



Client Alerts

California Compliant: When Workplace Rules May Be “Unfair Labor Practices”

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Many California employers already have on their do-to list a revised Employee Handbook for 2024. For example, businesses likely will need to update policies regarding paid sick leave and to add a new section about unpaid leave when employees experience a “reproductive loss.” (To learn more about those topics, click [here](#) and [here](#).) But the oft-included section entitled “Workplace Rules” or “Code of Conduct” also should be reviewed for compliance with a new standard for determining whether such rules impermissibly restrict employees’ federally-guaranteed rights.

An August 2023 decision of the National Labor Relations Board (Board) makes it more likely that common handbook provisions and rules for workers’ conduct may be challenged. In its decision, the Board reaffirmed that both “unionized and nonunionized” businesses must comply with the National Labor Relations Act’s prohibition against barring employees from engaging in protected conduct. Further, the Board emphasized that “any ambiguity in a work rule must be construed against the employer as the drafter of the rule.” Although it is a new standard, it will be applied retroactively.

Subjects Often Covered by “Workplace Rules”

Most employers develop and distribute standards, rules, or a code of conduct applicable to their employees. Communicating written expectations for workplace conduct (whether as part of an Employee Handbook, or a standalone document) benefits both employees and employers. In a perfect world, employees understand (and avoid) behavior that might subject them to discipline and employers enforce rules consistently to ensure fair treatment.

Workplace rules can encompass a wide variety of topics, some of which are unlikely to be controversial (for example, prohibitions against theft or violence). But others may create tension, such as restrictions on employees’ use of cell phones, or bans on taking pictures at the workplace. And although some rules may be easily understood (for example, restrictions on possession of alcohol at work), others – for example, guidelines for “civility” in the workplace – may be less clear.

Limits on Employers’ Rights to Classify Workplace Conduct as “Unacceptable”

Employers’ regulation of workplace speech, behavior, and appearance is limited in some respects. A rule banning employees from disclosing their compensation to others would be invalid under California Labor Code Sections 232 and 1197.5, as well as federal law. California Government Code Section 12964.5 prevents employers from requiring employees to enter into agreements that would prevent them from disclosing “information about unlawful acts in the workplace,” including information about “harassment or discrimination or other conduct that the employee has reasonable cause to believe is unlawful.” A dress code that prevents employees from having a “protective hairstyle” would be unlawful under California’s Fair Employment and Housing Act if it has the effect of discriminating against workers based on their race.

But some workplace rules may create potential liability for employers **even if they are not expressly prohibited by law**. Such exposure may be difficult to foresee; rules that potentially could “chill” employees from exercising federally-protected rights fall into this category. For instance, a rule prohibiting employees from using cameras at work might seem reasonable (especially in industries where employers must protect sensitive information), but conceivably could be interpreted as preventing an employee from taking pictures to document and report an unsafe working condition – a protected right.

When Does a Workplace Rule Impermissibly “Chill” an Employee from Exercising a Protected Right?

Federal law protects workers’ rights to self-organize (form a union), bargain collectively with an employer, and “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The National Labor Relations Act (NLRA) prohibits employers from interfering with or coercing employees with respect to such rights. Such interference is considered an “unfair labor practice.” Certain workplace rules – even if they do not **explicitly** restrict a protected right – potentially could violate this prohibition. Employers should know that the Board recently articulated “a new legal standard to decide whether an employer’s work rule that does not expressly restrict employees’ protected [] activity” nonetheless is “unlawful” under the NLRA (*Stericycle, Inc.*, 372 NLRB No. 113).

In *Stericycle*, the Board answered two questions: (1) how should a workplace rule be **interpreted** for the purpose of evaluating whether it impermissibly restricts employees’ rights; and (2) to what extent should **employers’ interests** be considered? The *Stericycle* decision confirms that employers have legitimate interests in protecting their business interests and maintaining “discipline” at work, and that workplace rules often further such interests. The Board found that those interests must be tempered, however, to “minimize, if not altogether eliminate, [the] coercive potential” for workplace rules to deter employees from exercising rights granted to them by the NLRA. *Stericycle* articulates a two-step process for evaluating a particular rule:

1. The workplace rule should be interpreted from the “perspective of [a] reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in.” The “reasonable employee,” in other words, is assumed to be quite cautious (a dissenting Board member wrote that the majority’s description of a “reasonable employee” is “the labor-law equivalent of tort law’s ‘eggshell skull plaintiff’”). Under the new standard, if it’s possible that a person “who wishes to avoid the risk of being disciplined or discharged for violating the rule” **could** reasonably interpret the rule as prohibiting her from engaging in protected activity, then “the rule is presumptively unlawful.” *Stericycle* affirms that this is true even if the rule also could be interpreted as not prohibiting such conduct; the Board believes employees should not be required to “ask” whether an ambiguous rule prohibits protected activity.
2. When a rule is presumptively unlawful, an employer can rebut the presumption by proving two things: (a) “the rule advances a legitimate and substantial business interest”; and (b) “the employer is unable to advance that interest with a more narrowly tailored rule.” The Board described this as “something akin to an affirmative defense.”

What Types of Rules Are Most Likely to be Considered “Unfair Labor Practices”?

Predicting whether specific rules would be considered presumptively unlawful, or if so, that an employer could overcome the presumption, will be difficult. The Board in *Stericycle* conceded that it did “not expect our new standard to provide complete certainty and predictability in this area of the law.” That uncertainty will be very uncomfortable for employers as they review their workplace rules.

As the dissenting Board member in *Stericycle* cautioned, the new standard may open the floodgates to challenges based on workplace rules. “[A]n individual predisposed to” interpreting a rule so that it could have an impact on protected activity might “read [a chilling effect] into” virtually any rule. That said, rules that are mostly likely to be challenged under the *Stericycle* standard include those:

- limiting acceptable speech or expression at the workplace (for example, barring employees from engaging in “political” conversations or activity while at work – an employee might conclude such a rule prohibits statements about equal pay or other terms/conditions of employment);
- generally requiring employees to work “in harmony” with others, or instructing them not to be “uncooperative” or to engage in “disruptions”;
- restricting employees’ use of camera features on mobile devices while on company property (e.g., “no pictures” or “no recording” rules);
- broadly preventing employees from communicating with news media about events affecting the company;



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- constraining employees’ social media communications or activity (the NLRA protects workers’ rights to comment publicly on working conditions); or
- requiring employees to maintain as confidential information about workplace investigations.

Going forward, workplace rules will be evaluated on “case-by-case” basis. Relevant considerations include: “the specific wording of the rule, the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory rights it may infringe.” In *Stericycle*, the Board expressly rejected a previous decision (*Boeing Co.*, 365 NLRB No. 154), which had concluded that specific categories of rules are “always lawful to maintain.”

Implications for Employers

To minimize risk that seemingly “common sense” rules could create exposure, employers should review their workplace standards with *Stericycle* in mind. Rules should be specific and straightforward to minimize any potential ambiguity (when proscribing unwanted behavior, do not use adjectives such as “rude,” “negative,” or “disrespectful”). Avoid vague statements, for instance, “You should not engage in any act that is not in the best interests of the Company.”

Whenever possible, rules should be narrowly tailored based on the physical setting and the subject of the rule. Broad restrictions on employees’ speech and conduct are more likely to be upheld when the company has a duty to prevent dissemination of classified information or information made confidential by law or regulation – for example, defense contractors, or medical providers required to protect patient information covered by HIPAA. Even so, if a rule could be “narrowed to lessen the infringement of employees’ statutory rights while still advancing the employer’s interest” – then it should be.

Employers also may need to review confidentiality agreements to evaluate whether any provisions could be interpreted as impermissibly restricting employees from engaging in conduct in furtherance of NLRA rights. An agreement requiring employees to maintain the confidentiality of “personnel information” arguably could be interpreted as forbidding workers from discussing the terms and conditions of their employment. Confidentiality agreements should be focused on the company’s protectable trade secrets.

What to Watch

Employers who are frustrated by the *Stericycle* decision have some reason to hope that the tide will turn; the Board has a long history of reversing course as administrations change, including with respect to permissible workplace rules (this is discussed at length in the *Stericycle* decision, which can be downloaded at <https://apps.nlr.gov/link/document.aspx/09031d4583af43bd>). But *Stericycle* is the last word, at least for now.

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