Employers Need to Review Workplace Rules and Policies Following Recent NLRB Decisions

Matthew Guerrero
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Practice Areas

Labor Management Relations

On August 22, 2023, we advised all employers—whether their workforces are unionized or not—about the National Labor Relations Board (NLRB) decision in *Stericycle, Inc.* In *Stericycle*, the NLRB articulated its new standard in analyzing whether employer work rules are impermissible under the National Labor Relations Act (NLRA). Under the new standard, employers must use caution when creating a work rule or policy that could reasonably be interpreted to "chill," restrict, or prohibit an employee's rights to protected concerted activity under Section 7 of the NLRA, such as an employee's rights to support unionizing or engaging in concerted activity to improve working conditions. Such a rule will be presumed by the NLRB to be unlawful.

Since the *Stericycle* standard was announced, the NLRB has issued a series of decisions finding a wide range of work rules to be unlawful, ranging from prohibitions on insubordination to prohibitions on falsifying employment applications. What follows is a short digest of some of the work rules that have recently come under scrutiny by the NLRB.

Work Rules Concerning Disrespect

In *United Electrical Contractors, Inc.*, decided November 9, 2023, the General Counsel argued, and the NLRB agreed, that a prohibition on "disrespect toward supervision" violates the NLRA, because it could reasonably be construed by employees to prohibit protected concerted activity. The NLRB cited to *Casino San Pablo* for support, where the NLRB

previously said, "the act of concertedly objecting to working conditions imposed by a supervisor, collectively complaining about a supervisor's arbitrary conduct, or jointly challenging an unlawful pay scheme—all core Section 7 activities—would reasonably be viewed by employees as 'disrespectful.'" The NLRB said the "disrespect" rule would reasonably tend to chill employees' exercise of their rights under the Act and, under *Stericycle* is presumptively unlawful.

Work Rules Requiring Honesty

Also in *United Electrical Contractors, Inc.*, the NLRB found rules requiring honesty on company records, including on employment applications, could reasonably be construed to chill an employee from leaving union-affiliated work history off of an application or falsely denying an intention to engage in organizing activity. The rule in that case did not refer to unions or unionization, but prohibited, "[d]ishonesty or falsification of any company records, including but not limited to employment applications and time entries," and "[p]roviding false or misleading information to any company representative or in any company records, including the employment application, benefits forms, time entry, expense reimbursement forms and similar records."

Citing to decisions that stood for the proposition that employees may lie about or omit their union employment or affiliation on applications, the Board found the above rules to be "overbroad" and stated that they interfere with the "rights of applicants and employees to falsely deny union affiliation or intent to engage in union activity, and to omit union-affiliated work history from their submissions."

However, in *General Motors, LLC*, decided January 24, 2024, the NLRB found a similar rule not to be overbroad and therefore legal. The rule there stated that "[f]alsification of personnel or other records" will be sufficient grounds for disciplinary action. In analyzing the work rule, the NLRB found that "no employee, though economically dependent on the employer and contemplating engaging in protected, concerted activity, would reasonably interpret the plain language of [this rule] to prohibit protected, concerted activity." The NLRB further noted that the rule's intent is to prohibit the falsification of personnel and other company records, which the Employer had a legitimate interest in ensuring are accurate.

Because these two rules are very similar, employers need to narrowly tailor their work rules regarding honesty. The major difference between the two rules is that the improper rule in *United Electrical Contractors, Inc.* explicitly referred to honesty on "employment applications" without creating an exception for union affiliation or union-related work history.

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Work Rules Prohibiting the Restriction of Production

Also in *United Electrical Contractors, Inc.*, the NLRB found a work rule that prohibits, "[r]estricting production or influencing others to do so" unlawful. "I find that employees would reasonably construe the prohibition on 'restricting production' to encompass a prohibition on striking and picketing," said the NLRB. Employees have a right to engage in those activities under Section 7 of the NLRA.

Prohibitions on Obscene or Abusive Language

Additionally, a rule against using obscene or abusive language was found to violate the NLRA because the rule was drafted "without stating that the rule was not intended to bar employees' Section 7 activity." "The rule does not provide any additional context showing that it is meant to address only language that involves violence or other unlawful conduct or that it does not prohibit Section 7 activity. I find that a reasonable employee would understand this rule to interfere with statements that are protected by the Act."

Employers should be aware that the NLRA has routinely decided that some profanity and even defiance must be tolerated. The NLRA protects employees even in instances where the employee is rude or disrespectful, and profanity will not bar an employee from invoking their rights under the NLRA. *See, for example, NLRB v. Chelsea Laboratories*.

Prohibitions on Use of Telephones

Employers have to be careful in limiting employee cell phone use. "On its face," said the NLRB on such a rule, "this rule gives the employer unfettered discretion to decide if an employee may use their personal phone at any time and in any area of a facility, including during breaks and other periods that are an employee's own time. Employees' would reasonably conclude that they could not, without obtaining the [employer's] authorization, engage in activities such as using their own smartphone to call a union representative during a lunch break."

The work rule in question, which simply prohibited "[u]nauthorized use of telephones" was thus found to be unlawful. The General Counsel argued, and the NLRB agreed, that "requiring an employee to seek the approval of management in order to use their personal phones for Section 7 communications is tantamount to surveillance of such activities, and would tend to have a chilling effect on employees' exercise of their rights."

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Prohibitions on Discourtesy to Customers, Vendors, or the General Public

Citing to precedent, the NLRB also recently said that employees would generally construe a broad prohibition against "disrespectful" conduct and "language which injures the image or reputation" of the employer as encompassing Section 7 activity, such as employees' protected statements objecting to their working conditions or seeking the support of others to improve them. The rule, which prohibited "[d]iscourtesy to a customer, vendor, or the general public resulting in a complaint or loss of good will" was deemed unlawful.

A similar rule more recently in *General Motors, LLC*, which stated discipline could result from "making or publishing of false, vicious or malicious statements concerning any employee, the Company, or its products" was found to be unlawful. Citing to precedent, the NLRB said that the Board has consistently found that rules prohibiting the making of "false, vicious or malicious statements" violate the NLRA because "they include within their proscription false statements that may nonetheless be protected." In other words, the prohibition on "false . . . statements" is too broad. For, in the same decision, *General Motors, LLC*, the work rule that discipline could result from "[a]busive language to any employee or supervisior" was lawful. The distinction is that the prohibition on false statements could reasonably relate to and deter an employee from engaging in their right to protected, concerted activity, but a similar prohibition on "abusive language," without any further context, would not reasonably chill an employee's protected speech.

What Employers Can Do

In the confusing wake of *Stericycle*, employers are often left not clearly knowing whether their work rules may be deemed presumptively unlawful under the NLRB's current standards. Employers, however, are not left without some guidance. First, the more narrowly tailored their work rules are to legitimate and substantial business interests, the less likely they will be deemed unlawful. Even presumptively unlawful work rules can survive scrutiny where employers can show that the work rule "advances a legitimate and substantial business interest" that cannot be advanced "with a more narrowly tailored rule."

Employers must use careful language and draft their work rules with an eye toward how the NLRB may view it. As seen above, very broad language can be interpreted to encompass and impede upon an employee's Section 7 rights. All employers should be reviewing existing work rules to determine whether they can be construed as unlawful under the *Stericycle* standard and revise them as needed. Caveats that a policy or work rule is not intended or designed to impede upon an employee's Section 7 rights can also aid employers in keeping their policies and handbook provisions lawful. Additionally, avoiding anti-union

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language anywhere throughout an employer's policies and handbooks will also help avoid an interpretation that any given rule is designed to chill employees' Section 7 rights.

If you have questions about how to comply with the recent NLRB decisions, contact your servicing Laner Muchin attorney.

515 North State Street, Suite 2400, Chicago, Illinois 60654 t: 312.467.9800 f: 312.467.9479