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Tips for Drafting Hospital Policies and Handbooks

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In *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the National Labor Relations Board (NLRB) established a new/modified standard for analyzing facially neutral rules in policies and handbooks. Under *Stericycle*, the General Counsel, who oversees litigating an unfair labor practice charge on behalf of the NLRB, must "prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights."[1]Section 7 of the National Labor Relations Act (the Act), among other things, provides employees with the right to engage in concerted activities for their mutual aid and protection.[2]

Significantly, upon evaluating whether a rule in a hospital's policy or handbook provision tends to "chill" employees' Section 7 rights, the NLRB interprets the rule "from the perspective of an employee who is subject to the rule and economically dependent on the [hospital], even if a contrary, noncoercive interpretation of the rule is also reasonable."[3] The NLRB reads language presented to employees in handbooks from the position of non-lawyers, rejecting wordsmithing efforts, no matter how carefully crafted, to salvage restrictions on protected conduct with language that assumes knowledge of the law.[4]

If the General Counsel carries the burden of showing a rule has a "tendency to chill," then the rule is presumptively unlawful. The hospital then must prove the rule advances a legitimate and substantial business interest and that it is unable to advance that interest with a more narrowly tailored rule. In evaluating the rule, the NLRB uses a "case-specific approach" that looks to "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."[5]

Savings clauses—language saying nothing in this rule takes away your otherwise lawful rights—do not necessarily salvage an unlawful rule. In deciding if a savings clause adequately clarifies the rule or restriction, the NLRB considers whether the language "address[es] the broad panoply of rights" protected by Section 7; the length of the document and the placement of the savings clause in relation to the provisions that it is claimed to remedy; whether the savings clause and the provisions reference each other; and whether the [hospital] has enforced the overbroad provision in a way that shows employees that the savings clause does not safeguard their Section 7 rights."[6] The NLRB construes any ambiguity against the hospital as the drafter.[7]

Stericycle arguably did not supersede every nuance applied to interpret work rules. Although the NLRB will now review a rule from the perspective of the employee, hospitals should still argue that prior NLRB precedent informs the analysis that the Board must give work rules their reasonable meaning within that review.[8] And the Board should also refrain from reading particular phrases in isolation and not presume improper interference with employee rights.[9]

It is also possible that a Republican Board under the Trump administration will revert back to the *Boeing* standard outlining three categories of work rules summarized: (1) lawful rules that do not interfere with or impact employees' rights under the Act or the potential adverse impact is outweighed by justifications associated with the rule; (2) rules that warrant individualized scrutiny as to whether they interfere with employees' rights under the Act and whether any adverse impact on those rights is outweighed by legitimate justifications; (3) rules that prohibit or limit protected conduct under the Act and the adverse impact on protected rights is not outweighed by justifications associated with the rule.[10]

Why does all this matter? The NLRB has held that where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether it is the kind that could have been prohibited by a lawful rule.[11] This includes the first steps of progressive discipline which, if unlawful, would nullify the employee's ultimate termination from employment.[12] An employee's layoff arguably could also be undone if the decision was made based in part on discipline pursuant to an unlawful rule.[13] This could create meaningful issues in discharge labor arbitrations or employment discrimination cases.

Rules That Get the NLRB's Attention

1. Investigative Confidentiality. The NLRB has ruled that Section 7 grants employees the right to discuss their terms and conditions of employment, including, but not limited to, the right to discuss potential workplace harassment, to solicit the assistance and support of others in filing and pursuing such harassment complaints, and/or to discuss the employer's response to those complaints. The NLRB generally prohibits rules restricting such discussions.[14] Although *Stericycle* is the NLRB's current standard to evaluate employer work rules, precedent exists relying on *Boeing* that could be resurrected under the current Republican Board that requiring employees to maintain confidentiality for the duration of an investigation is lawful.[15] Investigative confidentiality policies that limit the restriction to the conclusion of the investigation will likely be defensible under the current Board.
2. Tape recording. Audio recordings are protected by Section 7 of the Act if employees are acting in

concert for their mutual aid and protection and no overriding employer interest is present.[16] In addition, the Board has held that "any act of recording by a single employee that forms a part of, or is undertaken in furtherance of, a course of group action constitutes [protected] concerted activity within the meaning of Section 7."[17] Such activities may include documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment -related actions.[18] The cases, however, do not appear to address the restriction of *disclosure* of intent to record, especially in a confidential management meeting. In other words, no lawful right appears to exist to attend a confidential meeting so that asking for disclosure of intent to record before the meeting starts and excluding someone who intends to record from the meeting is arguably lawful.

3. Surveillance videos. An employer's surveillance and monitoring activities can cross the line when these tools infringe upon protected activities under Section 7 of the Act or applicable state law, especially when the company informs employees it is aware of their activity without identifying the source.[19] Unilateral implementation of surveillance is unlawful in a unionized environment absent providing the union with prior notice and engaging in at least effects bargaining.[20] And a rule directing employees to engage in surveillance of what would be considered protected concerted activity of their fellow employees like monitoring violations of alleged laws and to report those activities to the employer is unlawful.[21]
4. Cell phones and cameras. An absolute restriction on bringing cell phones and cameras on the employer's property or restricting them from all areas of the property will likely be considered unlawful because it could potentially interfere with employees' Section 7 rights. A rule that limits such activity to nonwork time in nonwork areas or while operating company vehicles will likely be considered lawful.[22] Hospitals typically are given greater latitude regarding work restrictions because of patient confidentiality concerns.
5. Posting on bulletin boards. No inherent statutory right exists of employees or a union to an employer's bulletin board. But if the employer permits, by formal rule or otherwise, employees or a union to post personal and official union notices on its bulletin boards, the employees' and the union's right to use the bulletin board receives the protection of the Act to the extent that the employer may not remove notices, or discriminate against an employee who posts notices, which meet the employer's rule of standard, but which the employer finds distasteful.[23] In addition, where posting is allowed, the Board will scrutinize as an unlawful interference with Section 7 activity a rule requiring prior notice or review by the employer before any employee may post a written notice or make public comments.[24]
6. Broad solicitation restrictions. A broad rule that prohibits solicitation for purposes of organizing a union on "company time" or during "working hours" that can be interpreted by employees that they are not permitted to engage in such union activity during breaks or during other nonworking periods is unlawful.[25]
7. Public comments about the employer. Rules restricting employee communications with third parties are typically unlawful because they tend to inhibit employees from bringing work related complaints to, and seeking redress from, entities other than their employer and restraining the employees' Section 7 rights to engage in concerted activities or for other mutual aid or protection.[26] This applies to restrictions barring employees from communicating with the

press.[27] Language in a policy that limits employees to only contacting management or requiring that they contact management first regarding questions or concerns may be considered an unlawful restriction of Section 7 rights.[28]

Writing rules and handbooks is not a routine or perfunctory exercise without legal consequences. Careful consideration and attention must be made to the nature and extent of any restrictions and its real purpose given that the NLRB is more closely scrutinizing these documents that may result in costly legal liability.

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[1] *Id.* Slip op at 2.

[2] 29 U.S.C.§ 157.

[3] *Stericycle*, Slip op. at 2.

[4] *Ingram Book Co.*, 315 NLRB 515, 516 (1994).

[5] *Stericycle,* Slip op. at 20.

[6] *First Transit, Inc.*, 360 NLRB 619, 621-622 (2014); See also, *299 Lincoln Street, Inc.*, 292 NLRB 172, 186 (1988).

[7] *Century Fast Foods, Inc.,* 363 NLRB 891, 901 (2016).

[8] *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004).

[9] *Id.*

[10] *Boeing v. IFPTE Local 2001*, 365 NLRB 1494,1496 (2017).

[11] *Double Eagle Hotel and Casino*, 341 NLRB 112, ftn.3 (2004) enfd. 414 F.3d 1249 (10th Cir. 2005). But see, *Continental Group, Inc.*, 357 NLRB 409, 412 (2011) for employer defenses.

[12] *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995); *Dynamics Corp.*, 296 NLRB 1252, 1253-1254. (1989 enf'd 928 F.2d 609 (2nd Cir. 1991).

[13] *Care Manor* at 726; *Dynamics* at 1253-1254.

[14] *Fresh & Easy Neighborhood Market,* 361 NLRB 151 (2014); Phoenix Transit System, 337 NLRB 510 (2002), enfd., 63 Fed. Appx. 524 (D.C. Cir. 2003).

[15] See *Apogee Retail LLC,* 368 NLRB No. 144 (2019).

[16] *Whole Foods Market, Inc.*, 363 NLRB 800, 802 (2015), enfd, 691 Fed. Appx. 49 (2nd Cir. 2017).

[17] *Id.*, at fn. 9.

[18] *Id.* Citing *White Oak Manor*, 353 NLRB 795, fn. 2 (2009).

[19] *Amerinox Processing,* 371 NLRB No. 105 (2022); See also, Office of the General counsel, *Electronic Monitoring and algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights*, Memorandum GC 23-02 (October 31, 2022).

[20] *Anheuser-Busch Inc.*, 342 NLRB 560 (2004).

[21] *Montgomery Ward*, 269 NLRB 598, 600 (1984).

[22] *Argos USA, d/b/a Argos Ready Mix, LLC*, 369 NLRB No. 26 (2019); See also, *Cott Beverages, Inc.*, 369 NLRB No. 82 (2019).

[23] *Honeywell, Inc.*, 262 NLRB 1402 (1982) enfd. 722 F.2d 405 (8th Cir. 1983).

[24] *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

[25] *Manor Mechanical Contractors, Inc.*, 357 NLRB 1526 (2011).

[26] Kinder-Care Learning Centers, Inc., 299 NLRB 1171, 1172 (1990); See also, Schwan's Home Service, Inc., 364 NLRB 170 (2016).

[27] *Main Coast Memorial Hosp.*, 369 NLRB No. 51 (2020); See also, *Trump Marina Casino Resort*, 354 NLRB 1027 fn.2 (2009).

[28] *Kinder-Care Learning Centers, Inc.*, 299 NLRB 1171 (1990).

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