Patterson Belknap

Employment Law Alert
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The National Labor Relations Board Tightens Restrictions on Workplace Conduct Policies

On August 2, 2023, the National Labor Relations Board ("NLRB" or the "Board") issued a decision in *Stericycle, Inc.* and *Teamsters Local 628* tightening the reins on employer workplace conduct policies. The decision rejects a more employer-friendly rule adopted by the NLRB during the Trump administration and returns to a pre-2017 approach whereby broad rules that could reasonably be interpreted as prohibiting protected organizing or collective action are generally unlawful. The Board did not describe or discuss the underlying employer policy in *Stericycle*; rather, it used the case as a vehicle to re-examine the applicable standard following amicus briefing and comments by various stakeholders. On remand, an Administrative Law Judge will re-consider the policies at issue—prohibitions on the use of personal devices and recording and video devices; using work email for non-business purposes; defaming or damaging the reputation of the company; and disclosing the resolution of harassment complaints—in light of the Board's revised standard.

Background

As background, Section 7 of the National Labor Relations Act ("NLRA" or the "Act") protects the right of employees—in both union and non-union workplaces—to organize, unionize, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or mutual protection." This includes activities such as discussion of wages and safety conditions in the workplace. Section 8(a)(1) of the Act prohibits interference with rights protected by Section 7, including by adopting workplace conduct policies that chill the exercise of such rights. A more detailed description of Section 7 rights and interference under Section 8(a)(1) is available on the Board's website, here.

In *Stericycle*, the NLRB adopted a two-part test for evaluating whether an employer's conduct rule unlawfully interferes with Section 7 rights, grounded largely in pre-2017 Board precedent.

Part 1 – "Reasonable Tendency" to "Chill" Protected Rights

Under *Stericycle*, an employer policy violates the NLRA (subject to the narrow tailoring affirmative defense discussed below) if it has "a reasonable tendency to chill employees from exercising their Section 7 rights." The Board will assess whether there is a reasonable tendency to chill from the perspective of "the reasonable employee" who is not a lawyer and "who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in." In sum, the Board intends to give employees the benefit of the doubt, recognizing that there is a potentially high cost—termination of employment—to employees who engage in protected conduct that could, on its face, violate an employer conduct rule.

If the Board determines that an employer rule has a reasonable tendency to chill protected activity, an employer is in violation of the NLRA unless it can establish the narrow tailoring affirmative defense.

Part 2 – Narrow Tailoring to Legitimate and Substantial Business Interest

Despite a reasonable tendency to chill protective activity, a workplace policy may be lawful if the employer can prove that "[1] the rule advances a legitimate and substantial business interest and [2] that the employer is unable to advance that interest with a more narrowly tailored rule." On the first prong, the rule cannot serve as pretext for suppressing Section 7 rights. On the second, the employer must establish that there was no narrower way to write the policy to accomplish the employer's purpose and protect employee collective action rights.

The Board made clear that whether this affirmative defense is satisfied depends on the individual circumstances present at the employer's workplace. By way of example, a blanket prohibition on video recordings in the workplace is lawful at a government contractor working on top secret government projects (under existing NLRB precedent). However, a blanket recording prohibition would not be lawful at many other workplaces where national security or other weighty security concerns are not at play, as the policy could be narrowly tailored to permit, for example, recordings of safety violations.

Key Takeaways

While the Board's decision in *Stericycle* in many respects marks a return to its position between 2004 and 2017 that employers have to consider the potential chilling impact of facially neutral policies on collective action rights, it also goes further by assessing potential chill from the vantage point of the "vulnerable employee." In the wake of *Stericycle*, employers should review their policies—particularly regarding confidentiality, audio and video recording, and social media—to assess where they could chill Section 7 activity, and how they might narrow them to be protective of employee rights under the NLRA. In doing so, employers should not rely on general disclaimers that a policy "shall not be interpreted as prohibiting activity protected by the NLRA" (or similar), as the Board generally finds such disclaimers insufficient to protect employee rights.

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