

The NLRB Tightens Standard for Evaluating Employer Policies

By Gregory P. Ripple and Gaby M. Mercurio

August 4, 2023

In its latest reversal of labor standards established under the Trump administration, the National Labor Relations Board (NLRB), on August 2, 2023, issued a decision rejecting an employer-friendly standard in favor of a modified and significantly less employer-friendly standard when evaluating whether a workplace rule violates the National Labor Relations Act (NLRA). The Board split along party lines. *Stericycle*, 372 NLRB No. 113 (2023).

The Act prohibits an employer from interfering with, restraining or coercing employees in the exercise of their rights, including the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” In recent years, the Board’s opinion of what constitutes interference, restraint or coercion has changed when control of the White House, and the Board, changed.

In 2017, the Board, in a case involving aircraft manufacturer Boeing, held that whether an employer rule interfered with employee rights turned on two factors: (1) the nature and extent of the rule’s potential impact on employee rights and (2) legitimate justifications associated with the rule. Furthermore, *Boeing* established a categorical classification system for evaluating rules, where some rules were always lawful to maintain.

Rejecting *Boeing*, the *Stericycle* majority explained that *Boeing* had a “chilling effect” on employee rights because it placed too little weight on employee rights and too much weight on employer interests. In particular, the majority criticized *Boeing* for neglecting to consider how an “economically dependent” employee would understand the rule and for failing to require the employer to narrowly tailor the rule in furtherance of a legitimate and substantial business interest. Moreover, contrary to *Boeing*’s categorical approach, the majority emphasized that whether an employer rule violates the Act calls for an individualized analysis, as no rule is “always lawful.”

The *Stericycle* majority thus abandoned the *Boeing* framework. In its place, the Board adopted a standard that presumes a work rule to be unlawful based on an employee’s understanding of the rule. So long as an employee could “reasonably interpret” an employer’s rule to have a coercive meaning, the rule is presumptively unlawful, even if a contrary, non-coercive interpretation of the rule is also reasonable. Importantly, the employer’s intent is irrelevant under the Board’s adopted standard.

Once a rule is presumptively unlawful, the employer may rebut the presumption by demonstrating that (1) the rule furthers a legitimate and substantial business interest and (2) a more narrowly tailored rule cannot achieve this interest. If the employer successfully rebuts the presumption, the rule is lawful under the NLRA.

The Board’s standard applies to all employers, even if an employer does not have employees represented by a Union. In light of the *Stericycle* standard, all employers are encouraged to review their employment policies and rules and consult with their labor counsel as necessary to determine if those policies and rules should be modified or rescinded in light of the Board’s decision.

If you have any questions about this article, please contact Gregory P. Ripple at gripple@vedderprice.com, Gaby M. Mercurio at gmercurio@vedderprice.com or any other Vedder Price attorney with whom you have worked.