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NLRB's New Standard: Work Rules and Policies Are Unlawful if They 'Could' Be Interpreted to Have a Coercive Meaning

On August 2, the National Labor Relations Board (NLRB or "Board") issued its long anticipated decision, [Stericycle Inc., 372 NLRB No. 113 \(2023\)](#) ("*Stericycle*"). *Stericycle* overruled existing precedent and reestablished a stricter, anti-management, test for evaluating whether facially neutral work rules or policies ("work rules") infringe upon an employee's Section 7 rights. The decision applies to private sector union and non-union workplaces. *Stericycle* will be applied retroactively to pending cases (in whatever stage) "unless doing so would amount to a manifest injustice."

The Pre-*Stericycle* Standards

In *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village – Livonia*, 343 NLRB No. 75 (2004), the Obama Board ruled that a neutral work rule would violate the National Labor Relations Act (NLRA), in part, if it "would be reasonably construed by employees to prohibit union and other Section 7 protected concerted activity." The *Lutheran Heritage* test invalidated a plethora of common-sense work rules that most people would reasonably expect responsible employers to maintain in their workplace. This non-exhaustive list included:

- Workplace civility
- Non-disparagement
- Fraternization
- Logos, trademarks, and copyrights
- Prohibition on audio/video recordings
- Confidential information
- Media communications
- Restricting access to non-employees

- Dress codes

In response to *Lutheran Heritage*, the Trump Board, in *Boeing Company* 365 NLRB No. 154 (2017), established a balancing test between the potential impact on the nature and extent of an employee's Section 7 rights *and* the employer's legitimate justifications for the work rule. For clarity purposes, the Board created three categories to classify work rules: category 1 – always lawful; category 2 – subject to individualized scrutiny; and category 3 – always unlawful. In *LA Specialty Produce*, 368 NLRB No. 93 (2019), the Trump Board further clarified that work rules must be interpreted from “the standpoint of reasonable employees” not “traditional labor lawyers.” The majority opinion emphasized that “a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity.” *Boeing's* balancing test brought a level of stability, predictability, and clarity to the drafting of work rules that benefited employees and employers alike. That predictability is now gone.

Stericycle's New Standard For Evaluating Work Rules

Stericycle overruled *Boeing* and *LA Specialty* and “revised” the prior *Lutheran Heritage* standard in an alarming way. For employers, the past is prologue.

First Step. General Counsel's Burden

Now, the NLRB General Counsel must show a challenged work rule “has a reasonable tendency to chill employees from exercising their Section 7 rights.” In doing so, **“the Board will interpret the rule from the perspective of the reasonable employee who is economically dependent on [his/her] employer and thus inclined to interpret an ambiguous rule to prohibit protected activity [he/she] would otherwise engage in.”** (Emphasis added.) This appears to be the *first* time the Board has not reviewed work rules from the generic “reasonable employee” viewpoint. Rather, it now further defines a “reasonable employee” as someone inclined

to interpret a work rule as interfering with their Section 7 rights. Aside from assuming most employees are incapable of independent thought, this is a huge change from *Lutheran Heritage*.

Second Step. Employer Rebuttal

If the General Counsel meets her (minimal) burden that a work rule is presumptively unlawful, the employer may rebut the presumption by proving:

- The rule advances a “legitimate and substantial business interest” (not defined); and
- It is unable to advance that interest with a “more narrowly tailored” (not defined) rule.

If the employer proves its defense, then the work rule will be found lawful to maintain. That, of course, is a big “if” with the current Board.

Other Points Culled from *Stericycle*

- A facially neutral work rule is presumptively unlawful if the General Counsel establishes a reasonable employee (as now defined by the Board) **could** reasonably interpret the rule to have a coercive meaning.
- The work rule is presumptively unlawful “even if the rule could also reasonably be interpreted not to restrict Section 7 rights and even if the employer did not intend for its rule to restrict Section 7 rights.”
- The “coercive potential of a work rule is inextricably intertwined with the vulnerable position of employees.”
- Work rules that expressly deter protected concerted activity are illegal and not subject to the two-step process above.
- Any ambiguity in a work rule will be construed against the employer/drafter.
- “Whether some hypothetical employee only sometimes, or even never, contemplated Section 7 activity is immaterial.”

- It is appropriate “for the Board to interpret an ambiguous work rule from the perspective of an employee who contemplates Section 7 activity, but who wishes to avoid the risk of being disciplined or discharged for violating the rule.”
- “The reasonable employee interprets rules as a layperson, not a lawyer.”
- The Board can challenge a work rule even if the employer does *not* apply it to an employee.

Member Kaplan’s Sobering Dissent

NLRB Member Marvin Kaplan’s dissent effectively summed up the crack in the foundation upon which this decision rests:

The majority’s interpretation of ‘reasonable employee’ in this context creates the labor-law equivalent of tort law’s ‘eggshell skull’ plaintiff. Their reasonable employee is an individual predisposed to read into their employer’s work-rules references to Section 7 activity where none exists, and who would not engage in protected concerted activity without first minutely examining each rule set forth in their employee handbook. If this individual could possibly suspect that any isolated work or phrase in a rule that does not prohibit Section 7 activity might be interpreted to do so, that rule would coerce employees from engaging in protected concerted activity and therefore would be presumptively unlawful, even though truly reasonable employees would apply common sense and recognize that the evident purpose of the rule has nothing to do with Section 7 rights. It is only the possibility that this so-called reasonable employee *could* interpret the rule outside the context of its evidence purpose that is controlling.

In other words, the proverbial deck is stacked against employers.

Takeaways

- Under this new standard, it will be virtually impossible to draft many work rules that are general enough to serve their

intended lawful purpose without being susceptible to challenge.

- The Board did not provide concrete guidance for employers defining the two key phases of the employer's rebuttal burden: "legitimate and substantial interest" and a "more narrowly tailored rule."
- Employers should assume that many common-sense, long-standing work rules *could* be deemed unlawful.
- While pure work rule language violations appear relatively minor, they could be used to block representative elections, overturn elections—where the employer won—and/or unnecessarily divert the employer's time and financial resources to defend language that *no* "actual reasonable person" (as opposed to the Board's new expanded definition) would logically consider to chill their ability to engage in Section 7 rights.
- The Board did not provide any guidance on whether a legally sufficient disclaimer to handbooks would insulate an employer's work rules from Board invalidation. Hopefully, the General Counsel and/or the Board (in subsequent decisions) will address and adopt reasonable safe harbor language in the future.
- *Stericycle* likely will result in more work rules being tested and more decisions from the Board finding those rules unlawful.

Next Steps

Employers should carefully review their policies and work rules under this skewed standard to determine whether any of them could "reasonably" be interpreted to restrict Section 7 rights. If so, can they be narrowly tailored to accomplish the same message and perhaps mitigate an adverse Board decision?

We end with this quote from Member Kaplan, who succinctly captures the fallacy of the new standard: "...it assumes that adults are unable to recognize for themselves whether or not such rules read in context, are intended to apply to, or will be enforced against, employee's exercise of their Section 7 rights."

If you have any questions about this decision or other labor law issues, please contact the authors of this article or any attorney in Frost Brown Todd's [Labor and Employment](#) practice group.

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