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[Podcast]: The New NLRB standard on Handbook Policies and Workplace Rules

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In this episode of The Proskauer Brief, senior counsels Jurate Schwartz, Joshua Fox, and special employment law counsel Laura Fant discuss the new standard on personnel policies and workplace rules set forth by the National Labor Relations Board (NLRB) in its August 1, 2023 decision in Stericycle, Inc., 372 NLRB No. 113 (2023). Be sure to tune in as we discuss why employers should take this opportunity to review their existing handbooks and policies with counsel in light of the new standard.

Jurate Schwartz: Hello and welcome to The Proskauer Brief: Hot Topics on Labor and Employment Law. Today, we will be talking about the new Stericycle decision and the new standard developed by the NLRB on personnel policies and workplace rules. I'm Jurate Schwartz, senior counsel in our employment counseling practice group, and with me today are my colleagues, Joshua Fox, senior counsel in our labor management relations practice group and Laura Fant, special employment counsel in our employment counseling practice group. Welcome to you both.

Joshua Fox: Thanks Jurate. I'm so excited to be here.

Laura Fant: Same. Thank you.

Jurate Schwartz: The topic for today is the new NLRB decision in Stericycle, published on August 1, 2023, about which we wrote in our Labor Relations Update blog and as a result of which, we will be discussing what employers should be doing now. Let me start with you, Josh. After we have all mastered the three categories of rules under the 2017 Board's decision in Boeing, as of August 1, 2023, the standard has changed again. Tell us about the change.

Joshua Fox: Yeah. So, this has been a heavily anticipated decision and it's been on our radar for the last couple of years. So, the board in Stericycle overturned Boeing, which you referred to, and the framework that was set forth in that decision. And the framework there was, it established three categories of employer rules: those that are always lawful, those that were always unlawful and then a category of basically, "It depends." That gave clear guidance for employers and employees about how these rules would operate. The board criticized the Boeing decision and the test in that decision for failing to account for what it called the "Economic Dependency of Employees on Their Employers." And given this dynamic, employees are reasonably inclined to construe an ambiguous work rule to prohibit their protected activities under the National Labor Relations Act. And because they were concerned about potential discipline, they would avoid engaging in those activities. So, Boeing, according to this board, gave too much weight to employer interest. Now, the board reverted to a standard in a 2004 case called Lutheran Heritage, with a slight tweak. The standard now is whether a facially neutral work rule is lawful depends on whether the rule has "a reasonable tendency to chill employees from exercising their Section 7 rights" from the perspective of an employee. The employer's intent at this stage in maintaining the rule doesn't matter. If the NLRB General Counsel establishes that reasonable tendency to chill employees from exercising their rights, the rule is presumptively unlawful. The employer, though, has an opportunity to rebut this presumption by proving that the rule advances a legitimate and substantial business interest, and significantly, that the employer cannot achieve the result that they are seeking with a more narrowly tailored rule.

Jurate Schwartz: Laura. What types of employers are impacted by the decision?

Laura Fant: So in fact, almost every private employer in the United States is impacted by this decision because they are most likely covered by the National Labor Relations Act. The NLRA has very limited carve outs. It does not apply to federal, state or local governments, to employers who solely employ only agricultural workers and employers who are subject to the Railway Labor Act, which includes interstate railroads and airlines. But beyond those limited exceptions, all other private employers in the U.S. are covered. There's also oftentimes a common misconception that the NLRA only applies to already unionized workforces, but that is simply not the case. Employees at both unionized and non-union workplaces, in fact, have certain rights under the NLRA, including the right to engage in protected concerted activity, which, broadly speaking, means acting together to improve the terms and conditions of their employment. So, as Josh touched upon, the Stericycle decision sets forth now the current standard for analyzing the lawfulness of employer policies and rules as they relate back to employees' protected concerted activity rights.

Jurate Schwartz: Josh, are there rules that the Stericycle decision did not change?

Joshua Fox: Yes, there are. Not many, though. The board noted in the Stericycle decision that there are certain work rules based on existing long-standing board precedent that address union or other protected solicitation on employer property, distribution of materials or employees' ability to wear union insignia like buttons. So for these issues, the general rule is that absent special circumstances, employers could not promulgate broad rules banning, for instance, solicitation by employees on their property during non-working time or banning the distribution of literature on employer property during non-working time and non-working hours and banning employees from wearing union insignia on employer's property during working time. So, the long-standing precedent remains intact that employers need to establish special circumstances to prohibit this type of activity.

Jurate Schwartz: Laura. What should employers do in light of the decision and the new standard?

Laura Fant: Well, I think employers should really take this opportunity to review their existing handbooks and policies with their counsel in light of this new standard. So, the Stericycle decision does not really set forth any black and white rules for whether certain policies are lawful or unlawful as Josh sort of touched upon. Rather, it really is going to require a fact-sensitive analysis based on things like the nature of the policy itself, the nature of the employer and the industry that they operate in, the specific goals that that employer is attempting to achieve by having such a policy and then, as Josh pointed to specifically, how narrowly tailored the policy is toward achieving that goal. So, I think working with counsel can assist employers in reviewing their existing policy language with an eye towards these specific nuances and offer guidance both on potential risk areas and then offering suggested revisions.

Jurate Schwartz: Is there a list of policies that employers should focus on when updating their handbooks and workplace rules in light of the new standard?

Laura Fant: So, the board in the Stericycle decision does mention a few types of policies that it seems to categorize as likely to touch upon protected concerted activity, and therefore would presumably be subject to scrutiny. And this includes policies such as workplace civility rules or policies sort of speaking to how employees interact with each other and with management in the workplace, as well as, importantly, electronically, such as on social media. Other policies or types of policies that the board touched upon in its decision include non-disparagement policies, no recording policies, policies prohibiting video or audio recording in workplaces, and rules regarding employees' communications with the media. While the board touched upon these types of policies in their decision, I think it is important to appreciate that these are not the only types of policies that may be subject to scrutiny under the Stericycle standard and therefore, employers really should keep NLRA considerations in mind when crafting all of their policies and work roles.

Jurate Schwartz: Josh. Any specific considerations for union-covered employers?

Joshua Fox: Sure. So, before issuing or revising workplace rules, I would suggest that union-covered employers check their applicable collective bargaining agreements to see whether the rules are set forth in the CBA and/or what rights the employer has to promulgate rules or policies. Sometimes those are expressly set forth in a CBA or rules may be promulgated pursuant to a management rights clause. There may be bargaining obligations with the union over changes that are implemented with respect to these types of policies.

Jurate Schwartz: Laura. Let me ask you a similar question focusing on non-union-covered employers. Why is having NLRA-compliant rules important, even for companies that do not have a Union-represented workforce?

Laura Fant: So, that's a great question. And I think there are a few key reasons. First, any employee, whether or not they are presently represented by a union, has the ability to file a charge with the National Labor Relations Board regarding alleged violations of the National Labor Relations Act by their employer. And in fact, charges can be filed with the board by any interested person and need not be filed by an employee who's even directly affected by the violation. So, that's one. Second, and kind of related back to that first point, in the event that a charge is filed with the board and a regional office of the board comes in to conduct an investigation, they may, and in fact, may be likely to ask to review a copy of that employer's handbook or work rules in full. And this may lead to a finding of a violation based on non-compliant policies, even if the original charge is not found to be meritorious. And then third, I think, in the event that an employer may in the future face unionization efforts in their workplace, organizers may attempt to utilize policies that are non-compliant or at least those that there may be some facially reasonable argument for being non-compliant. They may attempt to use those policies as a means of generating additional support for their effort.

Joshua Fox: And Laura, just if I can jump in and add, you know, unfair labor practice charges can be filed both in the abstract and in the concrete, right? So, they can be filed just for a finding that the policy itself violates the National Labor Relations Act, but they can also be filed if an employer seeks to implement and apply that policy as to a specific employee. And, you know, a charge could be filed for that employee to get some relief from the board specific as to their particular situation and how that policy has been applied. So, don't think just because you haven't applied a policy to a particular employee, you're in good stead and you can avoid an unfair labor practice charge.

Laura Fant: That’s a great point.

Jurate Schwartz: Laura and Josh, thank you so much for this informative discussion about the new NLRB standard on workplace rules and handbook policies. Thank you also to our listeners for joining us on The Proskauer Brief today. If you have any questions related to the new standards set forth in the NLRB decision, please do not hesitate to reach out to us. Stay tuned for more hot topics on labor and employment law and be sure to follow us on Apple Podcasts, Google Podcasts and Spotify.

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