



A New Standard: The NLRB Resets the Table for Handbooks and Policies with *Cemex* and *Stericycle*

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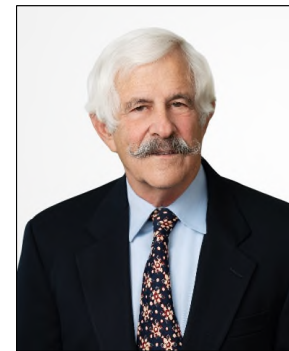
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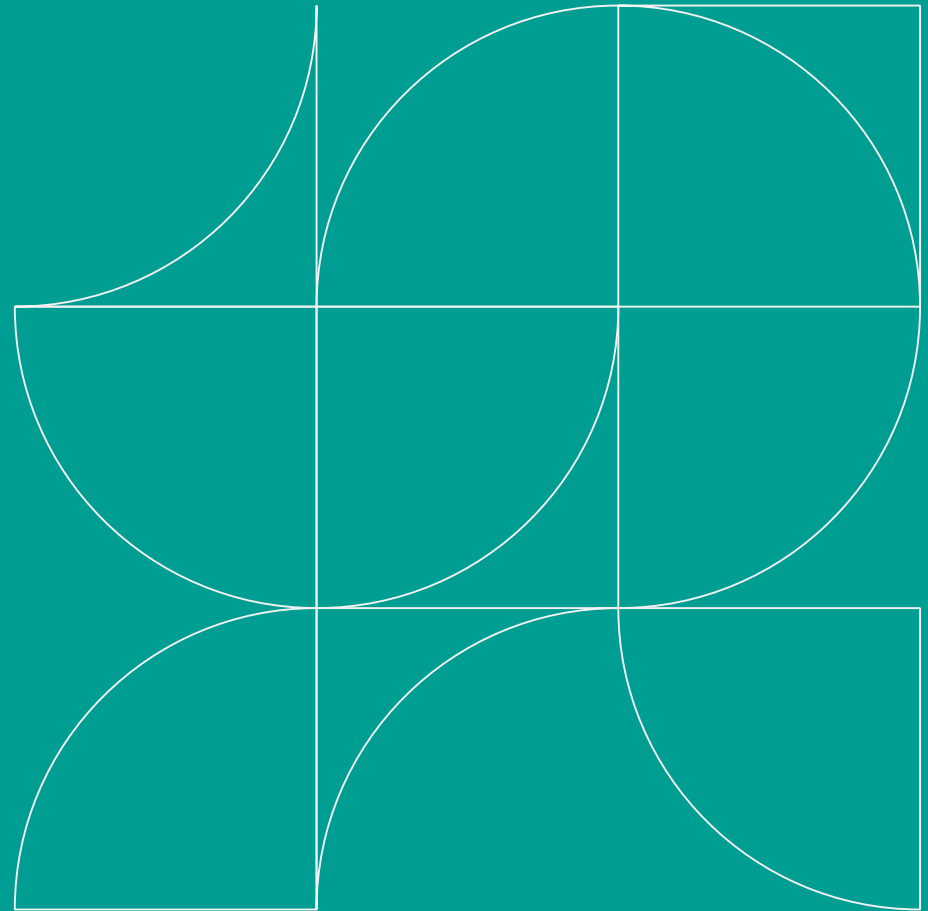


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Agenda

- 01 Setting the Stage
- 02 The Perfect Storm: *Stericycle* and *Cemex*
- 03 Specific Policies at Risk
- 04 Overall Handbook Best Practices

Setting the Stage





I intend to be the most pro-union President leading the most pro-union administration in American history.

President Biden, Sept. 8, 2021





I believe that vigorous enforcement of the Act will help level the playing field for workers and their freely chosen representatives, bring much needed equity to the historically underserved members of our communities, engender safe and productive workplaces, which is particularly critical right now as we fight a pandemic, and build a better economy for workers, families, and communities in this country.

NLRB General Counsel, Jennifer Abruzzo



Handbooks Pre- *Stericycle*

- When evaluating a facially-neutral policy that, when reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate:
 - the nature and extent of the potential impact on NLRA rights; and
 - the employer’s legitimate justifications for the rule.

The Boeing Company, 365 NLRB No. 154 (2017)
- This was, for all intents and purposes, a balancing test.

What Did Chair McFerran Think About the *Boeing* Standard?

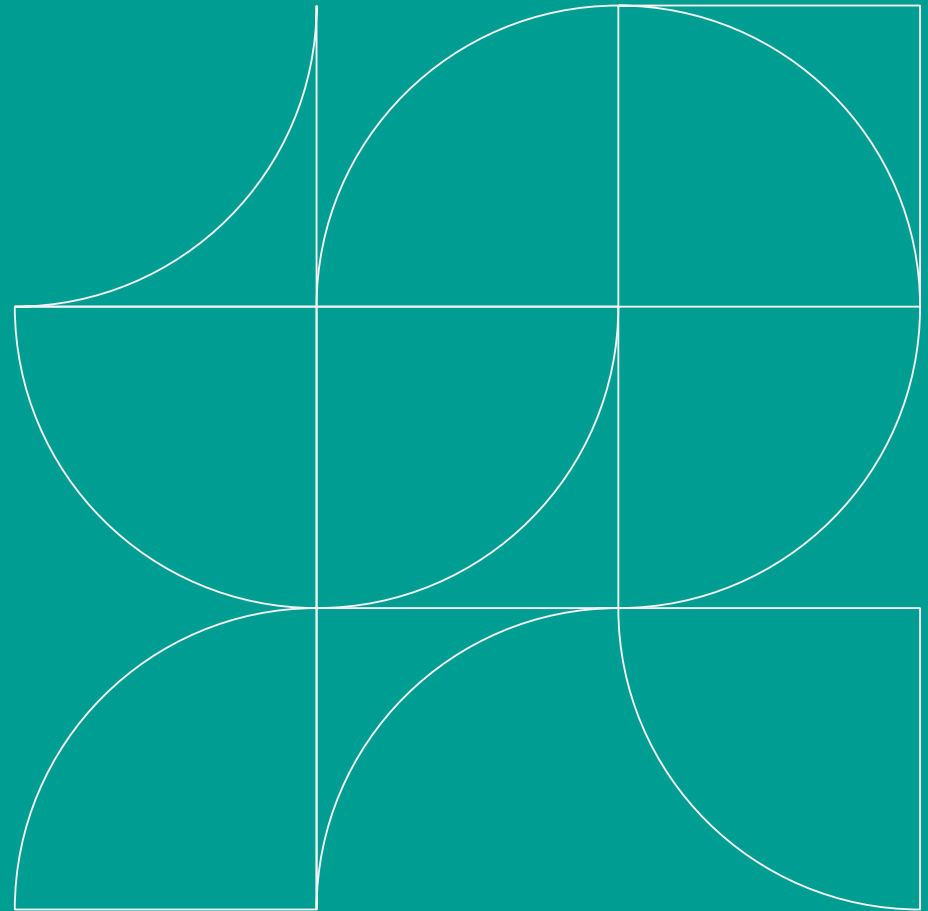
- *AT&T Mobility* (recording of conversations)
 - Stating *Boeing* should be rejected as being “so forgiving to employers that it cannot be reconciled with the Act’s guarantees to employees.”
- *LA Specialty Produce* (confidentiality and media rules)
 - “Until *Boeing*, an employer was required to tailor workplace rules so that workers would understand that they were free to engage in activity protected by the NLRA without subjecting themselves to discipline or discharge. After *Boeing*, workers must not only be brave enough to engage in protected activity, but they must also be brave enough to knowingly violate workplace rules and so subject themselves to the threat of discipline. A clearer recipe for stifling protected activity is hard to imagine.” (Emphasis in original).

Handbooks and Policies Before *Stericycle*

- GC Abruzzo wants to reconsider numerous types of policies (e.g., confidentiality, non-disparagement, social media, media communication, civility rules, respectful and professional manner rules, offensive language rules, cameras at work, etc.).
- Chair McFerran espoused a return to the analytical framework in *Lutheran Heritage Village-Livonia*.
 - *The mere maintenance of a neutral work rule will violate the Act if employees would reasonably construe the rule to prohibit union and other protected concerted activity.*



Stericycle and Cemex



Stericycle

- In *Stericycle, Inc.*, the NLRB held that a facially neutral work rule is presumptively unlawful if an employee who is subject to the rule and “economically dependent on his employer,” and who “contemplates engaging in protected concerted activity” could interpret the rule to have a “coercive meaning.”
- Assuming the NLRB General Counsel makes this modest showing, the employer may rebut this presumption by proving that the rule “advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule.”

Stericycle

- The highlights of this decision include:
 - A facially neutral work rule is presumed to be unlawful where the General Counsel makes a showing that it has a “reasonable tendency” to chill employees’ exercise of their Section 7 rights to engage in protected concerted activity.
 - Whether the rule has a “tendency” to chill will be viewed from the perspective of a “reasonable employee,” and not a lawyer, who:
 - Is subject to the rule, and
 - Is economically dependent on the employer, and
 - Contemplates engaging in protected concerted activity.

Stericycle

- The employer's intent in maintaining the rule is immaterial.
- To the extent the rule is ambiguous, the rule will be interpreted against the drafter (i.e., employer).
- To rebut the presumption, the employer must prove that "legitimate and substantial business interests" support the rule and cannot be achieved by a "more narrowly tailored rule."



Stericycle

- Decision applies retroactively.
- Decision does not apply to rules that explicitly restrict Section 7 rights or were promulgated in response to Section 7 activity.
- Because of that, there is a possibility that a host of work rules or policies that were once lawful are no longer valid.
- These include policies addressing social media, audio and video recordings at work, email use, distribution and solicitation, workplace conduct (including requirements that employees act “respectfully” or “professionally”), bulletin board access, off-duty access to facilities, among many others.
- Takeaway: Employers must review their rules and policies to determine whether they pass muster under the new Stericycle rule, which certainly will be challenged.

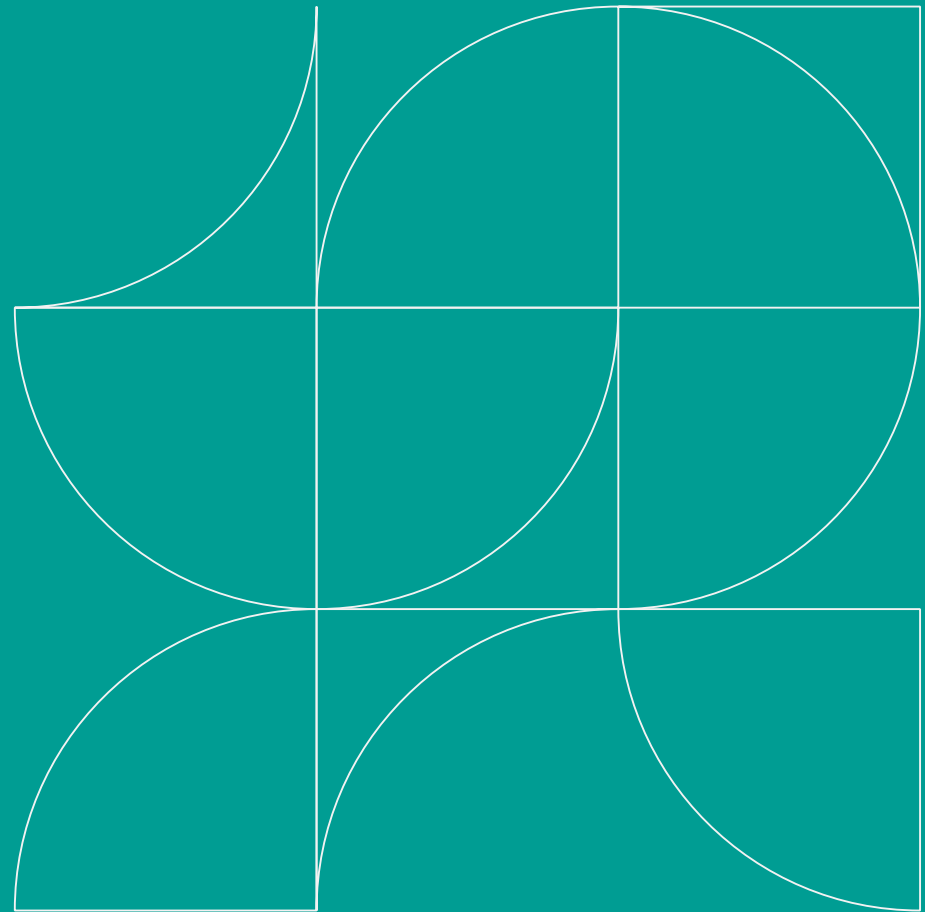
Cemex

- If a Union can show majority support in an appropriate bargaining unit, usually by offering a card check:
 - The company must either agree to recognize and bargain with the union; or
 - Petition the NLRB for an election within 2 weeks of the demand.
- If the employers wins the election, but is found to have engaged in any objectionable conduct:
 - The traditional rerun election remedy will no longer apply; and
 - A bargaining order will issue.
- Places a greater emphasis on maintaining NLRA compliant handbooks and policies, and training supervisors and managers on appropriate election conduct.

Cemex and Handbooks

- Footnote 188 of *Cemex*:
 - “Our colleague correctly points out that the Board has found, under specific factual circumstances, that an employer’s maintenance and dissemination to all employees of a generally applicable handbook confidentiality policy which impaired employees’ ability to campaign for their preferred position by inhibiting their discussion of wages, hours, and working conditions **required setting aside an election** in which the union failed to establish majority support by a margin of 43 ballots cast for and 43 against representation.”

Handbooks and Policies



Key Policies

- Confidentiality during investigations
- Social media
- Uniforms
- Bulletin boards
- Solicitation
- Distribution
- Use of email
- Use of company network and systems
- Recordings
- Media
- Civility rules



Problematic Policies in *Stericycle*

- Limited use of PEDs to break times only.
- Prohibited employee conduct that “maliciously harms or intends to harm the business reputation of” the Company.
- Prohibited activity that “constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management” including “activity in which a team member obtains financial gain due to his/her association with the Company” or “activity, which by its nature, detracts from the ability of the team member to fulfill his/her obligation to the Company.”
- Retaliation policy prohibited employees from disclosing “complaints and the terms of their resolution.”
- Restricted phone and email usage “should be infrequent and brief and limited to urgent family members.”
- Restricted employees from taking pictures, or video or audio recordings with any device without the permission of their supervisor/manager.

Confidentiality and IT Systems

- Confidentiality during investigations:
 - Under current Board law, confidentiality rules that by their terms apply only to open investigations are lawful.
 - *Apogee Retail, LLC*, 368 NLRB No. 144 (2019).
 - Before *Apogee*, whether an employer could demand confidentiality during an investigation was evaluated on a case-by-case basis.
- IT systems:
 - An employer may restrict the nonbusiness use of its IT resources, absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other.
 - *Caesars Entertainment*, 368 NLRB No. 143 (Dec. 17, 2019)
 - Will we see a return to *Purple Communications*?

Social Media and Recording

- Social Media:
 - As of now, rules that restrict who can speak on the employer's behalf on social media are facially lawful.
 - Rules that restrict the use of the employer's name as part of a social media account or URL are evaluated on a case-by-case basis.
 - We expect these rules to become more employee and union-friendly.
 - One decision has been remanded.
- Recording:
 - These were found to be lawful in the *Boeing* decision that ushered in the prior standard.
 - Now, based on the language in *Stericycle*, employers will need a really good reason for a no-recording policy.

What Has Already Changed?

- Confidentiality and non-disparagement in separation and settlement agreements:
 - *McLaren Macomb*, 372 NLRB No. 58 (2023).
- Policies prohibiting workplace profanity:
 - *Lion Elastomers LLC*, 372 NLRB No. 83 (2023).
 - Employer disciplined an employee based on continued misbehavior during a safety meeting and the investigatory meetings that followed.
 - Employee was agitated, continued to interrupt meetings with repeated questions, raised his voice, refused to allow others in the room to complete their statements, attempted to leave the room, and used an accusatory tone when addressing others in the room.

Take A Hard Look At Your Policies

- What are you trying to protect?
- Is it really necessary?
- Can you justify the policy or rule?
- Is that justification anywhere in writing?
- What about “illustrative examples”?
- Consider a “savings clause” or disclaimer language
 - Be wary, though, of the GC’s invitation to use “prophylactic language”



Ask Yourself...

- Does your policy, practice or agreement implicitly or explicitly...
 - Restrict employee access to the NLRB?
 - Prohibit employee discussions with the NLRB or others?
 - Prohibit employees from discussing terms and conditions of employment (e.g., wages, benefits, safety, etc.)?
 - Prohibit employee discussions about settlements or arbitral proceedings with the NLRB or their union?
 - Prohibit employee witnesses from talking about internal investigations?
 - Prohibit employees from talking to the media?
 - Regulate what employees can post in social media?
 - Deny third-parties access to company property?

Why Have a Handbook?

- Establish uniform expectations.
- Obtain acknowledgment of understanding of these expectations from employees.
- Showcase workplace benefits.
- Give employees something to rely on.
- Achieve organizational consistency.
- Reduce excessive supervisory discretion.
- Deliver notice of legal rights and obligations such as at-will and arbitration.
- Communicate required written policies (legal compliance!).
- Not to be a contract, but a reliable guidepost.

Seyfarth's Handbook Team

- 35+ attorneys of every level and office.
 - trained handbook and policy experts.
- Used as both an internal Seyfarth training (not billed to clients) and an external resource building project.
- Built an easily update and customizable national template and a state addendum for every state (even those that might not need one, just in case you want one).
- Updated questionnaire for employers to tailor handbooks and state addenda.
- Partnering with our paid sick leave and paid family leave teams to assist in efficiently managing national resources in those spaces as well.

Closing Thoughts

- Cases will get remanded so that ALJs can take another look at whether a work rule or policy passes muster under *Stericycle*.
- Track these decisions – they'll be informative.
- Review your handbooks and policies now.
- Be mindful when considering discipline or termination based on a work rule or policy.
 - Remind your supervisors and managers to consult with human resources or legal **BEFORE** making a disciplinary decision.



CLE Code

**thank
you**

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