

PRACTICAL NEWS
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Is Your Handbook a Liability?

New Standards for Workplace Rules, Policies and Procedures

As we get closer to 2024, employers should consider a review of employment practices and rules for the new year. This is especially so given the National Labor Relations Board's ("NLRB") decision this year in Stericycle, Inc., 372 NLRB 113 (2023). In Stericycle, the NLRB laid out a new legal standard for the evaluation of work rules, adopting a case-by-case review. Stericycle overrules the categorical approach contained in The Boeing Co., 365 NLRB 154 (2017) and revises the standard in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), presenting a change to a more employee-friendly approach to the evaluation of work rules.

Previously, under the Boeing standard, a balancing test was used for evaluating work policies, weighing the effect on employee's Section 7 rights under the National Labor Relations Act ("NLRA") and the employer's needs for the policy. In addition, Boeing categorized certain sets of work rules as presumptively valid, which is no longer the case. Prior to Boeing, the standard for evaluating work rules fell under Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004). Lutheran Heritage considered work rules unlawful where an employee "would reasonably construe" the work rule to interfere with an employee's exercise of their Section 7 rights.

Under the new Stericycle standard, general counsel must show that a work "rule has a reasonable tendency to chill employees from exercising their Section 7 rights." Stericycle at 2. As is well established, these Section 7 rights include, "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, and [] the right to refrain from any or all of such activities." NLRA, 29 U.S.C. § 157. When considering the challenged work rule, the NLRB will not take into account the employer's intent in using the rule, rather the NLRB will examine the rules "from the perspective of an employee who is subject to the rule and economically dependent on

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the employer.” Stericycle Inc. at 2. A work rule will be deemed **presumptively unlawful** “if an employee **could** reasonably interpret the rule to have a coercive meaning . . . even if a contrary, noncoercive interpretation of the rule is also reasonable.” Stericycle at 2 (emphasis added). Stericycle is a significant change from considering whether a reasonable employee would interpret the rule to chill their Section 7 rights to whether an economically dependent employee could interpret the rule as such.

Stericycle makes clear that “an employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule.” Stericycle at 2. The NLRB opined that it was departing from prior approaches in particular because Boeing allowed employers to utilize overbroad work rules that infringe upon employee rights under Section 7 of the NLRA.

The Stericycle standard will require further litigation to clarify which work rules the NLRB may take issue with. However, employers can no longer rely on categories of presumptively valid rules or their intent behind maintaining particular work rules. Therefore, during this time, employers should review all work rules and policies to determine whether any employee could interpret the rule to infringe on their Section 7 rights. Further, employers must consider whether there is a legitimate business reason to maintain each of their work rules, and if so, are the rules narrowly tailored to satisfy the Stericycle review. As the new Stericycle standard applies retroactively, this review applies to existing rules and new workplace rules. Thus, employers should review their current work rules to comply with the new standard and determine if changes should be made.

For more information about the new standards, please feel free to contact the attorneys within our Employment & Labor Law Practice.

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