



CUT AND PASTE POST SEPTEMBER 2023

Labor Day Special: The NLRB and Employee Handbooks: “Deja Vu All Over Again”



On August 2, 2023, in [Stericycle Inc.](#), the National Labor Relations Board adopted a new (but sort of old) legal standard for evaluating employer work rules which have been challenged as facially unlawful under Section 8(a)(1) of the National Labor Relations Act (NLRA). This decision turns back the clock on the 2017 *Boeing Co.* decision, which was later refined in *LA Specialty Produce Co.* (2019).

Under the *Boeing/LA Specialty Produce* standard, an employer was not required to narrowly tailor its rules to promote a legitimate business interest. In *Stericycle*, the Board said the primary problem with that standard was that it permitted employers to adopt overly broad work rules that chill employees’ exercise of their rights under Section 7 of the NLRA.

Under the *Stericycle* standard, work rules which have “a reasonable tendency to chill employees from exercising their rights” are “presumptively unlawful.” An employer may rebut the presumption by proving that 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. If the employer proves its defense, then the work rule will be found lawful.

On the heels of *Stericycle*, on August 9, 2023, Administrative Law Judge Michael Rosas found that Starbucks’ handbook policy requiring professional communications also violated the National Labor Relations Act.

The coffee giant’s policy said: “Partners are expected to communicate with other partners and customers in a professional and respectful manner at all times. The use of vulgar or profane language is not acceptable.”

Rosas analyzed *Starbuck* following the new *Stericycle* standard and found the *Starbuck* policy was illegal because employees reasonably viewed the rule as restricting their organizing rights (because store managers used it to do just that.) For example, managers used the rule to discipline workers for what they said in a private conversation and in a private social media group.

Legal Update Opportunity
On September 11 at Big Sky Medical Center, Mark Feddes will discuss a wide variety of recent state and federal law developments. Register to attend this training [here](#).

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Judge Rosa found that Starbucks had a legitimate interest to uphold basic standards of civility, but found the policy overly broad, vague, and susceptible to application against legally protected activity, particularly when workers are off the clock.

Rosa ordered Starbucks to rescind the civility rule, include an insert in its employee handbook that says the policy was eliminated, cover the unlawful policy with a “lawfully worded provision on adhesive backing,” or publish and distribute a revised handbook with a lawful policy.

The Starbucks case: [Starbucks Corp.](#), N.L.R.B. A.L.J., Case 04-CA-294636, 8/10/23.

Professional Pointer: As the pendulum swings yet again, it’s important to review what your personnel policies say and, equally as important, how they are being applied, for potential violations of the NLRA.

DOL Proposes New White Collar Salary Rules

As most of you probably already saw on the SHRM website, on August 30, the Department of Labor (DOL) announced the issuance of a [draft notice of proposed Rulemaking \(NPRM\)](#) regarding changes to the “White Collar” salary rules found in 29 CFR Part 541 of the Fair Labor Standards Act (FLSA). Admittedly, I haven’t read the entire 267 page document, but here’s a highlight of key changes being proposed to the 2019 regulations:

- **Salary Requirement:**
 - 2019: Set the salary level at \$684 per week (equivalent to \$35,568 per year for a full-year worker).
 - 2023 Proposed Rule: Would increase the minimum pay for exempt Executive, Administrative, and Professional (EAP) employees to **\$1,059** per week (**\$55,068** annually for a full-year worker). The increase reflects the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).
- **Highly Compensated Employee (HCE) pay:**
 - 2019 Rule: Increased the total annual compensation level for HCE’s from \$100,000 to \$107,432.
 - 2023 Proposed Rule: Would increase the minimum HCE salary to **\$143,988** annually. The increase reflects the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally.
- **Use of “Additional Pay” to partially satisfy minimum EAP salary levels:**
 - 2019 Rule: May satisfy up to 10% of the salary level through the payment of nondiscretionary bonuses and incentive pay (including commissions) when paid annually or more frequently.
 - 2023 Proposed Rule: The Department is not proposing any changes to how bonuses are counted toward the salary level requirement. Consistent with the current regulations, if the salary level is finalized as proposed, employers could satisfy up to 10 percent of the salary level (\$105.90 per week under this proposed rule) through the payment of nondiscretionary bonuses and incentive pay (including commissions) paid annually or more frequently.
- **Special salary levels for workers in U.S. territories and in the motion picture industry.**
 - 2019 Rule: This rule established special salary levels for workers in U.S. territories (including American Samoa) and in the motion picture industry. These salary levels were lower than those for U.S. workers.

- 2023 Proposed Rule: The wages for these workers would be adjusted and, under certain economic circumstances, the special salary levels for EAP employees in the American Samoa will be phased out, and they must be paid the full standard salary level.
- **Automatic increases to the white collar salary thresholds**
 - 2019: Did not provide for these increases.
 - 2023 Proposed Rule: Would implement automatic increases every three years to all earnings. These increases would be based on the BLS's most recent available four quarters of data

What didn't change?

1. **Montana Law.** If you're subject to Montana Wage and Hour Laws and not the Fair Labor Standards Act, the new salary levels would not apply unless/until Montana goes through its own rulemaking process.
2. **Job Duties Tests** - In order to qualify for a white collar exemption, employees must be paid the required salary, but must also meet the appropriate job duties test (see [DOL Fact Sheet 17A](#)). There is no proposed change to this requirement, or to the tests used to determine whether an employee performs exempt duties.

What to Do?

1. **Stay Tuned!** The NPRM has been approved by the Office of Management and Budget and is currently "pending placement on public inspection at the OFR and publication in the Federal Register". There may be slight changes to the notice before publication and "only the version published in the Federal Register is the official version".
2. **Comment:** A 60 day public comment period will begin when the NPRM is published in the Federal Register. We will let you know when that happens!
3. **Take advantage of SHRM's Resources** - On Wednesday, September 6 at 4 p.m. ET, SHRM Government Affairs will host a "first-word alert" webcast on the Proposed Rule. Register for this webcast [here](#).



Don't miss GVHRA'S monthly meeting!

Employee mental health issues can certainly affect the work environment, and addressing these issues can be a challenge! On September 14, 2023, in *Navigating Mental Health-Related Discussions: Exploring Tools, Resources, and Strategies*, Ellie Martin, LCSW will:

1. **Discuss** current challenges you face in conversations with employees that focus on mental health.
2. **Share** resources that are available in-person and virtually to assist employee in addressing their mental health needs
3. **Identify** Strategies that can help you navigate challenging conversations and practice with peers

Register for this meeting [here](#).