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Employers Beware: NLRB's 'Stericycle' Decision May Affect Your Work Rules

The National Labor Relations Board (NLRB) continues to keep employers on their toes. The NLRB again addressed whether otherwise neutral employment policies—those that do not on their own violate the National Labor Relations Act (the Act)—are still unlawful because they discourage employees from engaging in otherwise protected conduct. (The NLRB refers to this as "chilling" an employee's decision to act in a certain way.) This decision immediately affects all employers, regardless of whether a labor union represents their employees.

In *Stericycle Inc.*, the NLRB overturned its 2017 decision in *Boeing* and adopted a new standard for evaluating neutral employer work rules. In its decision, the NLRB readopted and then revised the *Lutheran Heritage* standard, which was in effect from 2004 until it was overturned by Boeing in 2017.

Under *Stericycle*, the NLRB's general counsel, who investigates and prosecutes alleged violations of the Act, must prove that the challenged rule has a reasonable tendency to chill employees from exercising their rights under the Act. The NLRB will interpret the rule from the perspective of an employee who is economically dependent on the employer. If the general counsel makes this showing, the burden then shifts to the employer to demonstrate that the rule advances a legitimate and substantial business interest which cannot be advanced with a narrower rule.

The NLRB's latest standard now considers a rule presumptively unlawful if it *could*—rather than would—be interpreted to prohibit an employee from exercising their rights. Any ambiguity is construed against the employer as the drafter, regardless of the employer's intentions.

Considering this change, employers should review their handbooks, policies and workplace rules for compliance with this new standard. Below are examples of work rules that were found unlawful under the *Lutheran Heritage* standard:

- **Social Media**. An employer's social media policy requiring employees to (1) identify themselves when posting comments about the employer or the employer's business; and (2) prohibit employees from using the employer's logos in any manner interfered with the exercise of employee rights. *Boch Imports, Inc.,* 362 NLRB 706 (2015).

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- **Employee Conduct.** An employee conduct policy was found unlawful for prohibiting employees from "making negative comments about fellow team members" and "engaging in or listening to negativity or gossip." *Hills and Dales Gen. Hosp.,* 360 NLRB 611 (2014).

- **Confidentiality**. An employer's handbook provision instructed employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company and to never give out information about customers or other employees." The NLRB found employees would reasonably interpret this rule as prohibiting protected communications and therefore, was unlawful. *DirecTV U.S. DirecTV Holdings LLC.,* 359 NLRB 545 (2013).

If the NLRB finds a work rule or policy to be unlawful under the new standard, employers must then remove, redact or replace unlawful language and distribute notice to its employees acknowledging the violation and providing information about employee rights under the Act. Employers should also be aware that the NLRB's finding of an unlawful rule or policy *during an organizing campaign* may result in the NLRB invalidating an election result (regardless of result) and ordering a re-election.

If you have any questions about whether your handbook policies or workplace rules comply with the NLRB's *Stericycle* decision, contact Robert Driscoll, Katie Triska or your Reinhart attorney.

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