

# PUBLICATION

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## Déjà Vu All Over Again: NLRB Returns to a Restrictive Employee Handbook Standard

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On August 2, 2023, the National Labor Relations Board (NLRB or the Board) issued an important decision in *Stericycle, Inc.* in which it overruled the precedent that had afforded employers a greater amount of latitude in crafting workplace policies. In doing so, the NLRB returned to a slightly modified version of the standard that was in place from 2004 through 2017 for evaluating whether an employer's maintenance of seemingly neutral work rules (e.g., personal conduct, conflicts of interest, confidentiality of harassment complaints, etc.) are unlawful under Section 8(a)(1) of the National Labor Relations Act (NLRA). The NLRB's *Stericycle, Inc.* ruling is effective immediately, applies retroactively, and applies to both unionized and non-unionized employers. In this client alert, we address what employers need to know about this recent development in federal labor law.

### Background

Section 7 of the NLRA protects workers at both unionized and non-unionized workplaces who engage in concerted activity for the purpose of mutual aid and protection. Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees who exercise those rights.

The standards utilized by the NLRB in assessing the permissibility of facially neutral workplace rules have been in flux for decades.

In the NLRB's *Lutheran Heritage Village-Livonia* (2004) decision, the NLRB adopted a broad standard that asked only whether an employee could "reasonably construe" a challenged workplace rule as prohibiting the exercise of Section 7 rights (such as the rights to organize and bargain collectively). The NLRB subsequently applied this standard to find unlawful many otherwise neutral rules, including rules prohibiting the use of cameras in production areas, disruptive behavior in the workplace, and speaking to the public or the media, among others.

The NLRB changed course in 2017 when issuing its decision in *Boeing Co.* (2017), a Trump-era case that involved an assessment of whether an employer policy restricting the use of camera-enabled devices such as cell phones on company property unlawfully restricted employees' Section 7 rights. In that case, the NLRB overruled the *Lutheran Heritage* standard and established what many employers viewed to be a commonsense solution for evaluating the legality of commonplace handbook rules under Section 8(a)(1) of the NLRA. Under the *Boeing* standard, the NLRB would examine facially neutral policies and handbook provisions by assessing: (1) the rule's potential impact on protected concerted activity; and (2) the employer's legitimate business justifications for maintaining the rule.

Under the NLRB's *Boeing* analysis, the NLRB would attempt to classify rules into one of three categories, including a category of rules that were *always lawful to maintain*. In several Board decisions following *Boeing*, the NLRB held that rules that were always lawful to maintain included work rules requiring employee confidentiality during employer investigations, rules prohibiting outside employment, and civility rules requiring employees to maintain harmonious interactions and relationships.

## The NLRB Abandons the *Boeing* Standard

*Stericycle, Inc.*, was a case in which Teamsters Local 628 claimed the employer maintained overly broad work rules for employees, including those that made workers keep harassment complaints confidential and those that prevented them from taking actions that could damage the employer's reputation. There, the NLRB overruled the *Boeing* standard in favor of a modified *Lutheran Heritage* standard after criticizing the former standard as one that permitted employers to adopt "overbroad work rules that chill employees' exercise of their [Section 7] rights."

The NLRB offered several rationales for overruling the *Boeing* standard. The NLRB found that the *Boeing* standard gave too little weight to the burden a work rule could impose on employees' Section 7 rights. For example, the NLRB said, the *Boeing* standard failed to account for the "economic dependency of employees on their employers." According to the NLRB, because employees are typically "anxious to avoid discharge or discipline," employees are inclined to view an ambiguous work rule as prohibiting activities otherwise protected by the NLRA, meaning that they would not engage in such protected activity to avoid the risk associated with violating the rule.

By the same token, the NLRB found the *Boeing* standard gave too much weight to employer interests. The NLRB took the position that the *Boeing* standard condoned overbroad work rules by not requiring the employer to "narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights." The NLRB also rejected *Boeing's* categorical approach to assessing work rules, under which certain types of rules were held to be always lawful.

## The New Standard

Under the new standard adopted in *Stericycle, Inc.*, the NLRB will again use a case-by-case analysis to assess the legality of a challenged work rule. The NLRB will no longer categorize certain work rules as being always lawful to maintain, creating some uncertainty for employers.

Moving forward, the NLRB's inquiry will consider the language of the challenged work rule (as viewed from the perspective of an employee subject to the rule), the potential impact of the rule on employees' Section 7 rights, the employer interests articulated in support of the rule, and potential alternatives to the rule.

Similar to the *Lutheran Heritage* rule, the NLRB's focus will be on whether an employee *could* reasonably interpret a rule to prohibit protected activity. If that low bar is met, then the rule is presumed to be unlawful and the employer then would bear the burden of (1) pointing to compelling business reasons for the rule and (2) showing that it could not have adopted a narrower rule to achieve its ends. If it successfully does that, the rule will be found to be lawful.

## Takeaways for Employers

The *Stericycle, Inc.* decision is a reminder for unionized and non-unionized employers to work with employment and labor counsel to review and update their employee handbooks and related policies. In light of this decision, it is prudent for employers to proactively identify a legitimate and substantial business interest to support any work rules that could reasonably be construed as having the tendency to chill employees' Section 7 rights. Employers should also consider whether a more narrowly tailored rule that advances the same interests can be implemented as an alternative. Yes, employers, once again, it is time to review – and probably revise – those handbooks.

Baker Donelson will continue to monitor these developments at the NLRB. If you have questions about this topic, reach out to [Donna M. Glover](#) or any member of Baker Donelson's [Labor & Employment Team](#).