

NLRB Adopts Standard Critical of Employer Workplace Rules, Handbooks

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On August 2, 2023, the National Labor Relations Board (NLRB) adopted a new burden-shifting standard for evaluating whether work rules infringe upon employees' rights under Section 7 of the National Labor Relations Act (NLRA)—that may require employers to narrowly tailor rules to avoid violating the act.

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Quick Hits

- The NLRB adopts a new standard for evaluating whether employer work rules infringe upon employees' NLRA Section 7 rights.
- The newly adopted burden-shifting standard focuses on whether a work rule *could* reasonably be interpreted to chill employees' Section 7 activity.

The ruling in [Stericycle, Inc.](#) resuscitates and modifies the Board's standard established in *Lutheran Heritage Village-Livonia* and overturns the two-factor balancing test the Board previously adopted in [Boeing Co.](#) and [LA Specialty Produce Co.](#) that had recognized employers' legitimate business interests maintaining workplace rules.

Under the newly adopted standard, the NLRB will now evaluate work rules and policies by determining whether the general counsel established that the work rule *could* reasonably be interpreted to have a coercive meaning, even if a contrary, noncoercive interpretation of the rule is also reasonable. In making this determination, the NLRB "will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer." If this burden is met, under *Stericycle*, the NLRB will find that the rule is presumptively unlawful. The

employer may rebut this 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.

Work Rules and the NLRA

The lawfulness of facially neutral work rules and handbooks under the NLRA has been a heavily litigated issue at the NLRB in recent years, impacting both unionized and nonunionized workplaces. Section 8(a)(1) of the NLRA makes it an unfair labor practice for employers to interfere with, restrain, or coerce employees in the exercise of their right to engage in “concerted activities” under Section 7 of the Act, including the right to organize and bargain collectively. While the Board has long recognized the importance of considering business justifications for rules, the Board in its 2004 *Lutheran Heritage Village-Livonia* decision said that rules cannot stand if “employees would reasonably construe the language to prohibit Section 7 activity.”

In *Boeing*, the Board overturned *Lutheran Heritage* and set forth a framework for determining whether a facially neutral policy, rule, or handbook provision, when reasonably interpreted, potentially interfered with employees’ exercise of NLRA rights. Under that framework, the NLRB evaluated a rule by (i) the nature and extent of the potential impact on rights under the Act, and (ii) the employer’s legitimate justifications associated with the rule. Under *Boeing*, the Board would find that the rule’s maintenance violated the NLRA if the business justifications for the rule were outweighed by the adverse impact on employees’ Section 7 rights. In *Boeing*, the Board further emphasized that the fact that a rule was overly broad was, on its own, insufficient to constitute a violation of the NLRA.

In addition, for clarity, the *Boeing* Board delineated employment rules and policies into categories as cases were decided, including some categories of rules that the Board found do not prohibit or interfere with the exercise of Section 7 rights.

Two years later in *LA Specialty Produce*, the Board further clarified that rules must be interpreted from “the standpoint of reasonable employees,” not “traditional labor lawyers,” meaning rules should not be scrutinized to find any and all potential applications that may restrict NLRA-protected activity. The Board also emphasized that the burden of proof is on the general counsel to show that the rule in question actually interferes with NLRA rights.

Board’s Analysis in *Stericycle*

In the *Stericycle* decision, the Board concluded that the standard established in *Boeing*, and later refined by *LA Specialty Produce*, permitted employers to implement overbroad work rules that chill employees’ exercise of their rights under the NLRA. The Board stated that the *Boeing* standard for evaluating rules “fails to account for the economic dependency of employees on their employers,” which makes employees inclined to “construe an ambiguous work rule to prohibit statutorily protected activities.”

Further, the Board rejected the categorical approach under *Boeing* that determined certain types of rules were categorically lawful, including investigative-confidentiality rules, nondisparagement rules, and rules prohibiting outside employment. The NLRB also overruled Board decisions involving work rules relying upon *Boeing* and *LA Specialty Produce*.

Instead, the Board adopted a modified version of its prior *Lutheran Heritage* standard, clarifying that the rule will be interpreted from the perspective of the employee contemplating Section 7 activity, and

on a case-by-case basis.

The Board stated that “if an employee *could* [emphasis added] reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden,” establishing a presumption that the rule is unlawful “even if a contrary, noncoercive interpretation of the rule is also reasonable.” However, employers “may rebut that 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.” Notably, the Board declined to address the issue of whether a “safe harbor” provision could effectively disclaim any potential infringement on employee rights.

The Board found that the new standard applies retroactively to pending cases and remanded to the administrative law judge the allegations over the employers’ specific work rules for “further appropriate action” in light of the newly adopted standard. The Board further stated that this decision does not change Board precedent on work rules covering union (or other protected) solicitation, distribution, or insignia.

In a dissenting opinion, Board Member Marvin Kaplan criticized the majority’s approach, arguing that the new standard gives effectively “dispositive weight” to the “employee rights” side of the balance between employee rights and employer interests.

Key Takeaways

The *Stericycle* decision is the latest employee-friendly ruling from the Board in its current political makeup, including the February 2023 decision in [McLaren Macomb](#) that found certain nondisparagement and confidentiality provisions in severance agreements unlawful. Indeed, the *Stericycle* decision could prove even more significant because it adopts the stance pushed by the Biden-appointed general counsel to look more critically at workplace rules, which could make it more likely that workplace rules—even commonplace ones—will be challenged and found to be unlawful. Employers may want to consider reviewing their rules and handbooks to ensure compliance with the NLRA in light of the decision.

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