

NLRB Significantly Increases Scrutiny of Employer Rules

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On August 2, 2023, the NLRB released its highly anticipated decision in *Stericycle, Inc.* which dramatically changed the standard that the NLRB has been using to evaluate workplace rules under the National Labor Relations Act (NLRA).

Background

Section 7 of the NLRA protects the rights of employees who are not supervisors to organize and engage in protected concerted activity for the purposes of collective bargaining or “other mutual aid or protection.” These protections also extend to employees who are not working for a unionized employer.

Section 7 grants employees the right to discuss or act as a group or to discuss or take action on behalf of a group in order to address the terms and conditions of their employment. Employee conduct is “concerted” (and thus protected by law) if it is engaged in by at least one other employee, on behalf of a group of employees, or if one employee is acting alone in the attempt to initiate group action on an issue concerning terms and conditions of employment.

NEW STANDARD FOR EVALUATING LEGALITY OF WORKPLACE RULES

In *Stericycle*, the NLRB adopted a new burden-shifting framework for evaluating the legality of workplace rules. Under the first step in the analysis, the NLRB will determine whether the challenged rule “has a reasonable tendency to chill employees from exercising their Section 7 rights,” regardless of whether a different, noncoercive interpretation would also be a reasonable way to read the rule. Furthermore, “[i]n doing so, the [NLRB] will interpret the rule from the perspective of the reasonable employee who is economically dependent on her employer and

thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in.”

If this initial showing is made, the rule will be held **presumptively unlawful**. The burden then shifts to the employer to show that the workplace rule legitimately advances substantial business needs which cannot be satisfied by adopting a narrower rule. Thus, overbroad rules which prohibit more conduct than is necessary to protect a legitimate interest will not survive NLRB scrutiny.

PREVIOUS STANDARD FOR EVALUATING LEGALITY OF WORKPLACE RULES

Under the previous standard (in *Boeing Co.*), the NLRB looked at two key factors to determine the legality of facially neutral employer rules: (1) the nature and extent of the potential impact on employees’ NLRA rights; and (2) an employer’s legitimate justifications for the rule.

The NLRB, under the old *Boeing Co.* standard, also delineated some bright line categories for workplace rules. Under Category 1, rules that did not interfere with employees’ NLRA rights or where the adverse impacts were outweighed by justifications associated with those rules were always lawful. Category 2 rules were sometimes lawful to maintain but warranted scrutiny in each case. Category 3 rules were always unlawful to maintain due to their impact on protected activity and could never be justified by an employer. While not always easy to tell which category a particular rule fell into, there were some areas of certainty established.

In its *Stericycle* decision, the NLRB criticized the previous standard for failing “to account for the economic dependency of employees on their employers ... and also condon[ing] 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.”

Employer Takeaways

This decision is a huge change and is intended to limit an employer’s ability to adopt overbroad rules which chill employees’ rights to discuss wages, hours, and other terms and conditions of employment. Essentially, an employer’s interest in maintaining a work rule is no longer material to a determination of whether the rule is lawful. Importantly, this decision is retroactive and applies to existing workplace policies. The Board remanded the *Stericycle* case back to the ALJ to apply this new standard without guidance as to the evidentiary standard an employer must meet and without guidance as to how a rule might be tailored to the employer’s demonstrated legitimate interest. Therefore, employers should be proactive and

conduct periodic reviews of their handbooks and workplace policies with an eye toward the Board's new standard to ensure compliance. This is no small task. Given the "case-by-case" approach mandated by this NLRB decision, even diligent employers will lack any sense of comfort.

We encourage employers to reach out to a member of the Boardman Clark [Labor & Employment Practice Group](#) with questions.

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

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