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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3 Takeaways As The NLRB Tightens Its Work Rule Test

By **Braden Campbell**

Law360 (August 3, 2023, 8:10 PM EDT) -- The National Labor Relations Board has revamped how it assesses whether workplace rules illegally restrict workers' rights, making it tougher for employers to defend confidentiality, civility and other policies. Here, Law360 looks at three takeaways from the Biden-era board's long-awaited ruling.

An Old Test Gets a New Look

A recent ruling in a case involving a waste disposal company alters how the National Labor Relations Board and its judges analyze claims that an employer violated the National Labor Relations Act. (Andrew Harrer/Bloomberg via Getty Images)

Wednesday's ruling in a case involving waste disposal company Stericycle alters how the **board and its judges analyze** claims that an employer violated the National Labor Relations Act by blocking workers from flexing their organizing rights, such as the right to talk to colleagues about forming a union or raising concerns about unfair or abusive practices.

The ruling comes more than a year and a half after a board majority comprising Democrats appointed by President Joe Biden **announced plans to reconsider** a 2017 decision involving Boeing. That decision **made it easier** for employers to defend workplace rules after they faced an onslaught of complaints under the prior standard, known as Lutheran Heritage Village.

In that 2004 ruling, the board held work rules are illegal if a worker would "reasonably construe" them to

infringe NLRA rights. Wednesday's decision restores that test, with a few wrinkles that will make a big difference.

The Stericycle majority held that a rule may be illegal if it has a "reasonable tendency to chill employees" from exercising their rights under Section 7 of the NLRA, which empowers them to take group action to improve working conditions.

The ruling sets out a two-part analysis. First, the board will examine prosecutors' claims that a given rule infringes the act from the perspective of a worker who is "economically dependent" on the employer and "who also contemplates engaging in protected concerted activity." For this part of the test, the employer's intent is "immaterial," the board said — the only thing that matters is whether a worker "could reasonably interpret the rule to have a coercive meaning."

Next, the revised test gives employers a chance to defend rules found to infringe workers' rights. If the employer shows the rule "advances a legitimate and substantial business interest" and that it couldn't fulfill that need with "a more narrowly tailored rule," the rule is legal, the majority said.

Allyson Belovin, a partner at union-side Levy Ratner PC, said approaching rules from a wary worker's perspective is the right move because broad rules can and do dissuade workers from using their organizing rights.

"If you have a rule that says you have to act in a civil, nondisruptive, respectful way in the workplace, many workers would absolutely interpret that to mean that they can't challenge their bosses, they can't speak negatively about their bosses," Belovin said. "Those are core Section 7 rights workers have."

And the addition of a defense prong will make for more consistent results than the original version, said Mark Gaston Pearce, a Democrat who frequently analyzed work rules as NLRB chairman from August 2011 to January 2017.

Pearce, now the executive director of the Workers' Rights Institute at Georgetown University Law Center, pointed to two 2011 decisions in cases involving Flagstaff Medical Center and Hyundai American Shipping Agency.

In Flagstaff, a majority found the hospital's limits on camera use were legal based in part on its "significant interest" in protecting patients' private information. But in Hyundai, a different panel didn't weigh the employer's interest when assessing its rules.

"Will it eliminate the case-by-case assessments where you have rules that are fairly similar from one case to another that get different results?" Pearce said. "Not entirely. But I think … the board is going to be in a better position to eliminate the amount of inconsistency that employers argued existed in the original application of the Lutheran Heritage standard."

But management advocates aren't thrilled with the changes. John Ring, a Morgan Lewis & Bockius attorney who chaired the NLRB for much of the Trump administration, said the test's emphasis on narrow drafting means the board will undoubtedly be "second-guessing every policy because any policy could be more narrowly drafted."

And the board's "economically vulnerable employee who also happens to be a labor activist" will be apt to find violations everywhere.

"Any rule that can possibly be read to interfere with the act will draw an unfair labor practice charge," Ring said.

No More Categories

In Boeing, the board's then-Republican majority made two big changes to the rules analysis. The majority ditched the "reasonably construe" standard from Lutheran Heritage and instead instructed agency judges to balance a given rule's effect on workers' rights against the employer's reasons for maintaining it.

And the board partially ditched the case-by-case approach it had taken to rules under Lutheran Heritage, opting to place policy archetypes into one of three categories: rules that are always legal to maintain because they have a minimal impact on workers' rights, rules that are never legal to maintain because they trample workers' rights, and rules that could go either way based on the circumstances in a given

workplace.

For example, the Boeing majority considered the legality of a rule barring workers from using camera phones and other devices to take pictures on the job without a permit. The majority said this rule had a "comparatively slight" impact on workers' rights, placing it in the always-legal category and giving employers the green light to deploy similar rules.

By ceasing to place rules in categories, the Biden board is treating every rule as a special snowflake, said Morgan Lewis & Bockius partner Philip Miscimarra, a Republican who chaired the NLRB when it decided Boeing.

"The unfortunate outgrowth of that is everybody is going to have to try to do what was so difficult to do before Boeing was decided, which is to guess as to what language is good enough and what rules are clear enough in order to avoid the possibility of having them invalidated after several years of litigation," Miscimarra said.

Pearce, who served eight months into the Trump administration and dissented in Boeing, called the return to the case-by-case approach a welcome change. That approach flipped the NLRA's mandate to protect workers' rights on its head by placing employers' reasons first, he said.

"There was no opportunity for workers … or the board to be able to say, there is a given, there is a statutory given that has to be overcome," Pearce said. "It was [under Boeing] as if the rule was the given, and the burden was placed completely on the employee to demonstrate the rule violates Section 7 rights."

A Tough Defense Burden for Employers

In theory, the new decision gives employers accused of infringing workers' rights an out by giving them an opportunity to mount a defense. But it may be tough to prove their case in practice.

Republican NLRB member Marvin Kaplan argued in his dissent it will be "nearly impossible" for employers to rebut the presumption that a rule is illegal once the general counsel establishes it. He pointed to a hypothetical rule punishing workers for an "inability or unwillingness to work harmoniously with other employees." The employer will have no trouble offering good reasons for its policy, but it will be hard-pressed to show a narrower rule couldn't do the trick, Kaplan said.

Miscimarra agreed with his former colleague. While the board purports to extend employers an olive branch by considering their reasons for having a rule, it "then places several dead weights on the other side of the scale" by presuming rules are illegal unless the employer passes a difficult test.

"That unfortunately gives some guidance regarding what will be the tendency of the board to go back and become the super wordsmith of all employment policies, work rules and handbook provisions," Miscimarra said.

Belovin, the union attorney, did not dispute that the revised test places a heavy burden on employers. It should, she said.

"So what if employers have to try hard to come up with a rule that doesn't improperly infringe upon workers' rights?" Belovin said. "I don't have a lot of sympathy for employers having to put in some effort to make it happen."

Kaplan went on to suggest that employers' "only real hope" to avoid decisions striking down their rules is to add a disclaimer to their handbooks stating the rules don't apply to labor activity.

Ring noted that general counsel Jennifer Abruzzo suggested this option in her brief in Stericycle, but the board didn't address the issue because Stericycle didn't have such a safe harbor. But the board has historically been hesitant to give much weight to disclaimers, and it's unclear what could satisfy its qualms in this context, he said.

And if employers don't feel they can pass the board's test, the law of unintended consequences may prevail, Ring added.

"If an employer cannot figure out how to safely, lawfully draft a policy, and there's so much uncertainty about whether you're going to get an unfair labor practice charge on a policy … employers stop writing

policies," he said. "That's not a good thing."

--Editing by Philip Shea and Nick Petruncio.