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12 Days Of Handbook Updates: A Chilling Effect

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This is the fourth of our 12 Days of Handbook Updates that take you through 12 important topics for employers as we round out the year.

Do your handbook policies chill your employees' exercise of their rights under the National Labor Relations Act (NLRA)? In August, the National Labor Relations Board (NLRB) [issued a decision in *Stericycle*](#) in which the Board adopted a new legal standard to determine if a handbook policy chills an employee's exercise of their Section 7 rights, making the policy unlawful.

[Section 7 of the NLRA](#) guarantees employees the right to self-organize and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) makes it clear that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in employee's exercise of their Section 7 rights.

Before *Stericycle*, the NLRB applied a balancing standard where the board evaluated "the nature and extent of the potential impact on NLRA rights" and "legitimate justifications associated with the rule." However, the NLRB said in [Stericycle](#) that this standard allowed "employers to adopt overbroad work rules that chill employees' exercise of their rights under Section 7[.]"

In *Stericycle*, the NLRB created a new standard: If an employee could "reasonably interpret" a handbook policy to restrict or prohibit Section 7

activity, then the policy is “presumptively unlawful.” It does not matter if the rule or policy could also reasonably be interpreted to not have a coercive meaning, and the employer’s intention behind the rule also doesn’t matter. However, the presumption that the rule is unlawful can be rebutted if the employer can prove “the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.”

So what does this mean for employers? It means that they should read through their handbook, and ask if an employee could reasonably interpret a policy as having a chilling effect on the employee’s right to engage in concerted activities. Handbook policies to pay special attention to include rules that:

1. Prohibit disparaging the company
2. Require civility of the workplace
3. Prohibit the use of profanity
4. Prohibit the use of cameras in the workplace
5. Require confidentiality

Stay warm, everyone.