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**Employers may need to
review workplace policies
following NLRB decision**



Most businesses have workplace rules that employees must follow. For example, some businesses may limit the use of social media or not allow recording devices in the workplace. However, a recent decision by the National Labor Relations Board may redefine the way you design and implement workplace policies. In this document, we'll provide an overview of Section 7 of the National Labor Relations Act and how the NLRB's recent decision might affect your workplace policies.

Section 7

Section 7 of the National Labor Relations Act provides workplace protections for employees. For instance, Section 7 lets workers join unions, talk about their work conditions, and participate in collective efforts.

While Section 7 might sound as though it's geared toward large corporations or union-heavy industries, it also affects many smaller businesses. If a business buys or sells goods or services across state lines for more than \$50,000 a year, then Section 7 likely applies to that business.

For businesses that are subject to Section 7, this rule protects a wide range of employee actions and behaviors, including:

- Talking with co-workers about wages, benefits, or other working conditions
- Circulating a petition asking for better hours
- Raising concerns about unsafe working conditions
- Openly talking about pay and benefits

And teaming up with co-workers to talk to the media or other organizations



In the past, the scales of justice often tilted in favor of businesses when it came to defending their policies and practices under Section 7. Employees generally had to establish that a business rule or practice not only violated their Section 7 rights but also that their employer lacked any legitimate justification for the rule. Most businesses, with the aid of a legal team, could muster some form of rationale for nearly any policy or practice. So, employees often faced an uphill battle when trying to challenge a workplace policy.

The Stericycle decision: a game-changer for employers

In 2020, the employees of Maryland-based Stericycle Incorporated complained that workplace rules regarding personal conduct, conflicts of interest, and confidentiality of harassment complaints were infringing on their Section 7 rights. On August 2, 2023, the National Labor Relations Board issued a decision, adopting a new standard for determining whether or not workplace rules violate Section 7 of the NLRA.

Under the NLRB decision, the onus is now on the employer to demonstrate the legitimacy of a given work rule. If an employee can demonstrate that a rule has a reasonable likelihood of discouraging employees from exercising their rights, the Board will presume it is unlawful. This means that the rule is assumed to be illegal on its face and without additional context or arguments. This is a considerably lower threshold than the previous standard, meaning virtually any rule could be subject to Section 7 scrutiny.

If the NLRB considers a rule to be unlawful, the burden is on the employer to prove that the rule serves a substantial business purpose, and that the rule is the simplest, least restrictive way of achieving that purpose.

There are no clear guidelines on what counts as a substantial business purpose or how to show that a rule is the simplest and least restrictive. This leaves a lot of room for interpretation, making it difficult for businesses to defend a rule once it is deemed problematic.



Any policy that could potentially affect an employee's Section 7 rights will need to be evaluated on a case-by-case basis, even if the policy was considered lawful in the past. In fact, several common policies that were once considered lawful may need to be reevaluated based on the Stericycle decision, including:

- Nondisparagement policies
- Rules about what's considered insubordination
- Any restrictions on how, when, or where co-workers can meet
- Policies limiting comments to media or government agencies
- Rules regarding petitions in the workplace
- Rules and procedures for safety complaints
- Any restrictions on the use of recording devices in the workplace
- And guidelines or limits on the use of company chat, email, and other communication tools

Protective measures for employers in light of Stericycle

The Stericycle decision has significant implications for employers. Virtually every workplace policy is now under the microscope, and if challenged, employers will need to explain persuasively why the rule exists in the first place. If they fail, the Board can assess penalties and award backpay. It could also open the door for other legal claims.

Given this new legal environment, companies can take four proactive measures.



First, reevaluate existing policies from an employee-centric lens. Comb through your existing policies and think from your employees' viewpoint. Could any policy be seen as restricting their right to discuss work conditions, either with their colleagues or in the public domain? Be sure to take a close look at nondisparagement policies, social media and communication protocols, and camera and recording restrictions - as they can easily be construed as silencing employees.

Next, consult with experts. It's a good idea to have a labor law expert take a peek at your policies. They can spot potential red flags and help you stay in line with the new standards.

Next, educate and train all employees in leadership positions to make sure they know about these changes. The last thing you want is someone unintentionally stepping out of bounds.

Finally, maintain open communication. Foster an environment where employees can express concerns about policies. It's better to tackle issues internally than to deal with bigger issues down the line.



Final Thoughts

This document is intended to provide a general overview of the Stericycle decision and what it means for employers. It is not legal advice. Every business has unique circumstances, and we encourage you to speak with an expert advisor for tailored guidance.



About Harding, Shymanski & Co.

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