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# nlrp adopts a new standard for assessing the lawfulness of workplace rules

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On August 2, 2023, the National Labor Relations Board (the Board) issued a decision in *Stericycle, Inc.*, 372 NLRB No. 113 (2023) that overruled existing Board precedent and established a standard by which existing workplace rules may be deemed facially unlawful under Section 8(a)(1) of the National Labor Relations Act (the NLRA), even if the rules don't expressly prohibit union activities or other conduct protected under the statute.

The NLRA's decision overrules its 2017 decision in *The Boeing Company*, 365 NLRB No. 154 (2017) (*Boeing*). In *Boeing*, the Board established a balancing test between the potential impact on the employee's rights under Section 7 of the NLRA and the employer's legitimate justifications associated with its workplace rule. Three categories of work rules were set forth by the Board: Category 1 policies which were always lawful, Category 2 policies which were subject to individualized scrutiny, and Category 3 policies which were always unlawful.

## Examples of Work Rule Categories Under the Prior *Boeing* Standard

An example of a Category 1 workplace rule included a rule that was challenged in *Boeing*, which restricted the use of cameras in the workplace where military and commercial aircraft were being manufactured. According to the Board in *Boeing*, such rules were always lawful because any "adverse impact" on NLRA rights was "comparatively slight," and was "outweighed by substantial and important justifications associated with Boeing's maintenance of the non-camera rule."

Another example of a rule which the *Boeing* Board classified as a Category 1 workplace rule was a rule requiring employees to abide by "basic standards of civility," because such a rule would have at best a comparatively slight impact on NLRA rights, outweighed by the employer's legitimate interest in fostering

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and maintaining positive, respectful relations among co-workers.

Examples of Category 3 rules included rules prohibiting employees from discussing wages or benefits with one another, or from joining any outside organizations. Even though such rules make no express reference to union activities or labor organizations, they naturally would be construed to squarely cover employee conduct protected under the NLRA; hence, the *Boeing* Board stated that such rules would always violate the NLRA because of their clear chilling effect on an employee's exercise of rights under the NLRA. Category 2 Rules, of course, covered rules that fell between these two extremes and would require individual scrutiny to determine their lawfulness under the *Boeing* standard.

The Board's *Stericycle* decision does away with the three categories of work rules announced in *Boeing* and instead, introduces a new standard by which the Board will examine whether a given workplace rule or policy has a reasonable tendency to interfere with an employee's exercise of Section 7 rights. Under this standard, if the Board's General Counsel can prove that a challenged rule has a reasonable tendency to chill employees from exercising their rights, the rule is presumptively unlawful. The presumption of unlawfulness can then be rebutted by the employer by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. If an employer successfully meets this burden, the challenged rule will be found lawful.

### A New, More Employee-Friendly Rule

In ultimately overturning *Boeing*, the Board found that the employer-friendly *Boeing* standard failed to take into account the "economic dependency" of employees on an employer, and unjustifiably categorized certain rules as always lawful. Hence, going forward, the Board will "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[.]" with the "goal, of course, ... to ensure that employers do not maintain unlawfully overbroad work rules that have a reasonable tendency to chill employees from exercising their statutory rights." In explaining its justification for adopting this new standard, the Board stated that "[t]he reasonable employee interprets rules as a layperson, not as a lawyer."

The Board's new standard makes it considerably easier to establish violations against well-meaning employers seeking to maintain legitimate workplace standards unrelated to union activities – according to the Board, even "if an employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, the General Counsel has satisfied her burden and demonstrated that the rule is presumptively unlawful. That is so 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."

Going forward, the Board's decision in *Stericycle* will likely see more charges filed over workplace policies, not least of all because the *Stericycle* decision applies retroactively. Accordingly, employers are encouraged to review their work rules to consider whether any can be interpreted to restrict Section 7 rights. Employers should work with both internal Human Resources and legal counsel to stay on top of the many recent changes made by the Board.



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Mitchell Silberberg & Knupp will continue to monitor developments as they unfold.