

Labor Board Returns to Case-by-Case Approach for Determining Lawfulness of Work Rules

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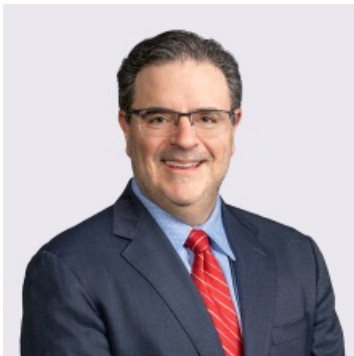
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The National Labor Relations Board has again revised its standard for assessing whether an employer's facially neutral work rules (rules that do not *explicitly* restrict Section 7 activities) unlawfully restrict employee activity protected under the National Labor Relations Act. *Stericycle, Inc.*, 372 NLRB No. 113 (2023).

The decision abandons the category-based approach to assess the lawfulness of work rules that balanced employers' business interests for maintaining them. *Boeing Co.*, 365 NLRB No. 154 (2017). *Stericycle* reinstates a modified version of the Board's pro-employee, pre-*Boeing* case-by-case approach.

The decision applies retroactively to all pending cases.

Background

Lutheran Heritage Village-Livonia

The Board adopted the *Lutheran Heritage* standard in 2004, in an effort to prohibit overbroad work rules that chill employees' exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB No. 646. Under *Lutheran Heritage*, facially neutral work rules violate the Act upon a showing of one of the following:

1. Employees would "reasonably construe" the language to prohibit Section 7 activity;
2. The rule was promulgated in response to union activity; or
3. The rule was applied to restrict the exercise of Section 7 rights.

However, the Board did not outline how, if at all, employers' business interests factored into the assessment. As a result, even the maintenance of a neutral work rule could violate the Act if employees could "reasonably construe" the rule to prohibit organizing activity. *Lutheran Heritage* rejected a categorical approach to analyzing the lawfulness of work rules, instead implementing a case-by-case approach.

Boeing Co.

Adopting a new standard in *Boeing Co.*, the Board sought to address the inconsistent evaluation of work rules that resulted under the *Lutheran Heritage* standard. The Board also sought to balance the impact of facially neutral work rules on workers' protected rights against employers' legitimate interests in maintaining them. The Board determined that, when analyzing the legality of a rule that, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, the Board will evaluate: (i) the nature and extent of the potential impact on those rights; and (ii) the legitimate justifications associated with the rule.

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The Board classified company rules into three categories:

- Category 1 rules are lawful to maintain, “because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.”
- Category 2 “include[s] rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights.”
- Category 3 rules are unlawful, “because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.”

The categories were established to provide employers “certainty and predictability” regarding the legality of their rules.

Stericycle

In January 2022, the Board issued a public notice inviting parties and amici to submit briefs addressing whether a new standard should be adopted. The Board’s decision in *Stericycle* adopts a modified *Lutheran Heritage* standard and abandons the categories set forth in *Boeing*.

The Board will assess “the specific wording of the rule, the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory rights it may infringe.” The Board will conduct its analysis from the “perspective of the economically dependent employee who contemplates engaging in Section 7 activity” Because such an employee is inclined to avoid violating work rules, the Board explained, they are also inclined “to interpret it more broadly to restrict or prohibit Section 7 activity than a disinterested observer might.”

Under *Stericycle*, work policies are presumptively unlawful if they have a “reasonable tendency” to chill employees from exercising their organizing rights or otherwise have a coercive meaning. The employer’s intent in establishing or maintaining the rule is immaterial. A rule may be found presumptively unlawful, “even if a contrary, noncoercive interpretation of the rule is also reasonable.”

If the Board determines an employee could reasonably interpret a rule to restrict or limit Section 7 rights, the burden shifts to the employer to prove the rule or policy “advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule.” If an employer can meet this burden, the rule will be found lawful.

Implications

While the new standard is intended to provide employers the “necessary leeway” to maintain work rules, provided they are narrowly tailored to minimize coercive potential, employers may face greater uncertainty about the lawfulness of work rules and the impact of findings that rules are unlawful as written, even if not applied.

Employers should strongly consider a detailed review of their workplace rules and

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policies with counsel to ensure they can withstand Board scrutiny.

Please contact a Jackson Lewis attorney with questions.

Labor Relations

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