

NLRB Recycles Work Rules Standard in: Stericycle, Inc.

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On Wednesday, August 2, 2023 a divided National Labor Relations Board (NLRB) adopted a "new" legal standard to determine whether Employer work rules that don't expressly restrict employee Section 7 rights, are nonetheless facially unlawful under Section 8(a)(1) of the NLRA. In [*Stericycle, Inc.*, 372 NLRB No. 113](#) (2023) the Board overruled existing Board precedent from *Boeing Co.* (2017), (as refined by *LA Specialty Produce Co.* (2019)), and revised the *Lutheran Heritage Village-Livonia* (2004) standard. The combination of those cases previously provided the framework for assessing whether a workplace rule that does not explicitly implicate Section 7 rights (the right to self-organization, to form, join or assist labor organizations, to bargain collectively and engage in other concerted protected activities) nonetheless tends to chill the employee's exercise thereof.

The new test, according to the Board, "builds on and revises the *Lutheran Heritage* standard," while overruling *Boeing* and *LA Specialty Produce*.

The Board in its decision, criticized *Boeing* and *LA Specialty Produce* prior Board decisions because "the current standard fails to account for the economic dependency of employees on their employers and also condones overbroad work rules by not requiring the party drafting the work rules-the employer-to narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights."

In *Stericycle, Inc.* (a national medical waste processing company with operations in Morgantown and Southampton, Pennsylvania), the Board was presented with a host of challenges to facially neutral handbook policies, including policies associated with cell phone use, personal conduct, conflicts of interest, harassment investigations and camera and email systems. The Administrative Law Judge found some provisions met the existing legal standard, while others did not. On appeal, because the Board announced a new standard, the case has been remanded to the Administrative Law Judge for further findings.

The Stericycle Standard

The new standard first requires the NLRB General Counsel to initially prove that a challenged work rule "has a reasonable tendency to chill employees from exercising their Section 7 rights". The finder of fact must put themselves in the place of the reasonable employee who is subject to the rule, who is economically dependent upon employer, and who is considering exercising their Section 7 rights. The employer's intent is immaterial. If the General Counsel establishes that a reasonable employee *could* reasonably interpret the rule to have a "chilling effect", then the rule is *presumed unlawful*.

The employer may rebut the presumption by proving that the rule: (1) advances a legitimate *and* substantial business interest; *and* (2) that the employer is unable to advance that interest with a more narrowly tailored rule.

Employer Takeaway

First, it is unclear whether any party will take an appeal from the Board's decision. The Board took considerable time on the case and invited interested parties to file briefs. Second, it is likely that the Board, with the new standard in hand, will be examining handbooks and work rules as cases come to them. Employers should reevaluate their work rules with this new standard in mind, which requires consideration of a "more narrowly tailored rule".

Accordingly, careful drafting of handbooks and work rules is critical. Employers may wish to consider attending our firm's upcoming [Employee Handbook Workshop](#) on August 15 at the Lancaster Chamber presented by fellow members of our Labor Law Practice Team, [Joshua Schwartz](#) and [Caleb Setlock](#). For questions involving this recent NLRB decision, please contact Partner [Kevin Moore](#), [Labor Law Practice](#) Team Chair, or any member of our [Employment Practice Group](#).

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