

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

AUGUST 8, 2023

### NLRB Adopts New Legal Standard for Evaluating Employer Work Rules

On August 2, 2023, the National Labor Relations Board (NLRB or Board) issued its decision in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), where it adopted a new legal standard to determine whether an employers' work rules violate Section 8(a)(1) of the National Labor Relations Act (NLRA). The Board's decision overrules existing precedent and establishes a more stringent test that is likely to render some existing work rules facially unlawful.

The Board has previously established and revised the standard for analyzing whether employers' work rules and policies are lawful. In *Martin Luther Memorial Home, Inc. d/b/a/ Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004), the Board set forth a three-prong test to evaluate work rules. Under the *Lutheran Heritage* framework, if the rule does not explicitly restrict activity protected by Section 7 of the NLRA, the violation is dependent 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 has been applied to restrict the exercise of Section 7 rights. Subsequent cases applying the *Lutheran Heritage* framework arguably departed from the Board's standard by inquiring only whether the rule *could* be reasonably construed to restrict Section 7 activity. Such an application of the standard resulted in a greater likelihood that employers' ambiguous work rules would be deemed unlawful.

Years later, in *The Boeing Company*, 365 NLRB No. 154 (2017), the Board overruled the test set forth in *Lutheran Heritage* and established a more employer-friendly balancing test. Under the *Boeing* standard, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will balance the nature and extent of the potential impact on NLRA rights with the legitimate justifications associated with the rule. The rule will be considered to violate the NLRA if the employer's justification for the rule is outweighed by the adverse impact on the rights protected by the NLRA.

Shortly after, the Board confirmed and clarified application of the *Boeing* test in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019). There, the Board made clear that the onus is on the General Counsel to prove that a facially neutral rule *would* in context be interpreted by a reasonable employee to potentially interfere with the exercise of their Section 7 rights. This was arguably a necessary change in light of pre-*Boeing* decisions where a workplace rule would be struck down if it "could" be interpreted to violate an employee's Section 7 rights, and where in application, the Board seemingly placed the burden on the employer. The Board further emphasized that this test is met only when a "reasonable employee" rather than an NLRA subject matter expert, such as an attorney, would read a rule to restrict protected activities. Based on this clarification, if a rule, reasonably construed, would not restrict employees' protected activities, the analysis ends there, and the rule must be considered valid. However, even if it is determined that a facially neutral rule would potentially interfere with the exercise of NLRA rights, the Board will apply the *Boeing* balancing test.

The Board's recent decision in *Stericycle* involved work rules addressing personal conduct, conflicts of interest, and confidentiality of harassment complaints. Acknowledging the omnipresence of work rules,

the need to ensure that employers' work rules do not undermine employees' exercise of their rights to engage in protected concerted activities, and the history in trying to clarify an appropriate standard that balances employees' rights to organize with employers' business interests, the Board sought amici filings, in addition to the parties' briefs in framing the new standard.

Ultimately, the Board ruled that the prior existing standard under *Boeing* allowed employers to adopt overbroad work rules that had a chilling effect on employees' exercise of their Section 7 rights, including the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Significantly the Board noted that the extant standard from *Boeing* as clarified in *LA Specialty Produce* failed to acknowledge employees' economic dependence on their employers, and the resultant reluctance employees have to risk violating, or even construing work rules liberally, for fear of discipline or discharge. Further, the then-existing standard places too much weight on the employers' interests and does not require employers to narrowly tailor its rules to only promote substantial and legitimate business interests while avoiding burden to employees.

In *Stericycle* the Board revives and modifies the framework for evaluating facially neutral work rules that it originally laid out in *Lutheran Heritage*. Under this new framework, the NLRB's General Counsel must prove that the challenged rule has a reasonable tendency to chill employees' exercise of their rights under the NLRA. If the General Counsel proves this, the rule or policy is presumed to be illegal. However, 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 to be lawful. In working through this process, the Board conducts its analysis from the standpoint of an employee who is economically dependent on the employer. The Board notes that "[f]or purposes of the [NLRA], then, the coercive potential of a work rule is inextricably intertwined with the vulnerable position of employees."

All employers' work rules and policies, except those that on their face prohibit some form of concerted activity, are subject to the Board's new standard to determine if the rule is unlawful or if it may be applied as the employer wrote it. Employers should understand that although the Board acknowledges their prerogative to craft rules that advance legitimate and substantial business interests, those rules will be evaluated in the context of minimizing or eliminating the burden that such rules can have on employees' exercise of their statutory rights. In reviewing and drafting employee handbooks and work rules, employers should be mindful to narrowly tailor restrictions to business interests, if they can be interpreted as chilling employees' Section 7 rights.

For more information on the information presented in this information memo, please contact [Pamela S. Silverblatt](#), [Gianelle M. Duby](#), any attorney in Bond's [labor and employment practice](#), or the Bond attorney with whom you are regularly in contact.

