All Workplace Rules Are Now Unlawful in the Eyes of the NLRB –- IF Employees and Unions Say So!?!?

Labor & Employment Law Update

By Timm Schowalter on August 3, 2023

An employee complains to human resources, "I am a hamster from Venus and filing unfair labor practice charge because the pay policy of paying bi-weekly is chilling my Section 7 rights!" No, this is not a bizarre scene out of a Monty Python movie but now the potential absurd reality in workplaces across the country. Reality, reasonableness…. who needs them? Not the Biden NLRB.

In a much anticipated decision, on August 2, 2023, the current NLRB in *Stericycle, Inc. and Teamsters Local 628* materially altered the standard for finding an employer's work rule that does not expressly restrict employees' protected concerted activity under Section 7 of the National Labor Relations Act (Act) as unlawful under Section 8(a)(1) of the Act. In doing so, the Board articulated an extreme pro-employee standard that defies truth and any semblance of reasonableness. The Board set forth a new analytical framework for determining when a facially neutral policy is unlawful under Section 8(a)(1). The new framework is: (1) if an employee *could* reasonably interpret the rule to have a coercive meaning, even if a contrary, noncoercive interpretation of the rule is also reasonable, then the rule is presumptive unlawful; and (2) an employer may rebut the presumption by proving that the work rule advances a legitimate and substantial business interest *and* that the employer is unable to advance that interest with a more narrowly tailored rule. At first glance the new framework seems to be more pro-employee but nothing overly alarming. However, upon closer examination, the nonsensicalness of the new standard comes to light.

A brief historical perspective aids in the understanding of the Board's dramatic shift. There has always been a delicate balance under the Act of protecting the employees' rights to organize for mutual aid without employer interference with that of an employer's right to maintain discipline in their establishments and otherwise protect their legitimate and substantial business interests by regulating employees' workplace conduct. *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945). The NLRB for years has juxtaposed these competing interests and articulated various standards for determining when a facially neutral work rule is, in fact, unlawful.

The historical linage of *Stericycle Inc.* begins with *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) when a prior Board set the standard as (1) employees *would* reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. The verb "*would*" was central to the standard insofar as it imposed an objective reasonable employee standard. In fact, the dissent argued for the use of the verb "*could*" setting forth a subjective standard. Yet, reasonable minds prevailed. Conspicuously absent from *Lutheran Heritage* standard, among other things, was any reliance on the core employer interest of a legitimate business reason for maintaining a rule. Accordingly, in *Boeing Co.*, 365 NLRB No. 154 (2017), a prior Board articulated the new standard: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule." The Board also set forth tiered classes of work rules that ranged from never violative of Section 7 to always violative of Section 7. Then in 2019, in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019), the Board added some "points of clarification" to *Boeing Co*. The key point of clarification was ensuring an objective reasonableness standard of the impact on the NLRA. The Board stated:

> [A] challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity..... and *would* in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights.

Today, however, it is the very "reasonableness" point of clarification that the current Board discarded in favor or a pure subjective and hypothetical standard. Specifically, the Board does not revert back to the *Lutheran Heritage* reasonableness standard as it contends. To the contrary, the Biden Board adopted the rejected subjective "could" standard found in the dissent of *Lutheran Heritage.* Although the Biden Board attempts to disguises the true standard with the uses of the term "reasonable" it is evident from its new post-modernism standard that the employee may be anything but reasonable. As explained by dissenting member Kaplan:

> [I]f this individual could possibly suspect that any isolated word or phrase in a rule that does not prohibit Section 7 activity might be interpreted to do so, that rule would coerce employees from engaging in protected concerted activity and therefore would be presumptively unlawful, even though truly reasonable employees would apply common sense and recognize that the evident purpose of the rule has nothing to do with Section 7 rights.

To further complicate matters, the current Board provided no guidance on how an employer is to narrowly tailor a generalized work rule that is intentionally drafted to address a myriad of workplace factual scenarios to overcome a presumptive unlawful rule; a presumption established by a single employee's

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purely subjective and potentially erroneous reading of the workplace rule. Once? again, a work place rule that quite possibly is indisputably noncoercive but is presumptively unlawful.

We have been taught from an early age that words matter. Here, the simple change of a single verb from "would" to "could" has materially altered the workplace landscape by exposing virtually every workplace rule to a purely subjective but yet effective challenge. So, when the hamster from Venus complains about a facially neutral pay policy, please stop, take notice and call your friendly employment counsel for legal assistance.

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