

NLRB RULING ON WORKPLACE CONDUCT RULES: How Your Employment Policies and Work Rules May Need to Change

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On Aug. 2, 2023, The National Labor Relations Board (NLRB) announced the new legal standard it will use to judge whether an employer's rules and policies are lawful. This decision will likely invalidate countless workplace rules and employment policies maintained by private-sector employers—whether they are unionized or not. Note that NLRB decisions apply to all private-sector employers, so this ruling applies to all companies covered by the National Labor Relations Act (NLRA). The NLRA does not apply to federal, state, or local governmental units, railroads, or airlines.

The new NLRB ruling is the [*Stericycle, Inc. and Teamsters Local 628, 372 NLRB No. 113 \(2023\)*](#) case, which creates a new standard for evaluating whether a private employer's workplace rules violate an employee's "Section 7 Rights" under the National Labor Relations Act (NLRA).

WHAT ARE "SECTION 7" RIGHTS?

Section 7 of the NLRA guarantees employees in all U.S.-based private sector employers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities** for the purpose of collective bargaining **or other mutual aid or protection**," as well as the right "to refrain from any or all such activities." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

Traditionally, an activity is "concerted" for Section 7 purposes if it is engaged in by (1) two or more employees, (2) one employee authorized to act on coworkers' behalf, (3) one employee seeking to induce or prepare for group action, or (4) one employee bringing group concerns to management's attention. So, the NLRA provides employees at private-sector workplaces the fundamental right to seek better working conditions and designation of representation without fear of retaliation.

An employee's Section 7 "rights" have been construed to include not only the right to discuss organizational issues but also to discuss the terms and conditions of an employee's employment, the right to criticize or complain about an employer, and the right to enlist the assistance of others in addressing employment matters. Thus, the concept of "concerted activity."

In order to avoid violating an employee's Section 7 rights, employers must be careful when implementing rules, policies, or practices that in any way arguably restrict employee speech and concerted activity, at least to the extent the restriction may arguably be interpreted to restrict discussion as to the terms and conditions of employment.

While an employer can have reasonable rules restricting speech during work time, rules and policies should not be so broad as to arguably impinge on an employee's right to engage in concerted activity when not working. When you need to have a rule restricting speech, be prepared to show that an individualized assessment of the need for such was made before implementing the rule and avoid unnecessarily broad restrictions.

BACKGROUND OF THE STERICYCLE RULING

In *Stericycle*, the NLRB majority overruled *The Boeing Co., 365 NLRB 154 (2017)*, its prior standard under which rules, policies, and handbook provisions were treated either as categorically lawful or as subject to a balancing test that weighed their tendency to restrict employee rights against the business needs justifying them.

The *Boeing Co.* test, in turn, had replaced *Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)*, which declared unlawful any workplace rule that "would reasonably be interpreted" by employees as limiting protected activities. The Lutheran Heritage standard had been used previously to target commonly adopted rules and policies including, among many others, those promoting civility, courtesy, productivity, and prohibiting harassing, disruptive, and insubordinate workplace conduct.

Under *Lutheran Heritage*, a facially neutral workplace policy would violate the NLRA 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.

Following its decision in *Lutheran Heritage*, the Board found unlawful many otherwise neutral policies, including rules prohibiting the use of cameras in production areas, disruptive behavior in the workplace, and rules limiting employees’ ability to speak to the public or media.

The NLRB’s *Stericycle* standard returns to a case-by-case review of rules and heightens its scrutiny of policies in at least two important ways:

1. The NLRB now considers a rule presumptively unlawful if it “could” (rather than “would”) be interpreted to limit employee rights, meaning rules may be invalidated even if there are alternative interpretations that are consistent with employee rights. The NLRB may find a rule invalid based on potential interference with activities that were not, or could not have been, foreseen by the employer when drafted, and even if the rule was never interpreted or applied in an unlawful manner.
2. Whether a rule implicitly limits protected activities under the new standard will not be considered from the standpoint of a “reasonable” employee, as it was under *Lutheran Heritage*, but instead based on the perspective of someone “economically dependent” on the employer who considers engaging in activity protected by the Act. Thus, rules that are appropriate under ordinary workplace circumstances may be found improper by the Board specifically in the context of a theoretical employee considering organizing or engaging in other concerted activities but fearful of doing so.

The NLRB’s *Stericycle* decision does acknowledge there may be competing justifications for maintaining such rules. Under its new standard, an employer can overcome the presumption of unlawfulness if it is able to prove both that a rule advances a “legitimate and substantial business interest” and that the employer is unable to achieve that interest with any narrower rule. Unfortunately, the NLRB did not specify how a rule must be tailored to the employer’s demonstrated “legitimate and substantial business interest.”

When defending a rule that the NLRB claims could be viewed as restrictive of employee rights, an employer will have the burden of establishing the justification for its rule and also demonstrating that justification cannot be accommodated by any more narrowly defined rule.

THE RULING AND ITS IMPACT

The *Stericycle* ruling is sweeping in scope and to comply, it is recommended that all employers consult with experts and have their attorneys review work rules and handbook policies to determine if they may violate the new standard.

In particular, employers should pay special attention to rules and policies addressing:

- Workplace civility, disruptive behavior, and insubordination.
- Defamation, misrepresentation, and criticism of the employer’s products, processes, and leaders.
- Confidentiality rules and other prohibitions on discussing proprietary and customer-related information.
- Conflicts of interest; and
- Rules regulating discussing the employer and its work verbally, on social media, and with members of the press.

It should also be noted that the *Stericycle* decision explicitly stated that it applies retroactively to existing rules and policies in private sector union and nonunion workplaces.

Beginning immediately, the NLRB will use a two-step process to judge a challenged employer rule or policy:

- **Step One:** The NLRB’s General Counsel must prove that the challenged rule has a reasonable tendency to chill employees’ exercise of their rights under the National Labor Relations Act (the Act). If the General Counsel proves this, the rule or policy is presumed to be illegal.
- **Step Two:** 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 proves its defense, the rule will be found lawful.

Under the first step, the General Counsel must clear an initial (low) bar of proving that an employee “could reasonably interpret the rule to have a coercive meaning,” leading to a chilling effect on protected activity. Specifically, 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.”

In doing so, the Board will analyze a rule from the “perspective of the economically dependent employee [on their employer] who contemplates engaging in Section 7 activity.” Under this framework, **a rule is presumptively unlawful if it has a “reasonable tendency” to chill employees’ exercise of Section 7 rights.** Notably, the employer’s intent in establishing a rule is entirely immaterial. Thus, a rule may be presumptively unlawful, “even if a contrary, noncoercive interpretation of the rule is also reasonable.”

Under the second step, the employer must rebut by demonstrating that (1) the rule advances a legitimate and substantial business interest and (2) the rule could not be replaced with a more narrowly tailored one. If the employer can meet this burden, the rule will be found lawful. There is little guidance, however, about what the Board will consider a sufficiently legitimate and substantial interest to overcome the presumption.

All employers’ rules and policies — except those that on their face prohibit some form of concerted activity — are subject to this two-step analysis for the NLRB to determine if a rule is unlawful or if it may be applied as the employer wrote it.

THE NEW STANDARD UNDER STERICYCLE

Under the new standard, which the NLRB is applying retroactively, any employer workplace rule that *could* (not “would”) reasonably be interpreted by an employee as restricting or interfering with any sort of protected concerted activity or other employee rights protected by the NLRA is presumptively unlawful “interference.” This is so even if there exist more reasonable interpretations of the rule and even if there is no evidence that the rule actually caused any “interference.”

As stated by the NLRB, “We clarify that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, *the employer’s intent in maintaining a rule is immaterial.* Rather, if an employee *could* reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable.”

Once the NLRB finds that the rule could have such a chilling effect, the burden of proof shifts to the employer to justify it. The employer may rebut the presumption of “interference” only by proving (1) that the rule advances a legitimate and substantial business interest and (2) that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer is unable to prevail on both parts of the defense, then the workplace rule will be found unlawful.

Some other employer takeaways from the ruling include:

- This standard applies to rules that are “facially neutral,” where it cannot be obviously determined by the language of the rule or policy that it could deter employees from participating in union and collective bargaining activities.
- Rules that specifically deter protected concerted activity are illegal, regardless of the employer’s business interest in maintaining the rule and are not subject to this two-step process.
- An employer’s rules and policies are interpreted from the viewpoint of the employees over whom the employer has some economic power.
- What the employer intended by the rule is immaterial.

- The decision expressly does “not disturb the Board’s long-established doctrines covering work rules that address union (or other protected) solicitation, distribution, or insignia.”

One unanswered question from the decision is what effect, if any, a legally sufficient disclaimer noting that a policy is not intended to interfere with protected employee activity would have on the NLRB’s determination regarding whether a policy fails step one of the test above.

EMPLOYMENT POLICY IMPLICATIONS

The following four policies are now likely to be deemed unlawful, since they typically were under the *Lutheran Heritage* standard:

1. **Workplace civility rules** - So called “workplace civility rules” requiring employees to positively engage with co-workers are likely to be deemed unlawful under the *Stericycle* standard. If the past is any indication, then such rules may include the following examples of broadly stated or overly restrictive policies:
 - “False, vicious, profane or malicious statements toward or concerning the ... employer or any of its employees” are prohibited.
 - Expecting “employees to behave in a professional manner that promotes efficiency, productivity, and cooperation ... to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.”
 - “To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information, employees are prohibited from recording people or confidential information using cameras.”
 - “If you feel you have not been paid all wages or pay owed to you, believe that an improper deduction was made from your salary, or feel you have been required to miss meal or rest periods, you are required to contact a manager, an HR business partner, or the integrity line.”

Under the now resurrected *Lutheran Heritage* standard, the NLRB had found that employees could reasonably construe each of these rules to coercively interfere with the exercise of Section 7 rights in violation of the NLRA.

2. **Loitering rules** - A policy stating that, “at no time are you to loiter around the premises off-duty” was previously deemed unlawful under the *Lutheran Heritage* standard. The NLRB specifically held that, “*an employer’s rule denying access to all off-duty employees to all areas of its premises violates the Act unless there are legitimate business concerns to justify the rule or policy.*” Consequently, employers maintaining such rules will need to evaluate whether they can continue to be enforced given the circumstances and particular working conditions.
3. **Rules prohibiting unlawful strikes, work stoppages, and slowdowns** - Rules prohibiting employees from “*engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any [Company Name] facility or official business meeting*” have also been found to be unlawful under the Act. As organizing activity increases throughout the country, employers must be careful to determine whether and to what extent these prohibitions can be maintained.
4. **Restrictions on video and/or cell phone recording** - This was one of the main policies at issue in Boeing, which permitted the possession of camera enabled devices. The policy added: “However, use of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security.” The rule was in place to comply with the federal contracting requirements.

You should expect that such policies may no longer be lawful and should therefore evaluate similar restrictions to determine whether revisions need to be made.

Some other examples of policies that likely need to be reviewed and rewritten to be aligned with the new board standard, include policies and work rules:

- Restricting employees' use of social media.

- Restricting criticism, negative comments, and disparagement of the company's management, products, or services.
- Promoting civility.
- Prohibiting insubordination.
- Requiring confidentiality of investigations and complaints.
- Restricting behaviors such as using cameras or recording devices in the workplace.
- Outlining rules for safety complaints.
- Restricting the use of company communication resources, such as email or Slack.
- Limiting the recording of meetings or the use of smartphones or other devices.
- Restricting meetings with co-workers or the circulation of petitions.
- Limiting comments to the media or government agencies.

The Board is applying the new standard retroactively, and unfair labor practice charges can reach back for a six-month limitations period. Thus, employers should promptly begin reviewing their employment policy manuals, employee handbooks, work rules, and policy statements and memoranda to assess how their rules might fare under the new standard.

In some cases, it might be advisable to revise or rescind rules. Likewise, in some cases, disciplinary actions imposed through application of the rules may also warrant reconsideration and modification. We should expect the NLRB to give particular scrutiny to rules focused on the following:

- Workplace civility and respect
- Access to the employer's facility during non-working time, and loitering
- Use of cameras or recording devices
- Use of mobile phones or devices
- Obscenity, profanity, and abusive language
- Harassment
- Conflict of interest
- Prohibiting outside employment ("moonlighting")
- Non-competition
- Use of employer's trademarks or logos
- Leaving work without permission; rules prohibiting strikes, walkouts, or slowdowns
- Posting without permission
- Attendance
- Non-disparagement
- Confidentiality of investigations
- No solicitation/distribution
- Social media, internet, and communications systems and device use
- Professionalism, attitude, and loyalty to employer
- Interference with productivity or meetings
- Uniforms and professional appearance

For rules that are being retained, employers should consider adding an explanation of the employer interest served by the rule and noting that the rule does not apply to protected concerted activity. Adding this language

may not sway the current Board, but it could arguably help to (1) demonstrate that no employee could reasonably interpret the rule or policy as interfering with Section 7 rights, or (2) persuade a court not to enforce an adverse Board decision and order based on a strained interpretation of a workplace rule.

NEXT STEPS FOR EMPLOYERS

The *Stericycle* decision will impact unionized and non-unionized private-sector employers, leading many to once again modify their handbooks to ensure compliance with the latest NLRB mandates. The impact will probably be more dramatic for non-unionized employers. Employers who are unaware of the NLRA and its requirements can be at risk, particularly if some type of employee dispute arises that's completely unrelated to any union issue.

Such a dispute may be seen by the NLRB as involving protected concerted activity under Section 7 of the NLRA. For example, if employees are unhappy with something in their workplace and they stage a group walkout. It can look very much like insubordination or quitting. The employer may take action not realizing that it is protected concerted activity.

There are some steps that employers should take now to address the new *Stericycle* standard.

- Employers should be sure to review all rules, regulations, and policies — including those in their employment policy manuals/employee handbooks — to analyze whether any of them could reasonably dissuade an employee who is economically dependent on the employer from engaging in concerted activity and risking discipline or discharge.
- Search out any workplace rule or policy that addresses employee conduct, behavior, social media use, or speech and begin the process of redrafting those rules to be more narrowly tailored, if possible.
- Add disclaimer language to any handbook specifically addressing a policy's non-application to protected Section 7 rights. While there is no guarantee these types of disclaimers or "safe harbor" language will be deemed sufficient by the NLRB to validate an otherwise unlawful rule, it is a proactive step that can be taken until the Board makes a decision one way or the other.
- Evaluate any complaints against the employer that have been filed such as wrongful discharge or discrimination charges, as well as any pending unfair labor charges that may have been brought against the employer. Remember - this standard is retroactive and would apply to any charge currently pending as of the date of the *Stericycle* decision. Accordingly, employers should review those charges and begin to think about how this decision may affect them.

All employers and HR professionals should work with their employment counsel to audit current employment policies for compliance with the new standard and to keep up to date on board decisions that will apply the *Stericycle* standard in coming months. The bottom line is that many policies will be under new and intense scrutiny by the NLRB, and employers should be aware of the new standard and review and update their policies accordingly.

Employers must prepare for the potential that this new framework will allow nearly any workplace rule to be interpreted as interfering with NLRA rights and protections. Employers should monitor NLRB activity on this issue, as rulings striking down workplace rules as unlawful likely will continue for as long as the current Board is in place. It is still unclear whether the NLRB's *Stericycle* decision will be appealed. In the meantime, however, the decision is enforceable, and employers should ensure their work rules and policies are compliant.

Poms will also be discussing these issues in an upcoming webinar: **TIME TO REVIEW AND UPDATE YOUR EMPLOYMENT POLICIES: Get Ready for 2024. The webinar will take place on Tuesday, November 16th from 10:00am-noon MST/9:00am-11:00am PST.**

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