably be interpreted by employees as chilling their right to engage in concerted activities, and consider adding disclaimers that the policies are not intended to restrict employees' rights under the NLRA," Kuenstler said in an email.

It may be helpful to provide illustrative examples of what conduct is acceptable and what conduct violates the employer's policy, Burke said. He added that managers should involve HR and inside legal counsel, if possible, before firing someone or taking disciplinary action based on a corporate policy.

In addition, employers need to understand that "the NLRB can challenge a rule even if the rule has not been applied to anyone. Merely maintaining the rule, applicable to employees, is enough for the board to take legal action if an employee files an unfair labor practice charge about it," Krivda said in an email.

However, the statute of limitations holds that employees must bring a charge under the NLRA within six months after their last adverse action, Burke said.