



NLRB DEFINES NEW STANDARD FOR DETERMINING WHETHER EMPLOYER WORK RULES VIOLATE EMPLOYEES’ SECTION 7 RIGHTS

On August 2, 2023, the National Labor Relations Board issued its decision in *Stericycle Inc.* This decision is the latest addition to the NLRB’s body of decisions which have reversed or clarified Trump-era precedent in order to preserve and protect employees’ rights under Section 7 of the National Labor Relations Act.¹ Specifically, the Board in *Stericycle* was asked to consider whether or not certain employer-promulgated work rules violate Section 8(a)(1) of the Act by interfering with employees’ rights to engage in protected, concerted activity under Section 7 of the Act. The Board sought briefing from the General Counsel, the parties, and interested third parties regarding whether it should continue to follow Trump-era precedents in *Boeing Company* and *LA Specialty Produce Co.*, revert to previous precedent from the 2004 decision in *Lutheran Heritage*, or determine a new standard for evaluating work rules.

In *Boeing* (2017) and *LA Specialty Produce Co.* (2019), the Board moved away from the case-by-case analysis adopted by *Lutheran Heritage* (2004) and its progeny. In making this change, the Board declined to consider the actual language of work rules and specific facts regarding the context of the workplace, and instead identified certain categories of rules that should always be considered lawful. The work rules at issue in *Boeing*, “no camera” and “no recording” policies, were held to be lawful because of the Employer’s legitimate interests as a federal defense contractor in protecting highly classified national security information. Inexplicably, however, the Board took this analysis one step further and held that “no camera” and “no recording” rules are *always* lawful, regardless of context, even though it admitted that such rules would chill the exercise of Section 7 rights to, for example, record workplace safety violations. The *Stericycle* Board took issue with this categorical approach, and determined that such an approach did not conform to the “dominant” purpose of the Act,

¹ For example, see previous AGD releases Vol. 43 No. 33 (*Tesla, Inc.*), Vol. 44 No. 14 (*McLaren Macomb*), Vol. 44 No. 23 (*Lion Elastomers, LLC*), <https://www.ulaw.com/press-releases>.

“protecting the rights of employees to organize for mutual aid without employer interference.” (citing *Republic Aviation*). It then overruled *Boeing* and *LA Specialty Produce Co.* and their progeny, retroactively.²

The new standard set forth by the Board in *Stericycle* lays out a clear, burden-shifting framework for evaluating challenges to employer work rules which (a) do not explicitly restrict Section 7 activity or (b) were not promulgated in response to Section 7 activity.³ In creating this standard, the Board intentionally examined how to (1) evaluate whether or not work rules interfere with employees’ exercise of Section 7 rights; and (2) find the proper way to balance employees’ right to engage in Section 7 activity against an employer’s legitimate business interest in maintaining those rules. The new rule has two steps:

- First, the General Counsel must prove that a challenged rule “has a reasonable tendency to chill employees from exercising their Section 7 rights.” If the General Counsel carries her burden, the rule is considered presumptively unlawful.
- Then, the employer may rebut that presumption 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 the employer so proves, then the rule is lawful.

The Board discussed at length what factors it would consider in evaluating language of a rule under this standard. It held that the employer’s intent in promulgating the rule is immaterial to the analysis of whether a reasonable employee would find that a rule chills his or her rights under Section 7. Further, the Board held that it must interpret rules from the perspective of an employee who is economically dependent on the employer enforcing the rule and who also contemplates engaging in Section 7 activity. This perspective is important in upholding the purpose of the Act. The General Counsel will meet her burden to prove the rule is presumptively unlawful if a reasonable employee with that perspective could interpret a rule as coercive, even if it could also have different interpretations. This is consistent with longstanding Board precedent which construes ambiguities in work rules against the drafter, the employer.

If the General Counsel meets her burden, then the employer must prove that the rule advances a “legitimate and substantial” business interest. The Board declined to create a specific definition of a legitimate and substantial business interest, but held that the burden to prove one exists properly lies with the employer who is in the best position to explain those interests. However, the presence of a legitimate and substantial business interest is not, by itself, enough to make a rule lawful. The employer must also show that there is no more narrowly tailored rule that could advance that interest without interfering with employees’ Section 7 rights.

This analysis and new test tips the scales decidedly back into the favor of employees’ freedom to exercise Section 7 rights in the workplace. The *Boeing* Board had shifted the Board’s focus onto the “legitimate” business interests of the employers by declining to consider any context under which certain categories of rules were made.

² The Board specifically addressed this issue and held that the new standard articulated in *Stericycle* should apply to all pending cases.

³ Such rules are evaluated under different standards which are untouched by this decision.

Now, the Board must consider a rule from the perspective of a reasonable employee in the specific workplace where the rule applies. This should result in more consistent findings from the Board and clearer workplace rules which should be easier for employees to follow.

The next time you find yourself faced with a new rule from your employer, carefully consider whether that rule could be interpreted to interfere with your rights to engage in protected, concerted activity for the mutual aid and protection of you and your colleagues in the workplace. If so, that rule may be unlawful, and could be challenged under *Stericycle*. Now is a good time to review your employee handbook under this lens as well. It remains to be seen whether the holding in *Stericycle* will unleash a flood of cases challenging employer rules, but at the very least, employers should now think more carefully about the language of its work rules and their impact on employees' rights.

ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Boulevard, Suite 720
Chicago, IL 60606 – 312.263.1500
www.ulaw.com

© 2023 Asher, Gittler & D'Alba, Ltd.
All rights reserved.
Dated. August 18, 2023

This release informs you of items of interest in the field of labor relations. It is not intended to be used as legal advice or opinion.

U.S. News & Report's Best Law Firms Designation is for Chicago Tier 1 rankings in Employment Law (Individuals), Labor Law (Union), and Litigation (Labor and Employment) and a National Tier 2 ranking in Litigation (Labor and Employment).

