

Client Alert: NLRB Ruling on Handbooks

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In the past week you may have received articles about a recent [ruling](#) by the National Labor Relations Board on the potential illegality of some bedrock workplace policies. This ruling is significant, and we plan to discuss it in more depth during our next webinar on September 7.

In a case called Stericycle, the NLRB ruled that certain employer policies may be illegal if a reasonable employee might interpret them as prohibiting employees from engaging in activities protected by the National Labor Relations Act (“NLRA”). These activities include union organizing and other concerted employee actions. The ruling applies to both union and non-union private sector workplaces.

Most handbooks contain civility rules or codes. For example, an employer may require employees to treat each other with respect. These types of high level common sense policies have in the past been challenged under the NLRA with mixed results. It has been argued that an employee may interpret this policy as limiting their ability to be oppositional and even confrontational with their employer when seeking to improve working conditions. After siding with employees during the Obama administration, NLRB rulings in 2017 and 2019 put employers in a better position to defend these policies. The Stericycle decision has changed the landscape, making these policies much more vulnerable to claims of illegality.

The new standard applied by the NLRB is that if an employee could reasonably interpret a workplace rule to restrict their rights to engage in protected activities under the National Labor Relations Act, the rule is presumed to be illegal and the employer must prove that it has a business necessity for the policy, which cannot be achieved with a narrower policy.

There are a few possible ways to approach this issue in your handbook to reduce the risk of some policies being found to be illegal. One approach is to sanitize the handbook and removing any policies that could be challenged. This may not be desirable, however, as policies on the confidentiality of investigations, the parameters of employee use social media, civility, workplace recordings, and many other important issues would either be removed or substantially weakened.

Another option is to retain these policies but include so-called savings language that indicates that nothing in the handbook is intended to limit employee rights under the NLRA. This does not eliminate the legal risk, as we suspect that the NLRB may still find some savings clauses inadequate.

A third option is to combine the addition of savings language that indicates that nothing in the handbook is intended to limit employee rights under the NLRA with a review of your handbook to identify the provisions that are most likely to be vulnerable to challenge, and consider making changes specific to those policies.

Another reality to consider is that due to court challenges to the Stericycle ruling, there will be some years of uncertainty while the appeals play out. Furthermore, the landscape could change again after the 2024 election as the NLRB is a politically appointed board and it changes direction with the political tides. However, for the time being, and likely for several years at least, Stericycle represents the state of the federal law. It will also be applied by a zealous NLRB General Counsel.

If you have any questions please contact Peter Lowe at Plowe@brannlaw.com or Hannah Wurgaft at Hwurgaft@brannlaw.com.